Protecting Natural Resources Under Scalia's "Incidental Effects" Test

by Anne Martorano

I. Introduction

Tension between property interests and environmental goals has existed for decades. In recent years, however, as environmental awareness has increased, the battle has intensified. And although the pendulum of protection has swung back and forth over time, most recently the Supreme Court has expressed its commitment to heightened constitutional protection of private property even where such protection sacrifices environmental concerns. In particular, the Court has displayed a willingness to use the Takings Clause of the Fifth Amendment to insulate commercial interests from environmental regulation.

However, despite this conservative shift in takings doctrine, the Court has declined to protect property interests to the fullest extent possible. In fact, *Lucas v. South Carolina Coastal Council,*[1] a case in which "the Court bent over backwards to draft an opinion that seemed wholly favorable to the landowner," actually leaves considerable latitude for environmental regulation.[2] First, while the Court held that an environmental regulation which barred plaintiff from erecting a home on his property constituted a taking, it refused to embrace plaintiff's proposed rule that land use regulations which eliminate all economic value constitute takings per se. Instead, the Court indicated that regulations which effect a deprivation of all economic value are not takings where "the proscribed use interests are not a part of his title to begin with."[3]

The Court further stated that an additional exception may apply in situations where the landowner is deprived of all economic value. Writing for the majority, Justice Scalia indicated that generally applicable regulations which are not aimed at land and which interfere with property rights in only an incidental manner might not constitute compensable takings.[4] The rather compelling implication of this statement is that if environmental legislation is drafted so as to regulate land use in only an incidental manner, the Takings Clause might be circumvented. Thus, environmental regulations once considered suspect would be enforceable under this exception because they do not work a taking of private property.

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This article will focus on the second exception articulated by Scalia in *Lucas* as discussed above; the notion that neutral regulations not aimed at land might be immunized from Takings Clause scrutiny. Before addressing this exception, however, a brief discussion of the Takings Clause and significant takings cases follows to provide the necessary foundation for an informed analysis of Justice Scalia's approach.

II. Takings in General

The Fifth Amendment of the Constitution guarantees that private property will not be taken for public use without just compensation.[5] Though the government may "take" property for public use without the owner's consent pursuant to its power of eminent domain, it must compensate the landowner

for the value of the land extracted. The rationale behind the Takings Clause is to provide protection for private property while at the same time allowing the government to perform necessary public functions.[6] It is important to note that physical takings of property have allowed for a variety of important public projects ranging from the construction of hospitals, highway infrastructure, and dams, to the preservation of wilderness areas and national parks. The notion is, however, that the burden associated with these projects should be borne by the public as a whole and not by a discrete segment of the population.[7]

In addition to its power to physically take property, the government may also enact land use regulations which interfere with the landowner's use of her property. As the government may be required to provide just compensation to the landowner under these circumstances, Congress seeks to draft regulations that will not be construed as takings of property. If, however, a regulation results in significant interference with property rights, a regulatory taking may result.

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Regulatory takings fall into two general categories.[8] The first of these categories consists of regulations which compel the landowner "to suffer a physical invasion of his property."[9] Examples of this type of taking include government-imposed beachfront easements[10] and mandated cable installations which necessitate physical intrusions onto private property.[11] The second category of regulatory takings is composed of regulations which deny a landowner all economically beneficial or productive use of her land.[12] The regulation in *Lucas* which prohibited the construction of permanent habitable structures on plaintiff's land exemplifies this latter category. As environmental regulations typically place limitations on a landowner's use of her property without any direct physical invasion, it is this last category of takings which will serve as the focus of this article.

III. Landmark Regulatory Takings Cases

The Supreme Court has devised a general analytic framework within which regulatory takings claims are to be evaluated. Though the framework in its modern form was first expressed in *Agins v. City of Tiburon*,[13] it is the product of many years of development through case law.

In early cases, the Court focused on the reasonable investment-backed expectations of the landowner in evaluating whether a regulatory taking had occurred.[14] This approach was applied in *Pennsylvania Coal v. Mahon*.[15] In *Pennsylvania Coal*, the Court examined the Kohler Act, a Pennsylvania statute which prohibited the removal of coal from land where surface subsidence could result. In an opinion delivered by Justice Holmes, the Court held that the Act's prohibitions constituted a taking of property rights without just compensation. Justice Holmes wrote his oft quoted observation that "while property may be regulated to a certain extent, if regulation goes too far, it will be recognized as a taking."[16] He indicated that the Kohler Act's prohibitions were excessive because they eliminated mining rights which property owners expected to exercise.

Over time, courts began to focus on "the parcel as a whole" in determining whether a regulatory taking had occurred. Under this analysis, the court evaluated whether a regulation extracted all economic value from the landowner's entire property.[17] The Court employed this approach in *Penn. Central Transportation Co. v. New York City*[18] where it stated, "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... 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."[19] In this case, the Court held that an ordinance which restricted the height of New York's Penn Central Station did not constitute a taking under the Fifth Amendment. The Court reasoned that the ordinance at issue merely placed a servitude on the land without effecting a taking of the entire property.[20]

In *Agins v. City of Tiburon*, the Court articulated the now prevailing test used to determine whether a regulatory taking has occurred. The *Agins* test incorporates both the investment-backed expectations of the landowner and an evaluation of the parcel as a whole. In addition to these elements, the test also requires a thorough analysis of the state interests which are furthered by the regulation at issue. While courts had long considered the nature of the relevant state interest, the *Agins* Court elevated the importance of this factor. In essence, the *Agins* test provides that: A regulation becomes a taking if it either (1) "does not substantially advance legitimate state interests" or (2) "denies an owner economically viable use of his land."[21]

Applying this test in *Agins*, the Court found that a modified zoning ordinance which reduced the number of single family dwellings that plaintiff could construct on his property did not constitute a taking. The Court reasoned that the ordinance substantially advanced the legitimate governmental goal of preserving open space.[22] Further, though the ordinance placed limitations on the development of plaintiff's property, it did not deny the plaintiff all economically viable use of his land.[23]

IV. The Effect of the *Agins* Test on Governmental Regulation

While at first blush the *Agins* test appears to provide state and local governments with wide latitude in drafting land use and environmental regulations, in recent cases the Court has interpreted the test so as to impose a heavy burden on governmental entities. For example, *Nollan v. California Coastal Commission*[24] held that a permit condition which required the dedication of a lateral access easement along the landowner's private beach failed the first tier of the *Agins* test. The Court reasoned that the state failed to establish a sufficient nexus between the identified impact of the Nollans' development (obstruction of the ocean view) and the permit condition.[25] More specifically, the Court found that there was merely a tenuous connection between the government's claimed interest in preserving visual access to the ocean and the easement condition placed upon the Nollans' permit (allowing for physical access across the beach). The Court thus concluded that the condition constituted a compensable taking. It is interesting to note that the Court found that a taking had occurred despite the fact that the permit request, which was made pursuant to plaintiff's desire to construct a larger home, could have been flatly denied by the Coastal Commission.

In *Dolan v. City of Tigard*,[26] one of the most recent takings cases decided by the Supreme Court, even more stringent requirements were placed upon state and local governments. In a less than successful effort to elucidate the nexus requirement established in *Nollan*, the *Dolan* Court held that "the necessary connection [between the permit condition and the impact of the property development] required by the Fifth Amendment is rough proportionality."[27] Applying this test, the Court concluded that permit conditions which required a landowner to dedicate a greenway and a pedestrian/bicycle pathway along her property did not bear a "roughly proportional" relationship to the governmental interests of flood minimization and the alleviation of traffic congestion. The Court reached this determination despite the fact that the city offered a series of findings suggesting that the bicycle path "could offset some of the traffic demand on streets [nearby] and lessen the increase in traffic congestion" and that the greenway

could achieve floodplain drainage purposes.[28]

As in *Nollan*, the Court found that a taking had occurred despite the fact that plaintiff's permit request, made in the effort to expand her plumbing and electric supply store, could have been denied without qualification by the city planning commission. Despite this fact, plaintiff's property rights were jealously guarded by the Court. Perhaps the true intentions of the Court are best revealed by Justice Rehnquist, writing for the majority, who stated, "We see no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or Fourth Amendment, should be relegated to the status of a poor relation..."[29]

V. Environmental Regulations Not Aimed at Land: Scalia's Exception to Property Protection Which May Swallow the Rule

While *Nollan* and *Dolan* reflect the Supreme Court's desire (candidly expressed by Justice Rehnquist in *Dolan*) to elevate the Fifth Amendment on the hierarchy of rights, this effort has been substantially undermined by key concepts in *Lucas v. South Carolina Coastal Commission*.[30] Though celebrated by conservatives for its ultimate holding, *Lucas* actually allows significant limitations on property protection, potentially leaving wide latitude for environmental regulation. Ironically, the *Lucas* Court sought to provide increased protection for private property. In reality, however, untapped elements of the *Lucas* holding undermine recent expansion of the reach of the Fifth Amendment.[31] Even more ironic is the fact that these Fifth Amendment limitations were articulated by Justice Scalia, a vehement supporter of private property protection.

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Justice Scalia delivered the opinion of the Court in *Lucas* that the South Carolina Beachfront Management Act[32] constituted a taking under the Fifth Amendment as applied to plaintiff's property. The Court noted that the Act, designed to protect the South Carolina coast from erosion, was adopted two years *after* plaintiff had purchased two plots of land for the purposes of commercial development. The Court reasoned that because the Act barred plaintiff from building permanent habitable structures on his land, it effectively deprived plaintiff of all economically beneficial use of his land. In effect, therefore, the regulation resulted in a compensable taking.

Concerned that the majority opinion was inconsistent with prior case law, Justice Stevens dissented. In his dissent, Stevens argued that because the South Carolina Beachfront Management Act was a generally applicable law which "regulate[d] the use of the coastline of the entire state," it was constitutional as applied to plaintiff.[33] In support of his contention that the Fifth Amendment is not infringed by a generally applicable land use regulation such as the one at bar, Stevens referred to Scalia's majority opinion in *Employment Division Services of Oregon v. Smith*.[34] He noted that in *Smith* the Court held that the Free Exercise Clause of the First Amendment was not infringed by a generally applicable Oregon law banning the ingestion of peyote by all residents, including those who wished to use the drug in religious services. Stevens indicated that the principle established in *Smith*, specifically that generally applicable laws not aimed at the restriction of religious beliefs do not violate the First Amendment, implies that generally applicable land use regulations should not violate the Fifth Amendment either.

In response to Justice Stevens' criticism, Justice Scalia insisted that the laws in *Smith* and *Lucas* are distinguishable, such that the decisions are entirely consistent. Scalia suggested that the law which prohibited peyote use in *Smith* was upheld because it was aimed at all Oregon residents and did not single out religious groups.[35] Consequently, the law only incidentally interfered with religious practices. In contrast, the law at issue in *Lucas* was directly aimed at land use. Scalia reasoned, therefore, that "the equivalent of a law of general application that inhibits the practice of religion without being aimed at religion, is a law that destroys the value of land without being aimed at land."[36] He suggested that a law not aimed at land use, such as a law that prohibits the sale of liquor thus destroying the value of a brewery, might not constitute a compensable taking.[37]

The implications of Scalia's analogy are vast indeed. Most notably, in placing Fifth Amendment rights on equal footing with First Amendment rights, Scalia appears to have undermined the very property rights he seeks to protect. If Fifth Amendment rights are to be grouped with First Amendment rights, then environmental laws which are carefully tailored so as to interfere with land use in only an incidental manner may survive takings scrutiny.[38]

Scalia's desire to provide rigorous protection for property rights is well-established. However, in light of the fact that *Smith* and *Lucas* are not the only cases in which Scalia has distinguished direct from incidental burdens, there is reason to believe that he may well have intended to limit property protection in this manner. As Fred Bosselman, a Professor of Law at Chicago-Kent College of Law states, "The incidental effects test has become a Scalia specialty ever since he used it in the famous peyote decision."[39] As Bosselman notes, Scalia also discussed this test in his dissenting opinion in *Planned Parenthood v. Casey*[40] where he stated, "I have forcefully urged that a law of general applicability which places only an incidental burden on a fundamental right does not infringe that right."[41]

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Regardless of what Scalia's intentions may have been, the rule he proposes is a sound one. Not only is the rule consistent with *Smith*, it also comports with cases directly related to land use regulation. In *Rincon Band of Mission Indians v. County of San Diego*,[42] for example, a generally applicable ordinance which forbade gambling in San Diego County was upheld by a California district court despite the incidental prohibitions it placed on the use of Indian reservation lands. The court reasoned that because the ordinance was "aimed squarely at conduct, not land use," the incidental restrictions on land use did not constitute an encumbrance on reservation lands.[43]

VI. Generally Applicable Environmental Regulations

In fact, there are some generally applicable laws already in existence which seek to ameliorate environmental harms without being directly aimed at land development. One example is Section 9(a)(1)(B) of the Endangered Species Act which has recently been interpreted by the Supreme Court to prohibit all actions that modify or degrade the habitat of an endangered species. *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*.[44] In this case, the Court rejected the argument made by a group of small landowners and logging companies that the Secretary of the Interior had unreasonably interpreted the Endangered Species Act to prohibit "significant habitat modification or degradation where it actually kills or injures wildlife."[45] The Court found that the Secretary's interpretation was

wholly consistent with both the broad purposes of the Act and Congressional intent.

The Court explained the implications of its decision. It noted that by prohibiting habitat modification and/or degradation, the Endangered Species Act bars activities that cause harm to a threatened species by indirect as well as deliberate means. Recognizing that the claimants did not "desire to harm either the red-cockaded woodpecker or the spotted owl," the Court concluded that their logging activities were nevertheless prohibited under the Act because they resulted in indirect harm to an endangered species.[46]

While the relevant provision of the Endangered Species Act in *Babbitt* is not expressly directed at restrictions on land use, it is clear that by prohibiting significant habitat modification and degradation, the act "incidentally" affects property rights. And while the term "incidental" is used in accordance with Scalia's analysis in *Lucas* to indicate that property rights are not directly being regulated, it is clear that the impacts of the Act on the landowner are profound. As one writer states, "A broad definition of harm disallows virtually any use of property designated as critical habitat."[47]

A second example is Section 404 of the Clean Water Act,[48] which never mentions wetlands but is nonetheless utilized by federal agencies for wetlands protection. Rather than placing land use restrictions on areas designated as wetlands, the Act merely refers to the regulation of water pollution. More specifically, it regulates the discharge of dredged and fill materials into navigable waters. However, since development of wetlands often results in the discharge of dredged and fill materials, the Clean Water Act may be invoked to limit wetland development. In *Florida Rock Industries, Inc. v. The United States*,[49] for example, the Federal Circuit sustained the government's denial of a permit to a land developer who sought to mine limestone under wetlands, an activity found to result in substantial water pollution.[50]

As one writer notes, because Section 404 of the Clean Water Act does not place any direct limitations on the development of wetlands, "it is not a comprehensive wetlands protection statute. It is essentially a water quality statute that has been used, with some success, to accomplish a purpose for which it was not specifically designed."[51] While it is true that wetlands protection under the Clean Water Act is somewhat limited because the Act was not designed for this purpose, it is likely that the Act achieves more under current takings doctrine than it otherwise would if the statute were directly aimed at land use. As indicated by Justice Scalia in *Lucas*, the Court is more likely to find a taking where regulations are directly aimed at land than it is where regulations only incidentally impact land use; for example, by placing prohibitions on conduct.

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VII. Model Environmental Statutes Under the Incidental Effects Test

The implications of Scalia's incidental effects test for future environmental legislation are quite significant. Under the incidental effects test, laws requiring general environmental preservation with only incidental effects on land use will most likely survive takings scrutiny. Consequently, a model statute regulating the use of coastal lands such as those in *Lucas* should dispense with direct restrictions on land and instead proscribe any activity which contributes to erosion. Thus, land development

activities contributing to erosion would be prohibited. Other activities such as boating might also be restricted where erosion is caused. Given that courts have recognized that erosion can result from a variety of sources, it is not unrealistic to envision a regulation which would generally restrict activities that induce erosion. In *Ballam v. United States*,[52] for example, the Court of Appeals for the Federal Circuit found that "harm [erosion] resulted directly and proximately from the acts of persons navigating vessels up and down the waterway, and generating waves therein."[53]

VIII. Conclusion

Justice Scalia's approach to the protection of private property under the Fifth Amendment suggests that environmental regulations not aimed at land should survive takings scrutiny. While this "suggestion" has not yet been tested in the courts, many commentators insist that if the Court is to remain consistent, neutral regulations not aimed at land must endure Fifth Amendment challenge.[54] Given this prevailing understanding, environmental legislation should be drafted such that land use is not directly regulated. As Fred Bosselman explains, "Under the Scalia regime," drafters of environmental laws "need to divert their attention away from land and toward the specific resource sought to be protected."[55]

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NOTES

1 112 S. Ct. 2886 (1992).
2 J. Lazarus, *Putting the Correct Spin on Lucas*, 45 STAN.L.REV. 1411, 1419 (1994).
3 *Lucas*, 112 S.Ct. 2886, 2899 (1992).
4 *Id.* at 2900.
5 U.S. Const. amend. V. The Fifth Amendment reads in relevant part: "[N]or shall private property be taken for public use without just compensation."
6 *See* THE FEDERALIST NO. 54, at 339 (James Madison)(Clinton Rossieter ed., 1961).
7 *Armstrong v. The United States*, 364 U.S. 40, 49 (1960).
8 *Lucas*, 112 S.Ct. 2886, at 2893.
9 *Id.* at 2893.
10 *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987).
11 *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).
12 *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980).
13 *Id.*
14 Susan Shaheen, *The Endangered Species Act: Inadequate Species Protection in the Wake of the Destruction of Private Property Rights*, 55 OHIO ST.L.J. 453 (1994).
15 260 U.S. 393 (1922).
16 *Id.* at 415.
17 Shaheen, *supra* note 14, at 466-467.
18 438 U.S. 104 (1978).
19 438 U.S. at 130-131.
20 *Id.* at 130 n.27.
21 *Agins*, 447 U.S. at 260.
22 *Id.* at 261-262.
23 *Id.* at 262.
24 483 U.S. 825 (1987).
25 *Id.* at 838-839.

[26] 114 S.Ct. 2309 (1994).
[27] *Id.* at 2314.
[28] *Id.* at 2316.
[29] *Id.* at 2314.
[30] 112 S. Ct. 2886 (1992).
[31] Lazarus, *supra* note 2, at 1425-1426.
[32] S.C. Code § § 48-39-250 *et seq.*. (Supp. 1990).
[33] *Lucas*, 112 S.Ct. at 2924.
[34] 494 U.S. 872 (1989).
[35] *Lucas*, 112 S.Ct. 2886.
[36] *Id.* at 2899 n.14.
[37] *Id.*
[38] Fred Bosselman, *Four Land Ethics: Order, Reform, Responsibility, Opportunity*, 24 ENVTL.L. 1439 (1994).
[39] Bosselman, at 1511 n.261.
[40] 112 S.Ct. 2791 (1992).
[41] *Id.* at 2878.
[42] 324 F.Supp. 371 (S.D. Ca. 1971).
[43] *Id.*
[44] 63 U.S.L.W. 4665 (1995).
[45] 50 C.F.R. § 17.3 (1973).
[46] 63 U.S.L.W. at 4667.
[47] Shaheen, *supra* note 14.
[48] 33 U.S.C. 1344 (1977).
[49] 18 F.3d 1560 (Fed. Cir. 1994).
[50] *Id.* at 1561.
[51] David M. Ivester, *Guide to Wetlands Regulation* , 2 Land Use Forum 197, 198 (1992).
[52] 806 F.2d 1017 (Fed. Cir. 1986).
[53] *Id.* at 1021.
[54] *See generally* Fred Bosselman, *Protecting Resources Under the Scalia Regime*, 2 Land Use Forum 63, 63-65 (1993) ("most promising is the *Lucas* Court's suggestion, analogizing from Free Exercise Clause precedent, that "generally applicable" environmental restrictions are not unconstitutional takings when, unlike the South Carolina law, they are not 'aimed at land' in the first instance"); Lazarus *supra* note 2, at 1429; Shaheen *supra* note 14.
[55] Bosselman, 2 Land Use Forum at 64.