
CHAPTER 5 THE RESULTS

To this point, this Report has focused entirely on Professor Epstein's theory that the Takings Clause could be used to roll back decades of health and safety regulation and the campaign by anti-regulatory ideologues to transform Professor Epstein's polemic on the Constitution into a body of case law. In this Chapter, we turn to the results of that campaign. For what is most remarkable about the Takings Project is not that it exists, but rather that it is succeeding. The combined efforts of the Takings Project have succeeded in creating in the federal courts a sympathetic environment for developers and a hostile environment for communities seeking to defend efforts to regulate land use. This judicial environment, in turn, has produced a transformation in takings law that bears startling similarities in both form and substance to Professor Epstein's blueprint.

JUDICIAL ACTIVISM FOR THE TAKINGS PROJECT

Professor Epstein's book *Takings* was a call for judicial activism; or, as Epstein put it: "a level of judicial intervention far greater than we have now, and indeed far greater than we ever had."¹ Judges on the Supreme Court and the Federal Circuit, led by Justice Scalia and Judge Plager, have answered Epstein's call and have reached across seemingly insurmountable jurisdictional and procedural barriers to take and decide key takings cases.²

Supreme Court

The *Nollan v. California Coastal Commission*³ case provides a good early example. Nollan addressed a regulation that required developers of beachfront lots to obtain a permit from the California Coastal Commission if they wished to substantially increase the surface area of development on such lots. Typically, when granting such a permit, the Commission demanded a concession from the landowner to mitigate the burdens the development imposed upon the community. In particular, in *Nollan*, the Coastal Commission demanded that the Nollans allow the public to pass along the beach below a sea wall that separated the Nollan's house from the ocean.

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To reach the merits, the Supreme Court had to overcome a number of important procedural obstacles. As an initial matter, the Court ignored serious questions about whether the Nollans even owned the beachfront passageway that the state allegedly “took” through its regulation. As California argued in *Nollan*, California only sought a passageway on land that was frequently below the mean high tide mark and, thus, arguably state property.⁴ Responding to this aspect of the *Nollan* case, Eban Moglan, then a law clerk to Justice Thurgood Marshall, now a law professor at Columbia University, wrote:

Not content with granting [Supreme Court review] in all takings cases in which the state wins, the Court has now moved on to granting review in takings cases which aren't cases at all.⁵

The Court also had to ignore the fact that, while their permit appeal was pending, the Nollans built their proposed house without a permit. Under California law, this illegal, unilateral action by the Nollans waived their right to challenge the conditions imposed on their development permit. California raised this point in seeking dismissal, and, as even the Meese Justice Department admitted, it is “settled beyond dispute” that a litigant must follow state procedures in raising a federal constitutional claim, and that unless the state procedures are unreasonable, failure to do so will deprive the Supreme Court of jurisdiction.⁶ The Court, however, simply denied California’s motion on this point without comment and proceeded to address the merits of the Nollan’s claim.

Lucas v. South Carolina Coastal Council, a 1992 case involving a development restriction imposed by South Carolina’s 1988 Beachfront Management Act,⁷ provides an even stronger example.⁸ The first hurdle cleared by Justice Scalia’s opinion was ripeness. South Carolina had amended the Beachfront Management Act before the Supreme Court reviewed the case and, under the new Act, Mr. Lucas could have applied for a special permit to build on his seaside lots. As a result, Lucas’ permanent takings claim—the only claim he had prevailed upon at trial and the only claim he appealed to the Supreme Court—was not ripe because Lucas had never applied for a permit under the new Act. Justice Scalia conceded this point, concluding in the first pages of his opinion that Mr. Lucas’ permanent taking claim was not ripe. Instead of dismissing the case, however, the Court addressed a question that had not even been briefed by the parties—whether Mr. Lucas has suffered a temporary taking between 1988, when the initial Act was passed, and 1990, when the Act was amended.

This creative hurdling of the ripeness barrier created another procedural problem: standing. As Justices Blackmun and Stevens pointed out in dissent, Lucas had not built on his property for 18 months before the ban on development went into effect and had testified at trial that he was “in no hurry” to build on his vacant lot, “because the lot was appreciating in value.”⁹ As importantly, the trial court had made no findings of fact that Lucas had any plans to

use the property between 1988 and 1990. In short, after a trial on the merits on his claims, including his temporary takings claim, Lucas had not shown that he was injured in any way by not being able to construct a residence from 1988 to 1990. As a result, Lucas lacked the “injury-in-fact” predicate necessary to have standing to bring a temporary takings claim. As Justice Scalia had opined just days before in denying standing to an environmental organization in *Lujan v. Defenders of Wildlife*, “‘some day’ intentions—without any description of concrete plans, or indeed even any specification of when the some day will be—do not support a finding of the ‘actual or imminent’ injury that our cases require.”¹⁰

Justice Scalia responded by arguing that *Lujan* was decided at the summary judgment stage while Lucas’ claim for a temporary taking was decided “at the pleading stage.”¹¹ This, however, as Justice Blackmun points out, was simply not the case: Lucas had a trial on the merits of his claim for “damages for the temporary taking” of his property and failed to demonstrate any imminent or concrete plans to build on or sell the lot.¹² In short, Lucas did not (and probably could not) show that he had any intention of building on his property between 1988 and 1990, and, therefore, under a 17-day old Supreme Court case, he lacked standing to even bring his temporary taking case before the Supreme Court.

Moreover, Scalia’s willingness to ignore the trial court record on the issue of standing contrasts markedly with his strict adherence to the trial court’s finding that South Carolina’s development restriction had rendered Lucas’ property “valueless.” Four justices, including Justice Kennedy, noted the painfully obvious truth: a beachfront lot on the Isle of Palms in South Carolina is not “valueless,” even if you can’t build a house on it. But this factual finding was critical to Scalia’s ruling for Lucas and Scalia ignored the State’s plea to re-examine it. For the first time in the case, Scalia became a stickler for procedural detail: ruling that because the State had not challenged the erroneous factual predicate in opposing Supreme Court review, the Court would “decline to entertain” the state’s argument on this point.¹³

Richard Lazarus, the Attorney for the Coastal Council before the Supreme Court, aptly summarizes the Court’s disposition of *Lucas* as follows:

[t]he majority surmounted a range of obstacles to reach the merits of the case, including ripeness, standing, and the sheer improbability of the lower court’s factual findings. . . [T]he Court’s generosity towards the landowners contrasts sharply with its refusal to consider the state government’s challenge to the trial court’s finding of fact. . . [t]he Lucas majority was clearly determined, and impatient, to issue a ruling favorable to the landowner.¹⁴

“The court presses on to decide the issue, and as it does, it ignores its jurisdictional limits, remakes its traditional rules of review and creates simultaneously a new categorical rule and an exception. . .”

— Justice Harry Blackman

The Federal Circuit

Judges on the Federal Circuit and, in particular, Judge Plager, have displayed an even greater determination to reach takings cases over jurisdictional and procedural hurdles. The best example is the Federal Circuit's decision that it had jurisdiction to hear the claim asserted in *Loveladies Harbor v. United States*.¹⁵ In *Loveladies*, the developer filed suit in the Court of Federal Claims at the same time it had pending in federal district court in New Jersey a suit seeking similar relief for the same alleged taking. This violated 28 U.S.C. section 1500, which states that "[t]he United States Court of Federal Claims shall not have jurisdiction of any claims for or in respect to which the plaintiff or his assignee has pending in any other court . . ."¹⁶

As the government forcefully noted in seeking dismissal, the plain words of section 1500, and recent Federal Circuit precedent, prohibited the Federal Circuit from hearing *Loveladies'* claim. Indeed, just a year before, in *UNR Industries v. United States*, the Federal Circuit sitting in banc engaged in "a comprehensive effort to set out the proper interpretation" of section 1500.¹⁷ In *UNR*, the court concluded that "[c]orrectly construed, section 1500 applies to all claims on whatever theories that 'arise from the same operative facts.'"¹⁸ The court expressly "overruled" *Casman v. United States*,¹⁹ and other cases which had excused adherence to section 1500 where the claims in the two suits seek different forms of relief, finding *Casman* inconsistent with the plain language of section 1500.

To reach the merits of *Loveladies'* takings claim, Judge Plager convinced five other judges to reverse course again. Finding the plain language of section 1500 was no longer so plain, Judge Plager resurrected the *Casman* exception. Plager noted that while the Supreme Court had affirmed the *UNR* opinion, the Court had declined to reach the question of "whether two actions based on the same operative facts, but seeking completely different relief, would implicate S. 1500."²⁰ From this, Plager concluded that the "Supreme Court took exception to our efforts" and that therefore, "anything we said in *UNR* regarding the legal import of cases [like *Casman*] whose factual bases were not properly before us was mere dictum."²¹ Plager then proceeded to apply the *Casman* exception to the *Loveladies* case (even though *Loveladies'* actions sought roughly the same relief), and used *Loveladies* to significantly advance the Takings Project.

A three judge dissent took on every aspect of Judge Plager's opinion. As an initial matter, the dissent decried the majority's decision to even revisit the court's opinion in *UNR*.²² The dissent reminded Judge Plager that the Supreme Court had affirmed *UNR*, and that the Supreme Court "said nothing by way of disapproval of our ruling on *Casman*."²³ The dissent also noted that "at the very least, one would expect reversal of our so recent in banc precedent to be supported by some compelling reason," but that such "special justification" was "missing from today's undertaking."²⁴

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— Judge Robert
Mayer

On the merits, the dissent decried Judge Plager's "judicial revision" of section 1500.²⁵ The dissent reminded Judge Plager that "it is axiomatic that courts cannot extend their jurisdiction in the interest of equity" and reiterated the logic of the *UNR* opinion:

[I]n *UNR* we concluded that section 1500 should be applied according to its plain words, and that instrumental to such application was a single, coherent definition of the word "claim" as referring only to the facts underlying the petitioner's action against the government. . . . We overruled *Casman* because it was in conflict with this interpretation.²⁶

Finally, the dissent criticized Judge Plager's "machinations" in fitting *Loveladies'* claim into the newly resurrected exception created in *Casman v. U.S.* As the dissent notes, the majority "ignores the words of the complaints" in which *Loveladies* requested almost the same relief in both actions, "substituting instead its understanding of what *Loveladies* must have intended by the several suits."²⁷

The dissent concluded with a rhetorical question. Noting that only a year before "nine of the ten judges hearing [*UNR*] said that *Casman* was unsound and inconsistent with section 1500," the dissent wondered "why six of them now think otherwise."²⁸ Judge Plager appears to answer the dissent's question in the final pages of his opinion:

[t]he nation is served by private litigation which accomplishes public ends, for example, by checking the power of the Government through suits brought under the APA or under the [T]akings [C]lause of the Fifth Amendment. Because this nation relies in significant degree on litigation to control the excesses to which Government may from time to time be prone, it would not be sound policy to force plaintiffs to forego monetary claims in order to challenge the validity of Government action. . . .²⁹

This portion of *Loveladies* suggests that, in Judge Plager's mind, the "sound policy" of hearing cases that "control the excesses" of government trumps the need to respect precedent or the plain language of the laws written by Congress.³⁰

THE PROGRESS SO FAR

To illustrate the substantive success of the Takings Project, it is necessary to recall the status of takings law in 1985. At that point, *Penn Central Transportation v. New York City* and its progeny defined the law of regulatory takings and, under *Penn Central*, a regulatory takings was generally not found unless the market value of a "parcel as a whole" was decreased by 90% or more. Even then, a regulation could be saved from a takings challenge by proof that the regulation was necessary to prevent a broadly defined category of nuisances.

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As outlined above, Professor Epstein's proposed rewrite of the Takings Clause required several significant revisions to Supreme Court takings doctrine, including the recognition of "partial takings," a radical revision of the nuisance exception and a closer look at the link between the means and ends of land use regulation. The Takings Project has succeeded in introducing each of these concepts into the constitutional dialogue. Preliminary and tentative versions of these doctrinal shifts have gained a foothold in the Supreme Court, and, extrapolating from these tentative steps, the Federal Circuit and other lower federal courts have adopted bolder, more fully realized versions. This much success for a theory at the fringe of constitutional theory is troubling and significant. The success is troubling in that the doctrines are premised upon a textual reading of the Takings Clause that, as demonstrated above, cannot withstand serious scrutiny. The success is significant in that, cases decided already—particularly the Federal Circuit's decision in *Florida Rock Industries v. United States*³¹—are already impacting important laws such as the wetlands provision of the Clean Water Act³² and, in that, if fully successful, the Takings Project puts all modern land use laws at risk.³³

The Partial Takings Doctrine

The most critical and expansive aspect of Professor Epstein's theory is his notion that the Takings Clause permits (and, indeed, demands) judicial oversight and interference with all regulations that impact property value, even those regulations with minor or even minute impacts. It is this aspect of his theory, his "partial takings" doctrine, that permits the clause to "invalidate[] much of the twentieth century legislation."

Professor Epstein's partial takings theory thus depends on two critical doctrinal points: first, the notion that property can be divided into a bundle of rights, including use, disposition and possession and that each stick in the bundle is protected by the Takings Clause; and second, that any infringement on any stick in the bundle, including for example a partial loss of use, is a taking and must be compensated as such. Since 1980, the Supreme Court has adopted the first of Epstein's two prongs; the Federal Circuit has adopted a version of both prongs.

The Supreme Court

In recent years, the Supreme Court has adopted a takings jurisprudence that looks at the impact of regulation on individual strands in the bundle of property rights. In *Penn Central*, the Supreme Court reiterated its traditional focus on the "parcel as a whole," declaring that "[t]aking' jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated."³⁴ Chief Justice Rehnquist was alone in his dissent in that case, which argued that the regulation at issue caused a taking of one strand: the owner's air rights.³⁵ Beginning with *Loretto* in 1982, however, the Court as a body began to move away from this focus

on the parcel as a whole and towards an assessment of the impact of regulation on a single strand.³⁶

The first and least surprising of these cases, *Loretto v. Teleprompter Manhattan CATV Corp.*,³⁷ was decided in 1982, while Epstein was still penning *Takings*. In *Loretto*, the Court ruled that when the government extinguishes the right to exclude by permanently occupying property, a per se takings occurs. While *Loretto* edged the Court toward a bundle of rights analysis by finding a taking primarily based on the impact the regulation had on one strand in the bundle, it did not represent a full-scale adoption of the concept.³⁸ The strand in *Loretto*, after all, was the right to be free of physical invasions and, as the Court noted, permanent physical invasions had always been treated differently.³⁹

A much larger step toward adoption of a “sticks in the bundle” approach to takings law came in the Court’s 1987 opinion in *Hodel v. Irving*.⁴⁰ In *Hodel*, a group of Native Americans challenged a federal law which extinguished their right to pass on to their heirs small, extremely divided interests in larger parcels. The Court found a taking despite recognizing the law had a minimal economic impact and did not interfere with investment-backed expectations. Central to the Court’s analysis was the “extraordinary” nature of the government regulation: that is, that it “amounts to virtually the abrogation” of the landowners rights in one strand of the bundle of property rights.⁴¹

The Court took the final and perhaps most important step in *Lucas*, where the Court ruled that complete abrogation of the right to use property can constitute a taking. With *Lucas*, the Court’s adoption of the first prong of Epstein’s theory was essentially complete.⁴² The Court has declared that each of the critical strands in the bundle—the right to use, exclude others from and dispose of property—is protected by the Takings Clause and that abrogation or elimination of a single strand in the bundle is a taking.⁴³

The Court has not yet, however, moved beyond the finding that a taking occurs for a complete loss of one strand to the second and most radical aspect of Professor Epstein’s theory: the notion that a partial (as opposed to a complete) infringement of a property interest can be a taking. Indeed, even in recent opinions, the Court has firmly rejected such a notion, particularly with regard to partial deprivations in the right to use property. In *Lucas*, for example, the Court reaffirmed that the *Penn Central* balancing test applied for regulations that restrict, but do not abrogate, the economic use of property.⁴⁴ In *Concrete Pipe & Products of California v. Construction Laborers Pension Trust*, a unanimous Court reaffirmed that under *Penn Central* “mere diminution in value of property, however serious, is insufficient to demonstrate a taking.”⁴⁵ Finally, in several recent cases, the Court has reaffirmed Justice Holmes’ recognition in creating the regulatory takings doctrine 70 years ago in *Mahon* that “government hardly could go on if to some extent values incident to property could not be diminished without paying for every such

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change in the general law.”⁴⁶ Each of these statements is directly at odds with Epstein’s partial takings theory.

The Federal Circuit

One would expect that these clear statements by the Supreme Court would have settled the partial takings issue at least until the Court itself decided to revisit the issue. Instead, it is here that the Federal Circuit has been its most adventurous. Drawing on the general pro-developer tenor of much of Justice Scalia’s opinion in *Lucas*, and *dicta* concerning the difficulty in determining the property interest at issue in taking cases,⁴⁷ Judges Plager and Rader of the Federal Circuit made a version of Professor Epstein’s partial takings doctrine the law of the land—at least with respect to Federal government regulations.

In *Florida Rock*, the plaintiff, a commercial mining company, alleged that a decision by the Army Corps of Engineers to deny a permit to mine the limestone underlying a 98-acre track of wetlands deprived the property of all economic value and, thus, constituted an uncompensated taking of private property. After rejecting the Plaintiff’s “total takings” argument because of uncontested evidence that the property maintained a resale value of at least twice the \$1900 per acre price Florida Rock originally paid, Plager raised a question neither party had briefed or argued. In his words:

[t]he question remains, does a partial deprivation resulting from a regulatory imposition, that is, a situation in which a regulation deprives the owner of a substantial part but not essentially all of the economic use or value of the property, constitute a partial taking and is it compensable as such?

The obvious answer to this question is: “only if the regulation fails the *Penn Central* balancing test.” After all, *Lucas* and the Court’s unanimous opinion in *Concrete Pipe* reaffirmed that *Penn Central*’s three factor inquiry still applies where a regulation diminishes but does not abrogate the permissible uses of property.⁴⁸ *Penn Central* was, in other words, binding Supreme Court precedent, and application of *Penn Central*’s balancing test to the facts of *Florida Rock* would have disposed of the case. As Chief Judge Nies argued succinctly in dissent, “[w]hile the Supreme Court may rethink and change its rulings, this court is not free to adopt positions in conflict with decisions of the Court.”⁴⁹

But Judge Plager did not consider himself so bound by Supreme Court precedent. Noting that *Lucas* had carved out an exception to the *Penn Central* balancing test, Plager felt free to disregard *Penn Central* completely. In its place, Plager established with a rule that the government may have to compensate a landowner for any regulation that causes a diminution in the value, unless there is a “reciprocity of advantage” by which landowner receives “direct compensating benefits” from the regulation.⁵⁰

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— Judge Helen Nies

Judge Plager reached this ruling following precisely the two-step blueprint drafted by Professor Epstein. Plager began, as Epstein suggested,⁵¹ by erasing the distinction between regulatory takings and physical invasions.⁵² Thus, according to Plager, the Takings Clause treats both the same: whenever government action impinges in any way on an owner's property, the court must look further to find whether a takings has occurred.⁵³ In doing so, Plager ignored two century's worth of binding Supreme Court decisions which make the difference between physical and regulatory takings a touchstone of takings doctrine.⁵⁴ The distinction did not make sense to Judge Plager, so he decided to discard it.

Of course it makes perfect sense to apply one standard to a category of government actions—physical expropriations—which are clearly prohibited by the Constitution and a different standard to a category—regulations—that is prohibited only by analogy. The distinction only becomes illogical when you interpret the Takings Clause to equally encompass both physical expropriations and regulations. In other words, both Epstein's and Plager's arguments about the illogic of applying different tests to regulatory and physical takings are necessarily premised upon Epstein's "plain meaning" interpretation of the Takings Clause, which, as demonstrated above, is irreparably flawed.

Second, Judge Plager obliterated any distinction between incremental diminutions in value and property rights, concluding, in essence that increments of value *are* property rights. Again, however, the premise that "value" is somehow a property right is inconsistent with Supreme Court precedent⁵⁵ and, in this instance, the status quo in all fifty states.⁵⁶ It *was* consistent, however, with Professor Epstein's theory,⁵⁷ and that, it seems, was enough for Judge Plager.

With these two radical steps, Judge Plager achieved, at least for now in the Federal Circuit, the principal objective Epstein set out to accomplish a decade before: an interpretation of the Takings Clause that requires careful judicial scrutiny of any regulation that reduces the value of private property. Gone is the distinction between physical and regulatory takings that has been a mainstay of the Court's interpretation of the Takings Clause for two hundred years. Gone too is what is perhaps the single most important rule in takings doctrine: *Penn Central's* category of regulatory actions that are generally not takings — those that reduce property value by less than 90%.⁵⁸

Florida Rock demonstrates what Professor Blumm called an "unprecedented vision of judicial activism."⁵⁹ The activism is Judge Plager's, who has acknowledged his activism⁶⁰ and commented that "one of the advantages of being an Article III judge with a lifetime appointment is that you never have to say you are sorry."⁶¹ The vision, however, was Epstein's who created the partial takings doctrine a decade ago and recognized that implementing the Takings Project would require judicial activism of an unprecedented nature.

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— Judge Jay Plager

"[U]nless the Supreme Court reverses Florida Rock, all federal environmental regulations are in jeopardy, and environmental law, as we have come to know it in the last quarter century, is over."

— *Michael Blumm*

Florida Rock is "an extremely destabilizing decision, exposing all wetlands regulation, indeed all environmental and land use regulation, to compensation claims."⁶² After *Florida Rock*, in the Federal Circuit, every time a regulation decreases the value of property, the government may be held liable for monetary damages. It does not require much imagination to realize that such a monetary burden could seriously hamper, if not completely hinder, attempts to regulate land use to protect the community. And that is precisely what Epstein and Plager intended. As Chief Judge Nies noted in dissent, "the objective of the [partial takings] theory is to preclude government regulation precisely because regulation will entail too great a cost."⁶³

The Nuisance Exception

From the Takings Project's inception, the nuisance exception loomed as a potential obstacle to the Project's goal of thwarting modern environmental laws. After all, as structured by the Court in *Mugler* and its progeny, the exception gave legislatures a broad, evolving and fairly open-ended opportunity to define what is and is not an injurious use. Since all or virtually all modern environmental laws have been justified by the legislature as being necessary to protect the health and welfare of the community, this exception threatened to thwart the Project. Not surprisingly, therefore, the nuisance exception has been under attack—first by Professor Epstein and later by both the Supreme Court and the Federal Circuit.

Professor Epstein

In *Takings*, Professor Epstein proposed a nuisance exception that is limited, essentially, to cases of physical invasion of neighboring property. The starting point for Epstein's nuisance analysis is not the legislature's assessment of the impact of a proposed use on the community, but rather the common-law or natural rights held by a property owner and defined in a property owner's title.

Epstein's argument is premised upon his idiosyncratic notion that the interaction between the Government and the property owner must be viewed essentially as a relationship between private parties. To Epstein, a corollary to this point is that the state has no independent set of entitlements. As such, in discussing the nuisance exception, Professor Epstein draws an analogy between self-defense and the police power: "The police power as a ground for legitimate public intervention is, then, exactly the same as when a private party acts on its own behalf."⁶⁴ A private individual may act to protect his own property against common law nuisances—that is, against deliberate acts by a neighboring owner that physically invade the property. According to Epstein, the nuisance exception "gives the state control over the full catalogue of common law wrongs involving force and misrepresentation, deliberate or accidental, against other persons," but no more.⁶⁵ Under his theory "the sole function of the police power is to protect individual liberty and private property against all manifestations of force and fraud."⁶⁶

The Supreme Court

In *Lucas*, Justice Scalia fashioned a nuisance exception that echoes Epstein's in important respects.⁶⁷ He argued that the "prevention of harmful use analysis" in *Mugler* and other prior cases was "merely" the Supreme Court's early formulation of the requirement that a regulation must advance a legitimate state interest to avoid compensation. Thus the nuisance analysis in earlier cases did not, according to Justice Scalia, describe an exception to the Takings Clause; it does not excuse payment of just compensation. Rather, control of a harmful use is a necessary component of a valid, non-compensable regulation: the "nuisance" analysis is necessary but not sufficient to avoid paying compensation.

Scalia crafted a new, narrower exception to takings liability by reference to common law nuisance principles and the restrictions in place at the time a property owner purchased the parcel. According to Scalia, when new regulations deprive a property owner of all economically beneficial use, the state must compensate a landowner unless the regulation simply makes explicit limitations that "inhere in the title" of the property. Scalia describes this as an "antecedent inquiry" pursuant to which compensation would be required for new regulations that eliminate all uses of property unless "[t]he use of these properties for what are now expressly prohibited purposes was *always* unlawful and. . . it was open to the State at any point to make the implication of those background principles of nuisance and property law explicit."⁶⁸ Finally, Justice Scalia suggests that he intended to limit the category of uses that were always unlawful to those that impose direct negative impacts on neighboring landowners.⁶⁹

Justice Scalia's analysis of the nuisance exception to the Takings Clause, thus, is similar in important ways to the exception proposed by Professor Epstein: The scope of the nuisance exception is linked to the title held by the land owner, and the government's authority is bounded, at least in part, by common law principles of nuisance.⁷⁰

However, Justice Scalia's nuisance exception also differed from Professor Epstein's version in two critical ways. First, the Court in *Lucas* applied the exception to a much smaller category of cases than proposed by Professor Epstein. Second, the Court provided a broader exception for "background principles of property and nuisance law" than Epstein envisioned. We discuss each of these critical differences in turn below.

Professor Epstein argued that nuisance control (in his narrow definition of the notion) should be the only excuse for non-compensation in *all* takings cases.⁷¹ Justice Scalia in *Lucas*, on the other hand, created his nuisance exception in the narrow context of a regulation rendering property "valueless" and was explicit that nuisance control is necessary to avoid compensation *only* in this limited category of cases.⁷² For other regulations, the *Penn Central* test will still apply, and *Lucas* clarifies that *Mugler* and other "harm

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prevention cases are still very relevant in applying Penn Central's third prong inquiry in the 'character of the government interest.'" As a result, *Lucas* does nothing to increase the likelihood that the vast majority of regulations (that restrict property use but do not render property valueless) will be considered a taking.⁷³

The second important way the nuisance exception established by the Court in *Lucas* varies from that proposed by Professor Epstein is that it refers to limitations in place at the time a property owner "obtains title" and suggests that limitations from "property law" as well as the common law of nuisance may "inhere in the title." This portion of the opinion, interpreted literally, suggests that all health, welfare and environmental laws and regulations that are in place at the time of purchase "inhere" in the title.⁷⁴

The Court's intent in this regard is uncertain. While Scalia suggests in portions of the *Lucas* opinion that the pre-existing limitations that "inhere" in the title may somehow be limited only to principles of state nuisance law, other portions suggest quite clearly that the "principles of property and nuisance law" include statutes in effect at the time of purchase. For example, Justice Scalia cites the Court's opinion in *Board of Regents of State Colleges v. Roth*,⁷⁴ in explicating the "existing rules or understandings that . . . define the range of interests that qualify for protection as 'property' under the Fifth and Fourteenth Amendments."⁷⁶ *Roth*, in turn, involves property interests that were created and defined entirely by state statutes. Similarly, Justice Scalia cites to Professor Michelman's classic article on "Property, Utility and Fairness"⁷⁵ in defining the category of uses that were "always unlawful."⁷⁸ In the cited passage, Professor Michelman makes quite clear that the exception should extend to uses that are unlawful under statutory as well as the common law.⁷⁹ Moreover, as courts and commentators have noted, there is no basis in logic or precedent for making the common law the sole basis for "inherent limitations on title."⁸⁰

Picking up on this portion of the Court's opinion in *Lucas*, numerous state and lower federal courts have interpreted *Lucas* to bar compensation whenever a property owner purchased property with an existing statutory restriction on its use.⁸¹ Perhaps the most comprehensive analysis was undertaken by the New York Court of Appeals in four cases decided on the same day in February 1997. The Court of Appeals applied *Lucas'* antecedent inquiry to rule against compensation for state regulations protecting wetlands,⁸² preventing development on steep slopes,⁸³ and requiring maintenance of lateral-support for public highways.⁸⁴

The logic of each of the cases was the same. *Lucas* requires courts make a threshold inquiry into "the rights and restrictions contained in a property owner's title."⁸⁵ Because constitutional law, statutory law and the common law all play a role in defining the rights and restrictions applicable to a specific parcel, "a court should look to the law in force, whatever its source, when the owner acquired the property."⁸⁶ Where a statutory or common law restriction was in place at the time a parcel was purchased, a property owner

cannot thereafter assert a takings claim.⁸⁷ The New York Court of Appeals also noted that restrictions in place at the time a parcel is purchased are factored into the purchase price.⁸⁸ A rule allowing a landowner who acquires restricted title to challenge the restriction as a taking, would create a windfall for subsequent purchases and “reward land speculation to the detriment of the public fisc.”⁸⁹

As the New York cases and the discussion above demonstrate, the Supreme Court’s flirtations with Professor Epstein’s theories have yet to have profound impacts on traditional takings law. There appears from the Court’s opinions in *Lucas* and other recent cases, that there are not yet five votes on the Court for adoption of the more radical aspects of the Epstein theories. Still, in taking tentative steps towards adopting a portion of Epstein’s nuisance exception, the Court has given Judge Plager and his activist colleagues a crack in the door. The Federal Circuit, in turn, has pushed through the crack to adopt a much more robust version of Professor Epstein’s nuisance exception.

The Federal Circuit

In an article discussing the *Lucas* opinion, Professor Epstein praised the Court for adopting many of his ideas but harshly criticized the Court for the two aforementioned limitations on the nuisance exception. According to Epstein, “[i]n order for Justice Scalia’s reasoning to work, it would have to bring many more forms of land use regulation within the Takings Clause. . . .” Only by expanding the category of cases where the nuisance exception applied, Epstein declared, can health and safety regulations receive “the close scrutiny and swift dispatch that most of them so richly deserve.”⁹⁰ Dutifully, in two Federal Circuit opinions, Judge Plager has closed (or attempted to close) the two loopholes created in *Lucas* and has created a nuisance exception far closer to that envisioned by Professor Epstein.

In *Loveladies*, Judge Plager accomplished the task of interpreting *Lucas* to change regulatory takings law outside of the narrow category of regulations that deny “all economically viable use.”⁹¹ According to Judge Plager, the *Lucas* opinion constituted a “sea change” in regulatory takings law that changed the central question in regulatory takings cases to:

simply one of basic property ownership rights: within the bundle of rights which property lawyers understand to constitute property, is the right or interest at issue, as a matter of law, owned by the property owner or reserved to the state?⁹²

Judge Plager thus concluded in *Loveladies* that the *Lucas* opinion replaced *Penn Central’s* three part balancing with a three part analysis through which a regulatory taking may be found if:

- (1) there is a denial of economically viable use of the land;⁹³
- (2) the owner has investment-backed expectations for

There appears from the Court’s opinions in Lucas and other recent cases, that there are not yet five votes on the Court for adoption of the more radical aspects of the Epstein theories.

the land; and

(3) the interest at issue was a property interest vested in the owner as a matter of state property law, and not within the power of the state to regulate under common law nuisance doctrine.⁹⁴

Under Judge Plager's reformulation of *Lucas*, the inquiry into restrictions that inhere in the title is not an "antecedent" inquiry that makes application of the *Penn Central* balancing unnecessary; rather, the inquiry *replaces Penn Central's* third-prong query into the "government interest" in the regulation. As Judge Plager notes, this masterstroke "removed from regulatory takings the vagaries of the balancing process."⁹⁵ What Judge Plager means is that under his reformulation of regulatory takings doctrine, the public's interest in regulating the uses of land is simply irrelevant. Rather than balancing competing interests, public and private, a court, according to Judge Plager, should look only at the title to the property and the history of state property law.⁹⁶

Judge Plager's opportunity to dismiss the notion that statutory laws may inhere in the title of property took a bit longer to materialize, and, when it finally did, it required Judge Plager to take on the logic and reasoning of two of his own colleagues on the Federal Circuit. The case in question was *Preseault v. United States*,⁹⁷ a case involving the federal Rails-to-Trails Act and the impact that federal regulation of rail corridors had on the reversionary interests held by landowners along a now unused corridor. Beginning in 1920, federal regulation prohibited abandonment of rail lines (the condition necessary for reversion of conditional interests to original landowners) without federal approval. By 1979, when the Preseaults purchased their parcel, federal regulations sanctioned the temporary use of rail corridors as recreational trails. Subsequently, the Preseaults challenged the use of the rail corridor as a recreational trail, alleging that this use amounted to a taking of their reversionary interest in the corridor.

A panel of the Federal Circuit found that no taking had occurred.⁹⁸ After first deciding that the government action in question was a physical invasion, requiring application of *Lucas'* per se takings analysis, the court turned to applying *Lucas'* antecedent inquiry. The court ruled that when the Preseaults purchased the reversionary interest in the rail corridor in 1979, the interest was already conditioned upon federal approval of any abandonment by the railroad. Because the federal government never sanctioned the abandonment of the rail corridor sought by the Preseaults, they had no current possessory interest in the rail corridor, and nothing was taken from them. In other words, the federal statutes in place at the time the Preseaults purchased their property inhered in their title, and the Preseaults could not now challenge the statutory provisions, which burdened their reversionary interests, as a taking.

Like the New York Court of Appeals, the panel justified its ruling as "a matter of economic as well as legal common sense."⁹⁹ The

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market price paid by a subsequent purchaser would reflect the restrictions in effect at the time of the purchase, so government compensation for the regulation would be a windfall to the subsequent owner. It is the first owner who has a takings claim, even after the sale, because the first owner received less for the property than he would have but for the restriction.

The activist majority on the Federal Circuit did not even wait for the *Preseaults* to request a rehearing. They decided on their own initiative to review the case in banc and Judge Plager wrote a plurality opinion vacating the panel's decision.¹⁰⁰ Judge Plager dismissed the panel's argument about *Lucas'* antecedent inquiry in a single page, without even discussing the logic of the panel's ruling or the language in *Lucas* suggesting that the antecedent inquiry includes both statutory and common law restrictions. Instead, Judge Plager again relied primarily on dictum from other portions of *Lucas* to conclude that *Lucas'* antecedent inquiry was limited to state-defined nuisance rules.¹⁰¹

The combined effect of *Loveladies* and *Preseault* is that, in the Federal Circuit, the nuisance exception and *Penn Central's* consideration of the government's interest in regulating have been reduced to a very narrow inquiry into whether the regulated use was a common-law nuisance. Coupled with *Florida Rock's* expansion of what can constitute a taking, the Federal Circuit has adopted important portions of two of the central tenets of Professor Epstein's proposed revolution in takings law.

Means/Ends Analysis

The final critical element of Professor Epstein's theory — the notion that courts should apply heightened scrutiny to all regulations affecting property to ensure the means used by federal, state and local governments to achieve their regulatory objectives are closely tailored to achieve permissible ends — has also begun to work its way into our constitutional jurisprudence. In *Takings*, Epstein, citing the Supreme Court's long-discredited *Lochner* opinion, argued that courts should apply an intermediate standard of review to land use regulations. In his formulation:

The act must have a more direct relation, as a means to an end, and the end itself must be appropriate and legitimate.¹⁰²

Professor Epstein suggested that this heightened scrutiny is especially important for land use restrictions that prevent certain individuals from engaging in land uses that are open to others. Professor Epstein's central concern was that differential treatment of one landowner or set of landowners is a "powerful telltale sign that the police power has become a cloak for illegitimate ends."¹⁰³ Professor Epstein suggested that over-broad means for achieving a valid end may be a sign that the articulated end is a sham and a cover for an illegitimate purpose—taking land without paying for it.

The activist majority on the Federal Circuit did not even wait for the Preseaults to request a rehearing.

In Nollan and Dolan, the Supreme Court adopted an Epstein-like means/ends analysis in takings cases involving “exactions”—and has articulated the same concerns in so doing.

In *Nollan v. California Coastal Commission* and *Dolan v. City of Tigard*,¹⁰⁴ the Supreme Court adopted an Epstein-like means/ends analysis in takings cases involving “exactions”¹⁰⁵—and has articulated the same concerns in so doing. For example, in *Nollan*, Justice Scalia acknowledged that the Coastal Commission could constitutionally have denied the Nollan’s requested development permit outright without compensation, but then found that the Commission could not constitutionally condition the permit on the receipt of an easement across the Nollan’s property unless there is an “essential nexus” between the purpose of the condition and the purpose that would be served by prohibiting the proposed development. According to Justice Scalia, the lack of a nexus shows the condition “is not a valid regulation of land use but an ‘out-and-out plan of extortion.’”¹⁰⁶ The link to Professor Epstein is apparent.

Similarly, in *Dolan*, the Court ruled that in addition to the essential nexus, there must be a “rough proportionality” between the legitimate state interest (the ends) and the condition (the means).¹⁰⁷ This heightened standard of review requires not just that there be some connection between the ends and the means, but also that the connection be quite close—so close in fact that the analysis effectively shifts the burden of proof in cases involving exactions to the government.¹⁰⁸ Chief Justice Rehnquist echoed Professor Epstein in suggesting that the narrow means/ends analysis is in truth a method for ferreting out illegitimate state ends cloaked in the police power.¹⁰⁹

As with other Supreme Court forays into Professor Epstein’s theory, the Supreme Court’s adoption of Epstein’s means/ends scrutiny has been less than complete. To date, the Court has only applied its nexus and rough proportionality tests to exactions that entail a physical invasion or require a dedication of private property, and the logic of the opinions suggest that the tests will be limited to that context.¹¹⁰ However, the Supreme Court has agreed to hear a case this term, *Eastern Enterprises v. Apfel*,¹¹¹ that may shed light upon the question of how broadly the Supreme Court will apply *Nollan’s* and *Dolan’s* heightened scrutiny.

Moreover, the Supreme Court’s introduction of the issue has again brazened conservative judges on lower federal courts to adopt a more expansive version of Epstein’s handiwork. In *Del Monte Dunes v. City of Monterey*,¹¹² a 1996 case, the Ninth Circuit Court of Appeals applied *Nollan’s* and *Dolan’s* heightened scrutiny to a decision to deny a development permit and implied that, as Epstein proposed, heightened judicial scrutiny will apply to all land use regulations.

Endnotes

- ¹ See EPSTEIN, *supra* Ch. 1, note 2, at 30.
- ² In addition to the Supreme Court cases discussed below, see *First Lutheran Church v. Los Angeles County*, 482 U.S. 304, 322—23 (1986) (Stevens, J. dissenting) (noting that the church had not even raised a takings challenge in its complaint and noting that the state court had remanded to the trial court on distinct grounds for liability—raising the possibility that the plaintiff would have won remuneration on non-Constitutional grounds.); *Dolan v. City of Tigard*, 512 U.S. 374, 412—14 (Souter J., dissenting) (questioning whether the facts of the case raised the question answered by the majority and arguing the case could have been decided using without creating a new takings doctrine).
- ³ 483 U.S. 825 (1987).
- ⁴ Motion of Appellee California Coastal Commission to Dismiss, No 86-133 (Nov. 26, 1996) at 3.
- ⁵ Bench Memorandum at 3, *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987) (No. 86—133).
- ⁶ See Brief of the United States as Amicus Curiae Supporting Reversal, n. 86-133, at 6.
- ⁷ See SC. Code Ann. S. 48—39—10 et. seq. (Law Co-op.1989).
- ⁸ *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).
- ⁹ *Id.* at 1043 n.5 (Blackmun, J., dissenting).
- ¹⁰ *Lucas v. Defenders of Wildlife*, 504 U.S. 555, 564 (1992).
- ¹¹ *Lucas*, 505 U.S. at 1012—13 n.3.
- ¹² *Lucas*, 505 U.S. at 1043 n.5.
- ¹³ See *Lucas*, 505 U.S. at 1020 n.9.
- ¹⁴ Richard J. Lazarus, *Putting the Correct "Spin" on Lucas*, 45 STAN. L.REV. 1411 at 1418, 1420—21 (1993); see also *Lucas*, 505 U.S. at 1062 (Stevens J. dissenting) (noting the majority was "eager to decide the merits" of Lucas' claim); *Id.* at 1036 (Blackmun J. dissenting) ("the court presses on to decide the issue, and as it does, it ignores its jurisdictional limits, remakes its traditional rules of review and creates simultaneously a new categorical rule and an exception (neither of which is rooted in our prior case law, common law, or common sense)"); *Id.* at 1077 (Souter, J., statement) (noting the "imprudence of proceeding to the merits in spite of these unpromising circumstances").
- ¹⁵ See 27 F.3d 1545, 1547 (Fed. Cir. 1994). For additional evidence of the activism of the Federal Circuit in takings cases, see *Florida Rock Industries v. United States*, 18 F.3d 1560, 1573 (Fed. Cir. 1994) (Neis, C.J., dissenting) (noting that Judge Smith had rejected Florida Rock's partial takings claim (finding instead that Florida Rock had suffered a complete denial of economic use) and Florida Rock had not appealed that ruling). As Judge Neis argued persuasively in dissent, the so-called "law of the case" should govern the partial takings issue and should not have been addressed by the Federal Circuit. See also *Preseault v. United States* 100 F.3d 1525 (Fed. Cir. 1996) (granting "in banc" review sua sponte).
- ¹⁶ 28 U.S.C. §1500.

- ¹⁷ 962 F.2d 1013, 1023 (Fed. Cir. 1992), *aff'd sub nom. Keene Corp. v. United States*, 508 U.S. 200 (1993).
- ¹⁸ *See id.* at 1023 (citation omitted).
- ¹⁹ 135 Ct. Cl. 647 (1956).
- ²⁰ *See id.* at 1548-49 (citing *Keene Corp. v. United States*, 508 U.S. 200, 211 (1993)).
- ²¹ *Id.* at 1548.
- ²² 27 F3d at 1556—60 (Mayer, J., dissenting).
- ²³ *Id.* at 1558.
- ²⁴ *Id.* at 1556—58.
- ²⁵ *Id.* at 1558.
- ²⁶ *Id.* at 1557.
- ²⁷ *Id.* at 1559.
- ²⁸ *Id.* at 1558.
- ²⁹ *Id.* at 1555—1556.
- ³⁰ *Id.*
- ³¹ *See* 18 F3d 1560 (Fed. Cir. 1994).
- ³² *See e.g. Broadwater Farms Joint Venture v. United States*, 1997 WL 428516 (Fed Cir. July 31, 1997) (reversing a ruling that a 28% diminution in value was not a taking (as a result of a denial of a wetlands permit under Section 404 of the Clean Water Act to develop 12 of 27 lots) and ruling that, under *Florida Rock*, a court must always evaluate the extent to which a regulation interferes with investment-backed alternatives and the character of the Government action before denying a takings claim).
- ³³ Professor Blumm finishes his article on *Florida Rock* by concluding that “[U]nless the Supreme Court reverses *Florida Rock*, all federal environmental regulations are in jeopardy, and environmental law, as we have come to know it in the last quarter century, is over.” *See* Blumm, *supra* Ch. 2, note 27, at 198.
- ³⁴ *Penn Central Transp Co. v. New York City*, 438 U.S. 104, 130-31 (1978). *See also* Margaret Radin, *The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings*, 88 Colum. L. Rev. 1667, 1676-77 (1988).
- ³⁵ *Penn Central*, 438 U.S. at 142-144.
- ³⁶ Radin, *supra* note 34 at 1677.
- ³⁷ 458 U.S. 419 (1982).
- ³⁸ Indeed the Court (through Justice Marshall) goes to great lengths in *Loretto* to clarify that it is *not* finding a takings simply because of the impact on the right to exclude. *See* 458 U.S. at 435 (“[p]roperty rights in a physical thing have been described as the rights ‘to possess, use and dispose of it.’ (citation omitted) To the extent that the government permanently occupies physical property, it effectively destroys each of these rights.”) The *Loretto* Court also made clear that a similar rule

should not apply to other sticks in the bundle, “deprivation of the right to use and obtain a profit from property is not, in every case, independently sufficient to establish a taking.” *Id.* at 435—36.

³⁹ See *id.* at 426 (“we have long considered a physical intrusion by government to be a property restriction of an unusually serious character for purposes of the Takings Clause”).

⁴⁰ 481 U.S. 704 (1987).

⁴¹ *Id.* at 716.

⁴² *Cf.* *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1027—1030 (1992) (citing *Andrus v. Allard*, 444 U.S. 51 (1979), a case prohibiting the sale of eagle feathers, for the proposition that strands in the bundle of “personal” property (as opposed to land) may be abrogated without compensation).

⁴³ Severing property into strands in the bundle or incidences of ownership is different from physically severing property into affected and not-affected portions (for example by dividing a parcel into its wetland and upland portions). The Court has adopted the first method of severing property, it has resolutely rejected the second method. See *Concrete Pipe & Prods. of Cal. v. Constr. Laborers Pension Trust for Southern California*, 508 U.S. 602, 643—44 (1993) (unanimous Court reaffirming *Penn Central’s* holding that “a claimant’s parcel of property could not first be divided into what was taken and what was left for the purpose of demonstrating the taking of the former to be complete”); *cf. Lucas*, 505 U.S. at 1017—18 (recognizing difficulty in ascertaining in all cases the “property interest” against which the loss of value is to be measured). Both these methods of severing property interests, in turn, are distinct from Epstein’s partial takings doctrine, which holds that any portion of any property interest (however defined) may be compensable under the Takings Clause.

⁴⁴ See 505 U.S. at 1019.

⁴⁵ See 508 U.S. at 645.

⁴⁶ See *Lucas*, 505 U.S. at 1017—18; see also *Dolan v. City of Tigard*, 512 U.S. 374, 396 (1994).

⁴⁷ The dicta relied upon by the Federal Circuit is contained in Footnote 7 of the *Lucas* opinion where Justice Scalia complains about the difficulty in determining “the ‘property interest’ against which the loss of value is to be measured” and muses that it is “unclear” whether the Court would treat a regulation that requires a developer to leave 90% of a rural tract in its natural state “as one in which the owner has been deprived of all economically beneficial use of the burdened portion of the tract, or as one in which the owner has suffered a mere diminution in value of the tract as a whole” See 505 U.S. at 1016 n.7. This dicta, at most, leaves open the possibility of physically severing property by the affected and unaffected portions, it does not raise or in any way leave open the partial takings issue. See *supra* Ch.5, note 43; *Florida Rock Indus. v. United States*, 18 F.3d 1560, 1578 (Fed. Cir. 1994) (Nies, J., *issenting*) (“[t]he majority seeks to shoehorn its ‘partial takings’ theory into this open question. It does not fit.”) Moreover, any ambiguity raised by Scalia’s dicta was forcefully put to rest by a unanimous Court a year before *Florida Rock* in *Concrete Pipe*. See 113 S.Ct. at 2290 (“to the extent that any portion of property is taken, that portion is always taken

in its entirety; the relevant question, however, is whether the property taken is all, or only a portion of the parcel in question.”

⁴⁸ See *Concrete Pipe*, 508 U.S. at 643—45.

⁴⁹ *Florida Rock*, 18 F3d at 1573 (Nies, C.J., dissenting).

⁵⁰ See *id.* at 1570—71.

⁵¹ EPSTEIN, *supra* Ch. 1, note 2, at 57.

⁵² See *Florida Rock*, 18 F3d at 1572 (“The fact that the source of a taking is a regulation rather than a physical entry should make no difference”).

⁵³ See *id.*

⁵⁴ See Chapter Two. See also *Lucas*, 505 U.S. at 1017 (justifying his rule that total deprivations in use were per se takings by noting that “total deprivation of beneficial use is, from the landowners’s point of view, the equivalent of a physical appropriation”).

⁵⁵ See *id.* at 1575 (Neis, C.J., dissenting) (noting that in *United States v. Causby*, 328 U.S. 256 (1945), and other Supreme Court cases the Court demanded “an identification of the specific property interest to be transferred”).

⁵⁶ See *id.* at 1575 (Neis, C.J., dissenting) (“Value is not a property value under Florida law or any state law that I can uncover.”).

⁵⁷ See EPSTEIN, *supra* Ch. 1, note 2, at 199.

⁵⁸ See 438 U.S. 104, 106-38 (1977). It is perhaps an overstatement to say that *Penn Central* established a “rule” that regulations that diminish property value by less than 90% do not require compensation under the takings clause. After all, *Penn Central* established a balancing test of three factors and ‘effect on property value’ is only one of the three factors. Nonetheless, *Penn Central* and its progeny strongly suggest that regulations that reduce property value by less than 90% will not be takings unless one of the other factors (the property owner’s “distinct investment backed expectations” and the “character of the government action” weigh strongly in the property owners favor. See *Concrete Pipe*, 508 U.S. at 643-45. If not a rule, then, it is at least a “rule of thumb” that provides guidance to government officials.

⁵⁹ See Blumm, *supra* Ch. 2, note 27, at 173.

⁶⁰ See Jay Plager, *Takings Law and Appellate Decision Making*, 25 ENVTL L 161, 162—163 (1995) (acknowledging that the partial takings issue had not been “fully briefed and argued,” and explaining that sometimes you have a “problem of trying to fit the issue you want to write about to the case that is before you”); see also *Florida Rock*, 18 F.3d at 1568 (“Nothing in the language of the Fifth Amendment compels a court to find a taking *only* when the Government divests the total ownership of the property”).

⁶¹ Plager, *supra* Ch.5, note 60, at 163.

⁶² See Blumm, *supra* Ch.2, note 27, at 180.

⁶³ *Florida Rock*, 18 F3d at 1575 (Nies, C.J., dissenting).

⁶⁴ See EPSTEIN, *supra* Ch. 1, note 2, at 111.

⁶⁵ *Id.*

⁶⁶ *Id.* at 112. Epstein's minimalist notions of the police power are, of course, fundamentally inconsistent with the broad and encompassing definition of the police power outlined by the Supreme Court:

Public safety, public health, morality, peace and quiet, law and order—these are some of the more conspicuous examples of the traditional application of the police power to municipal affairs. . . . The concept of public welfare is broad and inclusive (citations omitted). The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled.

Berman v. Parker, 348 U.S. 26, 32—33 (1954) (citations omitted).

⁶⁷ *Lucas*, 505 U.S. 1023-1024.

⁶⁸ *Id.*

⁶⁹ The examples Scalia gave of regulations that would not require compensation both involved proposed uses that would cause significant spillover costs to neighboring property. See *Lucas*, 505 U.S. at 1028—29 (discussing landowner land filling a lake bed and flooding his neighbors and corporation operating a nuclear power plant on top of an earthquake fault).

⁷⁰ See John A. Humbach, "Taking" *The Imperial Judiciary Seriously: Segmenting Property Interests and Judicial Revision of Legislative Judgments*, 42 CATH. U. L. REV. 771, 772 (1993) ("[w]hat the Supreme Court did in *Lucas* itself was to reassign flat-out a portion of this nation's ultimate environmental and land use authority from the legislatures, which traditionally had it, to the courts."

⁷¹ See EPSTEIN, *supra* Ch.1, note 2, at 112.

⁷² *Lucas*, 505 U.S. at 1007—08; *Concrete Pipe*, 508 U.S. at 643—44.

⁷³ *Lucas*, 505 U.S. at 1029.

⁷⁴ See *infra* notes 81-89 and accompanying text. While the Court in *Lucas* does not state explicitly that its antecedent inquiry applies outside of the category of *per se* takings, if compensation is not required in such instances for *per se* takings, *a fortiori* compensation should not be required under the same circumstances for less restrictive laws and regulations.

⁷⁵ 408 U.S. 564 (1972)

⁷⁶ See *Lucas*, 505 U.S. at 1030 (citations omitted).

⁷⁷ Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165 (1967).

⁷⁸ See *Lucas*, 505 U.S. at 1030.

⁷⁹ See Michelman, *supra* Ch.5, note 77, at 1239—41.

⁸⁰ For cases on the subject, see *infra*. For commentary, see Lynn E. Blais, *Takings, Statutes, and the Common Law: Considering Inherent Limitations on Title*, 70 S. CAL. L. REV. 1 (1997); see also Lazarus, *supra* Ch.5,

note 14, at 1426; Daniel R. Mandelker, *Investment-Backed Expectations in Taking Law*, 27 URBAN LAW. 215, 225 (1995).

⁸¹ In addition to the cases discussed below, see *Wilson v. City of Louisville*, 957 F.Supp. 948, 956 (W.D. Ky. 1997); *Hunziker v. State*, 519 N.W.2d 367, 370—71 (Iowa 1995); *Grant v. South Carolina Coastal Council*, 461 S.E.2d 388, 391 (S.C. 1995).

⁸² See generally *Gazza v. New York State Dept. of Env't'l Conserv.*, 679 N.E.2d 1035, 1041—42 (N.Y. 1997); *Basile v. Town of Southampton*, 678 N.E.2d 489, 490—91 (N.Y. 1997).

⁸³ See *Anello v. Zoning Bd. of Appeals of the Village of Dobbs Ferry*, 678 N.E.2d 870, 870—71 (N.Y. 1997).

⁸⁴ See *Kim v. City of New York*, 681 N.E.2d 312, 315 (N.Y. 1997).

⁸⁵ See *Kim*, 681 N.E.2d at 315.

⁸⁶ *Id.* at 315—16. The Court of Appeals stated in *Kim*:

It would be an illogical and incomplete inquiry if the courts were to look exclusively to common-law principles to identify the preexisting rules of State property law, while ignoring statutory law in force when the owner acquired title. (Citations omitted). To accept this proposition would elevate common law over statutory law, and would represent a departure from the established understanding that statutory law may trump an inconsistent principle of the common law. (citation omitted).

Id. at 315.

⁸⁷ See *id.* at 316—17 (common law and statutory obligations of lateral support); *Anello*, 678 N.E.2d at 870 (steep slope ordinance).

⁸⁸ *Kim*, 681 N.E.2d at 319; *Anello*, 678 N.E.2d at 871.

⁸⁹ *Anello*, 678 N.E.2d at 871.

⁹⁰ See Richard A Epstein, *Lucas v. South Carolina Coastal Council: A Tangled Web of Expectations*, 45 STAN. L. REV. 1369, 1392 (1993).

⁹¹ *Loveladies Harbor, Inc v. United States*, 28 F.3d 1171 (Fed. Cir. 1994).

⁹² *Id.* at 1179.

⁹³ Judge Plager's phrasing of this new first prong seems deliberately misleading. He drops the word "all" from Lucas' "denial of all economically viable use" category and replaces it with the ambiguous "denial of economically viable use." Judge Plager's discussion of the prong, however, makes it clear that he intends his new three prong test to apply whenever a regulation denies a property owner of *an* economically viable use. *Id.* at 1179-80. With that simple editing of the Supreme Court's opinion in *Lucas*, Judge Plager interpreted Lucas' to impact all regulatory takings cases. See *id.*

⁹⁴ *Id.*

⁹⁵ See *id.* at 1179.

⁹⁶ We note that because the Federal Circuit in *Loveladies* ultimately ruled that the regulation in question deprived *Loveladies* of *all* economically viable use of their property, Judge Plager's reformulation of *Penn Central* outside of Lucas' category of *per se* takings is *dicta*, which courts,

including the Federal Circuit, do not appear to be following. See *Broadwater Farms*, 1997 WL 428516, slip op. at 2 (applying original three-prong Penn Central test to regulatory taking case).

⁹⁷ See 66 F.3d 1167 (Fed. Cir. 1995), *vacated*, 66 F.3d 1190 (Fed. Cir. 1995), *rev'd* 100 F.3d 1525 (1996).

⁹⁸ See 66 F.3d at 1174-1180.

⁹⁹ 66 F.3d at 1176; see also *Gazza v. New York State Dep't of Env'tl. Conserv.*, 679 N.E.2d 1035, 1043 (N.Y. 1997).

¹⁰⁰ 100 F.3d 1525 (Fed. Cir. 1996). Because Judge Plager was only able to get three other justices to join his opinion, the opinion is not binding precedent in the circuit.

¹⁰¹ *Id.* at 1538-1539 ("Much of what the Supreme Court said then. . . about property rights indicates to the contrary.").

¹⁰² EPSTEIN, *supra* Ch.1, note 2, at 128.

¹⁰³ EPSTEIN, *supra* Ch.1, note 2, at 133.

¹⁰⁴ See 512 U.S. 374, 389—90 (1994). For a more complete treatment of *Nollan* and *Dolan*, see Douglas T. Kendall & James E. Ryan, *Paying for the Change: Using Eminent Domain to Secure Exactions and Sidestep Nollan and Dolan*, 81 VA. L. REV. 1801, 1807—79 (1995).

¹⁰⁵ The term "exactions" encompasses a variety of concessions that municipalities extract from landowners who wish to change the use of their land, such as impact fees, the provisions of services, restrictions on land use, and dedications of land. See Kendall & Ryan, *supra* Ch.5, note 104, at 1802—03.

¹⁰⁶ *Id.* 512 U.S. at 391.

¹⁰⁷ (quoting *J.E.D. Assoc. v. Atkinson*, 432 A.2d 12, 14—15 (1981)).

¹⁰⁸ See 512 U.S. at 413—14 (Souter, J., dissenting).

¹⁰⁹ See *Dolan*, 512 U.S. at 387.

¹¹⁰ See Kendall & Ryan, *supra* Ch.5, note 104, at 1807—08, n26, 1812 n.51 (discussing reasons why applying *Nollan* and *Dolan* outside the realm of physical exactions would be an improper extension of the cases).

¹¹¹ Docket No. 97-42.

¹¹² 95 F.3d 1422, 1428—34 (9th Cir. 1996).