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The Non-Impact of the United States Supreme Court Regulatory Takings Cases on the State Courts: Does the Supreme Court Really Matter?

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INTRODUCTION

The principal theme of twentieth-century American history is one of change. This has been a century of dramatic population growth, technological development, physical expansion, and environmental modification. While these changes have undoubtedly improved the quality of life for millions of Americans, urbanization and suburban growth have imposed adverse impacts on the natural and human environment. With the rapid expansion of land-use during this century, and as the expectations of improved quality of life continue to rise, the need to limit or control the negative aspects of community development became apparent to state and local government officials and to many citizens. Early in the century, it also became apparent that the traditional common-law legal techniques, such as public and private nuisance and trespass law, would be incapable of fulfilling the expectation of enhanced, high quality living conditions held by generations of Americans. This understanding of the limits of reactive common law methods led to the development of numerous land-use and environmentally protective regulatory techniques that were designed to plan for the future and avoid the adverse consequences of unconstrained community development. The legal and public policy instruments of zoning, building controls, subdivision regulation, and environmental protection measures were the results of this development.

With the adoption of such legal techniques also came the creation of governmental institutions to administer these regulatory programs for the public good. Occurring initially in local government and later at the regional and state government levels, these land-use regulations reflected an enlargement of the governmental role in the economy generally, and were indicative of the greater power accorded government to affect economic and property rights for the common good. At roughly the same time, a similar expansion of federal power was occurring, leading to regulation of numerous aspects of the national economy through the congressional exercise of the commerce power. The political and legal culture of the first half of the century accepted

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broad governmental powers and the subordination of landowners' property interests to the welfare of the community. In that period, property rights were clearly considered subordinate to the expressed needs of the local community.

During the early decades of the twentieth century, the rise in the community control of physical development occurred as an essentially legal development accompanied by significant popular support. The police power was harnessed to serve as the theoretical basis for the many forms of governmental regulation. In nearly all cases, land-use and environmental controls were imposed as police power regulations that did not require compensation to owners of adversely affected property. When challenged in court, police power regulations were usually upheld against a variety of legal attacks. With this regulatory emphasis, our twentieth century system of police power-based land-use and environmental controls presented the universal constitutional quandary: where does the community's interest end and the individual's autonomy begin? Stated alternatively, how far could local government regulate individual land-use for the general welfare without compensating the individual who was adversely affected by new restrictive rules? From the earliest times, community regulations affecting individual property rights have been met with the argument that a restrictive ordinance violated the property owner's constitutional rights as protected by the Fifth Amendment. However, as Justice Oliver Wendell Holmes, Jr. stated in his 1922 opinion in *Jackman v. Rosenbaum Co.*,[1] "[s]uch words as 'right' are a constant solicitation to fallacy."

Throughout the century, property owners have responded to new forms of land-use and environmental regulation with continued constitutional pleas, claiming that a particular regulation constituted a "taking" of their property. In such cases, the individual property owner typically asserted that regulation representing the public interest had infringed upon his or her core property interests, thereby requiring the payment of just compensation. The analogy usually employed was that, because the community was required to pay the property owner when land was taken for public works projects, compensation should likewise be constitutionally required when public regulations deprived the owner of rights to use the property. Such an argument based upon constitutional principles would require a judicial determination defining the boundary between valid uncompensated regulation and unconstitutional regulatory takings.

Under the American constitutional system and our political culture, the U.S. Supreme Court is viewed as the final arbiter of the meaning of the Constitution. Because of this fact, the evolution of the Fifth Amendment takings doctrine has generally been considered the prov-

1. 260 U.S. 22, 31 (1922).

ince of the Supreme Court. In adjudicating individual constitutional law cases, the Supreme Court acts as the judicial institution possessing the legitimate authority to define and express the meaning of American constitutional values. The study of constitutional law requires the examination of Supreme Court decisions in an effort to understand and predict the meaning of constitutional norms in future cases. The conventional assumption, therefore, has been that the Supreme Court dominates the field of federal constitutional interpretation. A subordinate assumption is that when the Supreme Court speaks, the lower courts listen and implement the constitutional principles enunciated by the Court.

With this backdrop, it is important to test the assumption of U.S. Supreme Court doctrinal authority and supremacy within the context of recent Fifth Amendment takings cases. What is the actual effect of articulating Fifth Amendment constitutional doctrine on the lower federal courts and state courts? What impact does a U.S. Supreme Court regulatory takings decision have on future cases? Ultimately, how is U.S. Supreme Court doctrine received by those theoretically obliged to follow it?

This Essay will examine the state law cases interpreting three recent U.S. Supreme Court decisions involving regulatory takings theory: *Nollan v. California Coastal Commission*,[2] *Lucas v. South Carolina Coastal Council*,[3] and *Dolan v. City of Tigard*.[4] After discussing the doctrinal significance of these three U.S. Supreme Court holdings, the Essay will examine the subsequent state court decisions applying and interpreting these rulings. This analysis will then draw conclusions regarding the importance of state court adjudication to the entire regulatory takings area, and will evaluate the relevance of the Supreme Court's rulings to the evolution of regulatory takings law in actual practice.

I. SETTING THE SCENE FOR MODERN TAKINGS LAW

The claim that governmental regulation unduly and unconstitutionally damages property owners' rights was well-known in the nineteenth and early twentieth centuries. In a widely divergent range of factual situations, the Supreme Court upheld a number of state and local government regulations that had resulted in the closure of previously lawful business enterprises against takings challenges. The achievement of important public goals—the elimination of alcoholic beverages from a "dry" state;[5] the preservation of apple orchards from cedar rust disease;[6] the exclusion of livery stables from urban

2. 483 U.S. 825 (1987).
3. 112 S. Ct. 2886 (1992).
4. 114 S. Ct. 2309 (1994).
5. Mugler v. Kansas, 123 U.S. 623 (1887).
6. Miller v. Schoene, 276 U.S. 272 (1928).

residential neighborhoods;[7] and the shutdown of a brickmaking factory in the path of emerging suburban expansion[8]—was found to be a legitimate objective, subject to regulatory control without compensation, even in the face of significant impairment of economic value. During this period, the Court also acted to support efforts to protect environmental quality from the adverse effects of industrial land use.[9] Consequently, prior to the New Deal, many forms of local health and safety regulation were sustained against a variety of constitutionally-based criticisms, as the U.S. Supreme Court followed an accommodative course supporting significant governmental intervention in the land-use context.

Perhaps the most sweeping constitutional affirmation of governmental power to regulate property use for the public good was the Supreme Court's determination in 1926 that municipal zoning, on its face, did not offend the Constitution's concepts of due process, equal protection, or protection against uncompensated taking of property. In *Village of Euclid v. Ambler Realty Co.*,[10] the Court (1) signaled acceptance, in constitutional terms, of state-authorized, local government-implemented land-use controls,[11] (2) created a low-level, or rational basis, due process standard of constitutional review,[12] (3) expressed a presumption of validity for legislatively-adopted regulations,[13] and (4) placed the burden of proving the illegality of zoning on the claimant challenging the regulation.[14] After the *Euclid* decision,

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7. Reinman v. City of Little Rock, 237 U.S. 171 (1915).

8. Hadacheck v. Sebastian, 239 U.S. 394 (1915).

9. For example, in Northwestern Laundry v. City of Des Moines, 239 U.S. 486 (1916), the Supreme Court upheld a local government air pollution ordinance grounded in the police power against substantive due process attacks.

10. 272 U.S. 365 (1926).

11. Judge Westenhaver, writing the lower court opinion, correctly concluded that "this case is obviously destined to go higher." Ambler Realty Co. v. Village of Euclid, 297 F. 307, 308 (N.D. Ohio 1924). He determined that Euclid's zoning ordinance, in light of then-recent Supreme Court decisions like Pennsylvania Coal Co. v. Mahon, discussed *infra* text accompanying notes 15-25, was "a taking of plaintiff's property without due process of law, and that, as applied to property situated as is plaintiff's, it can be sustained, if at all, only as an exercise of the power of eminent domain and on the condition of making just compensation." *Euclid*, 297 F. at 312. To support this conclusion, the trial judge cited decisions from Texas, Illinois, Maryland, Colorado, and West Virginia holding zoning ordinances to be takings of private property. *Id.* at 316-17. Writing for the Supreme Court, Justice Sutherland articulated a constitutional law theory that accommodated the emerging land-use and environmental regulation in a number of doctrinal ways. *Euclid*, 272 U.S. at 367.

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

13. *Id.* at 388.

14. This position, stating a presumption in favor of state land-use controls, was espoused by the Supreme Court as early as 1915 in Hadacheck v. Sebastian, 239 U.S. 394 (1915). However, Justice Sutherland's clear statement in Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926), that "if the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control." *Id.* at 388 (citing Radice v. New York, 264 U.S. 292, 294 (1924)). Justice Brandeis more explicitly stated this view in O'Gorman & Young, Inc. v. Hartford Fire

the constitutionality of such zoning-based property controls would no longer be in doubt—as a general practice, zoning was not a taking of property in the constitutional sense.

The most important early Supreme Court decision to find a regulatory taking of property was *Pennsylvania Coal Co. v. Mahon*.[15] In that case, the Supreme Court struck down the Kohler Act, a Pennsylvania statute that prohibited coal companies from mining anthracite coal in certain inhabited areas to prevent the injury and destruction caused by the subsidence of surface lands.[16] In *Pennsylvania Coal*, Justice Oliver Wendell Holmes, Jr. struggled with determining the constitutionality of a state statute designed by its drafters to protect public health and safety yet having severely damaging effects on the property rights of certain landowning firms and individuals. Justice Holmes characterized the Pennsylvania law as having limited public interest, and the legal controversy as focused upon a number of individuals benefitted by the Act.[17]

In addition, the degree of adverse impact on the coal company was of great importance. Under Pennsylvania law at the time, the coal mining or mineral rights were recognized as a separate estate in land. Justice Holmes believed that the effect of the recently enacted Kohler Act was to make coal mining commercially impractical and "ha[d] very nearly the same effect for constitutional purposes as appropriating or destroying [the coal]."[18] He ultimately concluded that "we are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change."[19] As a result, Justice Holmes held the Kohler Act to be an unconstitutional taking of property.

Justice Holmes' majority opinion in *Pennsylvania Coal* established a number of takings law principles that would be rediscovered sixty and seventy years later by other Supreme Court Justices intent upon invigorating the takings doctrine. Three central ideas can be extracted from the 1922 opinion. First, the decision advanced the view that an expanding, urbanizing society may legitimately regulate the use of private property for the common good without compensation.[20] Second,

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Ins. Co., 282 U.S. 251 (1931). This presumption of validity has been followed consistently by the states for nearly 70 years, and has provided municipal zoning and other land-use controls with a strong legal position that could be overcome only by powerful showings of illegality. In his dissent in Nollan v. California Coastal Comm'n, 483 U.S. 825, 834-35 n.3 (1987) (Scalia, J., dissenting), Justice Scalia questioned the continued vitality of the presumption of validity principle in the takings context.

15. 260 U.S. 393 (1922).

16. *Id.* at 412-13.

17. *Id.* at 413 ("this is the case of a single private house").

18. *Id.* at 414.

19. *Id.* at 416.

20. Justice Holmes recognized this necessary reality when he stated, "government could hardly go on if to some extent values incident to property could not be dimin-

Justice Holmes believed that the regulation of land use was encompassed by the Constitution's Takings Clause and required compensation, just as did actual, physical takings of land. An excessive or unlimited government regulation was just as unconstitutional a taking of property as a literal governmental acquisition of land.[21] This idea constituted a critically important and durable conclusion because it established the Fifth Amendment as a potential constitutional limitation upon a broad range of future government regulatory programs, notably those in the land-use and environmental protection fields. Under this view, the mere fact that the system of regulation achieves public, rather than private, benefits or prevents public harms is not sufficient to sustain it. Third, although property rights might be validly regulated without compensation under the police power, there is some point at which the public regulation "consumes" the individual property interest and "at last private property disappears."[22] The notion is that public regulation exists on a continuum and when "it reaches a certain magnitude,"[23] or when it "goes too far,"[24] the restriction will be recognized as a taking of property. Justice Holmes did not elaborate on the precise meaning of these regulatory limits, but subsequent judicial interpretations have considered the diminution in use and value to be of prime importance.[25]

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ished without paying for every such change in the general law." *Id.* at 413. His prior experience on the Massachusetts Supreme Judicial Court certainly prepared him for challenges to land-use control measures that were defended as being within the scope of the police power. In Attorney General v. Williams, 55 N.E. 77 (Mass. 1899), *aff'd sub nom.* Williams v. Parker, 188 U.S. 491 (1903), the Supreme Judicial Court of Massachusetts, of which Holmes was Chief Justice, upheld a Massachusetts statute imposing height limits in conjunction with condemnation of excess air rights in the vicinity of Copley Square in Boston. The court approved the acquisition of the air rights but added that compensation was unnecessary. "[I]t would be hard to say that this statute might not have been passed in the exercise of the police power as other statutes regulating the erection of buildings in cities are commonly passed." *Id.* at 77. In *Pennsylvania Coal*, Justice Holmes apparently believed that the landowner's injury was more complete.

21. Recognizing that all property owners take their ownership subject to an "implied limitation" and that they must generally yield to the police power, Holmes asserted that this ownership subordination "must have its limits or the contract and due process clauses are gone." *Pennsylvania Coal*, 260 U.S. at 413.

22. *Id.* at 415.

23. *Id.* at 413.

24. *Id.* at 415.

25. In Justice Holmes' view of the facts in *Pennsylvania Coal*, the Kohler Act may have totally destroyed the value of the mining company's property rights. However, in the context of contemporaneous cases, the Supreme Court had previously and subsequently upheld significant regulatory-induced value drops: 75% in Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926), and 92.5% in Hadacheck v. Sebastian, 239 U.S. 394 (1915). Consequently, Justice Holmes' conception of regulation going "too far" might have been total or near total reduction in value. Therefore, it is understandable that *Pennsylvania Coal* was not cited or otherwise mentioned in the *Euclid* zoning decisions four years later.

Following the decade of the 1920s, the Supreme Court substantially withdrew from the consideration of land-use control and environmental protection cases.[26] During that time, the essential meaning of *Euclid* was defined by the state courts, which generally ruled that comprehensive police power land-use regulation would be upheld without compensation. By the 1950s and 1960s, local government zoning decisions would be accorded considerable deference when challenged.[27] The low-level due process scrutiny applied in *Euclid* had been translated into numerous state cases using principles of the presumption of constitutional validity and the "fairly debatable" test for analyzing local and state law. While the Supreme Court took nearly a half-century hiatus from land-use cases, the state courts filled the vacuum by relying upon supportive federal constitutional law to fashion their own corpus of specialized land-use and environmental law. While each state's regulatory jurisprudence had individualized characteristics, they all relied upon the relatively undemanding federal constitutional foundation for a growing list of public health and safety controls.

With the coming of the 1970s and its powerful environmental protection movement, environmental regulation joined with the multi-decade development of increasingly sophisticated and demanding land-use controls and development exactions. At the same time, the state courts began to become more active and effective in undertaking judicial review of state and local government land regulation. The general judicial deference of prior decades began to give way to courts' demands for clearer and more defensible decisions[28] and reviewable procedures.[29] While the state courts may have become more concerned with judicial review of land-use regulations during the 1970s, they continued to be supportive of most efforts to protect the ever-expanding conception of the public interest.

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26. After Nectow v. City of Cambridge, 277 U.S. 183 (1928) (striking down the placement of the boundary between two zoning districts), the Supreme Court rarely accepted any case raising the constitutionality of local land-use or other public health and safety regulation until 1974 when it upheld a restrictive zoning ordinance in Village of Belle Terre v. Boraas, 416 U.S. 1 (1974).

27. *See* NORMAN WILLIAMS, AMERICAN LAND PLANNING LAW § 5.04 (1988). Regulatory takings claims arising from land-use restrictions only reached the Supreme Court once during this time frame in Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962), where a sand and gravel mining ordinance was unsuccessfully challenged.

28. *See* De Sena v. Board of Zoning Appeals, 379 N.E.2d 1144 (N.Y. 1978); Texas Antiquities Comm. v. Dallas County Community College Dist., 554 S.W.2d 924 (Tex. 1977). During the 1970s, some state courts also took it upon themselves to consider the impact of land-use and environmental regulation upon other social interests such as the availability of affordable housing opportunity for all income segments of the population.

29. *See* Topanga Ass'n for a Scenic Community v. County of Los Angeles, 522 P.2d 12 (Cal. 1974).

A. *The Revival of Judicial Interest in Landowner's Property Rights in an Increasingly Regulated World*

The 1970s heralded the beginning of widespread social concern with matters of environmental quality. Major federal environmental statutes[30] were enacted by Congress, and similar or supplementary measures were adopted by most state legislatures. The achievement of many environmental objectives often had significant land-use implications. For instance, environmental laws commonly placed restrictions on the use and development of wetlands, steep slopes, floodplains, mountain ridges, beachfront areas, and sand dunes. However, as the number and variety of environmental protection regulations increased in the 1970s, a contrary anti-regulatory theme began to emerge in the evolving environmental public policy,[31] and in the developing takings jurisprudence. In his dissent to the famous Supreme Court decision in *Penn Central Transportation Co. v. New York City*,[32] Chief Justice Rehnquist gave voice to the view that the Fifth Amendment's Takings Clause operated to prevent certain severe regulatory burdens from being imposed upon a limited number of landowners for the benefit of society in general.[33] With this case, the Supreme Court signaled its rekindled interest in the general field of land-use control as well as a desire to enunciate new regulatory takings policy.[34]

In the 1980s, the Court expressed greater receptivity to constitutional arguments against excessive land-use regulation and increased sensitivity to the interests of property owners rather than regulators. With the revival in interest in the regulatory takings theory during the

30. The National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-4370d (1988 & Supp. V 1993); the Clean Air Act, 42 U.S.C. §§ 7401-7719 (1988 & Supp. V 1993); the Federal Water Pollution Control Act, 33 U.S.C. §§ 1251-1387 (1988 & Supp. V 1993); the Resource Conservation and Recovery Act of 1976, 42 U.S.C. §§ 6901-6992k (1988 & Supp. V 1993); the Endangered Species Act of 1973, 16 U.S.C. §§ 1531-1544 (1988 & Supp. V 1993).

31. In the 1977 Clean Air Act Amendments, Congress withdrew the authority from the U.S. Environmental Protection Agency, ("EPA") to require indirect source controls as part of a state's air quality implementation plan. Clean Air Act Amendments of 1977, 91 Stat. 685, 695-96 (1991); *see* 42 U.S.C. §§ 7410(a)(5)-(6) (1988). The main rationale for this change to section 110 of the statute was to remove federal power to control the location and operation of "indirect sources" such as stadiums, shopping malls, and other attractors of large numbers of motor vehicles. The danger in the eyes of the legislative drafters was that the EPA would be able to control major land-use decisions at the local or regional level in the name of air pollution prevention.

32. 438 U.S. 104, 145-48 (1978).

33. Justice Rehnquist noted the well-established proposition that the " 'Fifth Amendment . . . was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.' " *Id.* at 147 (Rehnquist, J., dissenting) (quoting Armstrong v. United States, 364 U.S. 40, 49 (1960)).

34. It has been reported that since the *Belle Terre* case was decided in 1974, the Court has considered nearly one and a half land-use control cases per year. *See* 1 WILLIAMS, *supra* note 27, at 65 (Supp. 1994).

1980s, the language and ideas of Justice Holmes in *Pennsylvania Coal* influenced the constitutional analysis in both the state and the federal courts.[35] Justice Holmes' admonition against regulations going "too far" resurfaced and was extended by an unlikely advocate—Justice William Brennan. In *San Diego Gas & Electric Co. v. City of San Diego*,[36] Justice Brennan wrote, in dissent, that local land-use regulators must observe the Fifth Amendment's limits, just as any other public official must comprehend the constitutional limits of his or her power. He said, "after all, a policeman must know the Constitution, then why not a planner?"[37] While foreshadowing the shift of the Court to a more conservative bent, Justice Brennan also argued for giving the Takings Clause real meaning by imposing financial liability, as opposed to mere ordinance invalidation, as a means of controlling "overzealous regulatory attempts."[38]

The decade of the 1980s chronicled an increased number of land-use takings cases reaching the Supreme Court and many new decisions attempting to provide updated meaning to federal constitutional takings doctrine.[39] From this lengthy list of holdings, a number of basic doctrinal principles could be identified. First, the Court concluded that compensation would be constitutionally required whenever a taking of property was judicially determined. This eliminated support for the position that excessive regulation constituted a due process violation and should be remedied with the invalidation of the restriction. Second, and derived from the first point, the Court held that a taking of property could occur for short-term or temporary periods of time.[40] Consequently, the reversal or reduction of an unconstitutional regulation would not obviate the requirement of government compensation for the period of time the restriction was in place. Third, the idea was established that a categorical or per se taking occurs when either (1)

35. *See, e.g.*, Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 508 (1987) (Rehnquist, C.J., dissenting) and First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 316 (1987).

36. 450 U.S. 621, 649 (1981) (Brennan, J., dissenting).

37. 450 U.S. at 662 n.26 (1981).

38. *Id.* In taking this position, Justice Brennan argued directly against the then-prevailing state court positions held in California and New York. *See* Agins v. City of Tiburon, 598 P.2d 25, 28 (Cal. 1979); Fred F. French Investing Co. v. City of New York, 350 N.E.2d 381 (N.Y. 1976). Justice Brennan's dissenting view of the constitutional inadequacy of regulatory invalidation and the requirement of compensation for a taking of property would become the majority position of the Court within six years. *See First English*, 482 U.S. at 321.

39. *See generally* Dolan v. City of Tigard, 114 S. Ct. 2309 (1994); Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886 (1992); Yee v. City of Escondido, 112 S. Ct. 1522 (1992); Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987); *First English*, 482 U.S. 304 (1987); *Keystone*, 480 U.S. 470 (1987); MacDonald, Sommer & Frates v. County of Yolo, 477 U.S. 340 (1986); Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172 (1985); San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621 (1980); *Agins*, 447 U.S. 255 (1979).

40. *See First English*, 482 U.S. at 318.

there is a physical invasion of property, or (2) a regulation denies all economically beneficial or productive use of land.[41] Fourth, the Court developed a clearer and more demanding doctrine regarding the relationship between the state's regulatory objectives and the imposition of burdens upon individual landowners. This necessary relationship has been termed the "nexus" requirement and was articulated in situations in which a landowner was obligated to contribute a property interest—an exaction—to the government in exchange for permission to complete a land development proposal.[42] Fifth, the proposition was advanced that the Fifth Amendment requires that a governmentally-imposed exaction be correlated to the nature of the development project and that its burden must be commensurate to the impact of the project. This "rough proportionality" standard was required in tandem with two related points, that: (1) the government bears the burden of justifying the exaction, and (2) the exaction be imposed following an individualized determination of its propriety.[43]

Through this recent period of Fifth Amendment takings doctrinal development, the Supreme Court has spoken about constitutional meaning with its usual assumptions concerning the supremacy of its adjudication. In a traditional analysis, one function of the Supreme Court is to interpret the content of constitutional language and, in the takings context, determine the nature of individual property owners' rights against government regulation. In so doing, the Supreme Court acts both to decide individual controversies and to establish federal constitutional norms for subsequent application. With the incorporation of the rights secured by the Fifth Amendment through the Fourteenth Amendment,[44] the Supreme Court's pronouncements in recent takings jurisprudence have effectively informed state and local gov-

41. The Court did recognize an exception to the second prong of this rule when a state or local regulation will "do no more than duplicate the result that could have been achieved in the courts . . . under the State's law of private nuisance, or by the State under its complementary power to abate nuisances that affect the public generally, or otherwise." *Lucas*, 112 S. Ct. at 2900.

42. In the case of Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987), discussed *infra* notes 57-88 and accompanying text, the Supreme Court invalidated a regulatory exaction imposed in the name of beachfront preservation. The lateral access beachfront easement was required as a condition to the granting of permission to reconstruct a house on the California coast. Justice Scalia determined that the justifications given by the state for the required exaction were not sufficiently connected to the obligation imposed by the commission. *Id.* at 837. In this way, the Court found the exaction to fail a due process test and, at the same time, to be an illicit extortion of the landowner's property. *Id.*

43. Dolan v. City of Tigard, 114 S. Ct. 2309 (1994). *See* discussion *infra* notes 132-35 and accompanying text.

44. Although the Fifth Amendment prohibition against taking private property literally applies to the federal government, it has also been found to apply to state and local government via incorporation of its constitutional principles through the Due Process Clause of the Fourteenth Amendment. *See* Chicago, B. & Q.R.R. v. Chicago, 166 U.S. 226, 239 (1897).

ernment regulators[45] that there are now serious federal constitutional limits to the reach of their programs. Through these decisions, the Court has attempted to set the "boundaries" between legitimate, uncompensated governmental land-use regulation and core individual property rights.[46] In an era of decreasing political support for intrusive and expensive federal control of local prerogative and independence,[47] the Supreme Court, through its recent line of takings cases, has reminded local governments that the U.S. Constitution imposes costs upon them by recognizing in landowners enforceable property rights and the need for compensation that may not be jeopardized by regulation. The language of the Court's takings decisions over the last decade has given attorneys, academic analysts, and the public at large the impression that the Court is increasingly sympathetic to the plight of heavily regulated or otherwise burdened landowners resisting the

45. This is not to say that the recent rulings on the meaning of the Takings Clause of the Fifth Amendment do not affect the regulatory or programmatic undertakings of the federal government. Important recent decisions have found federal agencies liable for substantial damage awards when a taking of property has been found. *See* Florida Rock Indus. v. United States, 18 F.3d 1560, 1570 (Fed. Cir. 1994), *cert. denied*, 115 S. Ct. 898 (1995) (government wetlands regulation could violate the Just Compensation Clause of the Fifth Amendment if it worked a "partial taking" of property) and Loveladies Harbor, Inc. v. United States, 28 F.3d 1171, 1181 (Fed. Cir. 1994), *reh'g en banc denied*, 1994 U.S. App. LEXIS 28462 (Fed. Cir. Sept. 29, 1994) (the relevant parcel of property for takings analysis was, under the facts of the case, only the wetlands burdened by the regulation, not the entire original tract owned and subsequently developed and sold by the landowner).

46. The reservation of ultimate federal constitutional power to determine unlawful state and local government regulation creates something of a paradox. The Supreme Court has frequently stated that the states have the principal responsibility for defining property rights within their jurisdictions. *See, e.g.*, Lindsey v. Normet, 405 U.S. 56 (1972). However, federal constitutional takings principles apply uniformly to all states, placing federal limits on any state's ability to develop individual property rights concepts through its legislative, judicial, and administrative law. Through the application of a Fifth Amendment takings "floor," the Supreme Court has neutralized all states' power to determine independently the precise meaning of "property" within their borders. In this way the Court has attempted to *federalize* the meaning of property throughout the country by declaring constitutional property-owner protection to be a high federal interest.

47. *See* NEWT GINGRICH ET AL., CONTRACT WITH AMERICA (Edward Gillespie & Bob Schellhas eds., 1994). On March 3, 1994, in furtherance of the private property objectives described in the Contract with America, the U.S. House of Representatives overwhelmingly passed The Private Property Protection Act of 1995, H.R. 925, 104th Cong., 1st Sess., 141 CONG. REC. 2607 (1995). This statute proposes to compensate owners whose land has diminished in value by 20% or more as a result of specified federal statutes. Furthermore, if land has lost more than 50% of its value, H.R. 925 allows the owner to opt for the government to purchase the entire tract at fair market value. *See* 141 CONG. REC. at 2629. For further discussion, see *House Easily Passes Bills to Limit Regulations*, GOV'T & COMM., Mar. 4, 1995, at 679.

In addition, on February 1, 1995, the U.S. House of Representatives passed H.R. 5, the Unfunded Mandate Reform Act of 1995, H.R. 5, 104th Cong., 1st Sess., 141 CONG. REC. 1007 (1995). This bill takes numerous steps to limit federal legislative and agency actions that would impose excessive costs on state and local governments.

ever-escalating demands of state and local government.[48] This view has also come at a time when anti-regulatory political forces have begun to exert themselves in the legislative arena, causing state legislatures and Congress to adopt anti-taking statutes in a variety of forms.[49] As the discussion below will indicate, the limited impact of the Supreme Court's holdings on the state courts may explain this recent emphasis upon legislative solutions to the perceived problem of excessive environmental and land-use regulation.

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48. For example, Dean James L. Huffman's Article about the recent line of Supreme Court takings cases culminating in *Dolan*, applauded the apparent elevation of the Takings Clause in *Dolan* away from its inexplicable "stepchild status" as part of the Bill of Rights. As Justice Stevens noted, this "philosophical shift" in the Court's thinking makes it clear, that "property owners have surely found a new friend." *Dolan*, 114 S. Ct. 2309, 2326 (1994) (Stevens, J., dissenting). Dean Huffman concludes that such an analytical change

> will restore fairness to the application of a constitutional provision, the purpose of which is to assure the fair treatment of citizens who happen to own property. An incidental, and publicly significant, benefit of this shift will be the reinvigoration of a property rights system which is centrally important to the wise use of our planet's scarce resources.

James L. Huffman, Dolan v. City of Tigard: *Another Step in the Right Direction*, 25 ENVTL. L. 143, 153 (1995).

49. *See* John Martinez, *Statutes Enacting Takings Law: Flying in the Face of Uncertainty*, 26 URB. LAW. 327 (1994). In the late 1980s, environmental and land-use restrictions created growing anger in segments of the population who believed that the new laws were unreasonably limiting their daily lives. A direct result of this anti-regulatory sentiment was the emergence of a reactionary property rights movement that "[a]t its core . . . is railing against land-use laws, particularly those protecting wetlands and endangered species, that it claims rob property owners of the full use and value of their land." H. Jane Lehman, *Private Property Rights Proponents Gain Ground*, WASH. POST, Sept. 17, 1994, at E1. This movement has been estimated to consist of nearly 600 local property rights groups that have grown into a "powerful force that is throwing its weight around in Washington, State capitols and the Courts . . . [with the financial aid and support of] much wealthier and well established agriculture and industrial trade associations; lobbyists for large energy, mining and timber companies and conservative public interest law firms. . . ." Keith Schneider, *Fighting to Keep U.S. Rules from Devaluing Land*, N.Y. TIMES, Jan. 9, 1995, at A1, A12. This approach has been initially successful at the state level. Since 1994, nearly 100 bills addressing regulatory takings issues have been introduced in 37 states and legislation has been enacted in Arizona, Utah, Delaware, Virginia, Indiana, Washington, Idaho, and Mississippi. Defenders of Property Rights, 1 PROP. RTS. REP. 7 (Defenders of Property Rights, Wash., D.C.) 1994. Most of these statutes require state agencies to undertake extensive takings assessments of proposed laws and regulations, or require the state's attorney general to evaluate the takings implications of proposed agency rules. *See, e.g.*, W. VA. CODE §§ 22-1A-1 to 22-1A-6 (1994); IND. CODE ANN. § 4-22-2-32, *as amended by* Pub. L. No. 34-1993, § 4; Pub. L. No. 12-1993, § 3 (1995). On the federal level, in March 1995, the House of Representatives overwhelmingly passed "The Private Property Protection Act of 1995." *See* discussion *supra* note 47.

B. *The State Courts as Instruments of Implementation of Federal Constitutional Takings Doctrine*

In *First English Evangelical Lutheran Church v. County of Los Angeles*,[50] Chief Justice Rehnquist stated that Fifth Amendment Takings Clause claims were "self-executing," thus requiring compensation to be paid whenever an unconstitutional taking was found to exist. However, it is not immediately apparent when a particular land-use regulation, environmental regulation, or other governmental requirement constitutes a "taking" in a constitutional law context. Fact situations that closely resemble those actually considered in U.S. Supreme Court cases are normally quite unusual. Therefore, the more general doctrinal points expressed in these decisions must be implemented in subsequent controversies on a case-by-case basis. Thus, the constitutionality of a particular land-use control or other device must be determined principally in a judicial forum.

Ambiguity, contextual application, a balancing of multiple factors, and a general acceptance of a high degree of regulatory control have been considered the hallmarks of the constitutional law doctrine in the takings field. What happens when the Court appears to chart a different course that is arguably more favorable to the interests of landowners? How are the more recent constitutional principles enunciated by the Supreme Court actually implemented by lower courts in considering later cases? And, in this context, how do these Supreme Court decisions change the way that state and local governments act with regard to their authorized public health, safety, and environmental protection authorities?[51]

The answer to these questions would seemingly be found in the lower federal courts—a landowner's federal constitutional rights be-

50. 482 U.S. 304, 321 (1987).

51. Much of the answer to this question depends upon the clarity of the constitutional taking principle expressed by the Supreme Court, and also by the willingness of governments to limit or abandon their regulatory objectives. At least three possible reactions are likely. First, state and local governments can receive a clear understanding of the new constitutional norms from the Supreme Court's opinion and thereafter make necessary regulatory and programmatic adjustments to conform with the newly articulated takings limits. In this scenario, state and local government regulators voluntarily acquiesce to the Supreme Court constitutional interpretation and its application to their specific cases.

Second, there can be an honest disagreement between government and landowners over the meaning and application of new Supreme Court takings principles or their application to individual cases. Litigated or negotiated resolutions of these conflicts are the result, with the actual meaning of the takings concepts being provided by the deciding court or by the parties themselves as they compromise their conflicting interests.

Third, there can be resistance to a clearly articulated, revised constitutional norm with no governmental adjustment. This would apparently lead to judicial resolution forcing governmental action to conform to the newly adopted takings limitation. Such a course of action might have significant financial implications for a recalcitrant government that refuses to voluntarily comply with the constitutional command.

ing protected in federal court against governmental infringement. However, as a result of a number of recent Supreme Court decisions, claims of an as-applied regulatory taking violation by state and local governments can reach the federal court system in only a limited number of situations.[52] Due to the doctrines of ripeness, finality, and abstention,[53] the lower federal courts are generally not available to litigants seeking to establish that a particular regulation or programmatic requirement is an unconstitutional taking of private property.[54] Consequently, the state courts have become the primary interpreters of the meaning and application of the new generation of Supreme Court Fifth Amendment takings doctrine in the land-use and environmental protection areas.

52. Alleged federal government takings of private property can be brought initially in federal court by way of petition to the Federal Claims Court. However, the bulk of takings situations arise through the application of state and local government police or other sovereign power in the form of zoning, subdivision, natural resource, or environmental protection regulation.

53. Over the past 15 years, the Supreme Court has issued an extensive series of rulings ensuring that state courts first hear the federal takings claim and crystalize the facts and nature of the issue. In Agins v. City of Tiburon, 447 U.S. 255 (1980), a down-zoning takings claim was found by the Court not to be ripe since there had been no submission of the development plan required by the locality's land-use control ordinance. A year later, the Court reached a similar result in Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264 (1981). In San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621 (1981), the Court applied a final judgment rule to a situation in which the city adopted an open space plan and ordinance, but when the utility landowner brought a state inverse condemnation action, which was dismissed, the Supreme Court held that the California state courts had not finally determined whether a taking had occurred.

The key decision in this line of cases is Williamson County Planning Comm'n v. Hamilton Bank, 473 U.S. 172 (1985), which imposed two important requirements upon taking claims: (1) the landowner must obtain a final decision regarding the use of the property to make it known how severely the land-use regulation affects the land, *id.* at 186, and (2) the landowner must seek compensation through adequate, available state procedures, *id.* at 195, usually a state inverse condemnation action. Finally, in MacDonald, Sommer & Frates v. Yolo County, 477 U.S. 340 (1986), in a denial of a land-use reclassification, the decision of the land-use regulatory agency must be "final and authoritative" and it must describe the "type and intensity" of the development legally permitted. *Id.* at 348. Collectively, these decisions direct takings claims to the state courts and provide the grounds for federal courts to dismiss improperly filed cases.

54. *See* Thomas E. Roberts, *Fifth Amendment Taking Claims in Federal Court: The State Compensation Requirement and Principles of Res Judicata*, 24 URB. LAW. 479 (1992); Gregory Overstreet, *The Ripeness Doctrine of the Taking Clause: A Survey of Decisions Showing Just How Far Federal Courts Will Go to Avoid Adjudicating Land Use Cases*, 10 J. LAND USE & ENVTL. L. 91 (1994). For a partial listing of federal cases using a lack of ripeness as grounds for dismissal or avoidance of federal court action, see 7 PATRICK J. ROHAN, ZONING AND LAND USE CONTROLS § 52A-65 n.8 (1995).

II. Analysis of State Court Decisions Applying Recent United States Supreme Court Takings Cases

With the understanding that the state courts provide the mandatory first line of federal constitutional analysis, state decisions applying the holdings in three prominent U.S. Supreme Court takings precedents—*Dolan v. City of Tigard*,[55] *Lucas v. South Carolina Coastal Council*,[56] and *Nollan v. California Coastal Commission*[57]—were researched and examined. The research method employed was to search the LEXIS state law database for all decisions mentioning any of the three cases and then to analyze both the manner in which the state courts applied the Supreme Court case holdings and the results of the state level adjudication. The time period covered by the research was from the date of each Supreme Court opinion (1987 for *Nollan*, 1992 for *Lucas*, and 1994 for *Dolan*) up until January 15, 1995. The result of the computerized search of the cases in all states provided a total of 192 cases mentioning *Nollan*, 80 cases referring to *Lucas*, and 19 cases citing *Dolan*. These totals decreased substantially when state court cases merely citing, without discussing, one of the three Supreme Court decisions had been discarded: 30 cases for *Nollan*, 57 for *Lucas* and 6 for *Dolan*.

The principal overall conclusion drawn from the research was that there were surprisingly few reported decisions even mentioning the prominent U.S. Supreme Court holdings in the three cases. Although academic authors had analyzed, criticized, and harmonized these and other takings opinions in hundreds of law review articles, the state courts, at all levels, had given them far less attention and apparently attached far less significance to them in reaching their own decisions.

A. Nollan v. California Coastal Commission

In this case, James and Marilyn Nollan owned a beachfront lot in Ventura County, California located in close proximity to two public beaches and recreation areas.[58] The Nollans' agreement to purchase the lot had been conditioned upon their promise to demolish a small, 504-square-foot dilapidated bungalow situated on the lot and replace it with a new structure.[59] To rebuild on the beachfront lot, the Nollans were required under California law to obtain a coastal development permit from the California Coastal Commission ("Commission").[60] The Nollans applied for the necessary permit and were subsequently informed that their permit request had been granted by the Commission subject to the condition that they allow the public an easement to

55. 114 S. Ct. 2309 (1994).
56. 112 S. Ct. 2886 (1992).
57. 483 U.S. 825 (1987).
58. *Nollan*, 483 U.S. at 827.
59. *Id.* at 827-28.
60. *Id.* at 828.

pass across the portion of their property bounded by the mean high-tide line on one side and their backyard seawall on the other.[61] This lateral access easement would make it easier for the public to traverse the beach area behind the planned home and to reach the two public parks about a quarter of a mile away.[62]

The Nollans unsuccessfully protested the easement dedication before the Commission, which reaffirmed its imposition of the condition.[63] However, the state Superior Court ruled in favor of the Nollans based upon non-constitutional, statutory grounds that there was insufficient factual evidence in the administrative record for concluding that the replacement of the old bungalow with the new house would create a direct or cumulative burden on public access to the sea.[64] The California Court of Appeals reversed the lower court,[65] ruling that (1) the California Coastal Act required such a "conditioned" permit for a building replacement, (2) the requirement was constitutional as long as the project contributed, even indirectly, to the need for public beach access, and (3) there had not been a taking since the condition merely diminished the value of the Nollans' lot but it did not deprive them of all reasonable use of their property. On appeal to the U.S. Supreme Court, the Nollans raised only the constitutional issue.

In a five-to-four opinion, Justice Antonin Scalia ruled that the Commission's permit requiring the transfer of a lateral beach access easement was an unconstitutional taking of private property without just compensation. Citing *Agins v. City of Tiburon*,[66] Justice Scalia noted the general proposition that land-use regulation does not effect an unconstitutional taking if it "substantially advance[s] legitimate state interests" and does not "deny an owner economically viable use of his land."[67] Accepting the three principal justifications provided by California as legitimate state interests,[68] the majority concluded that the

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61. *Id.*

62. *Id.*

63. Following a public hearing, the California Coastal Commission ("Commission") found that the Nollans' proposed new house would decrease the public's view of the Pacific Ocean and contribute to the development of "a 'wall' of residential structures" that would prevent the public "psychologically . . . from realizing a stretch of coastline exists nearby that they have every right to visit." *Id.* at 828-29. In addition, the state agency concluded that this private use of the beachfront, "along with other area development, would cumulatively 'burden the public's ability to traverse to and along the shorefront.' " *Id.* at 829 (quoting Nollan v. California Coastal Comm'n, 223 Cal. Rptr. 28, 65-66 (Cal. Ct. App. 1986)). In the Commission's view, this incremental impact could be properly offset by a permit condition requiring the transfer of the lateral access easement. *Id.*

64. *Id.* at 829.

65. 223 Cal. Rptr. 28 (Cal. Ct. App. 1986).

66. 447 U.S. 255 (1980).

67. *Nollan*, 483 U.S. at 834.

68. The opinion notes three main justifications given by the Commission. "The Commission argues that among these permissible purposes are protecting the public's

permit condition failed to demonstrate a reasonable relationship to the otherwise valid state objectives identified in support of the easement requirement.[69] Justice Scalia noted that "this case does not meet even the most untailored standards."[70]

The *Nollan* decision is significant because it subjected a state program of beachfront development control to careful scrutiny under a linked or hybrid due process/takings standard of federal constitutional review. Here, the Court closely examined California's land-use control practice to determine if it "substantially advance[d]" the "legitimate state interest" sought to be achieved. This opinion, anticipating the holding in *Dolan* by seven years, announced a more searching form of judicial review when a land regulation allegedly affects a taking.[71] It also suggested that a land-use regulation or exaction could be considered an unconstitutional taking of property if, during judicial review, a connection to a "legitimate state interest" was found to be inadequate or absent. Justice Scalia certainly foresaw a more active, less deferential role for the courts in testing the constitutionality of future land-use and environmental protection practices.[72]

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ability to see the beach, assisting the public in overcoming the 'psychological barrier' to using the beach created by a developed shorefront, and preventing congestion on the public beaches." *Id.* at 835.

69. The majority opinion suggests that the permit requirement would be unconstitutional if the condition "utterly fails to further the end advanced as the justification for the prohibition." *Id.* at 837. However close a fit is required by the "essential nexus" standard articulated in this case, Justice Scalia found the justifications in *Nollan* to be sorely lacking. He wrote,

> [i]t is quite impossible to understand how a requirement that people already on the public beaches be able to walk across the Nollans' property reduces any obstacles to viewing the beach created by the new house. It is also impossible to understand how it lowers any "psychological barrier" to using the public beaches, or how it helps to remedy any additional congestion on them caused by construction of the Nollans' new house.

Id. at 838-39.

Furthermore, he suspected that the police power was being used illegitimately to extort valuable property from landowners who needed developmental approvals. *Id.* at 837 n.5. The use of regulatory approval as a de facto tax-raising device was not considered a proper object of regulation, and clearly offended the *Nollan* majority, which stated, "[w]hatever may be the outer limits of 'legitimate state interests' in the takings and land-use contexts, this is not one of them." *Id.* at 837.

70. *Id.* at 838.

71. In footnote 3, Justice Scalia suggested a "heightened" form of scrutiny by reformulating the appropriate standard of review in takings cases. He stated that

> there is no reason to believe . . . that so long as the regulation of property is at issue the standards for takings challenges, due process challenges, and equal protection challenges are identical; any more than there is any reason to believe that so long as the regulation of speech is at issue the standards for due process challenges, equal protection challenges, and First Amendment challenges are identical.

Id. at 835 n.3.

72. Due to the ripeness and finality principles, discussed *supra* notes 52-54 and accompanying text, which vest primary consideration for federal constitutionality in the state courts, the decision in *Nollan* linking due process and takings theories now

The analysis of state court decisions mentioning *Nollan* yielded a number of striking conclusions. The Supreme Court's holding, although heralded by academic and practitioner authors alike, was little used by the state courts during the seven-and-a-half-year period. *Nollan* was cited a total of 192 times during this period by all levels of reported state decisions. However, this number shrunk to merely thirty cases when the incidental citations to the *Nollan* case were discarded. Consequently, *Nollan* has been discussed in an average of less than four cases per year in all of the states and at all court levels since 1987.[73] In some regions of the country, there was virtually no substantive discussion of the *Nollan* holding at all.[74] The relative infrequency of state court consideration of the *Nollan* holding casts doubt on the assumption of the influential nature of this U.S. Supreme Court decision on state and local law. At least the statistical information indicates that *Nollan* rarely serves as the basis for the holdings of the reviewing state courts.

An overview of the state decisions mentioning *Nollan* provides an opportunity to sample the breadth and variety of legal questions before the nation's state courts. The controversies examined by this research cover such conventional zoning and land-use contexts as denied rezoning requests,[75] minimum square footage requirements,[76]

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effectively sends the initial due process arguments to the state courts. These courts have been asked to determine whether varied forms of state and local government land-use control and environmental protection actually do bear a substantial relationship to legitimate governmental interests. Not surprisingly, the overwhelming majority of state case holdings during the last seven-and-a-half-years have found such a relationship and have not found an unconstitutional taking of property. *See* discussion *infra* notes 75-89 and accompanying text. The state courts during this period have refused to use the *Nollan* opinion in an expansive way to invalidate or penalize general public health, safety, environmental, and land-use regulation.

73. The *Nollan* decision was rarely considered by state supreme courts over the seven-and-one-half-year period, with a total of 14 decisions discussing the U.S. Supreme Court's holding in any detail. This is an average of less than two state decisions per year.

74. The regional patterns for state court discussion of *Nollan* from 1987 to 1995 are as follows:

	Region	Number of Cases
1.	Pacific Coast	11 cases
2.	Southwestern	1 case
3.	Mountain states	4 cases
4.	Great Plains	1 case
5.	Southeastern	1 case
6.	Midwest	2 cases
7.	Mid-Atlantic	6 cases
8.	Northeast	4 cases

75. Cottonwood Farms v. Board of County Comm'rs, 763 P.2d 551 (Colo. 1988) (citing *Nollan* specifically for its ruling that an owner who purchases property with knowledge of applicable zoning regulations is not invariably prevented by the self-inflicted hardship doctrine from attacking the validity of those regulations as unconstitutional takings).

and sidewalk[77] and street dedication rules,[78] as well as a full range of modern regulatory areas. These include challenges to fire safety codes,[79] archeological protection rules,[80] farmland preservation laws,[81] nitrate ban ordinances,[82] airport height regulations,[83] estuarine sanctuary regulations,[84] and sign ordinances.[85] The second major conclusion derived from this analysis is that state courts have rarely used the *Nollan* precedent as grounds for the invalidation of a regulatory or other program. In fact, only one state supreme court[86] and four ap-

76. Builders Serv. Corp. v. Planning & Zoning Comm'n, 545 A.2d 530 (Conn. 1988) (plaintiff asserted that *Nollan*'s holding required a building permit condition "substantially advance a legitimate state purpose" and that it established a heightened standard of review for both permit conditions and zoning regulations, which was rejected by the court in a land-use regulation case).

77. State v. Lundberg, 825 P.2d 641 (Or. 1992).

78. Paradyne Corp. v. State, 528 So. 2d 921 (Fla. Dist. Ct. App. 1988) (finding a state transportation agency requirement that landowner build a driveway connecting its land and that of a neighbor to the state road to be a taking without due process and very similar to the lateral beach access easement in *Nollan* by failing the nexus test).

79. Van Sickle v. Boyes, 797 P.2d 1267 (Colo. 1990) (upholding the application of a municipal fire code to an existing building against *Nollan*-based takings claim by finding the code to advance the public interest and by refusing to compare the benefits of other safety approaches).

80. Department of Natural Resources v. Indiana Coal Council, 542 N.E.2d 1000 (Ind. 1990) (upholding an agency refusal to grant a strip mining permit on a small part of plaintiff's land that contained an archeologically sensitive site under *Nollan* because that case did not set a higher nexus standard and it applied only to cases in which government is attempting to enforce actual conveyance of property).

81. Gardner v. New Jersey Pinelands Comm'n, 593 A.2d 251 (N.J. 1991) (upholding severe restrictions on land use in an environmentally-sensitive region and distinguishing *Nollan* in that preserving undeveloped land is a legitimate public interest and the Pinelands restrictions appropriately serve that interest).

82. Cornish Town v. Koller, 817 P.2d 305 (Utah 1991) (remanding case in which an ordinance banning nitrate use was attacked as a taking by allegedly reducing property value by 85 to 90%, but finding *Nollan* to be inapplicable because it did not address whether the owners were denied any economically viable uses of their land).

83. Rogers v. City of Cheyenne, 747 P.2d 1137 (Wyo. 1987) (upholding height limitations in airport ordinance and distinguishing *Nollan* because the beachfront access easement did not bear nearly as strong a relationship to a demonstrable public interest as a regulation concerning the height of trees in an aircraft approach zone).

84. Orion Corp. v. State, 747 P.2d 1062 (Wash. 1987).

85. Circle K Corp. v. City of Mesa, 803 P.2d 457 (Ariz. Ct. App. 1990) (upholding an ordinance requiring the removal of a nonconforming sign as a condition for installing new conforming sign and finding a legitimate state interest in eliminating nonconforming signs).

86. In Seawall Assocs. v. City of New York, 542 N.E.2d 1059 (N.Y. 1989), the New York Court of Appeals struck down a New York City ordinance (1) prohibiting building owners from demolishing, altering, or converting single-room occupancy apartments and (2) requiring maintenance and repair of these properties for an indefinite period and the leasing to tenants at controlled rents. Significant financial penalties—as high as $150,000 per unit—could be imposed to enforce the ordinance. Property owners could evade these requirements by paying the city a $45,000 "buyout" contribution. Judge Hancock concluded that the law was an "unconstitutional confiscation of the owner's property" and that it violated the takings provisions of both the federal and the New York Constitutions.

pellate courts[87] in more than seven years have relied on *Nollan* to strike down a local initiative. The state court cases overwhelmingly uphold government regulatory and other programs when they are challenged as being inconsistent with the principles set forth in *Nollan.* Landowners lose these cases. When the *Nollan* precedent is applied, courts will often limit its application to situations in which the government acquires property rights without giving compensation and not to cases of use regulation. This is significant since most cases challenge use restrictions and do not involve exactions. In addition, some state courts will refer to *Nollan*'s "nexus" requirement as imposing a higher degree of correlation between the governmental objectives and the burden imposed on property owners.[88] Most decisions consider this issue but easily find that local regulations meet a rational basis due process test. Some courts simply refuse to apply *Nollan* to cases of direct land-use regulation, reserving it exclusively for property exaction situations.[89] Ultimately, *Nollan* appears to have had less of an impact than would have been expected.

Much of the court's discussion focused upon federal cases with major consideration of the *Nollan* opinion. The New York court found that the SRO ordinance worked a *per se* physical taking—equal to the lateral access easement required in *Nollan*—in that it denied the owners the power to exclude tenants in the future. Ruling on a separate basis, Judge Hancock held that the ordinance failed the nexus test from *Nollan* in that the stated goal of reducing homelessness would not be substantially advanced by the law. It found that there was no "close nexus" between the burdens imposed upon the property owners and the improvement of homelessness conditions, that any relationship was "indirect at best and conjectural." *Id.* at 1069. Central to the court's view of the New York City ordinance was the $45,000 "buyout" provision that appeared to impose a selective tax upon building owners and thus singled them out for disparate treatment.

87. Colony Cove Ass'n v. City of Carson, 14 Cal. Rptr. 2d 849 (Cal. Ct. App. 1992) (mobile home rent control ordinance); Surfside Colony Ltd. v. California Coastal Comm'n, No. G007940, 1991 Cal. App. LEXIS 132 (Cal. Ct. App. Feb. 14, 1991) (struck seawall permit conditioned upon public lateral beach access given by property owner since there was no substantial nexus between the public access condition and the seawall permit); Rohn v. City of Visalia, 263 Cal. Rptr. 319 (Cal. Ct. App. 1989) (struck rezoning condition requiring landowner to dedicate 14% of its property to correct a street alignment problem by concluding that the condition bears no relationship, either direct or indirect, to the present or future use of the property); Paradyne Corp. v. State, 528 So. 2d 921 (Fla. Ct. App. 1988) (required driveway improvement serving neighboring land fails nexus and per se physical takings tests).

88. The emphasis usually originates in the Supreme Court's language in Agins v. Tiburon, 447 U.S. 255, 260 (1980), creating a two prong test for taking claims: (1) whether the regulation substantially advances legitimate state interests, and (2) whether it denies the owner economically viable use of his land. The examination of the first prong of the *Agins* test with the enhanced emphasis placed on judicial review by Justice Scalia in *Nollan* has led some state courts to speak of imposing a higher degree of nexus, yet ultimately finding that the new benchmark has been met. *See, e.g.*, Department of Natural Resources v. Indiana Coal Council, 542 N.E.2d 1000 (Ind. 1989). Most cases, however, easily find that the required relationship exists without any discussion of a tougher level of scrutiny or a higher degree of correlation. *See, e.g.*, Rogers v. City of Cheyenne, 747 P.2d 1137 (Wyo. 1987).

89. Builders Serv. Corp. v. Planning & Zoning Comm'n, 545 A.2d 530 (Conn. 1988).

B. Lucas v. South Carolina Coastal Council

In 1992, the Supreme Court decided the much-heralded case of *Lucas v. South Carolina Coastal Council*,[90] which announced a new categorical rule for cases of total deprivation of all economically viable land usage.[91] In 1986, David Lucas purchased two residential building lots in a subdivision on the Isle of Palms barrier island in Charleston County, South Carolina.[92] At that time, the land was properly zoned for residential construction.[93] He paid $975,000 for both parcels.[94] Two years later, in 1988, the South Carolina Legislature enacted the Beachfront Management Act ("Act"),[95] which had the direct effect of barring Lucas from erecting any permanent habitable structures on the two lots.[96] Consequently, Lucas filed suit in state court, contending that the Act's complete extinguishment of his property's value entitled him to compensation.[97]

The trial court found that the Act "deprive[d] Lucas of any reasonable economic use of the lots, . . . eliminated the unrestricted right of use, and render[ed] them valueless."[98] It then decided that Lucas' lots had been "taken" by the operation of the Act, and ordered the state to pay Lucas $1.2 million.[99] On appeal, the Supreme Court of South Carolina reversed, ruling that when a regulation respecting the use of property is designed " 'to prevent serious public harm,' . . . no compensation is owing under the Takings Clause regardless of the regulation's effect on the property's value."[100]

The U.S. Supreme Court, brushing aside a ripeness defense,[101] reversed the state supreme court.[102] Justice Scalia, writing for a five-Justice majority, reviewed the federal takings jurisprudence and concluded that the Court had identified two "discrete categories of regulatory action as compensable without case-specific inquiry into the

90. 112 S. Ct. 2886 (1992).
91. *Lucas*, 112 S. Ct. at 2904 (Blackmun, J., dissenting).
92. *Id.* at 2889.
93. *Id.*
94. *Id.*
95. S.C. CODE ANN. §§ 48-39-10 to -360 (Law. Co-op. Supp. 1993).
96. The Beachfront Management Act ("Act") did permit the construction of a number of nonhabitable improvements including wooden walkways no larger in width than six feet and small wooden decks no larger than 144 square feet. *Lucas*, 112 S. Ct. at 2890 n.2.
97. *Id.* at 2890.
98. *Id.* (quoting App. to Pet. for Cert. 37).
99. *Id.*
100. *Id.* (quoting Lucas v. South Carolina Coastal Council, 404 S.E.2d 895, 899 (S.C. 1991)). Two justices of the Supreme Court of South Carolina dissented, holding that the chief purpose of the Act was not the avoidance of "noxious" use or public nuisances but rather the promotion of tourism and the creation of plant and animal habitat. The lesser legislative objective, in their view, did not justify, in constitutional terms, the Act's obliteration of Lucas's property value. *Lucas*, 404 S.E.2d at 906.
101. *Lucas*, 112 S. Ct. at 2890-92.
102. *Id.* at 2902.

public interest advanced in support of the restraint."[103] The first category is physical invasions of private property,[104] and the second is "where regulation denies all economically beneficial or productive use of land."[105] This second prong of the categorical takings law was the subject of *Lucas*. The suggestion of this part of the opinion was that severe regulations, "sacrific[ing] *all* economically beneficial uses in the name of the common good,"[106] impose an unconstitutional taking of property regardless of the harm to be prevented by the regulation.[107]

Backing off from that extreme position on the validity of new regulation, Justice Scalia admitted that a severe land-use limitation prohibiting all economically beneficial use of land could be upheld in certain situations.[108] He wrote, "[a]ny limitation so severe 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."[109] With these words, the majority opinion left open numerous questions concerning the meaning of the opinion, and actually reinforced the possibility of upholding sweeping land-use controls or prohibitions that might be imposed through either private or public nuisance actions "or otherwise."[110] In the end, the *Lucas* case was remanded back to the South Carolina courts with a challenge to identify those "background principles of nuisance and property law that would prohibit the uses [Lucas] now intends in the circumstances in which the property is presently found."[111] While David Lucas ultimately re-

103. *Id.* at 2893.

104. The principal examples given involved requiring the installation of cable lines on apartment buildings, physical invasions of airspace, and the imposition of navigational servitudes upon a private marina. *Id.*

105. *Id.*

106. *Id.* at 2895.

107. Justice Scalia cast a skeptical glance at the "harm-preventing" and "benefit-conferring" distinction as a means of justifying severe forms of land use or other regulation. He concluded that the actual difference was "often in the eye of the beholder," *Id.* at 2897, and that "[a] given restraint will be seen as mitigating 'harm' to the adjacent parcels or securing a 'benefit' for them, depending upon the observer's evaluation of the relative importance of the use that the restraint favors." *Id.* at 2898.

108. *Id.* at 2899-2902.

109. *Id.* at 2900.

110. *Id.* The "or otherwise" quote was amplified by a footnote that recognized the power of state or local government, or even private parties, to destroy private property in cases of actual necessity or "to forestall other grave threats to the lives and property of others." *Id.* at 2900 n.16.

111. *Id.* at 2901-02. At the conclusion of the majority opinion, Justice Scalia emphasized a great skepticism for state legislative declarations of state law and public policy. Anticipating the *Dolan* holding by two years, he wrote that the state must show clearly the pre-existing nuisance or property law that would justify a regulatory prohibition on land use. To emphasize the point, Justice Scalia stressed that,

> an affirmative decree eliminating all economically beneficial uses may be defended only if an objectively reasonable application of relevant precedents would exclude those beneficial uses in the circumstances in which the land is presently found.

ceived ample compensation for the two building lots,[112] scholars have continued to debate the significance of the holding.[113]

The review of the state court opinions in the two-and-one-half-year period following the *Lucas* decision revealed a total of eighty cases mentioning *Lucas*, only fifty-seven of which considered its holding in any detailed fashion. Even though it is rarely determinative of the outcome, *Lucas* has been mentioned in a wide variety of factual settings, including rent control, quarry regulation, permit denials for small lots, sea wall construction, wetland and floodplain building, and conditional use permit cases.[114] In all of the eighty state cases examined, only three can be said to have relied on *Lucas* in finding a regulatory taking.[115] A small number of decisions remand the contro-

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Id. at 2902 n.18. Apparently, legislative statements of purpose would not be sufficient; some greater indication of support in state property or tort law would be needed. Curiously, in more recent cases, Justice Scalia has objected to federal courts accepting state law definitions of "background property rights" that would determine whether a per se taking has occurred. *See* Stevens v. City of Cannon Beach, 114 S. Ct. 1332 (1994) (Scalia, J., dissenting from a denial of a writ of certiorari to the Supreme Court of Oregon).

112. On remand, the South Carolina Supreme Court unanimously found that there was no common-law basis for restricting the planned construction on the Lucas parcels, and transferred the case to the circuit court to determine "the actual damages Lucas has sustained as the result of his being temporarily deprived of the use of his property." Lucas v. South Carolina Coastal Council, 424 S.E.2d 484, 486 (S.C. 1992). The case eventually ended in a negotiated settlement whereby the State of South Carolina paid Lucas $850,000 for the two lots plus $725,000 in interest, attorney's fees, and costs, totalling $1.575 million. South Carolina then resold the lots to a construction company for only $785,000, thereby realizing a loss of nearly $800,000 on the complete transaction.

113. *See, e.g.*, Richard J. Lazarus, *Putting the Correct "Spin" on* Lucas, 45 STAN. L. REV. 1411 (1993); David Coursen, Lucas v. South Carolina Coastal Council*: Indirection in the Evolution of Takings Law*, 22 ENVTL. L. REP. (Envtl. L. Inst.) 10,778 (1992).

114. Litigants have discovered the regulatory takings theory and are employing it in novel situations. For example, in Carter v. City of Porterville, 22 Cal. Rptr. 2d 76 (Cal. Ct. App. 1993), a landowner sued the city for the negligent construction of a dam that had the potential to collapse. The plaintiff landowner alleged that this danger represented a regulatory taking because the city's actions had endangered his land and thereby had made it valueless. The trial court agreed with the plaintiff but the California Court of Appeal reversed, granting the city a specified amount of time to repair the dam, after which a regulatory taking would occur. *Id.* at 87.

115. In Moroney v. Mayor & City Council, 633 A.2d 1045 (N.J. Super. Ct. App. Div. 1993), landowners instituted an inverse condemnation suit when they were denied a hardship variance to build a house on an undersized lot. The court determined that the denial of permission to build the home deprived the owners of "all productive or beneficial use" of the land and it analogized the permit denial to an actual physical invasion of the land. *Id.* at 1050. Despite the ordinance having existed prior to the landowner's purchase, the court found that this owner did have reasonable investment-backed expectations and that all of its beneficial economic use had been deprived. *Id.* at 1049.

People *ex rel.* Department of Transp. v. Diversified Properties Co. III, 17 Cal. Rptr. 2d 676 (Cal. Ct. App. 1993), involved a developer who purchased land for use as a commercial center with knowledge that a portion of the land was to serve as a right of way for a highway. *Id.* at 678. The city blocked development pending the finalization

versy to the lower courts for a *Lucas* determination of whether the nuisance exception applies or whether there is any economically viable use left for the property. In several other cases, takings were held to have occurred, but exclusively under state constitutions.[116]

The clearest conclusion drawn from this analysis is that the vast majority of the cases citing *Lucas* do not find a regulatory taking nor a physical occupation taking. During the two-and-one-half-year period following the Supreme Court's decision, the state courts have not used the decision as a vehicle for massive interference with state and local government land-use and environmental regulatory programs. In fact, it is surprising how little effect this high profile takings case has had in actual controversies litigated in all of the state courts.

The reactions of the courts that have interpreted and applied the *Lucas* precedent are varied. Cases usually only mention *Lucas* in passing as part of a general discussion of federal takings jurisprudence.[117] It is actually cited frequently, not for its own content or

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of the state's highway plans. *Id.* The court of appeals affirmed the trial court's decision that a taking had occurred because the state had effectively "banked" the property so it could buy it years later when it was actually needed. *Id.* at 688. The temporary banking took place without any payment to the landowner. *Id.* at 679.

Finally, in The Mill v. State, 868 P.2d 1099 (Colo. Ct. App. 1993), the plaintiff owned an area formerly used as a uranium mill tailings disposal site and leased it, at a rental of $7000 per month, for use as a coal storage facility. *Id.* at 1103. Due to state restrictions, this use was barred and the property's rental value plummeted to $500-700 per month. *Id.* The court held that the restrictions on use amounted to a regulatory taking. *Id.* at 1109. *Lucas* was cited for the proposition that a regulation amounts to an unconstitutional taking when it extinguishes all or virtually all of a property's economic attributes. *Id.* The 90% reduction in rental value met this standard. *Id.* at 1110. The court, however, did not discuss the nuisance or background property concept exceptions to the *Lucas* policy.

116. The case of Powers v. Skagit County, 835 P.2d 230 (Wash. Ct. App. 1992), is a good example of the small number of cases that remand a controversy to the trial court for a determination of (1) whether the regulation in question strips property of all economically viable use or (2) whether the restriction is one that background principles of state property and nuisance law already place on ownership. This appellate court considered these to be material issues of fact that were unresolved by the lower court. *Id.* at 190-91. *See also* Wheeler v. City of Wayzata, 511 N.W.2d 39 (Minn. Ct. App. 1994); Tim Thompson, Inc. v. Village of Hinsdale, 617 N.E.2d 1227 (Ill. App. Ct. 1993).

As for holdings finding a taking under state law, see Whitehead Oil Co. v. City of Lincoln, 515 N.W.2d 401 (Neb. 1994); Layne v. City of Mandeville, 633 So. 2d 608 (La. Ct. App. 1994); Rivet v. Department of Transp., 635 So. 2d 295 (La. Ct. App. 1994).

117. Cannone v. Noey, 867 P.2d 797 (Alaska 1994) (holding *Lucas* not to apply because the landowner's property was not made valueless by the state's action); Anchorage v. Sandberg, 861 P.2d 554 (Alaska 1993) (same); Tensor Group v. City of Glendale, 17 Cal. Rptr. 2d 639 (Cal. Ct. App. 1993) (mentioning *Lucas* in passing); City & County of San Francisco v. Golden Gate Heights Invs., 18 Cal. Rptr. 2d 467 (Cal. Ct. App. 1993) (holding property not to have lost all economic value); Ehrlich v. City of Culver City, 19 Cal. Rptr. 2d 468 (Ct. App. 1993) (holding land not to have been rendered valueless by restrictions existing when the property was purchased); Tahoe Keys Property Owners' Ass'n v. State Water Resources Control Bd., 28 Cal. Rptr. 2d 734 (Cal. Ct. App. 1994) (discussing, in general terms, the state's power to

ideas, but rather, as a short-hand way of setting forth constitutional principles derived from the *Agins*, *Loretto v. Teleprompter Manhattan CATV Corp.*,[118] and *Penn Central* decisions.[119] Sometimes *Lucas* is merely relegated to a minor reference in a footnote.[120]

When opinions do, in fact, discuss the *Lucas* holding, they usually emphasize the categorical language of the opinion defining an unconstitutional taking as occurring when a regulation "denies all economically beneficial or productive use of the land."[121] While the state courts cite this portion of the Supreme Court's decision, they rarely find the constitutionally-forbidden condition to exist. Other cases mention *Lucas* but refuse to undertake any takings analysis due to a lack of ripeness, finality, or exhaustion of administrative remedies.[122]

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regulate property); Iowa Coal Mining Co. v. Monroe City, 494 N.W.2d 664 (Iowa 1993) (no total deprivation of economic value with a rezoning use change); Ward v. Harding, 860 S.W.2d 280 (Ky. 1993) (citing *Lucas* for the proposition that regulatory action may diminish or eliminate certain land uses so long as it does not destroy all permissible uses); Jones v. King County, 874 P.2d 853 (Wash. Ct. App. 1994) (holding that down-zoning did not deny all economically viable use and did not destroy any fundamental property right).

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

119. *See* Peters v. Milks Grove Special Drainage Dist. No. 1, 610 N.E.2d 1385 (1993) (citing *Lucas* as part of the court's discussion of Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982), and its rule for permanent, physical invasions); Fitzgarrald v. City of Iowa City, 492 N.W.2d 659 (Iowa 1992) (same); Ferguson v. City of Mill City, 852 P.2d 205 (Or. Ct. App. 1993) (holding a government action that effects a permanent physical occupation to be a taking).

120. *See* Zerbertz v. Municipality of Anchorage, 856 P.2d 777 (Alaska 1993); City of Northglenn v. Grynberg, 846 P.2d 175 (Colo. 1993); Forsythe County v. Greer, 439 S.E.2d 679 (Ga. Ct. App. 1993); National Resources & Envtl. Protection Cabinet v. Kentuck Harlan Coal Co., 870 S.W.2d 421 (Ky. Ct. App. 1993).

121. Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2893 (1992). The cases also frequently cite the similar quote that "when the owner of real property has been called upon to sacrifice all economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking." *Id.* at 2895.

In some cases, the state courts analyze the facts so as not to find a total elimination of use. For example, in Ramona Convent of the Holy Names v. City of Alhambra, 26 Cal. Rptr. 2d 140 (Cal. Ct. App. 1994), the court, under a *Lucas* analysis, found no taking when 10% of a 19-acre parcel had been designated "open space" and made unbuildable by the zoning regulation. *Id.* at 147. The court concluded that the landowner did not lose all economically viable use of its property since the city's designation diminished the value of the entire 19-acre parcel, but it did not prohibit its total use. *Id.* The wholistic concept of the property right at issue saved the open space zoning from the takings attack.

122. *See* Sierra Club v. Department of Forestry & Fire Protection, 26 Cal. Rptr. 2d 338 (Cal. Ct. App. 1993) (mentioning the *Lucas* test, but deferring the case on ripeness grounds); Hensler v. City of Glendale, 876 P.2d 1043 (Cal. 1994) (requiring a landowner to pursue administrative remedies prior to receiving judicial review of the taking claim); Galbraith v. Planning Dep't of Anderson, 627 N.E.2d 850 (Ind. Ct. App. 1994) (finding judicial review to be premature because administrative remedies were not exhausted); Kudloff v. City of Billings, 860 P.2d 140 (Mont. 1993) (same); Wheeler v. City of Wayzata, 511 N.W.2d 39 (Minn. Ct. App. 1994) (finding that the owner's claim was not ripe); Joyce v. Multnomah County, 835 P.2d 127 (Or. Ct. App. 1992) (defining ripeness).

Finally, *Lucas* receives narrow interpretation by many state courts, which conclude that certain kinds of government actions—e.g., permitting delays[123] and development moratoria—do not fall subject to its command.[124] Some courts do not give *Lucas* any effect, stating either that the Supreme Court's holding did not change preexisting law, that state (not federal) law applies, or that the regulation at issue fits within Justice Scalia's exception for nuisances and customary property rights.[125] The end result of this review indicates that the *Lucas* decision has not had a major impact on the state courts and has not resulted in more than a trivial number of constitutional invalidations of state and local regulations.

C. Dolan v. City of Tigard

This case involved Florence Dolan's plans to expand her hardware business in Tigard, Oregon.[126] The City of Tigard had adopted a comprehensive plan that noted that flooding had occurred at Fanno Creek near Dolan's property.[127] The plan recommended a number of improvements to the creek basin and also suggested that the floodplain be kept free of structures and preserved as a greenway to limit flood damage.[128] Tigard had adopted a plan for building a pedestrian/bicycle path to provide an alternative to automobile use and requiring development in the central business district to dedicate land for the path.[129] The Dolans owned a family hardware store on a 1.67 acre parcel and, consistent with the Tigard's zoning ordinance, planned to replace the existing structure with a 17,600-square-foot store to be built on the western side of the lot.[130] The new structure would double the size of the existing building and would require paving an area to accommodate a thirty-nine space parking lot.[131] Tigard's planning commission approved construction of the store building but it

123. *See* Wilson v. Commonwealth, 597 N.E.2d 43 (Mass. 1992) (holding that *Lucas* does not apply to a delay in the administrative process for approval to build a protective wall).

124. Another category of state cases rejects the regulatory takings theory on grounds that the landowner bought the parcel knowing of its regulatory limitations. *See, e.g.*, Community of Concerned Citizens, Inc. v. Union Township Bd. of Zoning Appeals, 613 N.E.2d 580 (Ohio 1993).

125. *See, e.g.*, Stevens v. City of Cannon Beach, 835 P.2d 940 (Or. Ct. App. 1992), *aff'd*, 854 P.2d 449 (Or. 1993), *cert. denied*, 114 S. Ct. 1332 (1994) (holding that denial of permission to build sea wall near beach did not take property interests because state customary law recognized public beach access rights long before landowner purchased).

126. The U.S. Supreme Court's decision recites most of the essential facts about the case. *See* 114 S. Ct. 2309 (1994). *See also* L. Watters, Dolan v. City of Tigard: *Introduction and Decision*, 25 ENVTL. L. 111 (1995).

127. *Dolan*, 114 S. Ct. 2309, 2313 (1994).

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.*

added conditions requiring the Dolans to remove a roof sign and dedicate land for a greenway and a pedestrian/bicycle path.[132] The land dedication requirement totalled about 7000 square feet of the lot or about ten percent of its area.[133]

Dolan appealed the planning commission's decision to the Oregon Land Use Board of Appeals ("LUBA") which upheld the two dedication requirements by finding that a "reasonable relationship" existed between the impact of the proposed development and both land contributions.[134] The Oregon Court of Appeals affirmed LUBA's conclusions that the correct test to be applied in this case was the Oregon precedent requiring a "reasonable relationship" between developmental impact and the conditions that may be attached.[135] The Oregon Supreme Court concurred,[136] concluding that the "reasonable relationship" test was not abandoned by the Court in *Nollan* and that the conditions imposed on the Dolans bore an essential nexus to the site and the proposed building.[137]

Once again, a five-to-four decision of the Supreme Court considered the development exactions and ruled that the Oregon practice violated the Fifth Amendment's Takings Clause.[138] Writing for the majority,[139] Chief Justice Rehnquist held that although the *Nollan* case required an "essential nexus" between the permit condition and a legitimate state interest, such a connection existed here with regard to the purposes of flood control and the reduction of traffic congestion.[140] The real import of the decision was its discussion of the required relationship between the city's conditions and the impact of the proposed redevelopment project.[141] For Fifth Amendment purposes,

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132. *Id.* at 2314. *See* 20 Or. LUBA 411, 413 (1991).

133. *Dolan*, 114 S. Ct. at 2314.

134. 20 Or. LUBA 411 (1991); 22 Or. LUBA 617 (1992).

135. *Dolan*, 114 S. Ct. at 2315; Dolan v. City of Tigard, 832 P.2d 853, 855 (1992). The Court of Appeals held that prior Oregon decisions had adopted this test under the Oregon Constitution as defined in prior state decisions. 832 P.2d at 355; *see* Hayes v. City of Albany, 490 P.2d 1018 (Or. Ct. App. 1971). The court also relied on a recent Ninth Circuit opinion interpreting the requirements of the Fifth Amendment of the federal Constitution as supporting the same result. 832 P.2d at 355; *see* Commercial Builders v. Sacramento, 941 F.2d 872 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 1997 (1992).

136. 854 P.2d 437 (Or. 1993), *rev'd*, 114 S. Ct. 2309 (1994).

137. *Id.* at 443.

138. *Dolan*, 114 S. Ct. at 2321.

139. The majority in *Dolan* was composed of Chief Justice Rehnquist and Justices Kennedy, O'Connor, Scalia, and Thomas.

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

141. Chief Justice Rehnquist stated this proposition in the following fashion,

> [T]he second part of our analysis requires us to determine whether the degree of the exactions demanded by the city's permit conditions bear the required relationship to the projected impact of petitioner's proposed development.

Id. at 2318. Due to their greater experience with this area of law, the Court examined the tests enunciated in state court opinions across the nation. *Id.* at 2318-19. These

the city's exactions must bear a "rough proportionality" to the impact of the proposed project.[142] The implicit meaning of this relational test is that any exaction or dedication not bearing such a rough proportionality would violate the Takings Clause and consequently be unconstitutional.[143]

In addition to announcing this new constitutional standard, Chief Justice Rehnquist also insisted that municipalities make "some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development."[144] Within the context of the controversy at issue in *Dolan*, the Court found that the city had failed to demonstrate the required reasonable relationship for either the floodplain easement or the pedestrian/bicycle pathway.[145] While it may be argued that the significance of the *Dolan* holding is limited to the specific circumstances of the case—an individual adjudicative determination and the required transfer of property to the city—the case is undoubtedly an attack upon the general support accorded government land-use control programs and their usual presumptive constitutionality.[146] At the very least, Chief Justice Rehnquist's opinion suggests the need for new governmental procedures designed to more accurately measure individual

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decisions ranged from the "very generalized statements" (supporting exactions in New York and Montana), *id.*, to the "reasonable relationship test"(an intermediate position in Nebraska), to the "specifically and uniquely attributable" test (limiting exactions in Illinois). *Id.* at 2319. In a conclusory fashion, Chief Justice Rehnquist stated that the "reasonable relationship" test "is closer to the federal constitutional norm than those previously discussed." *Id.* However, because the term "reasonable relationship" was "confusingly similar" to the low-level due process/equal protection scrutiny required under the Fourteenth Amendment, the Court chose to adopt a new, and possibly more demanding, test termed "rough proportionality." *Id.* By avoiding "confusion" with the low-level rational basis due process test, the majority also managed to shift the burden of proving the existence of the required relationship from the challenging landowner to the defending municipality. *Id.* at 2320. Both dissenting opinions objected to this change in the prevailing constitutional law principles. *Id.* at 2329-30 (Stevens, J., dissenting), 2331 (Souter, J., dissenting).

142. *Id.* at 2319.

143. *Id.* at 2319-20.

144. *Id.*

145. *Id.* at 2322.

146. Some commentators have minimized the impact of *Dolan* in their analyses. For instance, Professor William Funk has written that,

> [T]he thrust of my analysis has been to minimize the effect of *Dolan*. This is not just wishful thinking; it is the clear tenor of the decision itself. The terms of the decision distinguish the conditions in *Dolan* from ordinary land use regulation, both by reason of the dedications of property and the preconceived conditions before any development was planned. Even when the *Dolan* decision is applicable, the Court's rough proportionality test, both by its terms and as suggested by the Court's analysis of Tigard's conditions, is not particularly demanding. *And finally, Dolan will be mediated through state courts that are likely to make minimal changes to existing practices and understandings.*

William Funk, *Reading* Dolan v. City of Tigard, 25 ENVTL. L. 127, 141 (1995) (emphasis added). It is this final prediction that is the main focus of this Essay.

development impacts and to assign more proportional landowner burdens.

Reviewing the state court reception of the *Dolan* decision in the seven-month period following its announcement reveals the following patterns. *Dolan* was cited in a total of nineteen reported cases from June 24, 1994 through January 15, 1995.[147] Of the nineteen, only four decisions—two each in state supreme courts and appellate courts—contained any substantive discussion of *Dolan*.[148] Courts often found reasons to cite *Dolan* without using it as a basis for decision in the cases before them. For instance, in *Waters Landing Ltd. Partnership v. Montgomery County*,[149] the Maryland Court of Appeals considered the lawfulness of a county's retroactive imposition of a development impact fee authorized under state law. In approving the practice, the court explicitly rejected, as irrelevant, the application of *Dolan* since the Maryland practice at issue was a general legislative enactment and it did not require the landowner to deed portions of land to the government.[150] In this way, *Dolan* was confined to cases presenting land exaction conditions. Along similar lines, the Washington Supreme Court upheld a park and open space development fee requirement as being "reasonably necessary as a direct result of . . . proposed development"[151] and then cited *Dolan*, almost as if it were an afterthought, for the "rough proportionality" principle.[152] In other recent cases,

147. Of the reported cases citing *Dolan*, eight were in the state supreme courts, 10 were in the state appellate courts, and one was in state trial court.

148. The cases that were discarded usually failed to have anything but a brief citation to the *Dolan* decision. Sometimes these cases cited *Dolan* for a fundamental and general constitutional law principle. *See, e.g.*, Illinois State Toll Highway Auth. v. American Nat'l Bank & Trust Co., 642 N.E.2d 249 (Ill. 1994) (the Fifth Amendment is applicable to the states through the Fourteenth Amendment). Other decisions cited *Dolan*, quoting a sentence from the case without using it to decide the matter before the court. *See, e.g.*, Hensler v. City of Glendale, 876 P.2d 1043 (Cal. 1994) (paraphrasing the principle that an individualized assessment of development impact and its relation to a legitimate state interest is necessary in a taking analysis); State v. Heckman, 644 So. 2d 527, 530 (Fla. Dist. Ct. App. 1994) (quoting *Dolan*'s rough proportionality language); Francis O. Day Co. v. Montgomery County, 650 A.2d 303 (Md. Ct. Spec. App. 1994) (recognizing that a requirement placed upon a developer to address needs beyond those generated by the specific development "may run afoul of 'takings' jurisprudence"); Trimen Dev. Co. v. King County, 877 P.2d 187 (Wash. 1994) (citing the "rough proportionality" test); Luxembourg Group, Inc. v. Snohmish County, 887 P.2d 446 (Wash. Ct. App. 1995) (referring to the "rough proportionality" requirement in a footnote).

149. 650 A.2d 712 (Md. 1994).

150. *Id.* at 724. The Court of Appeals also believed that the Takings Clause of the U.S. Constitution did not apply to the facts of the case because the development fee or tax did not constitute a regulatory taking since it did not deny all economically beneficial or productive use of land or require a physical invasion of property. *Id.* In the court's view, the fee being imposed by the county did not have either of these regulatory effects. *Id.*

151. Trimen Dev. Co. v. King County, 877 P.2d 187 (Wash. 1994).

152. *Id.* at 194.

Dolan has materialized merely as a passing reference in dissenting opinions[153] or as being inapplicable.[154]

The *Dolan* precedent has appeared in a small number of recent state court decisions. In *Peterman v. State Department of Natural Resources*,[155] landowners sued the state, on constitutional takings and trespass theories, for the destruction through erosion of part of their beachfront property resulting from the state's improper construction of a boat launch and jetties. Within the unusual context of the case, the Michigan Supreme Court ruled that the state's power to make navigational improvements without compensating private property owners was limited. The court recognized the traditional support accorded the state in managing the state's waterways but it noted that "[T]he [uncompensated] loss of the property must be necessary or possess an essential nexus to the navigational improvement in question."[156] Justice Kallman gave *Dolan* an expansive reading, applying it and constitutional protection to situations in which the state's waterway management activities exceeded their legitimate public purposes.[157] In this way, the Michigan court found a constitutional—not tort-based—landowner's right to be free from physically damaging state conduct and effectively used the *Dolan* holding as punishment for taking harmful action without serving the public interest.

The most striking adoption of the principles articulated by Chief Justice Rehnquist in *Dolan* has occurred in the appellate courts in Oregon following the Supreme Court's decision. Two recent cases, *Schultz v. City of Grants Pass*,[158] and *J.C. Reeves Corp. v. Clackamas*

153. In Parking Ass'n of Georgia, Inc. v. City of Atlanta, 450 S.E.2d 200 (Ga. 1994), the majority of the Georgia Supreme Court upheld Atlanta's zoning ordinance, which required minimum barrier curbs and landscaping areas, ground cover, and trees for downtown and midtown commercial development. *Id.* at 203. The court applied a traditional and highly deferential Georgia due process standard of review that placed the burden of proof on the challenger. *Id.* at 202; *see* Gradous v. Board of Comm'rs, 349 S.E.2d 707, 709-10 (1986). The dissenting justices, however, argued against the prevailing *Gradous* test using a reference to the *Dolan* case in support of a new test, called the "benefit-extraction" test. *Id.* at 204 (Sears, J., dissenting).

154. In Third & Catalina Assocs. v. City of Phoenix, 895 P.2d 115 (Ariz. App. Div. 1 Aug. 18, 1994), a sprinkler retrofit ordinance was unsuccessfully challenged, and *Dolan* was held to be inapposite since the ordinance was for the protection of public health and safety and not for the acquisition of private property. The appellate court strongly supported the city's action and stated,

> The City may legitimately exercise its police power by requiring existing buildings used for human habitation to meet reasonable health and safety standards in order to protect the occupants. Private property may even be destroyed by a City without compensation to the owner when the destruction is necessary to protect the public.

Id. at 120.

155. 521 N.W.2d 499 (Mich. 1994).

156. *Id.* at 512.

157. *Id.* at 514-15.

158. 884 P.2d 569 (Or. Ct. App. 1994).

County,[159] presented similar issues concerning the imposition of conditions in exchange for granting regulatory permission for proposed land-use changes. In *Schultz*, the landowners sought a development permit allowing them to partition their 3.85-acre parcel into two building lots. Approval was granted subject to several conditions, including the transfer of a ten-foot right-of-way along the length of the two parcels and other roadway dedications.[160] On the other hand, *J.C. Reeves* involved a request to subdivide a 4.9-acre parcel into twenty-one building lots, approval of which was conditioned upon the landowner's construction of street improvements along the portion of a road abutting the parcel.[161]

In *Schultz*, the principal landowner complaint was that the city required the dedication of extensive portions of their property for road-widening in violation of the "rough proportionality" requirement of *Dolan*.[162] The appellate court examined the record developed by Grants Pass and concluded that it did not support the contention that the exaction was "related both in nature and extent to the impact of the proposed development."[163] The analysis was significant in two respects. First, the Oregon court rejected the argument that since the road dedications were required by general city ordinances, they were legislative decisions, and consequently not subject to the stringent demands of *Dolan*. The *Schultz* court ignored the method but rather focused upon the nature of exaction—a land dedication—to distinguish it from a generally applicable use restriction that would be entitled to a presumption of validity.[164] A state court wishing to apply *Dolan* expansively can follow *Schultz* and apply the heightened scrutiny to all land exactions whether imposed by general ordinance or by specific adjudicatory procedure.

Second, and more importantly, the *Schultz* case represents intrusive judicial review and second-guessing of a municipal process and developmental policy. The court took special offense to the city's technique of assessing the landowner's dedication responsibility in terms of the potential development of the partitioned tract rather than the actual proposed use of the parcel.[165] Placed in this context, the city's road dedication requirement appeared excessive and insufficiently related

159. 887 P.2d 360 (Or. Ct. App. 1994).

160. *Schultz*, 884 P.2d at 570.

161. *J.C. Reeves*, 887 P.2d at 360.

162. *Schultz*, 884 P.2d at 572. The landowner argued that there was "absolutely no relationship between the impacts of their proposed development and the imposition of the dedication requirement." *Id.*

163. *Id.* at 573 (citing Dolan v. City of Tigard, 114 S. Ct. 2309, 2320 (1994)).

164. *Id.*

165. The parcel in question contained a total of 3.85 acres and within the existing zoning district could accommodate up to 20 homesites of a permissible 8000 square feet per lot. *Id.* at 571. The city designed its highway dedication requirements based upon the transportation impact of this maximum development potential rather than the impact of the actual two-lot proposal. *Id.* at 573.

to the transportation impact reasonably caused by a less intensive use of the parcel.[166] Was the city trying to impose general city-wide transportation expenses upon one unfortunate landowner? Or was the city correct in projecting the traffic impacts of the most intensive, "worst case" example of permissible development? Within the meaning of *Dolan*, the Oregon court believed that the city had failed to establish the required connection between the land dedication condition and the harm to be caused by the proposed development.

In the *J.C. Reeves* case, decided a month after *Schultz*, the court also considered the validity of roadway land dedications required as a condition of developmental approval. The appellate court read *Dolan* to impose three new requirements: (1) the "rough proportionality" standard, (2) the allocation to government of the burden of showing Fifth Amendment compliance, and (3) the need for specific governmental findings supporting the exaction. With this interpretation of *Dolan*, the appellate court proceeded to evaluate, and reject, the county's determination of the subdivision-generated traffic and the need for the dedication.[167] The *J.C. Reeves* holding invalidates land transfer conditions that are not the result of a particularized impact assessment. Consistent with *Schultz*, a local government reference to a general requirement of the zoning ordinance as justifying the exaction was found to be insufficient.

If these two Oregon cases represent a trend in state court interpretation of *Dolan*, municipal exaction requirements will have to be individually customized following a judicially reviewable and defensible local government procedure. State and local governments will have to develop impact assessment processes that will produce defensible records of decision justifying a particular real property or cash exaction. Although mathematical precision has not been required by the Supreme Court, reviewing judges will be asked to give meaning to the constitutional concept of "rough proportionality" in individualized cases. General ordinance provisions assessing generic requirements on land development will be at least suspect and they will apparently not be satisfactory without careful tailoring to the impact of particular cases. Since *Dolan* represents the most recent Supreme Court takings decision, more time will be needed to determine the full impact of its holding.

166. The court was convinced that the landowners were being unfairly treated by the city and that the municipality had not convincingly established its case for the larger exaction. *Id.* at 572-73. "There is absolutely nothing in the record to connect the dedication of a substantial portion of petitioner's land, for the purpose of widening city streets, with petitioner's limited application." *Id.* at 573.

167. J.C. Reeves Corp. v. Clackamas County, 887 P.2d 360, 363-66 (Or. Ct. App. 1994).

CONCLUSION

The analysis of the aftermath of the *Nollan*, *Lucas*, and *Dolan* decisions of the U.S. Supreme Court reveals a number of significant insights concerning the actual implementation of Supreme Court constitutional doctrine. First, this research has reinforced the often-overlooked point that U.S. Supreme Court decisions are not self-executing. Commonly, Supreme Court holdings project a "symbolic" or media-created meaning that is at odds with the reality of litigation results. It is important to examine the application of Supreme Court principles in subsequent cases to understand, in a realistic way, the state of the law, and ultimately, the impact of the Supreme Court. Due to the special features of the regulatory takings area, constitutional doctrine must take its life and receive its meaning from the decisions of the state and not the federal courts. Consequently, while the Supreme Court may choose to announce broad or narrow points of federal constitutional policy, the state courts ultimately have the power to form the law by their judgments in individual cases.

Second, state courts apparently feel obliged to consider federal constitutional law in their rulings in regulatory takings cases. However, these panels mention U.S. Supreme Court decisions much more than they actually rely on them to justify specific case decisions. The vast majority of state cases often make trivial, passing references to the Supreme Court holdings under consideration in this research. When the takings theory is applied by the state courts, it is generally confined, not expanded, by the reviewing judges. The U.S. Supreme Court's doctrine has not been ignored by the state courts, but it generally has not been utilized as a basis for limiting community and state land-use and environmental regulation. The state courts give the impression that they have a strong interest in "managing" their jurisdictions without significant intrusion and interference by federal constitutional principles. This desire for state autonomy exists within the American system of federal constitutional supremacy and probably reflects the reality of a system of law largely implemented by the state courts.

Third, the three Supreme Court decisions under review have had less of an impact on the outcome of individual controversies than one may have expected. There has certainly been no rush to conservative economic constitutionalism across the country as an outgrowth of the *Nollan*, *Lucas*, and *Dolan* decisions. At least in this area of law, the Supreme Court and its increasingly pro-landowner ideology has not filtered down to control the outcome in individual cases. The statistical information derived from this research indicates that landowners have not been successful at using the state courts to limit restrictive regulation. In fact, the government overwhelmingly wins litigation. While the federal Supreme Court decisions might possibly be having subtle effects on the judgment and policies of state and local govern-

ment regulators, they are clearly not influencing state court judges to tilt their discretion toward property owners' interests. In the end, the realities of state litigation show judicial review not to be a fruitful pursuit for "over-regulated" landowners. Perhaps this explains the recent upsurge of interest at all levels of government in effecting legislative change to protect property owners' interests. Maybe it is the ineffectiveness of the Supreme Court to serve as an agent of change in the regulatory takings field that has led this debate from the courts to the legislatures—from the judicial forum to the purely political arena. After all, maybe the U.S. Supreme Court does not really matter.