RECENT DEVELOPMENTS IN THE LAW OF THE "TAKING ISSUE"

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The "Taking Issue"

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I. Introduction

Since the birth of the nation in 1789 when the states ratified the new Constitution, federal, state, and local governments have had the power, through the exercise of eminent domain, to condemn private property for public uses, subject only to the requirements they show the requisite degree of necessity and, most importantly, pay the owner just compensation. This power is an inherent attribute of sovereignty and is variously referred as the power of expropriation and the power to "take" property. Thus, if a government wishes to acquire land for a highway, a city hall, or a park, it can condemn that property without violating the Fifth Amendment, so long as it pays the owner just compensation. For over 130 years, most people thought that the Takings Clause "reached *only* a 'direct appropriation' of [the owner's possession],[1]" based on the exercise of the power of eminent domain.

The "Taking Issue" arises when a unit of government enacts a regulation that harshly restricts the uses to which a property can be put and, often, drastically reduces its fair market value, but does not formally institute proceedings in eminent domain. The "issue" is whether this action is a permissible regulation of private property under the police power, or whether it amounts to a "taking" of private property that must therefore be accompanied by the payment of just compensation. It is one of the most important and controversial constitutional issues in the field of the law of planning and urban development. Its doctrinal roots go back to the early days of the Republic, when the Bill of Rights was ratified in 1791. These roots were fertilized by late nineteenth century decisions of the U.S. Supreme Court, and the doctrine emerged in the 1920's in Justice Holmes' epigrammatic decision in *Pennsylvania Coal Co. v. Mahon*,[2] in which he held that the provisions of the Fifth Amendment decreeing that no "private property shall be taken for public use without just compensation" applied to circumstances where the government regulated private property harshly, but did not exercise the

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[1] *Lingle v. Chevron U.S.A. Inc.*, 545 U.S. ___, 125 S. Ct. 2074 (2005)

[2] 260 U.S. 393 (1922)

power of eminent domain, because the effects of this regulation were, in many ways, similar to a condemnation, except that it had not been accompanied by just compensation. The decision was epigrammatic because Justice Holmes' germinal statement, "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking,[3]" left unclear the circumstances under which the Court would conclude that a taking had occurred. Since then, the Supreme Court of the United States has sought to articulate what types of action went "too far." To put it another way, it has attempted, to greater or lesser degrees of success, depending on the views of the analyst, to create a clear and internally consistent conceptual scheme that would determine at what point a regulation crosses the line separating permissible regulation of private property from an unconstitutional taking of private property for which just compensation must be paid. At its heart, the analysis that follows sets out the results of the search.

These efforts have been complicated in the last twenty-five years by divisions within the Court between the liberal/centrist wing, led formerly and influentially by Justice Brennan and now, by Justice Stevens, and the conservative wing, led by Justices Rehnquist and Scalia. Many of the decisions have been by a deeply divided court, such as was the case with one of the core decisions, *Penn Central Transp. Co. v. New York City,*[4] and three important recent cases, *Palazzolo v. Rhode Island*,[5] *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*,[6], and *Kelo v. City of New London.*[7]. A fourth important decision, which will be discussed in this article, *Lingle v. Chevron U.S.A, Inc.,*[8] was unanimous. (See also, *Brown v. Legal Foundation of Washington*[9].) Because of these different points of view, it is difficult to predict how the court will decide the issues that a particular appeal presents, especially with the appointment of two new members of the Court in 2005 and 2006.

In 1995, pursuant to its "Contract with America," the Republican leadership in the House and the Senate introduced bills that would require the federal government to compensate landowners whose property values have been reduced a defined

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[3] *Pennsylvania Coal Co. v. Mahon*, 260 U.S. at 415 (1922).
[4] 438 U.S. 104 (1978)
[5] 533 U.S 606 (2001)
[6] 535 U.S. 302, 122 S. Ct. 1465 (2002)
[7] 545 U.S. ___, 125 S. Ct. 2655 (2005)
[8] 545 U.S. ___, 125 S. Ct. 2074 (2005)
[9] 538 U.S. 216 (2003)

percentage as a result of the application of certain types of legislation. The House bill passed, but a somewhat different Senate alternative never made it out of the upper house. The proponents of these bills and property rights advocates in state legislatures across the country have argued that the Fifth Amendment to the U.S. Constitution, as interpreted by the U.S. Supreme Court, protects private property owners against a reduction of value occasioned by statutes and ordinances. More recently, the Supreme Court's decision in *Kelo v. City of New London* [10] generated a storm of criticism and several bills in Congress seeking to limit the decision's impact. In that case, the Supreme Court upheld the power of a city to condemn property for the purposes of economic development and urban revitalization against a challenge based on the argument that such a purpose did not satisfy the "public use" requirement of the Fifth Amendment, because neither the buildings being condemned nor the area in which they were located could be considered "blighted."

These political developments at the national level demonstrate the scope and seriousness of national concern over the "Taking Issue:" the extent to which the Constitution protects landowners against legislation that drastically reduces the value of their property without compensating them for the loss in value. Over twenty states have passed some form of legislation that either (1) requires the state attorney general or a natural resource agency to prepare a "takings impact" statement before a statute becomes effective that evaluates the likelihood of a taking, or (2) provides for compensation to owners for losses occasioned by restrictive regulation of their property.[11] In November 2004, Oregon voters approved Ballot Measure 37 which, in substance, required that state and local governments that had enacted land use regulations that reduced the property values of properties subject to them had to either compensate the owners for the reduction in value or withdraw the laws. In October 2005, a lower court held that the ballot was improperly drafted and enjoined its enforcement. The Oregon Supreme Court subsequently stayed the enforcement until it had the opportunity to review the case.

The "Taking Issue" has moved to center stage in legislatures around the country, along with limitations on administrative regulations, the barring of unfunded mandates,

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[10] 545 U.S. ___, 125 S. Ct. 2655 (2005)

[11] See Mandelker, Daniel R., *Land Use Law* (Charlottesville, Va.: LexisLaw Publishing, (5th ed. 2003) Section 2.38. See also the web site of Defenders of Property Rights: www.defendersproprights.org/.

and the pruning back of some of the nation's basic laws that limit private activities that adversely affect the environment. But what has the U.S. Supreme Court said about the "Issue" in recent years? As a starting point, Justice Souter, speaking for a unanimous court in 1993, wrote:

> [Our] cases have long established that mere diminution in the value of property, however serious, is insufficient to demonstrate a taking. See, e.g., *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926) (approximately 75% diminution in value); *Hadacheck v. Sebastian*, 239 U.S. 394 (1915) (92.5% diminution).[12]

What elements other than reduction in value are part of the Supreme Court's conceptual scheme for drawing the line between legitimate exercises of the police power that have incidental impacts on property values, on the one hand, and extremely invasive or harsh regulations that result in a "taking" that requires the government to compensate the owner for the value of the property interest acquired, on the other?

As legislatures work through the costs and benefits of the spate of new laws, this analytical framework will be shaping much of the discussion, as legislators decide whether it is appropriate, wise, and legal for them to offer more compensation than the constitution requires. Furthermore, urban planners must understand the broad outlines of the "Taking Issue" because it hovers over the deliberations of state and municipal legislators and proceedings of Zoning Hearing Boards, as they go about the business of enacting and interpreting laws that regulate land use and protect the environment. A judicial finding that a law, ordinance, or administrative decision constitutes a "taking" may mean that the particular government – and, in some cases, the government representatives themselves[13] – are liable for a substantial amount of money by way of compensation for the property taken or for deprivation of the property owner's federally protected civil rights. The two most recent opinions of the U.S. Supreme Court on the Taking Issue -- *Tahoe-Sierra Preservation Council, Inc.*[14] (2002) and *Lingle*[15]

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[12] *Concrete Pipe and Products of Calif., Inc. v. Construction Laborers Pension Trust for Southern Calif.*, 508 U.S. 602, 643 (1993)

[13] See, Mandelker, Daniel R., *Land Use Law* (5th ed. 2003), Sections 8.34 to 8.38

[14] 535 U.S. 302 (2002)

(2005) – have clarified many of the elements of Taking doctrine. A third, *Kelo* (2005)[16], addressed the nature and scope of the "public use" requirement in the Fifth Amendment and essentially continued existing precedent. It is therefore timely to reexamine this conceptual scheme, in light of those decisions.[17]

Scholars and practicing lawyers have created a small library of books, law review articles, and more ephemeral publications ranging from newsletters to e-mail messages that address the "Taking Issue." A good stating point is The Taking Issue, published by the U.S. Council on Environmental Quality in 1973.[18] Other authoritative analyses include *Land Use Law*,[19] by Professor Daniel R. Mandelker, *Taking Sides on Takings Issues: Public and Private Perspectives*,[20] edited by Thomas E. Roberts, *Taking Sides on Takings Issues: The Impact of Tahoe-Sierra*,[21] also edited by Thomas E. Roberts, and *American Planning Law: Land Use and the Police Power*, by Norman Williams and John M. Taylor.[22] The analysis that follows focuses on the decisions of the U.S. Supreme Court.

II. General Principles under the U.S. Constitution

The Fifth Amendment to the U.S. Constitution provides "nor shall private

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[15] *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. ____, 125 S. Ct. 2074 (2005)

[16] *Kelo v. City of New London,* 545 U. S. ___. 125 S. Ct. 2655 (2005)

[17] See, generally, Roberts, Thomas E., editor, *Taking Sides on Takings Issues: Public and Private Perspectives* (Chicago: American Bar Ass'n Section on State and Local Government Law, 2002), and Roberts, Thomas E., editor, *Taking Sides on Takings Issues: The Impact of Tahoe-Sierra* (Chicago: American Bar Ass'n Section on State and Local Government Law, 2003)

[18] Bosselman, Frederick, David Callies, and John Banta, *The Taking Issue* (Washington, D.C.: U.S. Government Printing Office, 1973).

[19] Mandelker, Daniel R., *Land Use Law* (Newark, N.J.: Matthew Bender & Company: (5th ed. 2003) pp. 2-1 to 2-45 and 2-64 to 2-70.

[20] Roberts, Thomas E., editor, *Taking Sides on Takings Issues: Public and Private Perspectives* (Chicago: American Bar Ass'n Section on State and Local Government Law, 2002),

[21] Roberts, Thomas E., editor, *Taking Sides on Takings Issues: The Impact of Tahoe-Sierra* (Chicago: American Bar Ass'n Section on State and Local Government Law, 2003)

[22] Williams, Norman, and John M. Taylor, *American Land Planning Law: Land Use and the Police Power* (Chicago: Thompson/West Pub. 3d ed. 2003) with annual supplements). pp. 93-217

property be taken for public use without just compensation.[23]" During the early years of the United States' history, this safeguard applied only to actions of the federal government but, in a 1897 decision, *Chicago, Burlington & Quincy Ry. v. Chicago*,[24] the Supreme Court held that its provisions were to be incorporated into the Due Process clause of the Fourteenth Amendment so that they become applicable to actions of state and local governments across the land.

The original intent of the amendment was to give citizens redress for actual physical occupation of their properties when they were taken, for example, to house troops or for roads, parks, and utility purposes. That intent is now institutionalized in all states through eminent domain statutes that provide a process for valuation and compensation when government bodies take land for a public use or purpose. The United States Supreme Court has interpreted the "public use" clause requirement very broadly, however, so that there are virtually no legal or constitutional limitations on the use of the power of eminent domain, other than that there be just compensation.[25] In 1984, in *Hawaii Housing Auth. v. Midkiff*, the Supreme Court upheld, again unanimously, the Hawaii Land Reform Act of 1967's provisions that authorized the Housing Authority to condemn the land of large property owners and sell it to individuals, solely for the purpose of ending the oligopolistic land tenure structure in Hawaii. The Court held that the "public use" requirement of the Fifth Amendment was "coterminous with the scope of the sovereign's police powers,[26]" that the "role for the courts to play in reviewing a legislature's judgment of what constitutes a public use . . . is an extremely narrow one.[27]" and that the Court will defer to the exercise of legislative judgment so long as it is "rationally related to a conceivable public purpose,[28]". or if the "legislature *rationally could have believed* that the [Act] would promote its objective [italics in the

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[23] U.S. Constitution, Amendment V.

[24] 166 U.S. 26 (1897)

[25] See, e.g., *Berman v. Parker*, 348 U.S. 26 (1954), unanimously upholding the power of the District of Columbia Redevelopment Land Agency to condemn, as part of its urban renewal program, a department store that was located in a blighted area but was, itself, in good condition, and sell or lease it to another private entity. The court stated: "Subject to specific constitutional limitations, when the legislature has spoken, the public interest has been determined in terms well-nigh conclusive. In such cases, the legislature, not the judiciary, is the main guardian pf the public needs to be served by social legislation. . ")

[26] *Hawaii Housing Auth. v. Midkiff*, 467 U.S. 229 (1984), at p. 240

[27] *Ibid.*

[28] *Hawaii Housing Authority,* at p. 241

original].[29]" The Supreme Court recognized that legislatures have a wide discretion to determine whether a particular action served a sufficiently important public purpose to support the exercise of eminent domain.

Most importantly, in June 2005, a deeply divided U. S. Supreme Court held that private properties that were not considered to be "blighted" could be condemned for the purpose of implementing a well-considered economic development plan. *Kelo v. City of New London*[30]. In *Kelo*, the plaintiffs' homes were located in an area designated in New London's integrated Development Plan for the Fort Trumbull area development, which included provisions for a hotel, marinas, a museum, research and development office space, and other related uses. A state agency had designated New London a distressed city, and various state agencies had approved the Fort Trumbull development plan. The Plan was a central component of the city's efforts to revitalize its economy, and there was no evidence of an illegitimate purpose in the case.[31] Justice Stevens, writing for five centrist members of the Court, concluded:

> Given the comprehensive character of the plan, the thorough deliberation that preceded its adoption, and the limited scope of our review, it is appropriate for us, as it was in *Berman,* to resolve the challenges of the individual owners, not on a piecemeal basis, but rather in light of the entire plan. Because that plan unquestionably serves a public purpose, the takings challenged here satisfy the public use requirement of the Fifth Amendment.[32]"

Were these three important factors not present, or if it appeared that "one person's property [had been] taken for the benefit of another private person without a justifying public purpose," the exercise of the power of eminent domain would not be for a public use,[33] and would been invalid under the Fifth Amendment.

In recent years, some state courts have revisited the "public use" requirement. The Michigan Supreme Court, for example, in *County of Wayne v. Hathcock,* overruled

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[29] *Hawaii Housing Authority,* at p. 242
[30] 545 U.S. ___, 125 S. Ct. 2655 (2005)
[31] *Kelo*, 545 U.S. at p. ____, 125 S. Ct, 2655, at p. 2661
[32] *Kelo,* 545 U.S. at. p. ____, 125 S. Ct. 2655 at p. 2665
[33] *Hawaii Housing Auth.*, 467 U.S. 228, at p. 245

Poletown Neighborhood Council v. Detroit,[34] and held that a redevelopment scheme that condemned land owned by one set of landowners and transferred it to another set for the purpose of developing an industrial park, did not constitute a public use within the meaning of the term in the Michigan Constitution.[35]

In summary, then, the lesson of *Berman*, *Midkiff*, and *Kelo*, for the purposes of this analysis is that the Supreme Court has been highly deferential to the decisions of legislative bodies as to what is a legitimate public purpose for the exercise of the power of eminent domain.

Justice Stevens, in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*[36] distinguished between "physical takings" and "regulatory takings." In the first category, he placed both the acquisition of property by the use of eminent domain and actual physical appropriation without the exercise of eminent domain. As an example of the latter, he gave *United States v. Causby*,[37] where the governments' planes repeatedly invaded the private air space over a chicken farm as they made their approaches to an airport leased by the U.S. government, much to the horror and detriment of the terrified chickens in the coop.[38] In the words of Justice O'Connor, speaking for the Court in the unanimous *Lingle* decision, "The paradigmatic taking requiring just compensation is a direct government appropriation or physical invasion of private property,[39]" where the government acquires private property for a public purpose, whether the acquisition is the result of a condemnation proceeding or of a physical appropriation.[40] For instance, if a

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[34] 410 Mich. 616, 304 N.W. 2d 455 (1981)

[35] See, *County of Wayne v. Hathcock*, slip opinion, July 30, 2004, http://courtofappeals.mijud.net/DOCUMENTS/OPINIONS/FINAL/SCT/20040730_S124070_176_wayne_co7apr04_op.pdf, consulted August 31, 2004

[36] 535 U.S. 302 (2002)

[37] 328 U.S. 256 (1946)

[38] See, also, *Portsmouth Co. v. United States*, 260 U.S.327 (1922), in which the Court held that U.S. military installations' repeated firing of naval weaponry over a resort hotel that lay between the guns and the target constituted a taking, and *United States v. Cress*, 243 U.S. 316 (1917) where the Court held that repeated floodings of land caused by a water project constituted a taking..

[39] *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. ___, 125 S. Ct. 2074, 2081

[40] See, *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2003)

state highway department condemns land for a highway, or a city, for a park, it will follow the procedures prescribed for the exercise of eminent domain, determine the value of the value of the property taken, and pay just compensation. Or, when the U.S. government seized the nation's coal mines after World War II in order to avert a national strike by the coal miners, it was deemed to be a taking.[41] The fundamental purpose of this requirement is to prevent 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."[42] The funds used to compensate the individual property owners whose property is taken, are raised from broadly based taxes or other forms of general revenue.

These are, without further analysis, "physical takings." As Justice Stevens noted in *Tahoe-Sierra Preservation Council, Inc.*, in situations where the government acquires an interest in land, either through condemnation, physical occupation, or repeated physical invasion, there is a strong justification, and in fact, a need, for a bright line rule. He observed that physical takings are "relatively rare, easily identified, and usually present a greater affront to individual property rights.[43]" Acquisition of a property interest by a physical taking permits the government to use the property, to dispossess the owner from that part of the property that it has acquired, and limits the owner's right to exclude others.[44] The government "has a categorical duty to compensate the former owner [citation omitted], regardless of whether the interest taken constitutes an entire parcel or merely a part thereof."[45] Justice Stevens also pointed out that decisions involving physical takings are controlling only in such situations and are not precedent for cases involving regulatory takings,[46] such as are discussed below.

We have included this brief analysis of the constitutional issues that arise when a government exercises the power of eminent domain or physically appropriates a property interest, for the purposes of a full exposition of "taking" doctrines. The focus of this article, however, is on a separate issue, physical takings that arise because of a regulation of private property and "regulatory takings," to which we will now turn.

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[41] *United States v. Pewee Coal Co.*, 341 U.S. 114 (1951)
[42] *Armstrong v. U.S.*, 364 U.S. 40, 49 (1960)
[43] *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency* 535 U.S. 302, at p. 324
[44] *Ibid*, f.n. 19 at p. 324
[45] *Ibid*. at p. 322
[46] *Ibid. at p. 323*

As we have indicated above, in the last century, starting with its decision in *Pennsylvania Coal Co.*,[47] the U.S. Supreme Court interpreted the language of the Takings Clause so as to protect private property owners against stringent regulations that deprive their property of all or almost all of its value. This decision gave rise to the "Taking Issue" that concerns the question of whether a particular regulation goes beyond the realm of permissible regulation and constitutes a "taking" for which compensation must be paid. Divisions among the justices on several aspects of the "Taking Issue" make it difficult to be dogmatic about the elements of the Court's conceptual scheme. However, the general outlines of the various schools of thought are fairly clear. We will examine the doctrines that the U.S. Supreme Court has articulated, first, because they are important in and of themselves and second, because many state supreme courts follow them with considerable faithfulness in interpreting equivalent provisions of their state constitutions.

III. Ripeness, Exhaustion of Remedies, and Purchase subject to a Restrictive Regulation

There are three preliminary issues that we must address before moving to the details of Taking Doctrine. First, in most situations, landowners must have actually filed a development plan for their property and taken appropriate steps to secure development approval, before they will be permitted to make a takings claim in court. The case is "ripe for review" only after the relevant government agency has reached a final decision regarding the applications of land use controls to the subject property. *Palazzolo v. Rhode Island*[48] It is only in the most unusual of circumstances that a "taking" challenge to a land use control on its face will be heard if it involves no more than a speculative or potential land development project. *Agins v. City of Tiburon*,[49] *Williamson County Regional Planning Comm. v. Hamilton Bank of Johnson City*,[50] and *Pearson v. City of Grand Blanc*.[51] As Justice Kennedy explained in *Palazzolo v. Rhode Island,*[52]

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[47] 260 U.S. 393 (1922)
[48] 533 U.S. 606 (2001).
[49] 447 U.S. 255 (1980)
[50] 473 U.S. 172 (1985)
[51] 961 F.2d 1211 (6th Cir. 1992)
[52] 533 U.S. at p. 620-621.

> These cases stand for the important principle that a landowner may not establish a taking before a land-use authority has the opportunity, using its own reasonable procedures, to decide and explain the reach of the challenged regulation. Under our ripeness rules, a takings claim based on a law or regulation which is alleged to go too far in burdening the property depends upon the landowner's first having followed reasonable and necessary steps to allow regulatory agencies to exercise their full discretion in considering development plans for the property, including the opportunity to grant any variances or waivers allowed by law. As a general rule, until these ordinary processes have been followed, the extent of the restriction on property is not known and a regulatory taking has not been established. See *Suitum v. Tahoe Regional Planning Agency,* 520 U.S. 725, 736, and n. 10 (1997)

Second, plaintiffs must exhaust whatever state or local administrative remedies they may have, such as seeking a conditional use permit or a variance, before going to court. Where a legislature has provided such an administrative remedy, such as is the case, for example, when a landowner may apply to a Zoning Hearing Board for a variance from the strict application of the provisions of a zoning ordinance, the exhaustion of administrative remedies doctrine affords the administrative agency an opportunity to apply its special expertise and familiarity with the ordinance and the policies it embodies to the particular facts of the case, or to correct errors that may have been made in the matter. It may make unnecessary further review by the courts. In addition, the plaintiffs must have pursued whatever judicial appeals were available to them under state appellate rules.

Third, in the *Palazzolo* decision,[53] the Supreme Court resolved a final preliminary issue. It determined that a property owner was not deprived of the right to assert taking claims merely because of the fact that he bought the property after the establishment of the strict regulations of which he complains. Were the contrary principle, adopted by the Rhode Island Supreme Court in that case, to be the law, it "would work a critical alteration to the nature of property, as the newly regulated land-owner is stripped of the ability to transfer the interest which was possessed prior to the

[53] *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001)

regulation."[54] Thus, even if the property owner buys the property subject to restrictive regulations, presumably at a lower price than would have otherwise been the case, he may still challenge the constitutionality of these regulations.

IV. Principles Governing "Regulatory Takings"

A. Introduction

Where the government action that is being challenged is not a formal exercise of the power of eminent domain or the acquisition of a property interest, but an instance of non-possessory government activity where a regulation substantially limits the ability of a landowner to do what he wishes with the property, the Supreme Court has developed a four-fold conceptual scheme, for determining whether the regulation is a permissible exercise of the police power, on the one hand, or one that violates the precepts of the Fifth Amendment (as applied to the states through the Fourteenth Amendment), on the other hand so that it must be accompanied by just compensation. We will outline these elements here, and then analyze them in fuller detail in subsequent sections.

Justice O'Connor, speaking for a unanimous court summarized the four elements of the conceptual schemes in the 2005 *Lingle* decision.[55] The first applies where the government, by regulation, requires the owner to suffer a permanent physical invasion of her property. For instance, the Court held that a regulation that brought about a permanent physical occupation (such as the one cubic foot cable TV junction box whose installation landlords were mandated to allow) it is a categorical or *per se* regulatory taking for which there must be just compensation. See *Loretto v. Teleprompter Manhattan CATV Corp.*[56] In *Lingle*, Justice O'Connor characterized it as "categorical" because there is no requirement for a court to strike a balance among a number of actors, in contrast to the approach mandated in the third conceptual scheme discussed below.[57]

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[54] *Palazzolo*, 533 U.S., at p. 627

[55] *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. ___, 125 S. Ct. 2074, at p. 2081

[56] 458 U.S. 419 (1982)

[57] *Ibid., at p. 2081*. See also *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 322 (2003)

The second element applies to the situation where the regulation at issue permanently deprives an owner of all economically beneficial use of her land, or to put it another way, permits no productive or economically beneficial use of the land.[58] In *Lucas v. South Carolina Coastal Council*,[59] and confirmed in *Tahoe-Sierra Preservation Council Inc.*,[60] the Court also established this as a categorical or *per se* taking, in that such a regulation is a regulatory taking on its face, without further analysis.

The third element applies in those regulatory taking cases where the regulation neither requires the owner to suffer a permanent physical invasion of her property nor permanently deprives the owner of all economically beneficial or productive use of the land, but instead is an interference with property rights that "arises from some public program adjusting the benefits and burdens of economic life to promote the common good."[61] In such a case, the Court will engage in the type of "essentially ad hoc, factual inquiries" mandated by the 1978 *Penn Central* decision that are designed to allow careful examination and weighing of all the relevant circumstances.[62] For this element of the conceptual scheme, the Supreme Court has developed a much more elaborate, finely nuanced, and multi-factoral set of principles that balances relevant factual circumstances, the economic impacts of the regulation, the nature of the regulation, and the various pubic policies that are at play.

The fourth element applies to those situations where the government is imposing on the owner some form of exaction of an interest in real property as a condition to the granting of development permission, such as occurs when a municipality requires a developer to convey to it a site for future use as a park or a high school campus as a precondition to approving a residential development proposal.[63] It involves "a special application of the doctrine of unconstitutional conditions,"[64] We will address it later in this article.

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[58] *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. ___, 125 S. Ct. 2074, at p. 2081

[59] 505 U.S. 1003 (1992)

[60] 535 U.S. 302, at p. 330

[61] *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. ___, 125 S. Ct. 2074, at p. 2081

[62] *Ibid.*

[63] See, *e.g.*, *Nollan v. California Coastal Comm.*, 483 U.S. 825 (1987) and *Dolan v. Tigard*, 512 U.S. 374 (1994). The principles of this doctrine apply only in the special context of exactions. *Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999)

[64] *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. ___ at p., 125 S. Ct. 2074 at p. 2086-7 (2005)

In the following section, we address another important preliminary question: how to characterize the property interest at issue in the case.

B. Characterization of the Property Interest at Issue

A preliminary issue is whether the regulation being challenged affects a "property interest." Since the Fifth Amendment's protection against a taking without just compensation applies only to "property," it must be clear that the right being asserted by the plaintiff in a lawsuit is "property" in order to be entitled to constitutional protection. The Supreme Court has held, for instance, that a power company's interest in maintaining the water level of a navigable river at a certain height so as to maintain a power head, was not sufficiently bound up with reasonable expectations so as to constitute property for Fifth Amendment purposes. *United States v. Willow River Power Co.*[65] The court has also held that no property interest can exist in navigable waters. *United States v. Chandler-Dunbar Water Power Co.*[66] The states have title to the beds of navigable rivers, and the federal government has a navigation easement over both fresh and marine navigable waters. Owners of land along rivers and harbors cannot complain of regulations that limit what they can do with the bed of navigable waters.

Normally, the nature of the plaintiff's interest will be determined according to state law principles.[67] *Milens of California v. Richmond Redevelopment Agency*[68] However, the Third Circuit Court of Appeals and the majority of the Supreme Court appeared to reject Pennsylvania's characterization of the relevant property interests in the *Keystone Bituminous Coal Association v. De Benedictis*,[69] and to treat the issue as a matter to be decided under federal law. In his dissent in the case, Justice Rehnquist appeared to follow Pennsylvania's view of the property interests involved.[70] Clearly, this is one of the areas where there is a division of thought among the justices.

One example of a situation where an interest was held not to be "property," was

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[65] 324 U.S. 499 (1945)

[66] 229 U.S. 53 (1913)

[67] *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, at pp. 1016-17, f.n. 7 (1992),

[68] 665 F.2d 906 (9th Cir. 1992)

[69] 771 F.2d 707, 716 (1985), aff'd, 480 U.S. 470 (1987)

[70] See also Justice Scalia's dissent to the denial of certiorari *in Stevens v. City of Cannon Beach*, 114 S. Ct. 1332 (1994).

Commonwealth v. Alger,[71] a grand old case written by Judge Lemuel Shaw, Herman Melville's father-in-law and one of the craftsmen of the police power doctrine. As pertinent here, Judge Shaw held that Massachusetts followed the old English Common Law principle that the government had a navigation easement over the foreshore, or tidal flats, between the mean low water mark and the mean high water mark, held in trust for public uses such as fishing and navigation. Thus, in a state where that is still the law, a riparian landowner's title below the mean high water mark would be subject to the easement, and he would have no grounds for complaining about regulations that prohibit him from building to seaward of the mean high water mark.

Assuming that the Supreme Court finds that the asserted interest is a property interest, it must then decide what the nature of the property interest is: it must characterize the property interest.[72]

First, a property interest has a definitional dimension.[73] Is it a fee simple interest (the fullest type of interest under common law principles), a life estate, a leasehold, a remainder interest, an easement, or some other type of less-than-fee interest? Do the regulations limit or destroy a particular element in the bundle of rights that make up property, such as the right to occupy the property, the exclude others from it, the right to develop it, the right to use it as security for a loan, or the right to bequeath it to one's heirs? One would have thought that the right to sell property would be entitled to special protection, but the Supreme Court sustained the constitutionality of a statute that prohibited commercial transactions in eagle feathers but did not prohibit other uses of them, holding that it was not a taking even though it took away the owner's right to sell them. *Andrus v. Allard*[74]

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[71] 7 Cush. 53 (Mass. 1853)

[72] What we call the "characterization issue" has also been referred to as the "denominator issue," referring to the question of how the denominator of the fraction used to determine the per cent reduction caused by the regulation should be defined, see, e.g., Callies, David L. and Calvert G. Chipchase, "*Palazzolo v. Rhode Island*: Ripeness and "Notice" Rule Clarified and Statutory "Background Principles" Narrowed," 33 *Urban Lawyer* 907, 917, or the "segmentation issue." See, e.g., Mandelker, Daniel R., *Land Use Law* (Newark, N.J.: Matthew Bender & Company: (5th ed. 2003) pp. 2-24 to 2-28.

[73] *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 331 (2003)

[74] 444 U.S. 51, 66 (1979)

Second, a property interest has a spatial dimension:[75] What is its areal extent and location, measured in metes and bounds, its height, as limited by height limitations, and its depth in the ground, as limited by depth limitations? A typical issue that arises with respect to this dimension is whether a zoning regulation that limits the use of a portion of the parcel of land such as a segment that lies in a flood plain, is to be viewed as imposing restrictions on the property as a whole or as slicing out that part of the property that lies within the flood plain and subjecting it to special regulation. Clearly, if the Court defines the property interest as the whole parcel, the impact of the flood plain zoning regulation on the property as so defined is less, proportionally, than it would be if the court defined the relevant property interest as only that portion that lay within the flood plain. Similarly, if a zoning ordinance imposes a height limitation on building construction, are we to view it as limiting the use of the property as a whole, or are we to think of it as separating that part of the building envelope above the height limitation from that below it, and preventing any use of the superposed property interest. The regulatory impact on the property interest defined as the air rights alone is proportionately much greater that it would be on the full property interest.

Third, a property interest has a temporal dimension.[76] Is it a permanent restriction, or is it in effect for a limited period of time? If it is for a limited period of time, is the court to divide the property interest into two parts: the one defined by the period of the limitation, and the other by the time extending from the time the regulation expires, and then evaluate the impact on the first part alone? This issue arises when a municipality takes time to decide whether or not to grant permission to the property owner to develop his land. Are these delays "normal" or excessive? In *Tahoe-Sierra Preservation Council, Inc.*, Justice Stevens answered this question, in dictum, stating, "Mere fluctuations in value during the process of governmental decision-making, absent extraordinary delay, are incidents of ownership. They cannot be considered as a taking in the constitutional sense." Justice Rehnquist recognized, in his dissent in *Tahoe-Sierra Preservation Council, Inc.*, that temporary taking doctrines "did not apply 'in the case of normal delays in obtaining building permits, changes in zoning ordinances, variances, and the like.' "[77] "The right to improve property of course is

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[75] *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 332 (2003)

[76] *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 332 (2003)

[77] *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302,

subject to reasonable exercise of state authority, including the enforcement of valid zoning and land-use restrictions. . . . . Thus, the short term delays attendant to zoning and permit regimes are a fundamental feature of state property law and part of the landowner's reasonable investment-backed expectations." [78] In *Tahoe-Sierra Preservation Council, Inc.*[79], in which the U.S. Supreme Court upheld a 32-month building moratorium imposed by the Tahoe Regional Planning Agency to give itself time to develop a regional plan for protecting the fragile resources of Lake Tahoe, against a facial challenge that it was a taking *per se*. All nine justices would agree that, where moratoria have long been the practice in a particular jurisdictions, they would be part of "background principles of state property law," and therefore not subject to the *per se* rules of *Lucas*. In Justice Rehnquist's words, they would be an implied limitation of the exercise of property rights, to which the buyer would be subject, and therefore not constitutionally defective. By contrast, in eminent domain proceedings, the duty to compensate exists even where the interest taken is a temporally limited partial interest, as would be the case where the government condemned a leasehold interest.[80] It would also exist if the acquisition was temporary, as was the case in *United States v. General Motors Corp.*,[81] when the government condemned a leasehold interest for a fixed number of years.

Fourth, a property interest has a functional dimension. How is it being used: as a farm, as a home, as a store, as a factory? What uses does the challenged regulation prohibit? What uses does it permit? Is the cumulative effect of different components of the regulations for a permitted use so restrictive that they make the development of the use economically impossible?

1. The majority view: the "whole parcel rule"

In each case, the Supreme Court must define exactly the nature of property interest at issue (the fee simple interest, a leasehold, the right to use, sell, develop, etc.), the geographic limits of the property, the time dimension of the property

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351-352 (2003) (dissent)

[78] *Ibid.*, at p. 352

[79] See, *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002)

[80] *Ibid.*, at p. 322

[81] 323 U.S. 373 (1945)

interest, and the nature and purposes of the restrictions on the use and enjoyment of the property. The Justices of the Supreme Court hold two views on this issue. The first, followed by the majority in several recent decisions, such as *Penn Central Transportation Company v. New York City*,[82] and *Keystone Bituminous Coal Ass'n v. DeBenedictis*,[83], and *Tahoe-Sierra Preservation Council, Inc*[84], holds that the relevant property interest will almost always be the full fee simple interest -- the sum of all the property rights in the "bundle" that constitutes property. This includes the rights to sell a parcel, bequeath it, rent it, remove coal from deep below its surface (*Keystone Bituminous Coal Ass'n*), and lease the air rights above Grand Central Terminal in New York City (*Penn Central Transportation Co.*), etc. It will cover the full geographical extent of the property, not just the side yards, air space, subterranean space, or one part of an undivided tract. Justice Souter, writing for a unanimous court (i.e.: including Justices Scalia, Rehnquist, and Thomas), embraced this view in *Concrete Pipe and Products of Calif., Inc. v. Construction Laborers Pension Trust of Southern Calif.*,[85] at least for those governmental actions that do not result in a physical invasion of the property or a permanent appropriation of it. As Justice Brennan stated for the majority in *Penn Central*:

> "Takings" jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole . . .[86]

2. The minority view: the "less-than-fee" rule

The minority view is typified by Justice Rehnquist's statement in his opinion in *Dolan v. City of Tigard*,[87] and his dissents in *Penn Central* and *Keystone Bituminous*, that the operative property interest may be some lesser part of the bundle of property

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[82] 438 U.S. 104 (1978)
[83] 480 U.S. 470 (1987)
[84] 535 U.S. 302, 122 S. Ct. 1465 (2002)
[85] 508 U.S 602, 113 S. Ct. 2264 (1993)
[86] *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978), quoted with approval in *Tahoe-Sierra Preservation Council, Inc.*, supra, at p. 327. See, also, Justice Brandeis' dissent in *Pennsylvania Coal Co. v. Mahon, supra.*
[87] 512 U.S. 374, 114 S. Ct. 2309 (1994)

rights, the right to use the air rights above the terminal (*Penn Central*), or the right to develop one geographical segment of a tract. The three dissenters in the *Sierra-Tahoe Preservation Council, Inc.* decision, Justices Rehnquist, Thomas, and Scalia, took the position that the moratorium (which was, in their view of the facts, more than five years in duration, because they tacked the two years' delay resulting from litigation on to the original moratorium) was the practical equivalent the condemnation of a time-limited leasehold interest.[88] They were not influenced by the fact that the moratorium did not give the government a possessory interest in the land, as a lease would have. They would characterize the property as an interest in land with a temporal duration equal to the length of the moratorium together with the time needed to resolve the legal issues it raised. Since property owners were not able to develop their land during that period, there was the equivalent of an appropriation of property of a temporally limited property interest that amounted to a taking.

As we have seen, Justice Brennan took the position in the *Penn Central* case that the relevant property interest was the full fee simple interest of the railroad in the entire terminal property, including the Terminal Building itself, the underground facilities, and the air rights: in short, the entire city block. The effect of the landmark restrictions was to prevent the realization of only a fraction of this bundle of property rights – the air rights -- and to permit the company to continue to use rest of the property for its original purpose. Justice Rehnquist, by contrast, found that the relevant property interest was the air rights that had been leased to the developer. The landmark restrictions had the effect of making them virtually, if not completely, valueless. Clearly, the equities supporting Penn Central's position were much stronger under Justice Rehnquist's characterization of the relevant property interest than they were under Justice Brennan's. The same can be said of the characterizations of the property interest of the majority and the dissent in *Keystone Bituminous*.

3. The significance of the choice of characterization principles

The following example illustrates the importance of the characterization issue. One of the major considerations that the Court takes into account in determining whether a particular regulation constitutes a Taking is the nature

[88] *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 343 ff (dissent) 2002)

and extent of its economic impact on the relevant property interest. The economic impact is measured by a fraction whose numerator is the fair market value of the property interest after regulation, and denominator, the fair market value of the property interest before regulation. – the so-called "before and after" test. Let us assume that a building that has been declared a historic landmark (with the result that no use can be made of the air rights that exist above it, even though they could be developed under the municipality's zoning ordinance, were it not a landmark) has a value of $20 million before regulation, and a value after regulation of $15. The air rights thus have a value of $5 million. Under the majority's characterization rules, the economic impact of the regulation would be measured as follows:

$$\frac{\text{the fair market value of the whole parcel after regulation}}{\text{the fair market value of the whole parcel before regulation}} = \frac{\$15 \text{ million}}{\$20 \text{ million}} = 75\% \text{ of the pre-regulation value}$$

The effect of the regulation is to reduce the value of the property interest by 25%.

Under the minority's characterization rules, the economic impact of the regulation would be measured as follows:

$$\frac{\text{the fair market value of the air rights after regulation}}{\text{the fair market value of the air rights before regulation}} = \frac{0}{\$5 \text{ million}} = 0$$

The effect of the regulation is to destroy completely the value of the property interest.

Several state and federal courts have faced this issue. For instance, in 1996, the Wisconsin Supreme Court, long a leader in the area of environmental and land use law, decided *Zealy v. City of Waukesha*,[89] involving a county shore land protection ordinance

[89] 548 N.W. 2d 528 (Wis. 1996)

that placed about 80% of a 10.4 acre tract of land in a highly restrictive "conservancy" district where only natural and agricultural uses were permitted. The owner could develop the rest for residential and commercial uses. The question was whether the court should evaluate the effect of the ordinance only on the land in the conservancy district, or whether it should evaluate its effect on the property as a whole. In a carefully reasoned opinion, the Wisconsin Court concluded that it would measure the impact of the ordinance on the property as a whole, citing *Penn Central*[90] and *Concrete Pipe and Products.*[91]

C. Element # 1 of the Conceptual Scheme: Where the regulation at issue requires the owner to suffer a permanent physical occupation or a repeated invasion of her property, it is a *per se,* or categorical, regulatory taking.

Justice O'Connor, in the *Lingle* decision, recognized that past decisions of the Supreme Court had created "two categories of regulatory action that generally will be deemed to be *per se* takings for Fifth Amendment purposes,[92]" citing *Loretto v. Teleprompter Manhattan CATV Corp.*[93] In this case, where the Court held that a state law requiring landlords to install one cubic foot cable junction boxes on the outside of their apartment buildings was a taking, even though their economic impact was minimal and may, in fact, have been positive. The New York City ordinance required owners of apartment buildings to permit cable television companies to install the boxes and provided only token compensation. Justice O'Connor characterized the regulation as requiring owners to suffer a permanent physical occupation of their property that constituted a regulatory taking because it destroyed the right to exclude others from that segment of their property. It should be noted that Justice Stevens, in *Tahoe-Sierra*, appears to have viewed this as an example of a physical appropriation that was in the same category as a routine exercise of the power of eminent domain, rather than as a regulatory taking. Since he joined in Justice O'Connor's opinion in *Lingle*, it is fair to conclude that he has modified his position on the point.

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[90] *Penn Central Transp. Co. v. New York City,* 438 U.S. 104 (1978)

[91] *Concrete Pipe and Products of Calif., Inc. v. Construction Laborers Pension Trust of Southern Calif.*, 508 U.S 602 (1993)). See Ohm, Brian W., "The Wisconsin Supreme Court Responds to Lucas," 48 *Land Use Law and Zoning Digest* 3 (Sept. 1996)

[92] *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. ____, 125 S. Ct. 2074, at p. 2081 (2005)

[93] 458 U.S. 419 (1982)

D. Element #2 of the Conceptual Scheme:

Where the regulation at issue permanently deprives an owner of all economically beneficial use of his land, it is also a *per se,* or categorical, regulatory taking, unless the owner had no right to the use under background principles of state property or nuisance law.

In *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003 (1992), Justice Scalia, writing for five members of the Court, held that a regulation designed to protect the coastal zone that deprived the land of "all economically beneficial or productive use [as the trial court had found to be the case] constituted a categorical (or *per se*) taking,"[94] without weighing any of the factual or policy factors involved. Justice Rehnquist, speaking for Justices Scalia and Thomas in his dissent in *Tahoe-Sierra Preservation Council, Inc.,* observed that a regulation that deprived the land of all economically beneficial or productive use was the equivalent of a physical appropriation and, therefore, was governed by the categorical, *per se* doctrines that apply to physical takings.[95] He saw no distinction between a regulation that displaces an owner from a property interest and gives dominion over it to government and one that leaves the owner in possession with the right to exclude others, but without the power to put the property to profitable use. Justice Stevens recognized the point, observing that, "so long as these regulations do not require the landlord to suffer the physical occupation of a portion of his building by a third party, they will be analyzed under the multifactor inquiry generally applicable to nonpossessory governmental activity. [citing *Penn Central*.][96]

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[94] *Lucas*, at p. 1015

[95] *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 350 ff (dissent) 2002)

[96] *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, at p. 323, f.n.18.

In *Lucas*, however, the Court recognized two exceptions to the categorical rule: there would be no taking if the restriction inheres "in the restrictions that background principles of the State's law of property and nuisance already place on land ownership.[97]" The full implications of this doctrine will only become clearer as courts interpret the Supreme Court's language in *Lucas*, although Justice Scalia did note in that decision that it would be an extraordinary situation when a regulation deprived a piece of property of all productive or economic use of the land.

1. **If it does permanently deprive the owner of all economically beneficial use, does the regulation fall within the "property law" exception?**

The first exception to the general principle that a law that permanently denies a landowner all economically beneficial or productive use of the land constitutes a categorical taking is where the landowner has no right under state property law doctrines to engage in the use or activity denied him by the regulation. There is, of course, an element of circularity here. It presents the issue of whether the interest in land that the plaintiff is asserting can be characterized as "property," such that it will be entitled to Fifth Amendment protection. If, under "background principles of the relevant state's law," he never possessed the right in the first place to do what he seeks to do, it seems clear that he has no "property right" to do what the state is now preventing him from doing. Therefore, he will not be heard to complain that the state has "taken" his property.

2. **If it does permanently deprive the owner of all economically beneficial use, does the regulation fall within the "nuisance law exception?"**

The second, or "nuisance law," exception to the *Lucas* categorical taking rule covers those situations where the use that the regulation prohibits could have been enjoined at common law as a private nuisance. A private nuisance involves the intentional and unreasonable interference with another's use and enjoyment of his land. While there has been considerable variation, over the years and among the various state appellate courts, in the articulation of nuisance doctrine, Sections 822 ff. of the *Restatement of Torts* (American Law Institute, Philadelphia, Pa.) provide a useful summary

[97] *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, at p. 1029 (1992),

of its major elements. First, we can exclude negligent or intentional harm-inflicting actions because they are actionable under different legal theories. Second, a court will seek to balance the gravity of the harm to the plaintiff against the utility of the offending conduct by the defendant. In doing so, the courts will look at the extent, nature, seriousness, frequency, and duration of the harm. They will evaluate the social utility and the suitability to the neighborhood of both the activity being interfered with and the offending activity, and the ease with which the offending activity can reduce or avoid the harm or the activity being interfered with can protect itself against harm. Whether the plaintiff "came to the harm" is a factor to be taken into account together with all the other factors: simple priority in time is not enough to guarantee the offending landowner protection against nuisance liability. The principles are fluid and permit the court considerable latitude in striking a balance among all the factors to determine whether a nuisance exists and, if so, in fashioning an equitable remedy that is appropriate to the situation found to exist.

In their dissents in *Lucas*, Justices Blackmun and Stevens pointed out that Justice Scalia's nuisance exception disregarded the evolutionary nature of common law nuisance adjudication. It also imposed an unwarranted straitjacket on legislatures that limited their power to enact regulations that were stricter than those imposed by common law nuisance doctrines. This criticism is particularly telling in light of the flexible and evolving nature of common law nuisance principles themselves. As we have indicated, the courts will take into account the suitability of the use interfered with and the offending use to the neighborhood and the social value attributed to each. Both of these considerations can change from one era to another, so that courts have often concluded that pollution-generating activities or other land uses with externalities that were not nuisances at their inception, may become nuisances because of changes in the surrounding neighborhood. See, for instance, *Spur Industries v. Del E. Webb Development Co.*, 108 Ariz. 178, 494 P.2d 700 (1972).

E. Element #3 of the Conceptual Scheme: Where the regulation at issue neither requires an owner to suffer a permanent invasion of a property interest nor permanently deprives an owner of all economically beneficial use of his land, but simply limits or prohibits some uses of the property and thereby reduces its value, the court will evaluate the constitutionality of the regulation using the *Penn Central* multi-factoral process that weighs all the relevant circumstances

If the regulation does not fall under one of the "categorical taking" rubrics, the Court then undertakes the balancing process sketched out in the *Penn Central* decision in which it weighs a number of factors:[98]

1. the weightiness of the public purpose that the governmental action promotes. The Court is more likely to sustain a regulation that protects the public against serious risk of injury or death than it is to uphold one that seeks to promote good architectural design. If a particular restrictive regulation promotes policies that have been adopted by both state and local legislative bodies, the courts will give it considerable weight. The courts have accepted as valid a wide range of public purposes: in addition to the classic aims of the police power, protecting the public health, safety, and morals, they have recognized as legitimate the protection of prime agricultural land, historically and architecturally significant buildings, and areas of ecological concern such as flood plains;

2. **the comprehensiveness of the regulation.** The more broadly based the program, the more likely it is that it will be sustained. If the interference with property rights "arises from a public program that adjusts the benefits and burdens of economic life to promote the common good, [it does not], under our cases, constitute a taking requiring Government compensation.[99]" A landmark preservation ordinance that affects only a small number of properties may be more vulnerable to invalidation than a comprehensive rezoning;

3. the economic impact of the regulation on the relevant property interest, with special reference to its impact on "investment-backed expectations." The smaller the percentage decrease in the value of the property, the more likely it is that the Court will sustain it. While the courts have not formulated any simple mathematical formulae for determining when a regulatory taking has occurred, they have indicated that the economic impact must be extreme for there to be a taking. Justice Souter noted in *Concrete Pipe and Products* that the Court had upheld regulations that reduced property value by 75% (*Ambler Reality, supra*) and 92.5% (*Hadacheck, supra*). Thus, if the owner may put the property to some reasonable economic use, it is unlikely that the court will invalidate the regulation. Seldom, if ever, will mere loss of

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[98] See, e.g. *Tahoe Sierra Preservation Council, Inc.*, supra, part III of the majority opinion.

[99] *Concrete Pipe and Products*, 508 U.S. 602, 113 S. Ct. at p. 2290 (1993)

speculative value be the basis for a finding of a taking.

As Justice Scalia stressed in *Lucas*, it is relatively rare that a case will fall into the "categorical taking" categories, so that most "taking" lawsuits will involve a careful balancing of the various interests involved. How the balance will be struck will turn on the facts and equities of each case and the evolving jurisprudence of the members of the Court.

4. **the good faith of the government[100] and the reasons for which it enacted the regulation at issue in the case**. The principal justification advanced by Justice Stephens in support of applying the balancing principles of *Penn Central* to the question of whether a 32-month moratorium, rather than the *per se* principles of *Lucas*, was the protection and promotion of informed decisionmaking by planners and other officials of regulatory agencies.[101] The majority of the Court recognized the importance of providing regulatory agencies with a reasonable opportunity to formulate plans, ordinances, and well-reasoned administrative decisions, especially in the case of a regional agency like the Tahoe Regional Planning Commission, which was faced with complex issues of critical importance to the preservation of a national treasure such as Lake Tahoe. Years earlier, in *San Diego Gas & Electric Co. v. San Diego*,[102] Justice Brennan observed, in dissent, "if the policeman must know the Constitution, then why not the planner?" In the *Tahoe-Sierra Preservation Council, Inc.* decision, the majority called upon the courts to give weight to the benefits of informed decision-making when judging whether a particular postponement of the right to develop property was constitutionally valid.

Between 1980 and 2005, there was another set of principles that some members of the Court used on occasion to determine whether or not a taken had occurred. In *Agins v. City of Tiburon*,[103] Justice Powell stated that "The application of a general zoning law to a particular property effects a taking if the ordinance does not substantially advance legitimate state interests, see *Nectow v. Cambridge*,[104] or denies an owner economically viable use of his land, see *Penn Central Transp. Co. v. New York City*, 438 U.S, 104, 138, n. 36 (1978)." He held that the ordinance at issue in the case did

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[100] *Tahoe-Sierra Preservation Council, at p. 333.* Justice Stevens stressed that the trial court had found that the TRPA acted diligently and in good faith.

[101] *Tahoe-Sierra Preservation Council, Inc.* at pp. 337-342

[102] 450 U.S. 621 (1981)

[103] 447 U.S. 255 (1980)

[104] 277 U.S. 138, 188 (1928)

substantially advance legitimate government goals such as conserving open space and protecting the citizens of Tiburon from the ill effects of urbanization. Numerous analysts criticized this statement on the basis that the first prong restated the basic principle of substantive due process which was applicable in all cases, and should not be made a part of the "Takings" analysis. To state the principle simply, if a statute or ordnance does not promote the public health, safety, morals, or general welfare, it deprives the property owner of property affected thereby without due process, and the court will not even get to the taking issue. It is only when the contested legislation comports with substantive due process that a court must then determine whether it constitutes a taking.

Justice O'Connor devoted a major section of her *Lingle* opinion to the question of whether the "substantially advance legitimate state interests" prong had any place in Taking doctrine.[105] In fact, this analysis can fairly be characterized as the central holding of the case, because the Court reversed the lower court's opinion on the basis that it had erroneously relied on the *Agins* doctrine to reach its decision in favor of Chevron. In her judgment, the central flaw in the "substantially advances" reasoning was that it "reveals nothing about the *magnitude or character of the burden* a particular regulation imposes upon private property rights. Nor does it provide any information about how any regulatory burden is *distributed* among property owners. In consequence, this test does not help to identify those regulations whose effects are functionally comparable to government appropriation or invasion of private property; it is tethered neither to the text of the Takings Clause not to the basic justification for allowing regulatory actions to be challenged under the Clause. [Italics in the original][106]"

Reflecting the concern of many members of the Court about the scope of substantive due process review, Justice O'Connor stated her view that the "substantially advances" formula presented serious practical difficulties because it would "demand a heightened means-end review of virtually any regulation of private property.[107]" This heightened or intermediate scrutiny of state and federal legislation would involve the courts in decisions for which they are not well suited and put them in a role that is not appropriate under traditional separation of powers principles. As she concluded, "The reasons for [judicial] deference to legislative judgments about the need for, and likely

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[105] *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. ____, 125 S. Ct. 2074, at pp. 2082-85 (2005)
[106] *Lingle v. Chevron U.S.A. Inc., supra,* at p. 2085
[107] *Ibid*., 544 U.S. at p. ____, 125 S. Ct. 2085

effectiveness of, regulatory actions are by now well established, and we think they are no less applicable here.[108]" This conclusion, we should note, is more consistent with Justice O'Connor's position on the role of the Court in reviewing the public use requirements of the Fifth Amendment that she expressed in her decision for the Court

in *Hawaii Housing Auth. v. Midkiff*,[109] than with her position in dissent in *Kelo v. City of New London*.[110]

F. Element #4 of the Conceptual Scheme: Where the government is imposing an exaction by requiring the landowner to give an interest in land as a condition for obtaining development permission, the Court will apply the doctrines of the *Dolan* and *Nollan* decisions

The fourth category of principles governing the question of whether there is a Taking concerns those situations where the government seeks to impose an exaction on the property owner, whereby it requires that the property owner convey to it an interest in land, such as a site for a park or school or an easement, as a pre-condition for receiving development permission.[111] This doctrine does not apply to situations where local governments impose impact fees on developers. See, *City of Monterey v. Del Monte Dunes*.[112] Several state courts have reached the same conclusion.

1. The exaction must substantially promote a legitimate public interest.

The Court will first assure itself, as a matter of substantive due process, that the exaction promotes a legitimate pubic interest. For example, in *Nollan*, Justice Scalia found that the lateral right-of-way along the beach demanded by the California Coastal Commission as a condition to the development of a beachfront property, in no way advanced the public purpose it purported to promote: the protection of the view from

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[108] *Ibid*.
[109] 467 U.S. 229 (1984)
[110] 545 U.S. ___, 125 S. Ct. 2655, 2672 (dissent) (2005
[111] See, Mandelker, Daniel R., *Land Use Law* (Charlottesville, Va.: LexisLaw Publishing, (5th ed. 2003) Sections 2.10 – 2.13.
[112] 526 U.S. 687 (1999)

the coastal road behind the property and, as a result, was unconstitutional. We should note out that his oft-quoted statement that a land use regulation must "substantially promote a legitimate state interest," which seemed to require a higher standard of nexus, was dictum, because he held in the case that there was no connection between the asserted public interest and the condition imposed on development. In any event, this statement would appear to be a matter of substantive due process analysis and not of taking analysis because of the holding in *Lingle*.

After finding that there is a nexus between the exaction sought to be imposed and the public purpose it seeks to further, the Court will explore the character and intensity of the "nexus" or connection between the purpose of the regulations and the restrictions they seek to impose on the property owner.

3. The "nexus" between the condition on the granting of development permission and the public purpose it is designed to promote must be "roughly proportional" to that purpose.

The Supreme Court addressed this issue, which had been left largely undefined in the *Nollan* decision, in *Dolan v. Tigard*,[113] and, in dictum, in *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*,[114]. In the latter decision, the Court stressed that the principles that it applied to situations where development approval was conditioned on an exaction – such as a dedication of an interest in property to public use – and not apply to other takings. For cases involving an exaction, in *Dolan,* the Court adopted a three-part test:

1. Does the permit condition promote a legitimate public purpose?

2. Is there an essential nexus between the legitimate public interest and the permit condition?

3. Is there a "rough proportionality" between the required dedication or permit condition and the undesirable impact of the proposed of the development? Justice Rehnquist, writing for the Court, stated that "No precise mathematical

[113] 512 U.S. 374 (1994)
[114] 526 U.S. 687 (1999)

calculation is required, but the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development."[115] All nine justices in *Del Monte Dunes* joined in the dictum that the rough proportionality requirement applied only in exaction cases, and did not apply in regulatory takings cases where the government has simply denied development permission.[116]

Even here, Justice Scalia, who has often agreed with Justice Rehnquist on this point, suggested in *Nollan v. California Coastal Commission*,[117] that it would not offend the Taking Clause if the California Coastal Commission were to require, as a condition to the issuance of a building permit, that owners of beachfront property "provide a viewing spot on their property for passersby with whose sighting of the ocean their new house would interfere." He intended this as an example of an exaction that evidenced the required degree of nexus with the public purpose it sought to promote. Presumably, also, there is no constitutional infirmity in requiring subdivision developers to grant easements for public roads, sidewalks, and sewer rights-of-way, as a condition of subdivision approval.

This test echoed the intermediate "reasonable relationship test" that many state courts have embraced when dealing with the exactions imposed as a precondition to development approval. It rejected both the more stringent "specifically and uniquely attributable" test of *Pioneer Trust & Savings Bank v. Mount Prospect*,[118] and the more permissive standard of *Billings Properties, Inc. v. Yellowstone County*,[119]

3. The burden of persuasion in exaction cases rests on the government.

Furthermore, in *Dolan*, the Court shifted the burden of persuasion in these cases.[120] Traditionally, it is the plaintiff who must show that the challenged regulation is an arbitrary and unconstitutional infringement of his rights. Now the government agency must show that the particular regulation that conditions

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[115] *Dolan v. Tigard*, 512 U.S. 374, at p. ___ (1994)
[116] *Ibid.*
[117] 483 U.S. 825 (1987)
[118] 22 Ill. 2d 375, 380, 176 N.E. 2d 799, 802 (1961)
[119] 144 Mont. 25, 394 P. 2d 182 (1964)
[120] *Dolan v. City of Tigar*d, 512 U.S. 374 (1994)

development approval on the granting of an exaction has the requisite nexus to the asserted public purpose. This means, at the very least, that governments are called upon to "do their homework" and carefully lay the groundwork that will support restrictions and conditions that they seek to impose on the development of private property.

V. The Remedy: Compensation for the Fair Market Value of the Fee Simple, or Less-than-Fee Simple Property Interest Taken, Temporarily or Permanently

We should emphasize that, if a court finds that a "taking" has occurred and requires the governmental unit to pay compensation, the government is acquiring an interest in the property: the money paid is not simply damages. This is a result that many property owners may not want. It raises a number of interesting questions that are beyond the scope of this article. Must the owner obtain the consent of the government before she sells the property? What are the tax implications of the divided ownership? Presumably there would be capital gains implications because the owner has sold an interest to the government through an exercise of eminent domain, although the federal Internal Revenue Code may provide that such transactions do not result in realization of capital gains. Would the owner's real property tax and other *ad* valorum tax assessments be lowered because the government-owned part of the property interest would not be subject to the tax? Must the government join the owner in development proposals? If the government wishes to convey its property interest back to the owner, must it follow the statutory requirements governing disposal of government property? How would the fair market value of the interest be determined?

In most cases, once a court finds that a "taking" of a full or partial interest has occurred, even if it is only a temporary one, the property owner is entitled to just compensation for the period of the "taking." *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles.*[121] Thus, if a local government enacts a regulation that permanently prevents all use of a property interest and a court holds that there has been a taking, the local government can do one of two things: It may repeal the ordinance and pay compensation for the period of the taking (which will usually approximate the rental value of the property during that time), or it may acquire the property interest by paying the fair market value of that interest. In its 5-4 decision,

[121] 482 U.S. 304 (1987)

Brown v. Legal Foundation of Washington,[122] the Supreme Court held that even in a situation where there was a *per se* taking of interest earnings on lawyers' trust accounts (IOLTA) paid for clients' escrow accounts, and transferred to a state legal defense organization, the Legal Foundation of Washington, no compensation had to be paid because just compensation is measured by the property owner's loss rather than the government's gain. In this case, the transaction costs of the payment of interest exceeded the amount of the interest, so that the owner lost nothing and had no right to compensation.

VI. What Can a Government Do to Minimize the Chances of Being Found to Have "Taken" an Interest in Land?

While a full analysis of the steps that a governmental agency might take to minimize the chances of its being found to have "taken" and interest in land is beyond the scope of this paper, here are a few:[123]

1. Do your homework. The clearer the showing that a particular restriction promotes one or several legitimate public purposes, the more likely it is that it will be sustained. One of the strongest reasons for undertaking comprehensive growth management is that it provides the policy and legal bases for zoning, subdivision, timing control, and other municipal regulation. Determine whether there are any properties in the jurisdiction that present such high potential of successful "takings" claims that they should not be restricted. Establish a sound basis for land-use and environmental regulations, by means of careful comprehensive planning, based on scientifically convincing background studies.

2. Emphasize public health and safety and economic development objectives whenever possible, as opposed to aesthetic and non-specific environmental purposes. Zoning and subdivision regulations protect against erosion, surface and groundwater pollution, loss of habitat, and flooding, and often seek to conserve prime farmland and areas of critical ecological concern. Counties and municipalities should be careful to development the scientific connections between these purposes and the restrictions

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[122] 538 U.S. 216 (2003)

[123] Some of these recommendations are adapted from a Policy Guide on the Takings Issue, adopted by the American Planning Association, in March 1995. See, also, Merriam, Dwight, "Reengineering Regulation to Avoid Takings," 33 *Urban Lawyer* 1,2 (2001)

contained in the ordinances.

3. Establish an administrative development approval process that gives decision-makers the information they need to determine the risks of a successful "takings" claim, by requiring property owners to produce evidence of substantial negative economic impact on the property early in the review process, well before they file any legal action. The time to address possible takings claims is early in the application review process. It is reasonable to expect the landowner to demonstrate the existence of harsh adverse economic impact before an appropriate administrative agency because taking the local government to court. Thus, owners should be required to produce information such as the following: an explanation of the owner's interest in the property, the cost of the property or the option price, the terms of purchase, recent appraisals of the property and of the impacts of regulations on its value, real property taxes paid, income statements and pro formas for income-producing property, etc. .

4. Permit as many economically beneficial uses of the land as possible, consistent with the underlying purposes of the regulation, even if you use discretionary procedures such as conditional use permits and variances.

5. Allow for transfer of density to other parts of the tract or to other parcels, through the use of such techniques as planned unit development and transferable development rights (if authorized in the particular state).

6. Use performance standards and site plan review rather than Euclidean use categories. They link permitted uses to their adverse environmental impacts and limit them accordingly. For instance, a large majority of the municipalities in Bucks County, a county located to the north of Philadelphia that is undergoing substantial suburban land development, have adopted performance zoning as a means of fitting the amount and location of development to the natural characteristics of the land. Several courts have upheld the technique as a legitimate means for protecting natural resource lands and prima agricultural land.[124]

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[124] See, *e.g.*, *In re: Petition of Dolington Land Group*, 839 A.2d 1021 (Pa. 2003); *Crystal Forest Assoc., L.P. v. Buckingham Two Sup'v'rs*, ___ A2d ___, 2004 WL 323915 (Pa. Comwlth 2005); and *Jones v. Zoning Hrg. Bd. of McCandless Twp.*, 124 Pa. Comwlth. Ct. 435, 578 A.2d 1369 (1990). But see *C & M Developers , Inc. v. Bedminster Twp.*, 820 A.2d 143 (2002), which upheld the performance zoning approach but held that the Township had not shown that a one-acre

7. Establish variance or special permit procedures that provide for administrative relaxation of the stringent regulations in tough cases and allow some legitimate economically beneficial use of the property. Attach protective conditions where such permits are granted. A municipality will be wise to recognize strong equities favoring the landowner in a few difficult cases in order to preserve the program as a whole.

8. Take steps to avoid the subdivision of land in a way that may create economically unusable, substandard, or unbuildable properties. For instance, if the local government's policy is to discourage development in beach areas, flood plains, or wetlands, these areas should not be severed from the rest of the property. In fact, it is advisable to allow some transfer of density from these areas to the balance of the tract, wherever feasible. In this way, the owner is not deprived of all economically beneficial use of these ecologically significant areas, and can benefit from the fact that his tract contains such land. Furthermore, self-created hardships -- such as dividing off environmentally significant areas before applying for development permission -- should not be allowed to form the basis of a takings claim. An extreme example of this would be if the landowner divided his property into a number of tracts that corresponded to the area in the side, rear, and front yards, and created air rights about the permissible height limit. He should not then be heard to complain that he has been denied all economically viable use of these property interests. (In fact, Justice Souter expressly disapproved of this strategy in *Concrete Pipe and Products*, at p. 2390)

9. Make development pay its fair share, but establish a rational, equitable basis for calculating the type of any required land dedication, fee in lieu of dedication or impact fee. The U.S. Supreme Court -- and the courts of the states that have addressed this issue -- have approved the use of development conditions, so long as they are clearly related to the public purpose being served, and are roughly proportional to that purpose, and account separately for the funds generated thereby.

10. Remember that many local economic development programs, tax incentives and regulations actually confer benefits on landowners that are often capitalized into land value. These **"givings"** should be explained to the landowner and should be

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minimum lot size requirement for single family detached houses sufficiently promoted the agricultural purposes of the agricultural zoning district.

balanced against any reductions in land value occasioned by land use controls.

11. Decision-makers should remember that if a court determines that there has been a taking, and they decide to go ahead and pay compensation, the government will be acquiring a fee simple or less-than-fee simple interest in land by way of condemnation. In the latter case, it will become a tenant in common with the landowner. The compensation the landowner receives will be income that will at the very least reduce the cost basis of the property, although it will probably not be treated as recognized capital gains leading to tax liability in the year of acquisition. Furthermore, mortgagees, judgment lien holders, and holders of other security interest in the property may be entitled by the mortgage deed, judgment or the other security instruments to claim the proceeds of the compensation payment. In such a case, the owner would not realize any economic gain from the transaction, although he may have spent considerable money on legal expenses. The government would also presumably assume liability for injuries on the property and become responsible to meet the requirements of environmental protection laws, such as CERCLA (the SuperFund Law).

12. Have the solicitor review the state's law of private and public nuisance, to determine what kinds of activities can be prohibited because they are nuisances. Such prohibitions would fall into the nuisance law exception to Justice Scalia's second categorical taking principle in *Lucas*.