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REGULATORY TAKINGS AFTER THE SUPREME COURT'S 1991-92 TERM: AN EVOLVING RETURN TO PROPERTY RIGHTS

STEVEN J. EAGLE* AND WILLIAM H. MELLOR III**

INTRODUCTION

The Supreme Court continued during its 1991-92 Term what we regard as its evolution towards increased recognition of the rights of landowners faced with governmental restrictions amounting to regulatory takings.

Lucas v. South Carolina Coastal Council,¹ the Term's principal property-rights decision, augments the constraints upon regulation developed in *City of Cleburne v. Cleburne Living Center*,² *Nollan v. California Coastal Commission*,³ and other recent cases.⁴ We regard these cases as constituting a "skeptical transition" from the Court's "regulatory model" that reached its apogee in *Penn Central Transportation Co. v. New York City*⁵ to a post-*Lucas* "property rights model" which would focus on property rights rather than the police power and which would employ some form of heightened or reasonable basis scrutiny. The Court's other 1991-92 property-rights cases, *PFZ Properties, Inc. v. Rodriguez*⁶ and *Yee v. City of Escondido*,⁷ appear to fit within its pattern of tentatively exploring enhancements of property rights prior to subsequent decisions in their favor.⁸

As one of the Term's "celebrated" cases, *Lucas* engendered considerable immediate reaction.⁹ The consensus was that it "stopped well short of the

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Authors' note: The Institute for Justice had filed Amicus briefs in support of Petitioners in *Lucas v. South Carolina Coastal Commission* (reprinted at 25 LOY. L.A. L. REV. 1233 (1992)) and *PFZ Properties, Inc. v. Rodriguez*.

1. 112 S. Ct. 2886 (1992). See *infra* text accompanying notes 90-117.

2. 473 U.S. 432 (1985). See *infra* text accompanying notes 72-77.

3. 483 U.S. 825, 834 (1987). See *infra* text accompanying notes 78-89.

4. We have in mind principally *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987); and *Loretto v. Teleprompter Manhattan CATV Corp.*, 485 U.S. 419, 440 (1982).

5. 438 U.S. 104, 127 (1978). See *infra* text accompanying notes 69-71.

6. 928 F.2d 28 (1st Cir), *cert. granted*, 112 S. Ct. 414 (1991), *cert. dismissed as improvidently granted*, 112 S. Ct. 1151 (1992). See discussion *infra* in text accompanying notes 134-39.

7. 112 S. Ct. 1522 (1992). See *infra* text accompanying notes 124-28 (holding in *Yee*); notes 175-83 (regulatory dicta in *Yee*).

8. See *infra* text accompanying notes 132-44.

9. See, e.g., Tom Kenworthy & Kirstin Downey, *South Carolina May Have to Pay Compensation in Property Case*, WASH. POST, June 30, 1992, at A10.

sweeping vindication of property rights that many conservatives had hoped for."¹⁰ Some opponents of enhanced property rights were quick to write the case off as "very narrow," and therefore as a "partial victory" for their own side.¹¹ Others noted more judiciously that *Lucas* "should not impede the implementation of reasonable land-use limitations."¹² Some proponents of private property rights treated *Lucas* as a major loss in which the Court "blew" what was "a golden opportunity to straighten out" the law of takings.¹³

We believe that the substantial advancement of property rights implicit in *Lucas* has been obscured by expectations of the "sweeping vindication" sought by some and feared by others. For the Court to have radically changed property rights doctrine in one fell swoop would have been an unlikely outcome in any event. First, the Court's reluctance to make any but incremental changes in property rights doctrine hardly is surprising, given its checkered treatment of individuals' economic rights,¹⁴ the elusive character of the police power,¹⁵ and the "inconsistent pronouncements" marking its takings jurisprudence.¹⁶ Second, a "sweeping vindication" would be inconsistent with dicta in *Planned Parenthood of Southeastern Pennsylvania v. Casey*¹⁷ elaborating upon the Court's unwillingness to make radical changes in controversial doctrine.

It is true that the history of property law in America always has reflected the tension between liberal (Lockean) and republican (majoritarian) values.¹⁸ However, as the first Justice Harlan observed, "[d]ue protection of the rights of property has been regarded as a vital principle of republican institutions."¹⁹ The Court's recent property jurisprudence may be rectifying the balance.

10. Linda Greenhouse, *The Supreme Court: Justices Ease Way to Challenge Land-Use Rules That Prevent Development*, N.Y. TIMES, June 30, 1992, at A18.

11. Tom Kenworthy & Kirstin Downey, *South Carolina May Have to Pay Compensation in Property Case*, WASH. POST, June 30, 1992, at A10 (quoting John Echeverria, counsel for the National Audubon Society).

12. Karen Riley, *Land Ruling Called Overly Narrow*, WASH. TIMES, June 30, 1992, at A4 (quoting Jessica Landman, a lawyer with the Natural Resources Defense Council).

13. *Id.* (quoting Roger Pilon, Director of the Cato Institute's Center for Constitutional Studies).

14. See *infra* text accompanying notes 38-40.

15. See *infra* notes 29-31 and accompanying text.

16. *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886, 2894 n.7 (referring specifically to difficulties in defining the extent of the property affecting which there may have been a regulatory taking).

17. 112 S. Ct. 2791 (1992). *Casey* was handed down the same day as *Lucas*. See *infra* text accompanying notes 157-69.

18. See, e.g., JENNIFER NEDELSKY, PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM (1990); Frank Michelman, *Tutelary Jurisprudence and Constitutional Liberty*, in LIBERTY, PROPERTY, AND THE FUTURE OF CONSTITUTIONAL DEVELOPMENT 127 (Ellen Frankel Paul & Howard Dickman, eds., 1990).

19. *Chicago, B. & Q. R.R. Co. v. City of Chicago*, 166 U.S. 226, 235 (1897).

I. DEVELOPMENT OF THE REGULATORY MODEL:
MUGLER TO PENN CENTRAL

A. *Private Property Rights and the Police Power*

The Supreme Court has noted that property rights “are not created by the Constitution . . . but rather are “created” and “defined” by “existing rules or understandings that stem from an independent source such as state law. . . .”²⁰ As early as 1792, a South Carolina court had declared that “it was against common right, as well as against *magna charta*, to take away the freehold of one man and vest it in another.”²¹ This “historical compact” is at the heart of *Lucas*.²²

Several Constitutional provisions explicitly protect private property rights. The federal government is constrained by the Due Process Clause²³ and the Takings Clause²⁴ of the Fifth Amendment. State governments also are constrained by Takings Clause²⁵ through the Due Process Clause of the Fourteenth Amendment.²⁶ Implicit Constitutional protection of property is provided by, among other provisions, the Contracts Clause of Article I.²⁷ The notion that both natural law and the Contracts Clause protected the individual’s property rights was encapsulated in Professor Corwin’s notion of “vested rights.”²⁸

20. *Webb’s Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 161 (1980) (quoting *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972)).

21. *Bowman v. Middleton*, 1 Bay 252, 254 (S.C. 1792), quoted in JAMES W. ELY, JR., *THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS* 78 (1992).

22. *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886 (1992). “[T]he notion . . . that title [to land] is somehow held subject to the ‘implied limitation’ that the State may subsequently eliminate all economically valuable use is inconsistent with the historical compact recorded in the Takings Clause that has become part of our constitutional culture.” *Id.* at 2900.

23. U.S. CONST. amend. V (“No person shall . . . be deprived of . . . property, without due process of law . . .”).

24. *Id.* amend. V ([N]or shall private property be taken for public use, without just compensation.”).

25. *Chicago, B. & Q. R.R. Co. v. City of Chicago*, 166 U.S. 226 (1897).

26. U.S. CONST. amend. XIV (“Nor shall any State deprive any person of . . . property, without due process of law . . .”).

27. *Id.* art. I, § 10, cl. 1 (“No state shall . . . pass any . . . Law impairing the Obligation of Contracts. . . .”). See, e.g., *United States Trust Co. of New York v. New Jersey*, 431 U.S. 1 (1977) (invalidating retroactive repeal of bond covenant); *Chicago Bd. of Realtors, Inc. v. City of Chicago*, 819 F.2d 732, 744 (Posner, J., concurring) (1987) (Contracts Clause has been interpreted to mean little, at least when government not a party); Richard A. Epstein, *Toward a Revitalization of the Contract Clause*, 51 U. CHI. L. REV. 703 (1984).

28. The concept of vested rights “was that the effect of legislation on existing property rights was a primary test of its validity; for if these were essentially impaired then some clear constitutional justification must be found for the legislation or it must succumb to judicial condemnation.” EDWARD CORWIN, *LIBERTY AGAINST GOVERNMENT* 72 (1948), quoted in RONALD D. ROTUNDA, ET AL., *TREATISE ON CONSTITUTIONAL LAW, SUBSTANCE & PROCEDURE* § 15.1, at 30-31 (1986).

Yet from the beginning the courts have grappled with the tension between the need to protect property rights and the emergence of the police power. The so-called "police power"²⁹ has been the basis for governmental regulation of real property. While there are earlier instances of its employment,³⁰ regulation of land use through the police power conventionally is traced to the 1887 case of *Mugler v. Kansas*.³¹ The Supreme Court upheld a prohibition ordinance which had closed a existing brewery. It rejected the plaintiff's argument that his premises did not constitute a nuisance, on the grounds that the state could protect against the injurious consequences of alcohol as it saw fit. No showing was required of special harm, or that society could not be protected through less drastic means. Furthermore, "a prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the public health, morals or safety of the community, cannot in any sense, be deemed a taking or an appropriation of property for the public benefit."³² Under *Mugler*, regulations could and did deprive owners of most of the value of their property.³³

Mugler reflected earlier Supreme Court cases conditioning a "taking" on a "direct appropriation"³⁴ or a "practical ouster of [the owner's] possession."³⁵ But, as Justice Holmes explained in 1922, in *Pennsylvania Coal Co. v. Mahon*,³⁶ the result of a juxtaposition of compensable appropriations and non-compensable regulations would be the "natural tendency of human nature to extend the qualification more and more until at last private property disappear[ed]." Thus, "while property may be regulated to some extent, if regulation goes too far it will be recognized as a taking."³⁷

29. A fairly comprehensive definition is contained in *Lochner v. New York*, 198 U.S. 45, 53 (1905):

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

30. *E.g.*, *Charles River Bridge v. Warren Bridge Co.*, 36 U.S. (11 Pet.) 420 (1837) (interpreting bridge charter so as to allow the state to protect against monopoly).

31. 123 U.S. 623 (1887).

32. *Id.* at 668-69.

33. *See, e.g.*, *Hadacheck v. Sebastian*, 239 U.S. 394 (1915) (upholding restriction against preexisting brickyard now encroached by urban development, with 87 percent reduction in value). The police power is "one of the most essential . . . [and] least limitable" powers of government. *Id.* at 410.

34. *Legal Tender Cases*, 80 U.S. (12 Wall.) 457, 551 (1871).

35. *Transportation Co. v. Chicago*, 99 U.S. 635, 642 (1879).

36. 260 U.S. 393 (1922) (holding that a coal company could not be forbidden to exploit its mineral estate by a regulation designed to protect the surface owner).

37. *Id.* at 414-15.

The national citizenship provided by the post-Civil War Fourteenth Amendment³⁸ on its face supported property rights, but the Court's initial reading of these restrictions on state authority in *The Slaughter-House Cases*³⁹ was narrow.⁴⁰ However, in *Munn v. Illinois*,⁴¹ it announced that while it was upholding state regulation of grain elevator rates because grain elevators were "affected with a public interest,"⁴² "mere private contracts" could not be so regulated.⁴³

The best known of the economic substantive due process cases, *Lochner v. New York*,⁴⁴ the Court struck down a New York statute restricting the weekly working hours of bakers. Refusing to deem the restriction a health or safety measure, the Court found that it violated the employer and employees' liberty of contract—a right protected by the Fourteenth Amendment. However, the difficulty in discerning what businesses or restrictions were "affected with a public interest" and the intense New Deal opposition culminating in President Roosevelt's "court packing plan" led the Court to change direction. In *Nebbia v. New York*,⁴⁵ it held that "a state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare."⁴⁶ In *West Coast Hotel v. Parrish*,⁴⁷ the Court overruled *Adkins v. Children's Hospital*, which on substantive due process grounds, had invalidated, minimum wage laws for women.⁴⁸

Finally, in *United States v. Carolene Products Co.*,⁴⁹ the Court established the now-familiar dichotomy between general economic and social legislation on the one hand, and statutes affecting purported fundamental constitutional values on the other. Justice Stone declared that "[R]egulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless . . . it is of such a character as to preclude the

38. U.S. CONST. amend. XIV, § 1 ("No State shall . . . abridge the privileges or immunities of citizens of the United States; nor . . . deprive any person of life, liberty, or property, without due process of law; nor deny . . . equal protection of the laws.").

39. 83 U.S. (16 Wall.) 36 (1873) (holding that state-granted monopoly on slaughtering in New Orleans area was not violative of butchers' property or rights without due process of law).

40. Disagreement about the case remains intense. See, e.g., CLINT BOLICK, UNFINISHED BUSINESS 37 (1990) ("a dark day for civil rights"); ROBERT H. BORK, THE TEMPTING OF AMERICA 39 (1990) ("a narrow victory for judicial moderation"); LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 555 (2d ed. 1988) ("unwittingly . . . a first step toward the recognition of substantive due process").

41. 94 U.S. (4 Otto) 113 (1877).

42. *Id.* at 130.

43. *Id.* at 134.

44. 198 U.S. 45 (1905).

45. 291 U.S. 502 (1934) (upholding state regulatory scheme for milk production).

46. *Id.* at 537.

47. 300 U.S. 379 (1937).

48. 261 U.S. 525 (1923).

49. 304 U.S. 144 (1938) (upholding conviction of producer of "fired milk" (i.e., skim milk with vegetable oil added) for shipping produce in interstate commerce in violation of federal statute).

assumption that it rests on some rational basis. . . ."⁵⁰ The famous⁵¹ footnote 4 added: "There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth. . . ."⁵²

Since *Carolene Products*, the Supreme Court has not considered legislation on a substantive due process basis. Rather, the focus for protection of individual rights has been the concept of "equal protection," applicable to the states and their subdivisions under the Equal Protection Clause of the Fourteenth Amendment, and to the federal government under the Due Process Clause of the Fifth Amendment.⁵³ It is conventional to note that the Supreme Court reviews governmental statutes and regulations under three levels of scrutiny. The basic level, "rational basis" (in fact "conceivable basis") is used for the general run of economic and social legislation.⁵⁴ Indeed, where legislation has failed to state a conceivable purpose, the Court itself has furnished it.⁵⁵ Under the "intermediate test," the Court will not uphold a classification unless it has a "substantial relationship" to an "important" governmental interest. This test is used for gender⁵⁶ and illegitimacy⁵⁷ classifications. The "strict scrutiny" test for classifications based upon race or national origin requires a "compelling" governmental need, with the means "narrowly tailored."⁵⁸

In some cases, however, the Court has not been clear about which tier of scrutiny it is employing. In others, the Court has, sub rosa, departed from the three-tier framework.⁵⁹

50. *Id.* at 152.

51. This footnote has been styled by Justice Powell "the most celebrated footnote in constitutional law." Lewis Powell, *Carolene Products Revisited*, 82 COLUM. L. REV. 1087, 1087 (1982).

52. 304 U.S. at 252-53 n.4.

53. *See, e.g.*, *Bolling v. Sharpe*, 347 U.S. 497 (1954); Kenneth Karst, *The Fifth Amendment's Guarantee of Equal Protection*, 55 N.C. L. REV. 540 (1977).

54. *See, e.g.*, *Allied Stores v. Bowers*, 358 U.S. 522, 530 (1959) (in discerning rationality, the Court would generally uphold any classification based "upon a state of facts that reasonably can be conceived to constitute a distinction, or difference, in state policy").

55. *See, e.g.*, *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955) (hypothesizing justifications for statute prohibiting opticians from replacing broken lenses without a new prescription).

56. *See, e.g.*, *Orr v. Orr*, 440 U.S. 268 (1979) (striking state law providing for alimony only to wives).

57. *See, e.g.*, *Clark v. Jeter*, 486 U.S. 456 (1988) (striking limitation on paternity suits by illegitimate children).

58. *See, e.g.*, *Bolling v. Sharpe*, 347 U.S. 497 (1954).

59. For a treatment of these issues and possible use by the Court of a heightened scrutiny or "reasonable basis" test for restrictions on property rights, see discussion *infra* part III.F.

B. *Regulatory takings from Euclid to Penn Central*

The Court's sweeping approval of comprehensive zoning in 1926, in *Village of Euclid v. Ambler Realty Co.*,⁶⁰ was both a significant extension of police power regulation and a precursor of the later New Deal cases. Justice Sutherland's opinion was based on little more than fleeting references to fire, congestion and disease, all of which could have been dealt with individually on a more limited basis.⁶¹ After *Euclid*, the Court basically has left zoning regulation to the states. Its few cases established the contours of what we would now call "spot zoning;"⁶² permitted zoning favoring⁶³ (but not disfavoring)⁶⁴ traditional families; and permitted separate zoning districts for "adult" theatres.⁶⁵

Most germane, the Court, in *Goldblatt v. Town of Hempstead*,⁶⁶ upheld a zoning ordinance which in effect terminated a long-existing quarry. The regulation was held to further the interests of the public, be reasonably necessary to accomplish the public purpose, and "not [be] unduly oppressive upon individuals."⁶⁷ The last point was to figure prominently in *Agins v. Tiburon*, where the Court held that land use regulation does not effect a taking if it "substantially advance[s] legitimate state interests" and does not "den[y] an owner economically viable use of his land."⁶⁸

In *Penn Central Transportation Co. v. New York City*, perhaps the best-known regulatory takings case, the City had disapproved a plan to build a fifty-five-story office complex on top of Grand Central Terminal.⁶⁹ Although the proposal met planning and zoning requirements in all other respects, it was rejected to protect the aesthetic values of the Terminal, one of the best examples of Beaux-Arts architecture in the United States. Justice

60. 272 U.S. 365 (1926). Justice George Sutherland, one of the "four horsemen" of substantive due process, intended a "conservative" result in *Euclid*—the protection of established residential districts from urban disruption. See Hadley Arkes, *Who's the Laissez-Fairest of Them All*, POL'Y REV., Spring 1992, at 78, 84-85. The almost casual way in which Justice Sutherland classified apartment houses as "very near to being nuisances," however, has given almost carte blanche to revolutionary control of land use by government. 272 U.S. at 395.

61. See RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* 131-34 (1985).

62. *Washington ex rel. Seattle Title & Trust Co. v. Roeberg*, 278 U.S. 116 (1928) (conditioning zoning variance on vote of neighbors arbitrary and capricious). But see *Eastlake v. Forrest City Enters., Inc.*, 426 U.S. 668 (1976) (upholding exemption granted in general referendum); *Nectow v. City of Cambridge*, 277 U.S. 183 (1928) (holding that spot zoning depriving owner of most value did not bear substantial relation to general welfare).

63. *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974) (upholding zoning limiting number of unrelated persons who could live in each house).

64. *Moore v. City of East Cleveland*, 431 U.S. 494 (1977) (overturning zoning that split a family related by blood).

65. *Young v. American Mini-Theatres*, 427 U.S. 50 (1976).

66. 369 U.S. 590, 595 (1962).

67. *Id.*

68. 447 U.S. 255, 260 (1980).

69. 438 U.S. 104, 127 (1978).

William Brennan, writing for the Court, noted that there was no “‘set formula’ for determining when ‘justice and fairness’ require that economic injuries caused by public action be compensated by the government.” He went on to balance the interests of the parties, considering (1) the economic impact on the claimant, (2) the “extent to which the regulation . . . interfered with investment-backed expectations,” and (3) the character or extent of the government action.⁷⁰ He concluded that there was not a taking, since the station had not been physically changed by the regulation, the plaintiff could continue its existing use, and the restriction did not violate any original investment-backed expectation. Furthermore, he implied that the “transfer development rights” (TDRs) plaintiffs received for use elsewhere might have been adequate compensation.⁷¹

II. THE SKEPTICAL TRANSITION: *CLEBURNE*, *NOLLAN*, AND *LUCAS*

A. *Cleburne and Covert Heightened Scrutiny*

In *City of Cleburne v. Cleburne Living Center*,⁷² the Court subjected to what Professor Tribe has called “covert heightened scrutiny”⁷³ the denial of a special use permit for a group home for thirteen mentally retarded persons.⁷⁴ It purported not to find the retarded a “suspect class,” and to apply the rational basis test generally employed for economic or social legislation.⁷⁵

To withstand equal protection review, legislation that distinguishes between the mentally retarded and others must be *rationaly related to a legitimate governmental purpose*. This standard, we believe, affords government the latitude necessary both to pursue policies designed to assist the retarded in realizing their full potential, and to freely and efficiently engage in activities that burden the retarded in what is essentially an incidental manner. The State may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational.⁷⁶

However, the Court’s penetrating inquiry into the facts resulted in a finding that there was no rationality in any of the City’s proffered justifications.

70. *Id.* at 124.

71. *Id.* at 137 (“While these rights may well not have constituted ‘just compensation’ if a ‘taking’ had occurred, the rights nevertheless undoubtedly mitigate whatever financial burdens the law has imposed on appellants and, for that reason, are to be taken into account in considering the impact of regulation.”)

72. 473 U.S. 432 (1985). For a discussion of the future impact of *Cleburne*, see text associated with *infra* notes 246-49.

73. LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1612 (2d ed. 1988).

74. 473 U.S. at 435-37.

75. *Id.* at 440-47.

76. *Id.* at 446 (the phrase to which emphasis has been added is a standard formulation of the “rational basis” test).

This is in sharp contrast with the deference normally associated with rational basis review.

Cleburne compared the types of neighborhood problems apt to be presented by a group home for the retarded (for which a special use permit was needed) with those problems presented by hotels and fraternity houses (for which the existing neighborhood zoning sufficed). Unsurprisingly, the Court concluded that the problems were similar and that there was no rational basis for the stricter requirements imposed on the group home.⁷⁷ The only thing remarkable in this attempt to discern whether the city had a legitimate purpose for its zoning regulations and a zoning scheme rationally designed to further those purposes was that the Court actually engaged in it.

B. *Nollan and the "Sufficient Nexus"*

In *Nollan v. California Coastal Commission*,⁷⁸ the Supreme Court applied the "nexus" test to takings and police power regulation with new vigor.⁷⁹ Nollan conceded the Commission had the authority to deny his application to reconstruct and extend his house on the beach pursuant to its mandate to protect views of the ocean from the public highway. The Commission did not deny the application outright, but rather conditioned it on Nollan's grant to the public of a lateral easement that would allow people to walk along the shore behind Nollan's house between the parks on both sides of Nollan's lot.⁸⁰ The Commission argued that greater powers include lesser powers, and that its uncontradicted right to prohibit construction altogether allowed it to approve construction on conditions.

The Commission argues that a permit condition that serves the same legitimate police-power purpose as a refusal to issue the permit should not be found to be a taking if the refusal to issue the permit would not constitute a taking. We agree. . . . The evident constitutional propriety disappears, however, if the condition substituted for the prohibition utterly fails to further the end advanced as the justification for the prohibition. When that essential nexus is eliminated, the situation becomes the same as if California law forbade shouting fire in a crowded theater, but granted dispensations to those willing to contribute \$100 to the state treasury. . . . Similarly here, the lack of nexus between the condition and the original purpose of the building restriction converts that purpose to something other than what it was. The purpose then becomes, quite simply, the obtaining

77. *Id.* at 449 (discussing the site's location within a "five hundred year flood plain," and general concerns about municipal liability for resident conduct).

78. 483 U.S. 825 (1987).

79. Ends-means analysis in a Takings Clause context did not originate in *Nollan*, but rather had been used by courts and scholars from time to time. See, e.g., John J. Costonis, *Presumptive and Per Se Takings: A Decisional Model for the Taking Issue*, 58 N.Y.U. L. REV. 465, 490 (1983); Frank Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1193-94 (1967).

80. 483 U.S. at 287-89.

of an easement to serve some valid governmental purpose, but without payment of compensation.⁸¹

The fact that *Nollan* posed a grave threat to conceivable basis scrutiny⁸² led to its vituperative condemnation. One leading authority, Professor Michelman, declared:

In *Nollan* . . . the Court did rely outright and crucially on its own censorious appraisal of instrumental efficacy in condemning as an uncompensated taking a regulation that in its degree of onerousness did not remotely approach the level of a total denial of economic value or "viability." What is even more striking is that the Court expressly endorsed a form of semi-strict or heightened judicial scrutiny of regulatory means-ends relationships *** Who knows how many land-use regulations, hitherto thought virtually immune from federal judicial censorship, might be destined for doom at the hands of lower federal courts now supremely licensed to apply to them an intensified means-ends scrutiny?⁸³

It was Michelman's hope that *Nollan* would be less than it seemed, and that its "heightened scrutiny lesson" would be, in effect, a manifestation of the "talismanic force of 'permanent physical occupation'"⁸⁴ in *Loretto*.⁸⁵ Otherwise, he warned, we would be faced with "*Lochner redivivus*."⁸⁶ *Nollan*, in tandem with *Cleburne*⁸⁷ and *Lucas*,⁸⁸ will play a central role in the development of regulatory takings law.⁸⁹

C. *Lucas and the Property-Based Inquiry*

The Petitioner in *Lucas v. South Carolina Coastal Council*⁹⁰ was one of a group of developers who built a beachfront residential subdivision on a barrier island near Charleston. As the project wound down, Lucas purchased two of the remaining lots for his own account for \$975,000. He planned to construct residences, as the owners of the immediately adjacent lots had already done.⁹¹ One of these residences was to be for his personal use and the other for resale. Lucas commissioned architectural drawings. Under

81. *Id.* at 836-837.

82. *See supra* text accompanying note 54.

83. Frank Michelman, *Takings, 1987*, 88 COLUM. L. REV. 1600, 1607-08 (1988).

84. *Id.* at 1608.

85. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).

86. Michelman, *supra* note 83, at 1609.

87. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985). *See supra* text accompanying notes 72-77.

88. *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886 (1992). *See infra* text accompanying notes 90-117.

89. *See infra* part III.B.

90. 112 S. Ct. 2886 (1992).

91. *Id.* at 2889.

existing law, he was entitled to build the houses without further governmental permission.⁹²

Thereafter the State enacted a Beachfront Management Act (BMA), under which “construction of occupiable improvements” on Lucas’s land “was flatly prohibited.”⁹³ The few permissible improvements included “wooden walkways” and “small wooden decks.”⁹⁴ The South Carolina trial court found that this permanent ban on construction “deprive[d] Lucas of any reasonable economic use of the lots, . . . eliminated the unrestricted right of use, and render[ed] them valueless.”⁹⁵

While it is doubtful that the lots were in fact “valueless,”⁹⁶ Justice Scalia held that the State had waived its right to contest the issue.⁹⁷

The Court’s holding is quite narrow:

[R]egulations that prohibit all economically beneficial use of land . . . cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles of the State’s law of property and nuisance already place upon land ownership. A law or decree with such an effect must, in other words, do no more than duplicate the result that could have been achieved in the courts—by adjacent landowners . . . under the State’s law of private nuisance, or by the State [under public nuisance], or otherwise [principally to cope with “grave threats to the life and property of others”].⁹⁸

Whether such restrictions inhered in Lucas’s title, the permanence of the regulations, whether he should be compelled to seek a special permit to build, and the amount of damages all were remanded to the South Carolina courts.⁹⁹

92. *Id.*

93. *Id.* Subsequent to argument in the South Carolina Supreme Court, but prior to release of its opinion, the BMA was amended so as to permit landowners like Lucas to request a “special permit” permitting construction. The court declined the Coastal Council’s invitation to decide the case on ripeness grounds, and instead based its decision on the merits. While this disposition would allow Lucas to petition for a permit in the future, the U. S. Supreme Court held that it disposed on the merits Lucas’s takings claim for the period prior to the amendment. *Id.* at 2891 (citing *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987) (holding temporary deprivations of use are compensable under the Takings Clause)).

94. 112 S. Ct. at 2890 n.2.

95. 112 S. Ct. at 2890.

96. Because the trial court had “accepted no evidence from the State on the property’s value without a home, and petitioner’s appraiser testified that he never had considered what the value would be absent a residence,” the decision was “almost certainly erroneous.” 112 S. Ct. 2904, 2908 (Blackmun, J., dissenting). Justice Kennedy termed the finding “curious.” 112 S. Ct. at 2903 (Kennedy, J. concurring).

97. The State had not challenged the finding in its brief in opposition to the petition for certiorari, and the Court “decline[d] to entertain” it in the State’s brief on the merits. 112 S. Ct. at 2896 n.9.

98. 112 S. Ct. at 2900 & n.16.

99. 112 S. Ct. at 2902 (Kennedy, J., concurring).

Prior to *Lucas*, the Court's only explicit exception to the *Penn Central*¹⁰⁰ balancing test was the holding in *Loretto*¹⁰¹ that permanent physical intrusions would be compensable regardless of any public purpose to the regulation. In *Lucas*, Justice Scalia stated that the Court had "described at least two" discrete categories of regulatory action as compensable without case-specific inquiry into the public interest advanced. . . .¹⁰² "The second situation in which we have found categorical treatment appropriate is where regulation denies all economically beneficial or productive use of land."¹⁰³ Justice Scalia, placing principal reliance on the Court's unanimous opinion *Agins v. Tiburon*,¹⁰⁴ that "the Fifth Amendment is violated when land-use regulation 'does not substantially advance legitimate state interests or denies an owner economically viable use of his land.'"¹⁰⁵ Justice Blackmun, dissenting in *Lucas*, argued that the belated discovery of a new "per se rule" in *Agins* was "unpersuasive,"¹⁰⁶ and that other language in *Agins* asserted that "no precise rule determines when property has been taken" and required "a weighing of public and private interest."¹⁰⁷ It is not clear whether the limitation of the per se rule to deprivations of pecuniary value is of independent significance, whether it simply tracks the language of *Agins* and prior cases, or whether it merely reflects the Court's long-standing interpretation of the Just Compensation Clause limiting remuneration to market values.¹⁰⁸ Justice Scalia asserts that the Court will remain sensitive to non-pecuniary interests.¹⁰⁹

Justice Scalia suggested that the basis for the rule might be that "total deprivation of beneficial use is, from the landowner's point of view, the equivalent of a physical appropriation," and that "in the extraordinary circumstance when no productive or economically beneficial use of land is permitted, it is less realistic to indulge our usual assumption that the

100. *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 127 (1978). See *supra* text accompanying notes 69-71.

101. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435-440 (1982). See *supra* text accompanying notes 118-23.

102. 112 S. Ct. at 2893.

103. *Id.*

104. 447 U.S. 255 (1980) (upholding "open space" zoning, but not reaching inverse condemnation issue).

105. 112 S. Ct. at 2893 (quoting 447 U.S. at 260).

106. 112 S. Ct. at 2911 n.11 (Blackmun, J. dissenting) (citing 447 U.S. at 260-262) ("[T]he conclusion that a regulation is not on its face a taking because it allows the landowner some economic use of property is a far cry from the proposition that denial of such use is sufficient to establish a taking claim regardless of any other consideration.").

107. 112 S. Ct. at 2911 n.11 (Blackmun, J., dissenting).

108. *Olson v. United States*, 292 U.S. 246, 255 (1934) (entitling owner to be placed "in as good a position pecuniarily as if his property had not been taken"); *Kimball Laundry Co. v. United States*, 338 U.S. 1, 5 (1949) ("loss to the owner of non-transferable values deriving from his unique need for property or idiosyncratic attachment to it . . . is properly treated as part of the burden of common citizenship").

109. 112 S. Ct. at 2895 (citing the interest in excluding strangers protected in *Loretto*, 458 U.S. at 3176).

legislature is simply 'adjusting the benefits and burdens of economic life'.¹¹⁰ The affirmative side of the compensation requirement, he further suggested, is that a total elimination of value typically occurs when land is required to be left in its natural state, and that this presents "a heightened risk that private property is being pressed into some form of public service under the guise of mitigating serious public harm."¹¹¹

Central to *Lucas* is the idea that traditional land use regulation is based not upon "nuisance" as such, but upon securing what Justice Holmes in *Mahon* called an "average reciprocity of advantage."¹¹² Under this view, the harmful or noxious uses principle should be recast to reflect the underlying reality that regulations are imposed when they are expected to produce a widespread public benefit and to be applicable to all similarly situated property.¹¹³

However, according to Justice Scalia, in many cases regulations purporting to be "harm-preventing" equally could be cast as "benefit-conferring." Thus the South Carolina regulation might be viewed as preventing harm to the ecology, or, alternatively, conferring the benefit of preservation of benefit upon it. Putting it another way, both economists¹¹⁴ and environmentalists¹¹⁵ realize that the essential problem is one of incompatibility of legitimate activities. Were the legislature's characterization to be determinative of compensability, only a "stupid staff" would write rules purporting to confer benefits.¹¹⁶

With the nature of the regulation thus indeterminate, the answer must lie in the nature of the landowner's property right.

Where the State seeks to sustain regulation that deprives land of all economically beneficial use, we think it may resist compensation only if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with.¹¹⁷

D. Some Further Indications of Skepticism:

Loretto, First English, and PFZ

In *Loretto v. Teleprompter Manhattan CATV Corp.*,¹¹⁸ the owner of a small apartment building resisted the state statute mandating that she allow

110. 112 S. Ct. at 2894 (quoting *Penn Central*, 438 U.S. at 124).

111. 112 S. Ct. at 2894.

112. 112 S. Ct. at 2894 (quoting *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922)).

113. 112 S. Ct. at 2897.

114. The seminal analysis is R.H. Coase, *The Problem of Social Cost*, 3 J. L. & ECON. 1 (1960).

115. 112 S. Ct. at 2898 (citing Joseph Sax, *Takings and the Policy Power*, 74 YALE L.J. 36, 49 (1964)).

116. 112 S. Ct. at 2897-2899.

117. *Id.* at 2899.

118. 458 U.S. 419 (1982).

the cable company to install wires and connection boxes on her building for service to the tenants.¹¹⁹ Justice Marshall, writing for the Court, concluded that "a permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve."¹²⁰ In some ways *Loretto* is a curious departure from *Penn Central*. If the authorization had been temporary, a balancing test would have been employed. Under a balancing test, it is unlikely that Mrs. Loretto would have prevailed.¹²¹ As Justice Blackmun noted in dissent, the physical impact of the installation could not be greater than those of the signs, tenant mailboxes, sprinklers and other safety features that typically are mandated for residential rental buildings.¹²² The only difference seemed to be the formal one of ownership—the landlord would own the mailboxes whereas a "stranger" would own the cable boxes.

In spite of the force of Justice Blackmun's arguments, the majority found in the permanent physical taking a right that deserved protection under the Constitution. Professor Tribe, raising the specter of a familiar *bête noire*, regards "the Court's Constitution . . . as *Lochner*-style common law."¹²³ Perhaps he accurately intuits the Court's uneasiness with *Penn Central* balancing as capable of discerning all rights deserving of protection.

The Court in April, 1992, refused to extend *Loretto* in *Yee v. City of Escondido*.¹²⁴ Certiorari had been granted on the sole issue of whether the transfer of premium value as representing the right to occupancy at a reduced rent constituted a taking.¹²⁵ The Court affirmed for the city, on the ground that a permanent physical taking precluded the landlord's right to terminate the business and evict the tenants on six or twelve months notice.¹²⁶ While

119. *Id.* at 421-24.

120. *Id.* at 426.

121. The installation was small, consisting of two 1.5 square-foot cable boxes and runs of cable along the roof and down the sides of the building. The statute articulated the purpose of ensuring that tenants had access to educational television. The landlord was entitled to a \$1 fee, indemnification for any injuries, and an installation that reasonably conformed to safety and aesthetic requirements. 458 U.S. at 423-24.

122. 458 U.S. at 452 (Blackmun, J., dissenting).

123. LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 604 (2d ed. 1988).

124. 112 S. Ct. 1522 (1992).

125. *Id.* at 1533.

126. "A different case would be presented were the statute, on its face or as applied, to compel a landowner over objection to rent his property or to refrain in perpetuity from terminating a tenancy." 112 S. Ct. at 1529. This holding seems at variance with a footnote in *Loretto* stating that "a landlord's ability to rent his property may not be conditioned on his forfeiting the right to compensation for a physical occupation." 458 U.S. at 439 n.17. Furthermore, it is by no means clear that it is practicable for a California mobile home park owner to obtain the permits necessary to discontinue business and evict the tenants. *Hall v. City of Santa Barbara*, 833 F.2d 1270, 1278 n.18 (9th Cir. 1986).

the holding was routine,¹²⁷ Justice O'Connor's opinion contains significant dicta on regulatory takings in general.¹²⁸

In *First English Evangelical Lutheran Church of Glendale v. Los Angeles*,¹²⁹ the Court held that governmental entities did not have the right to impose regulations that could be withdrawn without compensation in the event the courts determined they constituted a taking. Rather, the property owner would be entitled to temporary damages for the period that the regulation was in force.¹³⁰ *First English* is both an extension of the principle that the Takings Clause is self-executing¹³¹ and a rejection of the California Supreme Court's holding in *Agins v. Tiburon*¹³² that effectively placed the burden of doubt about whether a regulation constitutes a taking upon the landowner.¹³³

In *PFZ Properties, Inc. v. Rodriguez*,¹³⁴ the Supreme Court had granted certiorari on the issue of whether an allegation of arbitrary, capricious, or illegal denial of a construction permit to a developer by officials acting under color of state law stated a due process claim under 42 U.S.C. section 1983.¹³⁵ While the pleadings suggested egregious interference with the plaintiffs rights,¹³⁶ the District Court dismissed PFZ's federal claim on the grounds that deprivations of economic rights were not protected

127. Supreme Court review probably was granted because of the widespread disruptions that otherwise would occur. 112 S. Ct. at 1534. The California appellate decision in *Yee* supported the tenant. 274 Cal. Rptr. 551, 556 (App. 1990), *review denied*, 1991 Cal. Lexis 353. Ninth Circuit precedent supported the landlord. *Hall v. City of Santa Barbara*, 833 F.2d 1270 (9th Cir. 1986), *cert. denied*, 485 U.S. 940 (1988) (upholding cause of action). *Accord*, *Pinewood Estates of Michigan v. Barnegat Township Leveling Board*, 898 F.2d 347 (3d Cir. 1990); *see also Azul Pacifico, Inc. v. City of Los Angeles*, 948 F.2d 575 (1991) (holding based on Hall).

128. *See infra* text accompanying notes 175-83.

129. 482 U.S. 304 (1987).

130. *Id.* at 317-20.

131. *See United States v. Clarke*, 445 U.S. 253, 257 (1980).

132. 598 P.2d 25 (1979), *aff'd on other grounds*, 447 U.S. 255 (1980).

133. Under the California Supreme Court's view, maintenance of a "regulatory" takings suit would allow the landowner to force the legislature to exercise its power of eminent domain. That court therefore determined that compensation would not be required until after both a judicial determination that the regulation constituted a taking and a decision by the government to continue the regulation in effect. 447 U.S. at 263. The effect, of course, would be to discourage landowner suits. Successful landowners would recover compensation only from a date sometime after they prevailed in court, and only if the government did not withdraw. If inverse condemnation succeeded without challenge, government would profit. If a challenge was successful, government could withdraw and not loose.

134. 928 F.2d 28 (1st Cir. 1991), *cert. granted*, 112 S. Ct. 414 (1991), *cert. dismissed as improvidently granted*, 112 S. Ct. 1151 (1992).

135. 112 S. Ct. 414 (1991).

136. PFZ had owned over 1,300 acres in Puerto Rico, on which it wanted to build a large residential and tourist development. The first phase would consist of 4,000 units. 928 F.2d at 29. PFZ claimed that government officials had for 11 years deliberately delayed processing and illegally refused to process construction drawings, and that their deliberate actions (including such chicanery as the wrongful removal of documents from files) deprived PFZ of its constitutional rights to procedural and substantive due process and to equal protection. *Id.* at 30-32.

by the Fourteenth Amendment Due Process Clause.¹³⁷ PFZ was relegated to its right to appeal the eventual agency determinations under Puerto Rican law.¹³⁸ The First Circuit upheld the ruling, noting that PFZ's claims did not involve racial animus, political discrimination, or fundamental procedural irregularity.¹³⁹

After oral argument the Supreme Court dismissed certiorari as improvidently granted.¹⁴⁰ Perhaps the Court recognized that it had little basis upon which to decide *PFZ* other than through mere affirmance of the holding below or through a full-blown reconsideration of the role of the Fourteenth Amendment in protecting economic liberty—an approach that would require its reappraisal of *The Slaughter-House Cases*.¹⁴¹ The Court clearly is unwilling to go that far. For the Court to put its toe in the water in such a way would not be novel. Indeed, its jurisprudence leading up to *Nollan*¹⁴² and *First English*¹⁴³ was marked with just such false starts.¹⁴⁴

III. THE CONTINUING EVOLUTION TOWARD PROPERTY RIGHTS

A. General Comments

Our analysis thus far suggests that takings law is evolving in the direction of increased recognition of private property rights.

One approach to property rights would be to continue with the “conceivable basis”¹⁴⁵ and *Penn Central* balancing tests¹⁴⁶ as before. Unfortunately, as both scholarly¹⁴⁷ and practical accounts¹⁴⁸ have demonstrated, land

137. “[N]or shall any State deprive any person of life, liberty, or property, without due process of law. . . .”

138. 739 F.Supp. 67 (D.P.R. 1990).

139. 928 F.2d 28, 30 (1st Cir. 1991).

140. 112 S. Ct. 1151 (1992).

141. 83 U.S. (16 Wall.) 36 (1873) (holding state-granted monopoly on slaughtering in New Orleans area not violative of butchers property or rights without due process of law).

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

143. *First English Evangelical Lutheran Church of Glendale v. Los Angeles*, 482 U.S. 304 (1987).

144. Prior to its 1987 cases, the Supreme Court had indicated a tentative interest in the takings area by granting certiorari in several cases and then by avoiding a decision on the merits. *See Agins v. City of Tiburon*, 447 U.S. 255 (1980); *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985); *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340 (1986); *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621 (1981) (each avoiding the compensation issue by ruling on procedural grounds or “ripeness”).

145. *See supra* text accompanying note 54.

146. *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 127 (1978). *See supra* text accompanying notes 69-71.

147. *E.g.*, Robert C. Ellickson, *Suburban Growth Controls: An Economic and Legal Analysis*, 86 *YALE L.J.* 385 (1977), WILLIAM FISCHER, *THE ECONOMICS OF ZONING LAWS* (1985).

148. *E.g.*, RICHARD F. BABCOCK & CHARLES L. SIEMON, *THE ZONING GAME REVISITED* (1985).

use controls serve most often to allow residents of homogeneous suburbs to enrich themselves by enacting drastic curbs on growth at the expense of owners of vacant land and prospective residents (who often are younger, less affluent, and more likely to be members of minority groups than the existing residents). The practical effects of this are enormous. For instance, a recent presidential "Advisory Commission on Regulatory Barriers to Affordable Housing" report¹⁴⁹ found affordability problems in the suburbs to be principally growth controls, restrictive and exclusionary zoning, excessive subdivision controls, inequitable fees on development, and burdensome and uncoordinated approval and permitting systems.¹⁵⁰ In the cities, comparable problems were restrictions on urban renewal, rent control, restrictions on low-cost housing, regulatory restrictions on certain types of housing, and reinvestment in older urban neighborhoods.¹⁵¹

A different approach would intensify regulation to check the admitted excesses of regulators. Professor Carol Rose, noting that "land use regulators became accustomed to believing that they were entitled to regulate anything that they pleased under the auspices of Euclidean zoning,"¹⁵² advocated a greater role for government, now in the form of the state legislature. As she notes, such "regulation of the regulators" in part targets "externalities that local regulation might create."¹⁵³ However, it also makes it easier for interest groups to capture land use regulation¹⁵⁴ and eliminates the incentive for similar jurisdictions to compete for residents by offering better services and lower taxes.¹⁵⁵ While excessive land use regulation has resulted in great burdens being placed upon ordinary citizens as well as on developers,¹⁵⁶ a "hair of the dog" solution lacks promise.

149. REPORT TO PRESIDENT BUSH AND SECRETARY KEMP OF THE ADVISORY COMMISSION OF REGULATORY BARRIERS TO AFFORDABLE HOUSING, NOT IN MY BACK YARD: REMOVING BARRIERS TO AFFORDABLE HOUSING (1990).

150. *Id.* at II:1-14.

151. *Id.* at III:1-14.

152. Carol M. Rose, *Property Rights, Regulatory Regimes and the New Takings Jurisprudence—An Evolutionary Approach*, 57 TENN. L. REV. 577, 589 (1990).

153. *Id.* at 591.

154. See generally George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGT. SCI. 3 (1971); ROBERT E. MCCORMICK & ROBERT D. TOLLISON, *POLITICIANS, LEGISLATION, AND THE ECONOMY: AN INQUIRY INTO THE INTEREST-GROUP THEORY OF GOVERNMENT* (1981).

155. See Charles Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956); Wallace E. Oates, *The Effects of Property Taxes and Local Public Spending on Property Values: An Empirical Study of Tax Capitalization and the Tiebout Hypothesis*, 77 J. POL. ECON. 957 (1969) (demonstrating that local taxes and school expenditures resulted in comparable increases in property values, supporting the hypothesis that consumer behavior is rational).

156. E.g., REPORT TO PRESIDENT BUSH AND SECRETARY KEMP OF THE ADVISORY COMMISSION OF REGULATORY BARRIERS TO AFFORDABLE HOUSING, NOT IN MY BACK YARD: REMOVING BARRIERS TO AFFORDABLE HOUSING 4 (1990) (noting evidence suggesting that "an increase of 20 to 35 percent in housing prices attributable to excessive regulation is not uncommon in the areas of the country that are most severely affected").

A third approach, which we consider likely, is an evolution back towards recognition of individual property rights under per se rules and increased judicial scrutiny. Extraordinary dicta in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,¹⁵⁷ states that the Court is unwilling to make radical changes in important jurisprudential areas without compelling need. Justices O'Connor, Kennedy, and Souter, writing for the majority, found that "only two . . . decisional lines from the past century" present such "sustained and widespread debate"¹⁵⁸ as *Roe v. Wade*.¹⁵⁹ They are *Plessy v. Ferguson*,¹⁶⁰ later overruled in *Brown v. Board of Education*,¹⁶¹ and *Lochner v. New York*,¹⁶² the "demise" of which was "signalled"¹⁶³ in *West Coast Hotel v. Parrish*.¹⁶⁴ *Brown* recognized that those who were segregated were stigmatized with a "badge of inferiority."¹⁶⁵ As for *West Coast Hotel*, the Court in *Casey* rather blithely states in passing that the Depression has given "most people" the "unmistakable" lesson that contractual freedom at the heart of substantive due process "rested on fundamentally false factual assumptions about the capacity of a relatively unregulated market to satisfy minimal levels of human welfare."¹⁶⁶ While the Court's characterization of *Lochner* and *West Coast Hotel* might reflect outmoded conventional wisdom,¹⁶⁷ the Court's skepticism about the role of market forces further decreases any possibility that it would make a sudden and sweeping change in the balance between property rights and the police power. Both *West Coast Hotel* and *Brown*, the Court stated in *Casey*,

157. 112 S. Ct. 2791 (1992) (generally upholding the abortion rights enunciated in *Roe v. Wade*, 410 U.S. 113 (1973)).

158. 112 S. Ct. at 2813.

159. 410 U.S. 113 (1973) (holding that the Constitution protects a woman's right to terminate her pregnancy in its early stages).

160. 163 U.S. 537 (1896) (enunciating the "separate but equal" doctrine).

161. 347 U.S. 483 (1954) (repudiating segregation).

162. 198 U.S. 45 (1905).

163. 112 S. Ct. at 2812.

164. 300 U.S. 379 (1937).

165. 112 S. Ct. at 2813 (quoting 347 U.S. at 494-95).

166. 112 S. Ct. at 2812.

167. According to James Q. Wilson, "[w]e must be stuck at every turn by the importance of ideas. Regulation itself is such an idea; deregulation is another. . . . To the extent [that] an agency can choose, its choices will be importantly shaped by what its executives learned in college a decade or two earlier." JAMES Q. WILSON, *THE POLITICS OF REGULATION* 393 (1980), quoted in THOMAS K. MCCRAW, *PROPHETS OF REGULATION* 303 (1984). In any event, a new generation of policy makers has become convinced that "many of the [New Deal] independent commissions . . . had since been captured by the very interests that these agencies had been set up to regulate." *Op. cit.* at 303. Similarly, scholars have expressed convincing doubts that the "unregulated market" was the cause of the Depression and government its cure. See, e.g., MILTON FRIEDMAN & ANNA JACOBSON SCHWARTZ, *A MONETARY HISTORY OF THE UNITED STATES* (1963) (asserting that overly-restrictive monetary policy was principally to blame). Indeed, just as traditional welfare economics is predicated upon failures in the market, public choice economics uses economic analysis to discern failures in the political system. See generally JAMES M. BUCHANAN, ET AL., EDs., *TOWARD A THEORY OF THE RENT-SEEKING SOCIETY* (1980). For a good recent example with a useful bibliography, see RICHARD E. WAGNER, *TO PROMOTE THE GENERAL WELFARE* (1989).

“rested on facts, or an understanding of facts, changed from these which furnished the claimed justifications for the earlier constitutional resolutions.”¹⁶⁸ *Roe*, the Court concluded, “presents no such occasion.”¹⁶⁹

B. *The Role of Nollan*

The Supreme Court’s decision in *Lucas*¹⁷⁰ makes its landmark *Nollan*¹⁷¹ decision even more crucial. Within the next few years, courts will be adjudicating cases that will determine the ultimate contours of *Lucas*. Important issues that must be worked out include reexamining the numerator and denominator of the “takings fraction,” discerning whether the totality of deprivation test should be liberalized, and reviewing property rights and nuisance under state law.

In the course of this litigation there will be much fact-specific evidence respecting the nature of the landowners nominal interest,¹⁷² the nature of any “background principals” of state “property and nuisance” law that “inhere” in his title.¹⁷³ This evidence, in turn, will give judges greater opportunity to examine whether specific regulations have a “sufficient nexus” with the legitimate state purposes that they purport to serve. This is true under the rational basis test, which is marked by deference to economic and social legislation. It would be even more true should the courts adopt an explicit or implicit heightened scrutiny or reasonable basis test for property rights.¹⁷⁴

*Yee v. City of Escondido*¹⁷⁵ hints at the crucial role that *Nollan* might play in subsequent cases. As noted earlier,¹⁷⁶ *Yee* held that the *Loretto* per se test for permanent physical takings was not applicable when a landowner could terminate the use that gave rise to the regulations. While the holding was quite ordinary, Justice O’Connor’s dicta on regulatory takings potentially is of considerable significance.

Yee came to the Court as the result of an ingenious extension of *Loretto* developed by Ninth Circuit Judge Alex Kozinski in *Hall v. City of Santa*

168. 112 S. Ct. at 2813.

169. *Id.*

170. *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886 (1992). *See supra* text accompanying notes 90-117.

171. *Nollan v. California Coastal Comm’n*, 483 U.S. 825, 834 (1987). *See supra* text accompanying notes 78-89.

172. *I.e.*, the conventional interest in land that the deed to the landowner purported to grant.

173. 112 S. Ct. 2900 & n.16.

174. *See infra* part III.F.

175. 112 S. Ct. 1522 (1992).

176. *See supra* text accompanying notes 124-28.

Barbara.¹⁷⁷ He found that a physical taking would occur when a mobile home park tenant could “monetize” the future benefits of rent control by selling his mobile home for an inflated price reflecting his alienable right to rent a space in the park at a low rent.¹⁷⁸ This argument was rejected by a California appellate court in *Yee*,¹⁷⁹ and by the Supreme Court on the physical takings issue.¹⁸⁰

However, Justice O'Connor noted that the sitting tenant capturing all of the value of rent control to the exclusion of the landlord and subsequent tenants “might have some bearing on whether the ordinance causes a regulatory taking, as it may shed some light on whether there is a sufficient nexus between the effect of the ordinance and the objectives it is supposed to advance.”¹⁸¹ “The same may be said of petitioners’ contention that the ordinance amounts to compelled physical occupation because it deprives petitioners of the ability to choose their incoming tenants. Again, this effect may be relevant to a regulatory taking argument, as it may be one factor a reviewing court would wish to consider.”¹⁸² Justice O'Connor’s opinion also stated that the landowner would have standing to raise such claims.¹⁸³

These issues were raised in *Hall*,¹⁸⁴ where Judge Kozinski pointed to a number of non-economic factors that might make a landlord value the right to choose one prospective tenant over another.¹⁸⁵ More importantly, he had advocated meaningful judicial review:

177. 833 F.2d 1270 (9th Cir. 1986), *cert. denied*, 485 U.S. 940 (1988) (upholding cause of action). *Accord* *Pinewood Estates of Mich. v. Barnegat Township Leveling Bd.*, 898 F.2d 347 (3d Cir. 1990). *See also* *Azul Pacifico, Inc. v. City of Los Angeles*, 948 F.2d 575 (1991) (holding based on *Hall*).

178. Juxtaposed state laws and local ordinances provided for strict rent controls without vacancy decontrol and required the park owner to accept the buyer of a departing tenant’s mobile home as his successor. 112 S. Ct. at 1526-27.

179. *Yee v. City of Escondido*, 274 Cal.Rptr. 551, 556 (App. 1990), *review denied*, 1991 Cal. Lexis 353 (Cal. Supreme Ct. 1991), *aff’d* 112 S. Ct. 1522 (1992) (conjecturing that any value added to a selling tenant’s mobile home by dint of rent control only removed an “artificially and perhaps unfairly low” value caused by “excessive” rents).

180. 112 S. Ct. at 1529. (“Ordinary rent control often transfers wealth from landlords to tenants by reducing the landlords’ income and the tenants’ monthly payments, although it does not cause a one-time transfer of value as occurs with mobile homes.” The premium that the park tenant might obtain on the sale of his mobile home merely makes “this wealth transfer more visible than in the ordinary case.” (citing Richard A. Epstein, *Rent Control and the Theory of Efficient Regulation*, 54 BROOK. L. REV. 741, 758-59 (1988)). Professor Epstein and the Justices are odd bedfellows, given a fuller explication of Epstein’s views: “Rent control is politically palatable and constitutionally allowable because it is a form of disguised confiscation. Once that confiscation is made explicit, the practice cannot survive criticism. When the tenant sells the landlord’s reversion and pockets the landlord’s money, the situation becomes clear enough for all to see. *Hall* embodies an unconstitutional rent control scheme, but no more so than any other.” *Id.* at 759.

181. 112 S. Ct. at 1530.

182. *Id.*

183. While certiorari had been limited to the physical takings issue, appellant had standing for a facial challenge of the ordinance on a regulatory takings basis. 112 S. Ct. at 1530.

184. *Hall v. City of Santa Barbara*, 833 F.2d 1270 (9th Cir. 1986).

185. 833 F.2d at 1279 n.23.

Here, the Santa Barbara City Council enacted the ordinance to alleviate what it perceived as “a critical shortage of low and moderate income housing.” If appellants’ allegations are substantiated, there would be significant doubt whether these purposes are achieved, or could rationally be thought achievable, by means of the ordinance.

If appellants are able to prove their allegations, it would seem that the Santa Barbara ordinance will do little more than give a windfall to current mobile park tenants at the expense of current mobile park owners. If, as appellants allege, the ordinance has resulted in a substantial increase in the market price of mobile homes subject to the ordinance, this may well hinder rather than assist lower-income families seeking access to rental units in mobile park homes. . . .¹⁸⁶

C. *The Increased Role of “Ownership” Under Lucas*

1. The Shift in Focus From Police Power to Ownership Rights

The aspect of the 1991-1992 Term most likely to enhance property rights is Justice Scalia’s admission in *Lucas* that police power regulation of real property really is based not upon what property law traditionally has regarded as “nuisance,” but rather upon governmental implementation of policies for “expected widespread public benefit and applicable to similarly situated property.”¹⁸⁷ This notion of benefit coupled with generalized burdens implicates Justice Holmes’ “average reciprocity of advantage” of all interested parties.¹⁸⁸ The idea is that landowners are in a real sense the subject of takings, but they will be compensated in kind through the advantages that will inure to them by dint of similar restrictions imposed on others. This is the converse of the requirement of *Armstrong v. United States*¹⁸⁹ that compensation must be paid when burdens are placed upon a few which “in fairness and justice” should be imposed upon the general public. For Justice Scalia, “reciprocity of advantage” can work only if landowners only incidentally required to suffer regulatory deprivations of value. Unlike Justice Stevens, who would regard the regulatory scheme in *Lucas* covering the entire South Carolina coastline as “similarly situated property” for police power purposes,¹⁹⁰ Justice Scalia would not so regard any regulation directed at land as such. Given the indeterminacy of regulations as “harm preventing” or “benefit conferring,” he insists that regulations must be analogous to those upheld in *Employment Division v.*

186. 833 F.2d at 1280-81.

187. 112 S. Ct. at 2897 (quoting *Nollan v. California Coastal Comm’n*, 438 U.S. at 133-34 n.30).

188. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

189. 364 U.S. 40, 49 (1960).

190. 112 S. Ct. at 2924 (Stevens, J. dissenting).

Smith,¹⁹¹ where rules of general application affected religious observances but were not aimed at religion per se.¹⁹² In cases where a property owner commits what is understood in state law to be a public or private nuisance, Scalia expounds that the state may proscribe such conduct, not under the police power, but rather because such uses are not encompassed by the owner's title to begin with.¹⁹³

Generally speaking, Justice Scalia clearly is correct when he posits that the law of real property is a better anchor for individual rights than the police power.¹⁹⁴ The law of real property has a solid historical record of distrust for novel interests (that might serve to increase transactions costs)¹⁹⁵ and restraints on alienability (i.e., hindrance of the market).¹⁹⁶ It is not merely coincidental that the recent "revolution" in American landlord-tenant law is associated with a switch in the governing regime from property to contract.¹⁹⁷

Lucas could be seen as categorizing land use regulations into three types: regulations incidentally affecting property (e.g., a state business income tax incorporating in-state asset values as a factor); regulations affecting conduct that never was incident to a valid property right (e.g., ownership of part of a stream bed does not encompass a "property right" to dump toxins in the stream); and others (e.g., the great bulk of zoning and other land use regulations). Proper treatment of this last category would present the most difficulty, and we see a heightened scrutiny or reasonable basis test as a solution.¹⁹⁸

2. The Problem of Circularity

As Justice Scalia acknowledged in *Lucas*, even under the per se test for regulatory deprivations of all economically beneficial use, there would be a necessary limitation on landowners' uses of their property in order to prevent

191. 494 U.S. 872, 878-879 (1990) (discharging Native American for ritualistic use of peyote).

192. 112 S. Ct. at 2900 n.14.

193. 112 S. Ct. at 2900. See *supra* text accompanying note 117.

194. 112 S. Ct. at 2902 ("There is no doubt some leeway in a court's interpretation of what existing state law permits—but not remotely as much, we think, as in a legislative crafting of the reasons for its confiscatory regulation.").

195. A modern application of this principle involves the extent to which a landowner could create new forms of servitudes. For contrasting views, see, e.g., Susan French, *Toward a Modern Law of Servitudes: Reweaving the Ancient Strands*, 55 S. CAL. L. REV. 1261, 1289-1310 (1982); and Richard A. Epstein, *Notice and Freedom of Contract in the Law of Servitudes*, 55 S. CAL. L. REV. 1353, 1358-64 (1982).

196. See, e.g., RICHARD R. POWELL & PATRICK J. ROHAN, *POWELL ON REAL PROPERTY* 848 (1950, 1992) (social policy favors alienability).

197. See Edward H. Rabin, *The Revolution in Residential Landlord-Tenant Law: Causes and Consequences*, 69 CORNELL L. REV. 517 (1984) for a comprehensive summary.

198. See *infra* part III.F.

harm to “public lands and resources, or adjacent private property.”¹⁹⁹ Just as it would have to do if it sued for public nuisance, the state “must identify background principles of nuisance and property law that prohibit the uses he now intends. . . .”²⁰⁰ While these limitations must preexist the landowner’s rights, “changed circumstances or new knowledge may make what was previously permissible no longer so.”²⁰¹

Property rights extend up to the boundary of nuisance. In the instance of a “total taking,” property rights cannot be trumped by the state’s policy power because of the *Lucas* per se rule. However, the police power is in large part based on nuisance, and nuisance delimits the scope of property rights.

In spite of Justice Scalia’s optimism, there is considerable cause to expect that regulation might grow at the expense of property rights. A recent overview of the Court’s interpretation of the Contracts Clause by Judge Richard Posner provides a troubling analogy:

[T]he Supreme Court has read the contract clause so that it means very little, at least when the government is not a party to the contract. The Court has inserted the word “reasonably” before the word “impairing,” and has adopted “a broad, loose, and forgiving standard of reasonableness It stresses the importance of whether the contracting parties are operating in an already regulated field and can therefore anticipate the possibility of new regulation that will alter the obligations imposed by the contract *So the more the state regulates, the more it can regulate without violating the Constitution*—a bootstrapping approach if ever there was one. And when the state is not a party to the contract, its judgment regarding both ends and means is to be given great deference.”²⁰²

Second, Justice Kennedy’s concurrence in *Lucas* also noted an “inherent tendency towards circularity,” but seemed (perhaps naively) unconcerned because “[t]he expectations protected by the Constitution are based on objective rules and customs that can be understood as reasonable by all parties involved.”²⁰³ His link of the circularity problem to whether a “deprivation is contrary to reasonable, investment-backed expectations”²⁰⁴ is somewhat troubling. As one of the *Penn Central* balancing test factors, “investment-backed expectation” relates to the owner, not to the parcel. Yet the *Lucas* per se test is applicable only where the owner is deprived of market value, which, being objective, must relate to the value of the parcel.

199. 112 S. Ct. at 2901.

200. 112 S. Ct. at 2901-02.

201. 112 S. Ct. at 2901 (citing RESTATEMENT (SECOND) OF TORTS § 827, cmt. g (1977)).

202. *Chicago Bd. of Realtors, Inc. v. City of Chicago*, 819 F.2d 732, 744 (7th Cir. 1987) (Posner, J., concurring) (emphasis added).

203. 112 S. Ct. at 2903 (Kennedy, J. concurring) (citing *Katz v. United States*, 389 U.S. 347 (1967) (holding Fourth Amendment protections are defined by reasonable expectations of privacy)).

204. 112 S. Ct. at 2903 (Kennedy, J. concurring).

Justice Kennedy would further muddy the waters by rejecting as the boundary of property rights the common law of nuisance, which he finds "too narrow a confine for the exercise of regulatory power in a complex and interdependent society."²⁰⁵ He would substitute consideration of "all reasonable expectations whatever their source."²⁰⁶ This would exacerbate the circuitry problem.

But, as political scientist Dennis Coyle argues, the concerns for liberty and equality that gave rise to the "double standard" of *Carolene Products* are now eroding the double standard.²⁰⁷ The indeterminacy of regulations as "harm-preventing" or "benefit-conferring"²⁰⁸ adds to this process.

D. Discerning Whether the Deprivation was "Total"

1. The Difficulty in Showing "Total" Deprivation

While the *Lucas* per se test is built upon the fact that the landowner is left "no economically viable use," that determination respecting *Lucas*'s own lots is unconvincing.²⁰⁹ Making an affirmative case for the presence of value, Justice Blackmun noted that *Lucas* could exclude others and use the land for recreation or camping.²¹⁰

With respect to most types of land use regulation, Justice Scalia's observation is correct that total deprivations of value would be in "relatively rare situations."²¹¹ Indeed, one could postulate that the only people who would write legislation achieving a total wipe-out would be the same "stupid staff" who Justice Scalia postulates would cast the regulations as "benefit-conferring" rather than "harm-preventing."²¹² It is too easy to draft regulations permitting such small benefits as passive recreation. Indeed, a boiler-plate savings clause might provide owners who otherwise would lose "all economically feasible use" of their lands with a modicum of administrative relief.

Two important situations in which there is a realistic possibility that owners would be deprived of all value involve scenic preservation and wetlands regulation. One significant recent case, *Loveladies Harbor, Inc. v.*

205. *Id.*

206. 112 S. Ct. 2903 (Kennedy, J., concurring) (citing *Goldblatt v. Hempstead*, 369 U.S. 590, 593 (1962)).

207. Dennis Coyle, *The Circle Unbroken: Property Rights and the Eclipse of the Double Standard* (typescript, 1989), cited in Carol M. Rose, *Property Rights, Regulatory Regimes and the New Takings Jurisprudence—An Evolutionary Approach*, 57 TENN. L. REV. 577, 580 & n.20 (1990).

208. See *supra* text accompanying notes 112-16.

209. See *supra* notes 96-97 and accompanying text.

210. 112 S. Ct. at 2908 (Blackmun, J. dissenting).

211. *Id.* at 2894.

212. *Id.* at 2897-99.

United States,²¹³ involved the denial of a fill permit for a New Jersey coastal subdivision. Chief Judge Loren Smith of the U.S. Claims Court ruled that the environmental regulation had decreased the value of plaintiff's property from \$2,658,000 to \$12,500, resulting in a diminution in value of over 99%. While the government argued that neighbors might want to acquire the property to ensure their continued unobstructed water view, Judge Smith concluded that "it is difficult to imagine why a rational property owner would spend additional money to purchase that which the government already has bestowed."²¹⁴ More generally, he relied upon *Olson v. United States*²¹⁵ for the principle that the judge, as finder of fact, "must discount proposed uses that do not meet a 'showing of reasonable probability that the land is both physically adaptable for such use and that there is a demand for such use in the reasonably near future'."²¹⁶

Although he referred to the remaining value as "nominal," this fact was coupled with the Claims Court's earlier determination of a "lack of a countervailing substantial legitimate state interest." The result was finding for the landowner under the *Penn Central* balancing test.²¹⁷

In post-*Lucas*, cases where the landowner arguably has a small residual value, trial judges may choose to invoke *Penn Central* as well as *Lucas*, or may exercise flexibility in determining the remaining value to be zero under *Olson*.

2. The "Takings Fraction"

Ever since Justice Holmes warned in *Pennsylvania Coal Co. v. Mahon*²¹⁸ that "if regulation goes too far it will be recognized as a taking," the question has arisen "too far with respect to what?" In *Mahon* itself, Holmes' holding for the coal company emphasized that the company's mineral estate was recognized in Pennsylvania as an "estate in land," and the statute "purports to abolish" it.²¹⁹ On the other hand, Justice Brandeis argued in dissent that the value of the coal kept in place because of the restriction should be compared with the value of the fee simple. "The rights of an owner as against the public are not increased by dividing the interests in his property into surface and subsoil."²²⁰ Brandeis' view is forcefully

213. 21 Cl.Ct. 153 (1990).

214. *Id.* at 159.

215. 292 U.S. 246 (1934).

216. 21 Cl.Ct. at 158 (quoting *United States v. 341.45 Acres of Land*, 633 F.2d 108, 111 (8th Cir.1980), *cert. denied sub nom. Bassett v. United States*, 451 U.S. 938 (1981), (in turn relying on *Olson*).

217. 21 Cl.Ct. at 160. *Loveladies Harbor* has been appealed, and is now awaiting decision by the U.S. Court of Appeals for the Federal Circuit.

218. 260 U.S. 393, 415 (1922).

219. 260 U.S. at 414.

220. 260 U.S. at 419 (Brandeis, J. dissenting).

represented among modern commentators. Holmes' treatment of the "estate in land" as the interest completely taken would be referred to by Professor Radin as "conceptual severance,"²²¹ a term that Professor Michelman suggests might be recast as "entitlement chopping."²²²

While Justice Scalia's opinion in *Lucas* readily concedes the problem,²²³ he offers no solution.²²⁴ He does, however, term "extreme" and "unsupportable" the view of the New York Court of Appeals in *Penn Central* that the relevant denominator included all of the railroad's considerable other holdings in the vicinity of Grand Central Terminal.²²⁵

This suggests that the Court will take a common sense approach to the takings denominator, perhaps through extending a presumption of validity to estates commonly employed in the vicinity in similar projects where specific regulatory concerns were not an issue. Correspondingly, the state could not merge for takings purposes lots or interests which customarily would be treated as separate for real property purposes. While the problem should not be minimized, the difficulties are no greater than corresponding issues of form versus substance under the Internal Revenue Code.²²⁶ It seems unlikely, in light of the principles noted in the preceding sentence, that courts would give credence to novel interests palpably designed to court a regulatory wipe-out.²²⁷ This analysis is parallel to Justice Scalia's conclusion that common law nuisance is apt to be absent (and hence the landowner's property right present) when a pattern of development has been long engaged in or where similarly situated owners will be allowed to continue uses denied to the plaintiff.²²⁸

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

222. Frank Michelman, *Takings, 1987*, 88 COLUM. L. REV. 1600, 1601 (1988).

223. 112 S. Ct. at 2894 n.7 ("Regrettably, the rhetorical force of our 'deprivation of all economically feasible use' rule is greater than its precision. . . . When, for example, a regulation requires a developer to leave 90% of a rural tract in its natural state, it is unclear whether we would analyze the situation as one in which the owner has been deprived of all economically beneficial use of the burdened portion . . . or as one in which the owner has suffered a mere diminution in value of the tract as a whole. . . .").

224. 112 S. Ct. at 2894. The fact that each of *Lucas*' two lots was owned in fee simple ("an estate with a rich tradition of protection") and that the South Carolina trial court had determined that *Lucas* was deprived of all value allowed the Court to "avoid this difficulty in the present case." *Id.*

225. 112 S. Ct. at 2894 n.7.

226. *See, e.g., Orrisch v. Commissioner*, 55 T.C. 395 (1970) (special allocation of depreciation to partner not supported by "substantial economic effect"); *Hort v. Commissioner*, 313 U.S. 28 (1941) (landlord's receipt for cancellation of long-term lease substitute for recurring rentals and not sale of capital asset). *Cf. Blair v. Commissioner*, 300 U.S. 5 (1937) (gift of life interest in a trust transfer of property, not transfer of income).

227. We would regard as an example of such an interest the right, hypothesized in Justice Stevens' dissent, to build a multi-family structure only. This would become worthless when subsequent regulations permit the construction of only a single-family structure. 112 S. Ct. at 2919-20 (Stevens, J. dissenting).

228. 112 S. Ct. at 2901.

*Loveladies Harbor*²²⁹ provides an insight into what might become a typical “takings fraction” problem. The “upland” portion of the tract in question did not have the same recreational or residential appeal as the coastal portion. There was no evidence that, given the denial of a fill permit, infrastructure would be constructed that would provide a market for upland lots. Presumably a buyer of these lots prior to the imposition of environmental regulations could have argued that there had been a complete wipe-out. The owner of a coastal lot would have had a more difficult case.

E. The Implausibility of Limiting Lucas to Total Deprivations of Value

Central to the Supreme Court’s holding in *Lucas v. South Carolina Coastal Council*²³⁰ is its applicability only to regulatory deprivations “of all economically beneficial or productive use of land.”²³¹ As previously discussed, such deprivations would be not only “relatively rare,” but could be rendered non-existent through the insertion in regulations of boiler-plate savings clauses.²³² Given the practicalities of real estate development, the protection accorded by *Lucas* might well be illusory. Under such circumstances, courts may well adopt a “deprivation of substantially all value” or “essentially all value” approach.²³³ As *Lucas* reveals, most land use regulation is directed towards the enhancement of societal wealth, and not, to use Professor Sax’s term, toward “moral wrongdoing” by landowners.²³⁴ Therefore, the question of why some landowners should suffer substantial (albeit not total) reductions in value becomes more acute. Perhaps it was the realization that courts inevitably would be tempted to relax the requirement for a total wipe-out that led Justice Stevens in his *Lucas* dissent to be so concerned about the “wholly arbitrary” application of *Lucas* to the 100% taking and its complete non-applicability to the 95% taking.²³⁵ Justice Scalia’s somewhat lame response was that life is sometimes unfair,²³⁶ and that, besides, those with 95% deprivations have the benefit of the *Penn Central* balancing test.²³⁷

This last point brings up a more fundamental reason for the instability of Justice Scalia’s deprivation-of-all-value approach. *Lucas* creates not only

229. *Loveladies Harbor, Inc. v. United States*, 21 Cl.Ct. 153 (1990). See *supra* text accompanying notes 213-16.

230. 112 S. Ct. 2886 (1992).

231. *Id.* at 2893 (emphasis added).

232. See *supra* text accompanying notes 211-12.

233. This process might be eased by realistic appraisals of the land’s market value in light of the fact that potential purchasers in many cases could obtain the benefits they seek by freeriding on the regulations. See *supra* text accompanying notes 213-16.

234. See Joseph Sax, *Takings and the Police Power*, 74 YALE L.J. 36, 50 (1964).

235. 112 S. Ct. at 2919 (Stevens, J., dissenting).

236. 112 S. Ct. 2895 n.8. (“Takings law is full of these ‘all-or-nothing’ situations.”)

237. *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 127 (1978). See *supra* text accompanying notes 69-71.

a categorical exclusion from *Penn Central* balancing, but also a new way of conceptualizing the interface of police power regulation and property rights. In the world of *Lucas*, traditional police power restrictions on land use are transmuted into either limitations that inhere in the owner's title itself (if they are the equivalent of public or private nuisances) or societal constraints that have an incidental impact on landowners (such as general schemes of taxation).²³⁸ It is the daily task of courts to apply different technical rules to different fact patterns. It is quite a different thing, however, to expect judges to adjust their overall conception of the nature of police power restrictions and ownership rights from case to case, depending on whether the regulatory deprivation of value in the given case had reached totality or had fallen just short of that mark.

F. A "Heightened Scrutiny" or "Reasonable Basis" Approach

A number of factors suggest that the Court might move towards substituting some form of "heightened scrutiny" or "reasonable basis" test for governmental restrictions on real property in place of the present "rational basis" (or "conceivable basis") test.²³⁹ First, there have been many suggestions that the Court in general adopt a different approach. Some of this is attributable to dissatisfaction with the fact that the Court never has made the three-tiered system clear.²⁴⁰ Alternatives have been advocated by Justice Marshall²⁴¹ and by commentators.²⁴² Professor Gerald Gunther has suggested that courts might make critical determinations in cases before them without formally abandoning the rational basis test—which he calls rational basis "with bite."²⁴³ Professor Tribe advocates a process of "explicit judicial debate" that would categorize who is eligible for heightened scrutiny.²⁴⁴ Professors Ronald Rotunda and John Nowak suggest that "it is possible that the Court is moving towards converting the rationality test into a 'reasonableness' test similar to that employed during the 1900-1936 era."²⁴⁵

238. See *supra* text accompanying notes 90-117.

239. See *supra* text accompanying note 54.

240. See, e.g., LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1614 (2d ed. 1988). ("The Court has never provided a coherent explanation of the characteristics which, either overtly or covertly, trigger intermediate review.")

241. He called for a balancing test in equal protection cases. See, e.g., *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 318-21 (1976) (Marshall, J., dissenting).

242. See, e.g., JOHN H. ELY, *DEMOCRACY AND DISTRUST* (1980).

243. Gerald Gunther, *Forward, In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972).

244. LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1445-1446 (2d ed. 1988) (Economic regulations would still be governed by the "conceivable basis" test, as a "means of upholding all but the most brazenly and blatantly irrational governmental measures.").

245. See RONALD D. ROTUNDA, ET AL., *TREATISE ON CONSTITUTIONAL LAW, SUBSTANCE & PROCEDURE* § 15.4, text at n.62-63 (1986).

Second, as previously discussed,²⁴⁶ the Court already has adopted heightened scrutiny in at least one land use regulation case, *City of Cleburne v. Cleburne Living Center*.²⁴⁷ There, the Court's refusal to treat the mentally retarded as a suspect class did not hinder it from a searching factual inquiry regarding the circumstances under which the City turned down a special use permit for a group home. While undoubtedly sympathy for the plight of retarded persons who might otherwise be homeless entered into the Court's thinking, many common types of governmental regulations lead to a lack of affordable housing for the young, the poor, and minorities.²⁴⁸ Professor Tribe, while apparently sympathetic to the result in *Cleburne*, implicitly acknowledges the breadth of these concerns when he warns that this type of "covert" heightened scrutiny might mean that "even routine economic regulations may from time to time succumb to a form of review reminiscent of the *Lochner* era. . . ." ²⁴⁹

Third, the recent pivotal cases of *Nollan v. California Coastal Commission*²⁵⁰ and *Lucas v. South Carolina Coastal Council*²⁵¹ together seem inexorably to presage a higher standard of review. *Nollan* seems totally inconsistent with the deference to the legislature that marks the "conceivable basis" test. As previously discussed, *Nollan*'s "sufficient nexus" holding²⁵² is in itself an invocation of heightened scrutiny. When this holding is coupled with the intensive, fact-based inquiries into the nature of the regulation, the landowner's title, and limitations on that title that inhere from "background principles of . . . property and nuisance" law,²⁵³ it would be very difficult for a court to pull back to a deferential approach. On this point it is instructive to note that, in the face of Justice Blackmun's sharp objection,²⁵⁴ the Court in *Lucas* performed its own critical review of the South Carolina Beachfront Management Act. It concluded that neither the specific provisions of the Act nor the South Carolina Supreme Court

246. See *supra* text accompanying notes 72-77.

247. 473 U.S. 432 (1985).

248. See *supra* text accompanying notes 149-51. Indeed, regulations often deprive these groups of entrepreneurial opportunities that would allow them to afford suitable housing under present land use regulations. See generally on protecting economic liberty for individuals of modest social circumstances, CLINT BOLICK, UNFINISHED BUSINESS: A CIVIL RIGHTS STRATEGY FOR AMERICA'S THIRD CENTURY 47-91 (1990). It could be said that "[c]ivil' rights and 'property' rights are indistinguishable in origin and have the same instrumental justifications." William H. Riker, *Civil Rights and Property Rights*, in LIBERTY, PROPERTY, AND THE FUTURE OF CONSTITUTIONAL DEVELOPMENT 49, 49 (Ellen Frankel Paul & Howard Dickman, eds. 1990).

249. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1445-1446 (2d ed. 1988) ("[F]ar better" that "explicit judicial debate" decide who is eligible for heightened scrutiny. Economic regulations would still be governed by the "conceivable basis" test, as a "means of upholding all but the most brazenly and blatantly irrational governmental measures.").

250. 483 U.S. 825, 834 (1987).

251. 112 S. Ct. 2886 (1992).

252. See *supra* text accompanying notes 78-89.

253. 112 S. Ct. at 2900.

254. 112 S. Ct. at 2906 (Blackmun, J., dissenting).

deference justified the conclusion that the state legislature's purported intent was harm-preventing rather than benefit-conferring.²⁵⁵ Obviously this process would be greatly hastened if *Lucas* evolves so as not to be limited to total deprivation of value cases.²⁵⁶

In recent years some state court decisions have taken the lead in enhancing property rights, based upon their view of the federal Constitution,²⁵⁷ or, following Justice Brennan's advice,²⁵⁸ their state constitution.²⁵⁹ In the next few years it is inevitable that state courts will hear many challenges to land use regulations that invoke *Nollan* and *Lucas*. It is likely that some of these courts will fashion decisions, based upon the federal Constitution or their state constitution, that will change the *Lucas* "deprivation of all beneficial use" and application of the "conceivable basis" tests as we have just discussed.

Through this process, these state courts will serve as laboratories²⁶⁰ in the formation of legal doctrine that will preserve legitimate governmental interests, while at the same time continuing the evolving protection of property rights of which *Cleburne*, *Nollan*, and now *Lucas* play such an important part.

255. 112 S. Ct. at 2898 & n.11.

256. *See supra* part III.D.2.

257. *See, e.g.*, *Seawall Associates v. City of New York*, 542 N.E.2d 1059 (N.Y. 1989) (holding ordinance establishing five-year moratorium on conversion, alteration or demolition of single-room occupancy housing and requiring the owners to restore all units to habitable condition and lease them at controlled rents for indefinite period to constitute physical taking, regulatory taking, and lacking essential nexus with its articulated goal).

258. William J. Brennan, *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535 (1986) (advocating recourse to state constitutional adjudication to circumvent Supreme Court unwillingness to expand protection for criminal defendants under equivalent provisions of U.S. Constitution).

259. *United Artists Theater Circuit, Inc. v. City of Philadelphia*, 595 A.2d 6 (Penn. 1991), *reargument granted*, Aug. 30, 1991 (invalidated under takings clause of Pennsylvania constitution a Philadelphia Historical Commission mandate that a theater with some art deco features be maintained in its present state at the owner's expense until the Commission permitted otherwise).

260. *Truax v. Corrigan*, 257 U.S. 312, 344 (1921) (Holmes, J., dissenting). ("... social experiments . . . in the insulated chambers afforded by the several States . . ."); *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). ("It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.")