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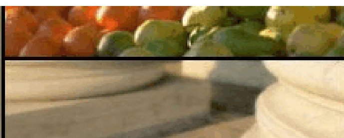

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Constitutional Jurisprudence in the Eyes of the Beholder: Preventing Harms and Providing Benefits in American Takings Law

by

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CONSTITUTIONAL JURISPRUDENCE IN THE EYES OF THE BEHOLDER: PREVENTING HARMS AND PROVIDING BENEFITS IN AMERICAN TAKINGS LAW

*John S. Harbison**

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I. INTRODUCTION

The Fifth Amendment to the United States Constitution contains the following deceptively simple statement: "private property shall not be taken for public use, without just compensation."[1] This provision prohibits state and local governments from "taking" private property for public use by permanent physical occupation or regulatory restriction on use without paying for it.[2] The rule on permanent physical occupations is straightforward—an appropriation of private property is a taking per se.[3] The law on regulatory takings is, however, far from straightforward.[4] The concept of regulatory takings traces back to Justice Holmes' laconic declaration in *Pennsylvania Coal Co. v. Mahon*[5] that "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."[6]

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* Associate Research Professor, University of Arkansas School of Law. I am grateful to Peggy Radin and Buzz Thompson for encouraging me to think about takings issues, and for giving me guidance along the way. Susan Pilcher provided her customary support throughout the project. Each reader will understand, I hope, that space limitations prevent my giving full due to the complexities of the subject in this essay.

1. U.S. CONST. amend. V.

2. Chicago, Burlington & Quincy R.R. v. Chicago, 166 U.S. 226, 238-39 (1897) (holding that the Takings Clause applies to state and local government by its incorporation in the Due Process Clause of the Fourteenth Amendment).

3. *Id.* at 239.

4. Spotting the contradictions and indeterminacies of regulatory takings jurisprudence has become an academic cottage industry. It is almost de rigueur to begin an article on the takings problem by listing other articles pointing out the doctrine is a muddle. *See, e.g.*, David A. Dana, *Natural Preservation and the Race to Develop*, 143 U. PA. L. REV. 655, 656 n.4 (1995); Jed Rubenfeld, *Usings*, 102 YALE L.J. 1077, 1078 n.2 (1993).

5. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922).

6. *Id.* at 415.

For the first 150 years of American constitutional history, there were no known regulatory takings.[7] Since *Mahon*, American judges have tried earnestly to decide how far is "too far."

In distilled form, the doctrinal tests for identifying instances in which government regulation goes too far ask four questions: (1) Did the government physically appropriate the property?[8] (2) Did the regulation cause excessive loss of the property's market value?[9] (3) Did the regulation intend to prevent a public harm or provide a public benefit?[10] and (4) Does the regulatory restriction bear a close relation (or individualized nexus) to the governmental interest at stake?[11] This essay addresses the last two tests insofar as they involve the denial of development rights appertaining to agricultural lands, timberlands, and other undeveloped spaces. Because the two tests more or less stand alone, the discussion contains a few disjunctions, but does have a pair of related themes. First, the distinctions the tests ask us to consider are largely semantic. Second, the rule-like formulations they apparently establish will not sit still. As Margaret Jane Radin has pointed out, "[t]he pragmatic ethical issue [embedded in the takings problem] defies reduction to formal rules."[12]

What is the ethical issue? According to the United States Supreme Court, "It is axiomatic that the Fifth Amendment's just compensation provision is 'designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.' "[13] But if this axiom means *every* public burden should be borne by the public as a whole, then the formulation runs aground on the shoals of reality. Professor Radin further observes:

> When the Court's takings jurisprudence has not been conclusory, it has usually attempted to address in a practical way an underlying issue of political and moral theory: is it appropriate to make this particular person bear the cost of this particular government action for the benefit of this particular community?[14]

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7. In fact, physical occupations were apparently the only takings that concerned the Constitution's drafters. The Takings Clause may have been a response to the arbitrary confiscation of property by armies during the Revolutionary War. *See* William M. Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 785-98 (1995). This must be a matter of discomfort to property rights advocates who generally espouse the doctrine of original intent in constitutional adjudication.

8. *See* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 435 (1982).

9. *See* Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1019 (1992).

10. *See, e.g.*, Mugler v. Kansas, 123 U.S. 623 (1887); Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962).

11. *See* Nollan v. California Coastal Comm'n, 483 U.S. 825, 836-37 (1987); *see also*, Dolan v. City of Tigard, 114 S. Ct. 2309, 2319-20 (1994).

12. Margaret Jane Radin, *The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings*, 88 COLUM. L. REV. 1667, 1684 (1988).

13. First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 302, 318-19 (1987) (quoting Armstrong v. United States, 364 U.S. 40, 49 (1960)).

14. Radin, *supra* note 12, at 1684.

It is very often necessary.

Frank Michelman once contrasted L.T. Hobhouse's contention that it is unjust for one citizen to suffer for the benefit of many citizens with Holmes' realism that this injustice is unavoidable.[15] Misleadingly, formulations like the harm-benefit distinction[16] and the individualized nexus test[17] imply that Holmes' answer to Hobhouse is untrue.

I shall focus on three recent takings cases. The first two are *Lucas v. South Carolina Coastal Council*[18] and *Gardner v. New Jersey Pinelands Commission.*[19] *Lucas* and *Gardner* were explicitly concerned with the preservation of undeveloped land in an undeveloped state. In *Lucas*, the land was part of a beach-dune system along the South Carolina coast labeled by the challenged legislation as "critically eroding."[20] In *Gardner*, the land was in one of the few remaining agricultural districts in the emerging coastal megalopolis extending from Boston, Massachusetts, to Richmond, Virginia.[21] In *Lucas*, the Court's plurality opinion suggested that the legislation designed to restrict development of undeveloped land was defective because "by requiring land to be left substantially in its natural state, . . . private property [was] being pressed into some form of public service under the guise of mitigating serious public harm."[22] In *Gardner*, a unanimous New Jersey Supreme Court found that similar legislation advanced a valid purpose by preventing the public harm associated with residential, commercial, and industrial development in an agricultural district.[23] Neither court attempted to explain why it saw the statute as one securing a benefit rather than preventing a harm, or vice versa. Their dereliction is not surprising, because the harm-benefit distinction is pure illusion.[24]

15. *See* Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1165-66 (1967) (citing L.T. HOBHOUSE, LIBERALISM 41 (1964); OLIVER W. HOLMES, THE COMMON LAW 37 (Mark D. Howe ed., 1963)).

16. *See infra* notes 33-73 and accompanying text.

17. *See infra* notes 74-114 and accompanying text.

18. Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1030 (1992) (holding that a regulation preventing development of property is a taking per se if it completely destroys the property's market value, unless the regulation rests on a principle of nuisance or property law inhering in the title that restricts rights of use).

19. Gardner v. New Jersey Pinelands Comm'n, 593 A.2d 251, 262 (N.J. 1991) (holding that a regulation restricting development to a specified fraction of a working farm, and requiring that a deed restriction confine future uses to agricultural uses on the remainder was not a taking because it did not destroy the property's market value, was intended to prevent public harms, and had a nexus with the harms involved).

20. Lucas v. South Carolina Coastal Council, 505 U.S. at 1007 (citing 1988 S.C. Acts 634 (codified as S.C. CODE ANN. § 48-39-250 (Law. Co-op. Supp. 1993))).

21. Gardner v. New Jersey Pinelands Comm'n, 593 A.2d at 254.

22. Lucas v. South Carolina Coastal Council, 505 U.S. at 1018.

23. Gardner v. New Jersey Pinelands Comm'n, 593 A.2d at 258.

24. *See infra* notes 33-47 and accompanying text.

The third case I shall visit is *Dolan v. City of Tigard*.[25] The outcome in *Dolan* hinged on the answer to the fourth question enumerated above: Was there a sufficient nexus between the restriction imposed by the government on the property owner and the government's interest in mitigating the particular adverse impacts of additional development?[26] *Dolan* holds that if the government exacts a dedication of land for public use in exchange for a building permit,[27] the government has the burden of proving by "some sort of individualized determination that the required proposed dedication is related both in nature and extent to the impact of the proposed development."[28] Whether the Court intends the *Dolan* test to apply to the type of agricultural zoning at issue in *Gardner* is uncertain, though the *Gardner* court assumed the test did apply.[29] Whether the government would prevail in *Gardner* again, if it were retried after *Dolan*, is unclear. My guess, however, is that it would not. The unstated presumption of *Dolan* is that society may *not* ask one person to sacrifice property rights for the good of the community. This is what *Lucas* and *Dolan* have in common; they rest upon the unworldly idealism of Hobhouse, rather than the pragmatic realism of Holmes.

Lucas and *Dolan* instruct judges to focus on harms. *Lucas* does so by establishing that a complete diminution in value of the property is a taking per se unless the regulation affecting the property is based on the common law of nuisance.[30] With this exception to the per se rule for complete diminution, the regulation can be saved by showing that it reaches a common law

25. Dolan v. City of Tigard, 114 S. Ct. 2309 (1994) (holding that a requirement that property owner dedicate a pedestrian and bicycle pathway easement for public use was a taking because the city failed to show that the additional number of vehicle and bicycle trips generated by proposed development was reasonably related to the requirement).

26. *Id.* at 2317.

27. *Dolan* deals with a particular type of land-use regulation called an exaction. *Id.* at 2312. Usually, this is a subdivision improvement, a dedication of a public facility, or a fee in lieu of a dedication that will be used for the purchase of a public facility. *See* DANIEL R. MANDELKER, LAND USE LAW 413 (3d ed. 1993).

28. Dolan v. City of Tigard, 114 S. Ct. at 2319.

29. *See infra* notes 60-62, 74 and accompanying text. Perhaps *Dolan* is to be confined to cases in which the government exacts an easement for public use from the property owner. The Court did suggest that the public use element was significant. *See* Dolan v. City of Tigard, 114 S. Ct. at 2316 ("[P]ublic access would deprive petition of the right to exclude others, 'one of the most essential sticks in the bundle of rights that are commonly characterized as property.'"). In *Gardner*, by contrast, the deed-restricted land was not open to public use, but was dedicated to continued agricultural use by the property owner. Gardner v. New Jersey Pinelands Comm'n, 593 A.2d 251, 253 (N.J. 1991). The *Gardner* court analyzed the case as if it involved an exaction—holding that the regulation met the exaction test established by *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987). Gardner v. New Jersey Pinelands Comm'n, 593 A.2d at 259. *Nollan* found that there must be an essential nexus between the impact of the development and the means chosen to deal with it. Nollan v. California Coastal Comm'n, 483 U.S. at 837. On the facts before it, *Gardner* found a nexus between the impact of developing agricultural land and the density and deed restriction regulation. Gardner v. New Jersey Pinelands Comm'n, 593 A.2d at 259. In addition, *Dolan* requires not only a nexus be necessary, but the impact of development and the burden of the regulation must be "roughly proportional." Dolan v. City of Tigard, 114 S. Ct. at 2319.

30. Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1030 (1992).

nuisance—that is, a harm attributable to the property's use that could be abated under the common law.[31] Similarly, *Dolan* directs judges to ensure that the burden of any regulatory exaction is closely related to the actual anticipated harms of development. The first goal of this Article is to persuade the reader that a harm-benefit analysis of either the *Lucas* or *Dolan* variety is not rule-oriented, but largely semantic. The second goal is to persuade the reader that harm-benefit analysis diverts attention from the ethical question embedded in the takings problem: What is an unfair sacrifice of property rights? *Lucas* and *Dolan* rest on the assumption that almost every sacrifice of property rights is unfair. That cannot be true. As Jeremy Paul has noted, the Takings Clause ultimately asks us to decide "which kinds of sacrifice constitute the price of civilization and which sacrifices are themselves uncivilized."[32] To focus on the abatement or mitigation of harms is to pretend this question does not exist.

II. THE HARM-BENEFIT DISTINCTION

The harm-benefit distinction directs judges to ask whether the government intends permissibly to prevent a public harm or, impermissibly, to provide a public benefit. *Lucas* and *Gardner*, especially in juxtaposition, expose the conclusory nature of this question.[33] The harm-benefit distinction implies that there may be a rule-like solution to the takings problem in the form of a syllogism: Securing any public benefit is a taking; preserving undeveloped land secures a public benefit; therefore, preserving undeveloped land is a taking. Conversely, one can create a contrasting syllogism: Preventing any public harm is not a taking; preserving undeveloped land prevents a public harm; therefore, it is not a taking.[34]

The weakness of these formulations is that one can always say that preventing public harm is a benefit, and thereby collapse the syllogism. Harm and benefit are merely two sides of one coin—a point Justice Scalia makes in *Lucas*.[35] But his plurality opinion inexplicably "begins by telling judges why traditional nuisance reasoning [i.e., the harm-benefit distinction] is unworkable in takings law, and it ends by telling them that they must apply *only* traditional nuisance reasoning when they decide total-loss takings cases."[36]

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31. *See id.*

32. Jeremy Paul, *The Hidden Structure of Takings Law*, 64 S. CAL. L. REV. 1393, 1547 (1991).

33. I am not the first observer of takings jurisprudence to criticize the harm-benefit distinction. *See also* Dana, *supra* note 4, at 660-68; Donald W. Large, *The Supreme Court and the Takings Clause: The Search for a Better Rule*, 18 ENVTL. L. 3, 29-34 (1987); Michelman, *supra* note 15, 1196-201; Paul, *supra* note 32, at 1438-65; Rubenfeld, *supra* note 4, at 1097-100; Joseph L. Sax, *Takings and the Police Power*, 74 YALE L.J. 36, 48-50 (1964).

34. I do not mean to suggest that the syllogism would decide the case by itself. The harm-benefit distinction is usually only one factor in the outcome. Other factors of importance are the character of the government's action, and the weight of the burden on the property owner.

35. Lucas v. South Carolina Coastal Council, 505 U.S. at 1024.

36. Rubenfeld, *supra* note 4, at 1094.

Justice Scalia's criticism of the harm-benefit distinction is set forth in a passage about the malleability of legislative findings, a passage sure to resonate with anyone who has ever watched legislation being made. According to Justice Scalia:

> the distinction between "harm-preventing" and "benefit-conferring" regulation is often in the eye of the beholder. It is quite possible, for example, to describe in *either* fashion the ecological, economic, and aesthetic concerns that inspired the South Carolina legislature in the present case. One could say that imposing a servitude on Lucas's land is necessary in order to prevent his use of it from "harming" South Carolina's ecological resources; or, instead, in order to achieve the "benefits" of an ecological preserve.[37]

This means, of course, that basing a test for determining whether compensation is due on "whether the legislature has recited a harm-preventing justification for its action [is pointless]. Since such a justification can be formulated in practically every case, this amounts to a test of whether the legislature has a stupid staff."[38]

Nevertheless, the harm-benefit distinction refuses to go away because it is "captivating intuitively."[39] In particular, the harm side of the distinction arises from our shared understanding of the rights of private property. We understand that the classic, liberal conception of ownership includes strong rights to possess, use, manage, and earn income from property,[40] but also recognize that one cannot use property in a way that unreasonably harms a neighbor. This principle has deep roots.[41] Thus, Justice Scalia first rejects the explanatory power of the harm-benefit distinction,[42] but he then suggests that the legislation in question is benefit-conferring and thus suspect.[43] Despite his strictures against the meaningfulness of the harm-benefit distinction, Justice Scalia both disdains the extraction of public benefits, and suggests that judges will be able to confine legislatures to the regulation of uncompensated public nuisances. In his words:

37. Lucas v. South Carolina Coastal Council, 505 U.S. at 1024 (footnote omitted).

38. *Id.* at 1025-26 n.12.

39. Michelman, *supra* note 15, at 1201.

40. A.M. Honoré, *Ownership, in* OXFORD ESSAYS IN JURISPRUDENCE 107, 107 (A.G. Guest ed., 1961).

41. *See, e.g.*, Aldred's Case, 77 Eng. Rep. 816 (K.B. 1611) (finding that "action on the case lies for erecting a hogstye so near the house of the plaintiff that the air thereof was corrupted"). The defendant unsuccessfully raised the sensitive plaintiff defense: "[O]ne ought not to have so delicate a nose, that he cannot bear the smell of hogs." *Id.* at 817.

42. Lucas v. South Carolina Coastal Council, 505 U.S. at 1025 ("A given restraint will be seen as mitigating 'harm' to the adjacent parcels or securing a 'benefit' for them, depending upon the observer's evaluation of the relative importance of the use that the restraint favors.").

43. *Id.* at 1024 n.11 (observing that the restrictions passed by the South Carolina Legislature and upheld by the state supreme court "seem to us phrased in 'benefit-conferring' language instead").

> Any limitation [on the rights of property] so severe [as to prohibit all beneficial use of land] cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership.[44]

Establishing the boundaries of these common law principles is difficult, but let us see what can be accomplished.

III. THE NUISANCE EXCEPTION

The *Lucas* opinion acknowledges the indeterminacies inherent in the harm-benefit distinction, but tries to reduce them by confining the category of regulable harms to those areas society traditionally views as harmful. Any regulatory limitation on the rights of ownership not aimed at a nuisance must be, therefore, the unconstitutional extraction of a public benefit. This alters the rule-like syllogism as follows: Preventing any public harm considered a nuisance is not a taking; preserving undeveloped land prevents a public harm or nuisance; therefore, such preservation is not a taking. The key, of course, is that the harm really must be a nuisance. This begs an obvious question: How does a judge decide whether or not it is a nuisance? According to Justice Scalia, the answer is found by employing the balancing method endorsed by the *Restatement (Second) of Torts*.[45] This method is, however, another illusory rule-like structure.

Consider, for example, a hypothetical involving one of the harms explicitly mentioned in *Gardner v. New Jersey Pineland Commission*: the pollution of groundwater.[46] Greenjeans decides to subdivide his two-hundred acre farm into two-acre parcels for developing single-family residences. The property owner's farm is not within a nearby town's planning area jurisdiction and is not served by its sewer lines. The farmer installs septic tanks that ultimately fail because of the extreme porosity of the underlying substrate, causing detectable degradation of an aquifer supplying the town's drinking water. This is the type of harm the New Jersey Legislature intended to guard against when it enacted the Pinelands Protection Act.[47] The legislature of the

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44. *Id.* at 1029.

45. *Id.* at 1031. Factors to be balanced include the degree of harm to public resources or adjacent private property, RESTATEMENT (SECOND) OF TORTS §§ 826, 827 (1977), the social value of the claimant's activities and their suitability to the locality, *id.* §§ 828, 831, the relative difficulty of avoiding the harm through measures taken by the landowner, the government, or the neighbors, *id.* §§ 827-828, 830, and whether the use was engaged in by other landowners, *id.* § 827 cmt. g.

46. Gardner v. New Jersey Pineland Comm'n, 593 A.2d 251, 258 (N.J. 1991).

47. According to the Pinelands Protection Act:

> The legislature further finds and declares that the current pace of random and uncoordinated development and construction in the pinelands area poses an immediate threat to the resources thereof, especially to the survival of rare, threatened, and endangered plant and animal species and the habitat thereof, and to the maintenance of the existing high quality of surface and ground

state where the town is located follows New Jersey's example by enacting an identical statute. The most important limitations are set forth in the implementing regulations: in designated Agricultural Production Areas, the residential density level cannot exceed one unit per forty acres; the residences must be clustered on one-acre lots; and the remaining thirty-nine acres allocated to each residence must be permanently dedicated to agricultural use by a recorded deed restriction.[48] Of course, the damage caused by the farmer's development has already occurred. The new statute aims at farmers who have not yet subdivided their property and may file post-*Lucas* taking claims.

A question confronting trial courts under *Lucas* is whether the statute is intended to mitigate a nuisance. Unfortunately, in our hypothetical state, no court has determined whether it is a nuisance for a property owner to pollute a groundwater aquifer. The lawyers research the common law of other states in the hope of finding some guidance on the question. One set of cases in particular catches the attention of the state's attorney. These cases make up the ancient law of privies, a line of decisions rarely cited in our modern era of indoor plumbing. These cases are interesting, however, because *Lucas* holds:

> [a]ny limitation [on the rights of property] so severe [as to prohibit all beneficial use of land] cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership.[49]

The government's lawyer is pleased to learn that privies may be prima facie nuisances.[50] The legislature, through the police power, can declare privies to be nuisances per se and require abatement.[51] All this seems pertinent because privies, like septic systems, rely on leachfields to control wastewater pollution.

Moreover, it seems clear that the legislature can abate, as a public nuisance, the pollution of a public drinking water source.[52] In all of these cases courts employ the traditional balancing approach codified in the *Restatement (Second) of Torts*.[53] The most significant factors are the character of the community, the nature of the geography and geology, the temporal priority of occupation and use, the extent of the injury and its regularity, and the

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> waters; that such development and construction increase the risk and extent of destruction of life and property which could be caused by the natural cycle of forest fires in this unique area.

N.J. STAT. ANN. § 13:18A-2 (West 1994).

48. This provision is identical to the one that prompted the takings claim in *Gardner*. *See* N.J. ADMIN. CODE tit. 7:50, §§ 5.24(a)(3), 5.24(c) (1991).

49. Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1029 (1992).

50. Trevett v. Prison Ass'n of Virginia, 36 S.E. 373 (Va. 1900); Harrington v. Board of Aldermen, 38 A. 1 (R.I. 1897).

51. Nourse v. City of Russellville, 78 S.W.2d 761, 764 (Ky. 1935).

52. Pennsylvania R. Co. v. Sagamore Coal Co., 126 A. 386, 391-92 (Pa. 1924); Auger & Simon Silk Dyeing Co. v. East Jersey Water Co., 96 A. 60, 61 (N.J. 1915).

53. RESTATEMENT (SECOND) OF TORTS § 826 (1977).

availability of corrective measures.[54] In our hypothetical, the legislature is concerned with the use of conventional leachfields in poor geology near settled communities dependent on shallow aquifers for drinking water. In enacting the farmland preservation statute, this legislature declares that it is acting to prevent a nuisance: the pollution of public drinking water supplies by septic systems.[55]

Have the property rights of farmers who cannot now follow the Greenjeans example been "taken for public use without just compensation?"[56] No obvious answer to this question exists, though a lawyer versed in the law of nuisance might correctly predict the outcomes of their respective claims. As Justice Holmes said, "a legal duty so called is nothing but a prediction that if a man does or omits certain things he will be made to suffer in this or that way by judgment of the court;—and so of a legal right."[57] But Holmes was under no illusion. Prediction would not be easy, because "[s]uch words as 'right' are a constant solicitation to fallacy"[58]—and any right grounded in the suspect terrain of nuisance law offers a special invitation to miscalculation. The nuisance exception undermines *Lucas*'s effort to establish a rule-like answer to total takings. Instead, its use requires the same sort of harm-benefit calculation *Lucas* claims to eschew. Often, the nuisance question turns on the weight of the burden on the property owner balanced against "the good and welfare of the commonwealth, and of the subjects of the same."[59] Sometimes a property owner must suffer when the needs of the public are greater than the burden on the individual. This assumption is inherent in the nuisance exception, and raises the question: Why did *Lucas* give such cheer to property rights advocates, who hailed the decision as a return to a takings law recognizing "the Primacy of the Property Owner's Expectations?"[60]

The answer may be that the Supreme Court is determined to reduce the category of harms that might be dealt with by the legislature. *Lucas* directs judges to look to the nuisance laws of the states to determine whether the harm in question is one that counts,[61] but admonishes that the nuisance exception will not be extensive. As Justice Scalia stated:

> [Justice Blackmun's dissent] decries our reliance on background nuisance principles at least in part because he believes those principles to be as manipulable as we find the harm prevention/benefit conferral dichotomy . . . . There is no doubt some leeway in a court's interpretation of what existing state law permits—but not remotely as much, we think, as in a

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54. *Id.* §§ 827-828.

55. *See, e.g.*, Adams v. Louisiana Dept. of Health & Human Resources, 458 So. 2d 1295 (La. 1984); *see also* Clean Water Act, 33 U.S.C. § 1365 (1994).

56. U.S. CONST. amend. V.

57. Oliver W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 458 (1897).

58. Jackman v. Rosenbaum Co., 260 U.S. 22, 31 (1922).

59. Harrington v. Board of Alderman, 38 A. 1, 2 (R.I. 1897).

60. Michael M. Berger, *Property Owners Have Rights: Lower Courts Need to Protect Them*, *in* AFTER LUCAS: LAND USE REGULATION AND THE TAKING OF PROPERTY WITHOUT COMPENSATION 29, 32 (David L. Callies ed., 1993).

61. Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1032 n.18 (1992).

> legislative crafting of the reasons for its confiscatory regulation. We stress that an affirmative decree eliminating all economically beneficial uses may be defended only if an *objectively reasonable application* of relevant precedents would exclude those beneficial uses in the circumstances in which the land is presently found.[62]

This is a telling quotation. It reveals a fundamental distrust of legislatures (apt to engage in confiscatory behavior disguised as the prevention of harm) and a fundamental confidence in judges (able to distinguish objectively prevention of harm from extraction of benefits). The faith in judges' ability to handle this assignment holds the opinion together. Legislatures cannot baldly assert that a use is noxious, because legislatures are viewed as having a natural tendency to expropriate property. Judges, however, society can trust.

Are courts to act as though nuisance law were on display in a museum case? If the limitation must inhere in the title, is the evolution of nuisance law ossified as of the date title passes from A to B?[63] If so, *Lucas* is an immeasurably bad idea. In his dissent in *Lucas*, Justice Stevens observed:

> [A]rresting the development of the common law is not only a departure from our prior decisions; it is also profoundly unwise. The human condition is one of constant learning and evolution—both moral and practical. Legislatures implement that new learning; in doing so they must often revise the definition of property and the rights of property owners.... [For example, a better] appreciation of the significance of endangered species, the importance of wetlands, and the vulnerability of coastal lands shapes our evolving understandings of property rights.[64]

A common law frozen in time will fail to reflect much of what we understand today about the etiology of ecological harms. Consider *Just v. Marinette County*.[65] In *Just*, the Wisconsin Supreme Court denied the right to fill a wetland and construct a dwelling, finding that "[t]he ordinance [did] not create or improve the public condition but only preserve[d] nature from the despoilage and harm resulting from the unrestricted activities of humans."[66] Would Justice Scalia call *Just* an objective reading of the State's property law

62. *Id.*

63. Or is the law brought up to date, adding additional limitations, when the title subsequently passes from B to C? What does C purchase in acquiring title? Is it title with the inherent limitations of nuisance law as of the date of B's acquisition, or is it with the inherent limitations of nuisance law as of the date of B's transfer? These are questions without obvious answers.

64. Lucas v. South Carolina Coastal Council, 505 U.S. at 1069-70. Even Justice Kennedy's concurrence in *Lucas* concedes this point: "[T]he common law of nuisance is too narrow a confine for the exercise of regulatory power in a complex and interdependent society. The State should not be prevented from enacting new regulatory initiatives in response to changing conditions, and courts must consider all reasonable expectations whatever their source." *Id.* at 1035.

65. Just v. Marinette County, 201 N.W.2d 761 (Wis. 1972).

66. *Id.* at 771.

precedents, given his belief that the historic compact enshrined in the Constitution favors "all economically valuable use?"[67] After all, "what is the land but the profits thereof[?]"[68] These questions loom on the horizon of takings jurisprudence.

IV. THE INDIVIDUALIZED REGULATORY NEXUS

The legislature that enacted the New Jersey Pinelands Protection Act (the Act) gave several justifications for the statute: to protect a unique ecological habitat for plants and animals, to promote the area's cultural and historic characteristics, to safeguard the region's water supply, and to preserve farmland and agriculture.[69] Regulations promulgated under the Act limited residential development density, required clustering of houses, and insisted on a deed restricting the remaining property to agricultural use.[70] The landowner's challenge to these regulations in *Gardner*[71] relied heavily on the Supreme Court's decision in *Nollan v. California Coastal Commission*.[72] In a rather conclusory fashion, the *Gardner* court found that the regulatory limitations of the Pinelands Preservation Act did not impose "a burden . . . unrelated to the essential purposes of the regulatory scheme."[73] In the sequence of recent significant takings cases, however, *Gardner* falls between *Nollan* and *Dolan*.[74] *Nollan* requires a nexus between the impact of the development and the means chosen to deal with it.[75] In *Dolan*, the Court tells us how strong this nexus must be: "[N]o precise mathematical calculation is required, but the city must make some sort of individualized determination

67. Lucas v. South Carolina Coastal Council, 505 U.S. at 1028.

68. *Id.* at 1017 (quoting 1 EDWARD COKE, THE INSTITUTES OF THE LAWS OF ENGLAND § 1 (Francis Hargreave & Charles Butler eds., 1st Am. ed., Johnson & Warner 1812)). *But see* Just v. Marinette County, 201 N.W.2d at 771 ("The Justs argue that their property has been severely depreciated in value. But this depreciation of value is not based on the use of the land in its natural state but on what the land would be worth if it could be filled and used for the location of a dwelling. While loss of value is to be considered in determining whether a restriction is a constructive taking, value based upon changing the character of the land at the expense of harm to public rights is not an essential factor or controlling.").

69. Gardner v. New Jersey Pinelands Comm'n, 593 A.2d 251, 257-58 (N.J. 1991).

70. *Id.* at 256.

71. *Id.* at 258-59.

72. Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987). In *Nollan*, the Coastal Commission said the impact of the development—enlargement of an existing beachfront bungalow—was the loss of visual access to the ocean from the shoreward side of the house lot. *Id.* at 828-29. To remedy this loss, the Commission required the Nollans grant the public a right-of-way easement along the shoreline of their property as a condition of the building permit. *Id.* at 827-29. Thus, as in *Dolan*, the exaction required a dedication of property to public use. *See supra* text accompanying note 22.

73. Gardner v. New Jersey Pinelands Comm'n, 258 A.2d at 259.

74. Dolan v. City of Tigard, 114 S. Ct. 2309 (1994).

75. Nollan v. California Coastal Comm'n, 483 U.S. at 837 ("Constitutional propriety disappears . . . if the condition . . . utterly fails to further the end advanced as the justification for the [condition.]").

that the required dedication is related both in nature and extent to the impact of the proposed development."[76]

Thus, the *Dolan* majority tightened the nuisance-like circle around land-use controls. For an exaction to survive constitutional scrutiny, it must satisfy two tests: (a) the exaction must be related to some nuisance-like harm associated with the development (*Nollan*), and (b) the relationship between the exaction and the harm must be "roughly proportional" (*Dolan*).[77] *Dolan* involved two predominant harms, traffic congestion and surface water runoff, which would be exacerbated by the development in question—nearly doubling the size of an existing hardware store[78] and paving a thirty-nine space parking lot.[79] To deal with these anticipated harms, the city conditioned the necessary building permit by requiring the landowner to dedicate the portion of the property within a 100-year floodplain to the city's greenway system and an additional portion adjacent to the floodplain as a pedestrian and bicycle pathway.[80] Both dedications ran afoul of the rough proportionality test.[81] With respect to the first dedication, the majority was concerned that the city failed to show "why a public greenway, as opposed to a private one, was required in the interest of flood control."[82] With respect to the second dedication, the concern was that the city failed to meet "its burden of demonstrating that the additional number of vehicle and bicycle trips generated by the petitioner's development reasonably related to the city's requirement for a dedication of the pedestrian/bicycle pathway easement."[83]

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76. Dolan v. City of Tigard, 114 S. Ct. at 2319-20.

77. *See id.* at 2319. "Rough proportionality" is the *Dolan* Court's shorthand for the individualized nexus test. *See id.* Moreover, in adopting this test, the Court placed the evidentiary burden on the government. *Id.* The majority conceded "that in evaluating most generally applicable zoning regulations, the burden properly rests on the party challenging the regulation to prove that it constitutes an arbitrary regulation of property rights." *Id.* at 2320 n.8. It held, however, that shifting the evidentiary burden is appropriate when "the city [makes] an adjudicative decision to condition [the property owner's] application for a building permit on an individual parcel." *Id.* at 2331 (Souter, J., dissenting). Perhaps the government should have this burden in an exaction case, but to say that it should have this burden simply because the determination is adjudicative is conclusory and arguably simplistic. As a current member of a city planning commission, I can attest that no land-use determination is adjudicative in even the loosest sense of the term.

78. The existing store, covering 9700 square feet on a 1.67 acre lot, was to be razed and replaced by a larger store covering 17,600 square feet. *Id.* at 2313.

79. *Id.* Most cities would require the pavement of additional parking spaces to correspond with the increase in the building's footprint. The *Dolan* opinion does not say whether the pavement area increase *was* required by the City of Tigard, but the paving alone could substantially increase surface water flows off the property.

80. *Id.* at 2314.

81. *Id.* at 2319-20.

82. *Id.* at 2320. "The city has not attempted to make any individualized determination to support this part of its request." *Id.* at 2312.

83. *Id.* at 2321. "No precise mathematical calculation is required, but the city must make some effort to quantify its findings in support of the dedication for the pedestrian/bicycle pathway beyond the conclusory statement that it could offset some of the traffic demand generated." *Id.* at 2322.

The Court was not going to defer unquestioningly to administrative findings.[84]

One can envision land-use planners throughout the country asking themselves what they must do to pass the rough proportionality test. *Dolan* was criticized, not surprisingly, as "vague, ambiguous, and unquantifiable."[85] Some planners wondered whether the test has effectively precluded some land-use controls. Agricultural zoning is a prime example. Consider again the regulatory restrictions before the court in *Gardner*.[86] It is a close question whether a regulation substantially denying development and demanding a deed restricting most of the property to lower-value uses could ever be roughly proportional to the incremental harms apparently anticipated.[87] The legislature could, of course, ratchet up the rhetoric concerning the harms involved, though judges are admonished to pay little attention to findings after *Lucas*.[88] Yet the difficulty is one the *Gardner* court anticipated: "On a conceptual level, applying the nexus requirement . . . in connection with a single private development to a comprehensive environmental protection scheme that limits the use of land is difficult, if not impossible."[89] Unfortunately, the court did not develop this point. I conclude by offering a few thoughts on the scope of the problem.

More than any other recent takings case, *Dolan* reveals the degree to which a majority of the Supreme Court is transfixed by the harm-benefit distinction.[90] The central premise of *Dolan* is that any development exaction imposed by the government must be related to an anticipated harm attributable to the development.[91] The new rule of law set forth is that the exaction and the anticipated harm must not merely be related, but related in an individualized, clearly demonstrable way.[92] What accounts for this close focus on anticipated harms? Re-examining its decision in *Nollan*, the *Dolan* Court asserted that "[t]he absence of a nexus left the [government] in the position of simply trying to obtain an easement through gimmickry, which converted a valid regulation of land use into 'an out-and-out plan of extortion.' " [93] In short, we must focus on the essential nexus between anticipated harms and

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84. *See id.* Note the Court's similar discounting of the legislative findings in *Lucas*. *See supra* notes 37-40 and accompanying text.

85. Julian R. Kossow, Dolan v. City of Tigard, *Takings Law, and the Supreme Court: Throwing the Baby out with the Floodwater*, 14 STAN. ENVTL. L.J. 215, 227 (1995).

86. Gardner v. New Jersey Pinelands Comm'n, 593 A.2d 251 (N.J. 1991).

87. This assumes, of course, that the deed restriction in *Gardner* is the type of exaction that would be affected by *Dolan*. Because the *Gardner* deed restriction does not dedicate land for public use, arguably it is not. On the other hand, the *Gardner* court apparently thought it was a dedication for a public purpose, because it analyzed the case under *Nollan's* essential nexus test.

88. Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1030-31 (1992).

89. Gardner v. New Jersey Pinelands Comm'n, 593 A.2d 251, 262-63 (N.J. 1991).

90. *See* Dolan v. City of Tigard, 114 S. Ct. 2309, 2322 (1994).

91. *Id.*

92. *Id.*

93. *Id.* at 2317 (quoting Nollan v. California Coastal Comm'n, 483 U.S. 825, 837 (1987)).

land-use regulations in order to ensure that regulatory grasp will not overreach. Why is this assurance needed? Apparently, the Court assumes, regulators relentlessly attempt to coerce public benefits from private property owners. The individualized nexus test is security against this supposed coercion. It functions by making regulators *prove* rough proportionality between the anticipated harms of development, and the land-use exactions regulators impose.

Consider how the rough proportionality test would operate, however, in the context of *Gardner* and the Pinelands Preservation Act. The legislature and the planning agency said that they intended to preserve productive agricultural land from advancing urbanization by imposing a deed restriction on a substantial portion of each permitted subdivision.[94] The landowner characterized these limitations as an exaction, and the court accepted this nomenclature.[95] If the case is analyzed under the individualized nexus test, what must the government show? First, of course, the state must persuade the court that the loss of productive agricultural land is actually a harm.[96] Second, the state must assess the incidence of this harm related to the development in issue, with some degree of precision.[97] Finally, the state is required to prove that the deed restriction is roughly proportional to the amount of harm anticipated, again with some degree of precision.[98] Unfortunately, this line of reasoning reduces to a conclusion that is "true purely by virtue of the meanings of component terms."[99] Assume the court is convinced—despite *Lucas*[100]—that the loss of productive agricultural land is a harm. Subdivision will cause the loss of forty acres of such land. It seems almost axiomatic that the exaction, a deed restriction prohibiting development of thirty-nine acres, is roughly proportional to the anticipated harm.[101] The government wins. Surely, the *Dolan* Court had some other kind of harm in

94. Gardner v. New Jersey Pinelands Comm'n, 593 A.2d 251, 253 (N.J. 1991). I am simplifying things, of course, by assuming the government had only one purpose. The Pinelands Act in fact identified several purposes. *See id.* at 254. *Dolan* seems to say that the government must satisfy the rough proportionality test with respect to every named purpose. For discussion of this point, see Kossow, *supra* note 85, at 235.

95. *Id.* at 262-63.

96. Dolan v. City of Tigard, 114 S. Ct. 2309, 2317 (1994).

97. *Id.* at 2321. For example, in *Dolan* the city showed that the development would add 435 automobile trips per day to downtown streets. *See id.* at 2321 n.9. This was the anticipated harm in support of the need for a bicycle and pedestrian pathway.

98. *Id.* at 2319-20.

99. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2244 (1986) (defining tautologous).

100. *See* Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1031 (1992) (stating "It seems unlikely that common-law principles [of property or nuisance law] would have prevented the erection of any habitable or productive improvements on petitioner's land; they rarely support prohibition of the 'essential use' of land.") By essential use, the Court means, of course, profitable use. *See id.* at 1029-30.

101. Dolan v. City of Tigard, 114 S. Ct. at 2322. The numbers given are from the clustering, density, and deed restriction provisions of the Pinelands regulations. *See id.*

mind.[102] Preservation—characterized as the prevention of a harm—does not fit the *Dolan* paradigm.[103]

On the other hand, what if the Pinelands legislature and the planning agency were to say that they intended to protect groundwater from the development of agricultural land? This sounds more like *Dolan*, since it deals with a nuisance-like externality, but it yields another conclusory result.[104] This time the landowner wins. Of course, pollution of groundwater is a harm. Clearly, subdivision of the plaintiff's farm will cause a detectable, but, by itself, probably insignificant amount of this harm. If the incremental harm is insignificant, however, it seems axiomatic that a deed restriction on thirty-nine of the landowner's forty acres is not roughly proportional to the harm anticipated. As *Gardner* points out, "applying the nexus requirement . . . in connection with a single private development to a *comprehensive environmental protection scheme* that limits the use of land is difficult, if not impossible."[105] Many environmental regulations are intended to prevent ecological damage caused by numerous, diffuse, small-scale harms, inconsequential by themselves, but perhaps catastrophic in the aggregate. This is a basic lesson of ecology. We are not just dealing with classic nuisances like the proverbial pig in the parlor,[106] but with externalities unseen, unheard, and difficult to reduce to an individualized nexus.[107] Moreover, these are matters not obviously positioned on a scale that differentiates harms and benefits.

V. RETURNING TO FIRST THINGS

In *Lucas*, Justice Scalia cited a New Jersey Supreme Court case, *Morris County Land Improvement Co. v. Parsippany-Troy Hills Township*,[108] for the proposition that "requiring land to be left substantially in its natural state [carries] a heightened risk that private property is being pressed into some form of public service under the guise of mitigating serious public harm."[109] The use of *Morris County Land* is interesting. Eleven months before *Lucas*, the New Jersey Supreme Court, in *Gardner*, forcefully disavowed *Morris County Land*.[110] According to the *Gardner* court:

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102. *See* Dolan v. City of Tigard, 114 S. Ct. 2309 (1994).

103. *Id.*

104. *Id.* at 2322.

105. Gardner v. New Jersey Pinelands Comm'n, 593 A.2d 251, 262 (N.J. 1991) (emphasis added).

106. *See, e.g.*, Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 388 (1926) ("A nuisance may be merely a right thing in a wrong place, like a pig in the parlor instead of the barnyard."); Aldred's Case, 77 Eng. Rep. 816, 816 (K.B. 1610) (noting defendant's pig residing "next to the hall and parlour of the plaintiff").

107. Dolan v. City of Tigard, 114 S. Ct. 2309, 2321-22 (1994).

108. Morris County Land Improvement Co. v. Parsippany-Troy Hills Township, 193 A.2d 232 (N.J. 1963) (prohibiting the filling of marshlands in order to preserve region as a water detention basin).

109. Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1018 (1992).

110. Gardner v. New Jersey Pinelands Comm'n, 593 A.2d 251, 261 (N.J. 1991).

> [T]he vitality of *Morris County Land* has declined with the emerging priority accorded to the ecological integrity of the environment. The decision, now nearly thirty years old, arose in a time before the environmental and social harms of indiscriminate and excessive development were widely understood or acknowledged. That the same facts would occasion the same result today is by no means certain. Indeed, many more recent decisions have overtly or tacitly failed to follow *Morris County Land* in environmental contexts.[111]

Although Justice Scalia never refers to *Gardner*, one cannot help but wonder whether his endorsement of *Morris County Land* is a veiled threat against the kind of regulatory program upheld in *Gardner*. It is likely that Justice Scalia would agree with the court in *Morris County Land*, that it was "obvious from the proofs, *and legally of the highest significance*, that the main purpose of enacting regulations with the practical effect of retaining the meadows in their natural state was for a public benefit."[112] One may further assume that Justice Scalia would conclude from this statement that a regulatory program preserving agricultural land should be viewed with suspicion.

The harm benefit distinction makes constitutional analysis depend on the eyes of the beholder. *Morris County Land*, *Lucas*, *Dolan*, and *Gardner* employ a jurisprudence based on "differing connotations of words of similar denotative meaning."[113] The harm-benefit distinction is, in other words, largely semantic. This is clearly evident in *Morris County Land* and *Gardner*. In the former, the New Jersey Supreme Court finds it obvious and legally significant that the preservation of agricultural land provides a public benefit.[114] In the latter case, the same court twenty-eight years later finds that a regulatory program with the same general purpose prevents a public harm.[115] *Gardner* explains this about-face by noting that during the course of the last thirty years we have gained a better understanding of our complex environments.[116] We have learned that natural systems are not static, that there is no such thing as a balance of nature, that environmental change is inevitable, and that we have dramatically influenced, and will continue to influence, the direction and rate of change for good or ill. There is, however, no point in arguing whether regulatory programs based on our scientific understanding of the environment, and our relationship with it, are meant to prevent harms or provide benefits. Such programs always do both at once.

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111. *Id.*

112. Morris County Land Improvement Co. v. Parsippany-Troy Hills Township, 193 A.2d at 240 (emphasis added).

113. WEBSTER'S, *supra* note 99, at 2062 (defining semantic). *See generally* Dolan v. City of Tigard, 114 S. Ct. 2309 (1994); Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992); Gardner v. New Jersey Pinelands Comm'n, 593 A.2d 251 (N.J. 1991); Morris County Land Improvement Co. v. Parsippany-Troy Hills Township, 193 A.2d 232 (N.J. 1963).

114. Morris County Land Improvement Co. v. Parsippany-Troy Hills Township, 193 A.2d at 240.

115. Gardner v. New Jersey Pinelands Comm'n, 593 A.2d at 257.

116. *See generally id.*

This Article is an effort to undermine the idea that it is constitutionally legitimate to regulate against public harms, but constitutionally illegitimate to regulate for public benefits. Such an approach to constitutional jurisprudence is a game played with words. Law is an interpretive process, of course, but essentially meaningless interpretive distinctions should not be accepted. *Gardner*'s characterization of the regulatory purpose for preserving agricultural land is not closer to the truth than *Morris County Land*'s characterization. They are two versions of one truth. To assert that the distinction these cases supposedly illustrate should actually lead to the outcome of a takings claim is simplistic in the extreme. Deciding regulatory takings cases *ought to be harder* than any rule-like test would make it, because the role of property in the formation of our personal identities, civic culture, and physical environments is subtle and complicated. Takings jurisprudence should focus on the *values* that justify property's regulation or constitutional protection. This approach, however, would require a theory of property, its distribution, and regulation more discerning than the harm-benefit distinction could ever provide.

VI. AN ADDENDUM ON DOLAN AND FARMLAND PRESERVATION

As I have noted, the plaintiffs in *Gardner* characterized their case as an unconstitutional exaction.[117] Actually, *Gardner* is a case in which the zoning authority requires less intensive uses pursuant to a comprehensive growth management plan.[118] Most courts have been very deferential to the findings of zoning authorities in these cases precisely because they operate under a comprehensive plan.[119] Indeed, the *Gardner* court was deferential to the Pinelands zoning authority despite its invocation of *Nollan*—in which the Court held that the underlying regulation did not directly further the central purpose of the act.[120] Clearly a downzoning can be a taking since it requires a less intensive use. There is also warranted skepticism of piecemeal downzoning unassociated with a comprehensive growth management plan.[121] In agreeing with the legitimacy of the zoning authority's purpose in *Gardner*, however, the New Jersey Supreme Court joined many others upholding

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117. *Id.* at 262.

118. *Id.* at 254-55.

119. *See generally* MANDELKER, *supra* note 27, at 258-60.

120. *Id.* at 259. This theory of the case promised some advantages, of course, since exactions, even before *Dolan*, were regarded warily. Exaction cases often look like deals between government and property owners done not at arms length, but under circumstances that amount to coercion. A government that can deny a permit, after all, is in a very strong bargaining position. *See generally* Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987).

121. *See, e.g.*, Board of Supervisors v. Snell Constr. Corp., 202 S.E.2d 889, 894 (Va. 1974) (finding that the usual presumption of the validity of zoning changes is weakened with respect to piecemeal downzonings). Piecemeal downzonings are more likely to be incompatible with surrounding uses, exclusionary, or otherwise dubious. *Id.*

downzoning to protect water supplies, or other environmental resources and amenities when the downzoning is part of a broad land-use plan.[122]

There is an aspect of *Gardner*, however, that may distinguish it from the typical downzoning case—the legislation's requirement that the property owners restrict their deed to agricultural uses.[123] In fact, this requirement looks suspiciously like the public easement exactions rejected in *Nollan* and *Dolan*. The requirements are conceptually distinct, of course, since only the public easements in *Nollan* and *Dolan* removed the property owner's right to exclude others, an element that is "one of the most essential sticks in the bundle of rights that are commonly characterized as property."[124] But, the question is whether this distinction would make a difference to the current Supreme Court. The rights of possession taken in *Nollan* and *Dolan*, and the right of use claimed to be taken in *Gardner*, are strongly entwined. In the classical account of property, exclusivity is common to both.[125] The classical right of possession, for example, can be defined as "the right of exclusive physical control that the nature of the thing admits, coupled with a claim-right to non-interference;"[126] the right of use as "a claim-right to exclusive use of the thing implying a general duty on the part of all others not to use the thing without the owner's permission."[127] Were the Gardners deprived of the latter of these core rights, or merely of some less important right like the power to manage?[128] Is this a distinction which makes a difference?

Takings jurisprudence is on a slippery slope. The Supreme Court seems to be on a natural progression to some broader application of *Nollan-Dolan* heightened scrutiny. Of course slippery slopes should be avoided when possible, but it is worth pointing out that there are two separate slippery slope arguments. As Bernard Williams puts it, "[t]he first type—the *horrible result* argument—objects, roughly speaking, to what is at the bottom of the slope. The second type objects to the fact that it is a slope"[129]—so that whatever is at the bottom of the slope is arbitrary. Each of these objections could be made in the present context, though neither would be likely to have much effect on the current Court. The first argument is this: there is no foundational hierar-

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122. *See, e.g.*, Chucta v. Planning & Zoning Comm'n, 225 A.2d 822, 823 (Conn. 1967) (zoning change to increase the minimum lot size to protect safe water supply); Lee County v. Morales, 557 So. 2d 652, 655 (Fla. Dist. Ct. App. 1990) (zoning change from commercial to agricultural to protect adjoining aquatic preserve); Parranto Bros. v. City of New Brighton, 425 N.W.2d 585, 592 (Minn. Ct. App. 1988) (zoning change from general to limited business to protect public waters); Pacific Blvd. Assoc. v. City of Long Beach, 368 N.Y.S.2d 867, 869 (App. Div. 1975) (zoning change to decrease residential density to protect water supply).

123. MANDELKER, *supra* note 27, at 257.

124. Dolan v. City of Tigard, 114 S. Ct. 2309, 2316 (1994) (quoting Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979)); *see also* Honoré, *supra* note 40.

125. JOHN CHRISTMAN, THE MYTH OF PROPERTY: TOWARD AN EGALITARIAN THEORY OF OWNERSHIP 19 (1994).

126. *Id.*

127. *Id.*

128. *See id.*

129. Bernard Williams, *Which Slopes Are Slippery*, *in* MAKING SENSE OF HUMANITY AND OTHER PHILOSOPHICAL PAPERS 213, 213 (1995).

that there is an easy answer to the question: Society must not ask more from Mary Gardner than to prevent any harms the subdivision of her property may produce.[135] There is a reason, however, why takings jurisprudence resists confinement in rule-oriented analysis. It has *no* obvious answer.

135. *See supra* text accompanying note 14.