SUPREME COURT TAKINGS DOCTRINE

Peter N. Davis
Isidor Loeb Professor of Law
University of Missouri-Columbia

For many decades, landowners have complained that zoning and various land use regulations unduly restrict their choice of land uses. Zoning limits land uses to those permitted in the particular zoning district and prohibits all others. Subdivision regulations impose design standards on the development of land. In recent decades, local governments in particular have sought to preserve open space, wetlands, and floodplains and to prohibit their alteration and development in order to promote public recreation, environmental and flood mitigation purposes.[1] Similarly, they have sought to preserve historic structures and prevent their demolition or substantial alteration. All of these measures greatly limit the landowners' use and development options and can destroy significant portions of the lands' market value. Arguing that these constraints constitute regulatory takings, landowners have sought compensation. The local governments respond that these constraints are needed to protect public interests and are valid exercises of the police power. Until ten years ago, this regulatory takings debate had been argued almost entirely in the state courts.

But over the past ten years, the United States Supreme Court has decided several regulatory takings cases. Generally, the Court has found that regulatory restraints on land development can be sufficiently great so as to amount to unconstitutional takings, requiring compensation, but that the restraint must have an actual significant impact on the development value of the land for a regulatory taking to occur. Included in these cases are ones involving floodplains[2] and coastal zone management.[3] Lower federal courts have applied the Supreme Court's takings doctrine to wetlands.[4]

The law of regulatory takings is derived from the Fifth Amendment, which provides that "private property shall not be taken for public use, without just compensation." U.S. CONST. amend. V. The Fifth Amendment's just compensation clause 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."[5] Hence, when the federal government restricts a land use, the affected landowner may invoke the Fifth Amendment and seek compensation.

Most state constitutions have takings clauses similar to the Fifth Amendment. Also, although the Fifth Amendment does not apply directly to states, it applies indirectly through the Fourteenth Amendment. U.S. CONST. amend. XIV. Thus, when a state or local governmental unit restricts a land use under their police power, the affected landowner may invoke both the federal and state takings doctrines to seek compensation.

Whether a regulatory constraint on land uses constitutes a taking is a complex question. In a series of cases, the Supreme Court has expressly recognized four types of takings.[6] (1) The government takes possession of the land, or denies access to it.[7] (2) Government regulation causes too great a reduction in the market value of the affected land. In so doing, the government is destroying the market-based expectations of the landowner.[8] The Court's decisions do not define what reduction in value is too great and constitutes a taking. One study 25 years ago of over 450 state open space and floodplain preservation cases found that no taking occurred if the reduction in value was less than 63 percent and a taking occurred in all but exceptional circumstances if the reduction in value was greater than 85 percent. In between, the decisions were divided. (U.S. Water Resources Counc. 1971) (3) Government regulation denies all or most of the "reasonable economically beneficial or productive uses" of the land. Conceptually a total deprivation of lawful uses of land is functionally

equivalent to its physical appropriation.[9] (4) The government requires the giving up of a constitutionally protected "fundamental attribute" of land ownership in exchange for the granting of a discretionary benefit. In particular, the government cannot require a landowner to give up his right to exclude the public from his land.[10] Recently, the Court has added a fifth type of taking. (5) The government may not require the transfer of a property interest substantially unrelated to the discretionary permission the landowner is requesting from the government.[11]

However, none of these types of takings can justify a landowner's beginning or maintaining a public nuisance.[12] Nor do they prevent the government from regulating land uses to protect the public safety[13] and to prevent land use incompatibilities.[14] In each case, the question to be decided is whether the activity is sufficiently obnoxious or dangerous to justify the government's prohibiting or regulating it regardless of the adverse economic consequences on the affected landowner.

Doctrine Applied to Wetlands and Floodplains

Both wetlands and floodplain regulations often involve denials of permission to fill low-lying lands and to construct structures. Their purpose is to preserve those wetlands and floodplains in their natural condition.

The denial raises two constitutional questions. First, does the denial involve any of the five types of takings? The answer often is yes! Denial of development permission usually causes a very significant reduction in the market value of the land [type 2, above]. Also, usually there remain few or no economically beneficial or productive uses of the land [type 3, above]. Second, does the denial prevent the creation or maintenance of a public nuisance, involve preservation of some significant public interest or prevent some significant public injury sufficient to justify the regulation? If so, the regulation may be constitutionally protected.

Protecting wetlands preserves their habitat function for fish, birds and wildlife and retains their floodwater retention and water quality enhancement capabilities. Often only passive recreational uses are permitted in wetlands. Protecting floodplains preserves their flood mitigation capability and reduces the likelihood of property destruction and reduces the amount of flood disaster relief and flood insurance payouts required. In some cases, floodplain regulation only allows passive nonstructural uses of land. While it is clear that these are valid public purposes under the police power, it is not at all clear whether nonetheless they constitute a regulatory taking.

A few state cases have found regulatory takings.[15] But the majority of state cases have not found a taking, citing a variety of grounds: (1) the harm to the public of filling wetlands outweighed any private benefit;[16] (2) the landowner retained some reasonable development options and land value because the filling prohibition applied only to a portion of the wetland;[17] (3) the landowner retains significant nonwetlands area to develop although the government denied permission to develop any of the wetlands area;[18] (4) there was no loss of land value because the landowner had only a unilateral expectation that governmental permission would be granted;[19] (5) the regulation prevented the creation of a public nuisance;[20] (6) designation of land as a wetland is not a facile taking, since denial of a development permit is not foreordained;[21] and (7) landowner purchased land with notice of the wetlands regulation.[22]

Most floodplain regulation cases also have rejected takings objections, because not all development options were denied,[23] because there would be dangers of enhanced flooding to the community if floodplain development were permitted,[24] or because the landowner had failed to seek a building permit.[25]

The United States Supreme Court and federal courts of appeal have significantly altered the teachings of state wetlands and floodplain jurisprudence. In the cases discussed below, they have held that all economic uses of land cannot be denied, that the value of wetlands and floodplain properties cannot be

reduced to less than approximately one-quarter of preregulation market value, and that the prevention of public detriment and public nuisance justifications are limited to regulation of traditional common law public nuisances and they do not extend to prevention of environmental harm.

The effect of these decisions is that often individual tracts of wetlands or floodplains cannot be preserved in undeveloped condition under the police power. If the government desires such total preservation, it must acquire title or development rights. But if the impact of development on the public would be enjoinable as a traditional public nuisance, development can be prohibited or substantially limited.

At the same time the Supreme Court and lower federal courts have retained a rule that reduces the impact of the Court's revised takings doctrine. Under the "whole parcel" rule, they continue to allow the effect of regulation to be evaluated on the basis of the whole area of the landowner's property, not just on the wetlands or floodplain portion. They continue to debate the appropriateness of this rule, but until and unless they change it to narrow the focus of the value reduction evaluation, states and localities will retain a greater ability to restrict development of wetlands, shorelands, and floodplains than the revised takings doctrine otherwise would suggest.

Federal Takings Cases

This federal alteration of constitutional takings doctrine began in the courts of appeal in the mid-1980s in cases like *Florida Rock Industries, Inc. v. United States*.[26] The landowner brought an inverse condemnation takings claim after the Corps of Engineers denied a wetlands dredging and underwater phosphate mining permit under Clean Water Act § 404, 33 U.S.C. § 1344. The court concluded:

> Denial of the permit requires [landowner] to maintain at its own expense a facility, the wetlands, which by presently received wisdom operates for the public good, and benefits a large population who make no contribution to the expense of maintaining such facility. ... The private interest, unless relieved by a [compensation] award, sustains what may well be a permanent obligation to maintain property for public benefit, to carry the taxes and other expenses, and not to receive business income from the property in return.[27]

Thus the court held that there could be a taking involved and remanded the case to the court of claims to determine what compensation ought to be awarded. On remand, the court of claims determined that a 95 percent reduction in market value resulted and awarded compensation of over $ 1 million.[28]

In 1987, the U.S. Supreme Court opined in *First English Evangelical Lutheran Church v. Los Angeles County*[29] that a total ban on reconstruction of camping facilities in a canyon floodplain could constitute a taking. It was considering a temporary development moratorium pending development of permanent floodplain legislation. It held that if the moratorium were later found to be a regulatory taking, the landowner could be entitled to compensation for the period of the moratorium. On remand, the state court found no taking.[30] The importance of *First English* is that for the first time the Court suggested that a total ban on development could be a regulatory taking even though the regulation was imposed to protect the public safety.

The Court confirmed that view in *Lucas v. South Carolina Coastal Council* in 1992.[31] After plaintiff had purchased two adjacent vacant beachfront lots in a newly developed residential area, the state enacted legislation establishing a no-construction zone along the shore which included plaintiff's lots. The state trial court found that this "deprived [him] of any reasonable economic use of the lots, ... eliminated the unrestricted right of use, and render[ed] them valueless," and ordered payment of compensation of over $ 1 million.[32] The state supreme court reversed, holding that prevention of beach erosion was a valid exercise of the police power "to prevent serious public harm" which did not require compensation.[33]

The U.S. Supreme Court reversed the state supreme court, holding that there was a regulatory taking because landowner had been deprived of all economic uses of the land and because the value of the lots had been reduced to zero. The Court stated,

> [T]otal deprivation of beneficial uses is, from the landowner's point of view, the equivalent of a physical appropriation. ... Surely, at least, in the extraordinary circumstance when *no* productive or economically beneficial use of land is permitted, it is less realistic to indulge our usual assumption that the legislature is simply "adjusting the benefits and burdens of economic life."
>
> ... [T]he fact that regulations that leave the owner of land without economically beneficial or productive options for its use -- typically, as here, by requiring land to be left substantially in its natural state -- carry with them a heightened risk that private property is being pressed into some form of public service under the guise of mitigating serious public harm.[34]

The Court observed that land can be preserved in its natural state by formally condemning development rights.[35] Thus, the Court confirmed its suggestion in *First English* that total deprivation of land development and use options constitutes a compensable regulatory taking.

South Carolina in *Lucas* had sought to justify the regulation as one protecting the public from significant public harm, relying on the long-standing exception to compensability for regulation and proscription of "harmful or noxious uses.[36] Conceding that its recent decisions do not focus on the noxiousness of the regulated activity, but instead on the degree to which the regulation "substantially advance[s] legitimate state interests," the Court stated that the proper analysis is to determine whether the primary purpose of the regulation is to prevent harm or to confer a benefit on the public.[37] In rejecting the noxious-use exception in total deprivation of use cases, the Court stated:

> [T]he distinction between regulation that "prevents harmful use" and that which "confers benefits" is difficult, if not impossible, to discern on an objective, value-free basis; it becomes self-evident that noxious-use logic cannot serve as a touchstone to distinguish regulatory "takings" -- which require compensation -- from regulatory deprivations that do not require compensation.[38]

The Court was not prepared to allow recitation of a noxious-use justification to "essentially nullify *Mahon's* affirmation of limits to the noncompensable exercise of the police power."[39] Instead, the Court held that a total deprivation of uses would be noncompensable only if the regulation prohibited a common law private or public nuisance:

> Any limitation so severe cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership. A law or decree with such an effect must ... do no more than duplicate the result that could have been achieved in the courts -- by adjacent landowners (or other uniquely affected persons) under the State's law of private nuisance, or by the State under its complementary power to abate nuisances that affect the public generally ....[40]

Such a nuisance analysis would involve determination of the degree of harm to public lands and to adjacent private property posed by the applicant's proposed activities.[41] For example, it would allow the state to prohibit the filling of a wetland which would cause flooding of adjacent land,[42] but probably would not allow the state to prevent the erection of structures on plaintiff's beachfront.[43]

The impact of *Lucas* on land use controls law in

general and on regulation of wetlands and floodplains cannot be overestimated. It holds that preservation of wetlands and floodplains cannot be accomplished by uncompensated regulation if it results in an elimination of all economically beneficial uses of the land. Furthermore, such regulation can no longer be justified by a purpose to prevent significant harm to the public; only if that harm falls within traditional interpretations of private and public nuisance may the regulation cause total use deprivation without incurring the obligation to pay compensation. No prior Supreme Court decision has required that there must be some residual beneficial use in order for a non-nuisance restriction preventing public inconvenience or promoting public amenities to be valid and noncompensable.[44] The majority's focus on structures as the essence of viable beneficial uses calls into question the decisions of many state courts holding that residual agricultural and recreational uses are sufficient to avoid the "no beneficial use" proscription.[45]

Lucas probably will have a much greater impact on wetlands regulation than on floodplain regulation. Wetlands regulation often involves prohibition of all development, whereas that is not true for most floodplain regulation. In floodways, where prohibition of all structural and fill uses may be imposed, there is a concomitant flooding threat from development enjoinable as a private or public nuisance, or in some states as a violation of the common law of repelling floodwaters. By contrast, failure to preserve wetlands rarely gives rise to a private or public nuisance cause of action.

Lucas also interplays with an earlier rule evolved by the U.S. Supreme Court and lower federal courts, the "whole parcel" rule. Beginning in *Penn Central Transp. Co. v. New York City* in 1978,[46] the Court has held that the reduction in market value analysis must be made in the context of the whole parcel owned by the affected landowner, not just the affected portion of his land. This rule was affirmed in *Keystone Bituminous* in 1987.[47] Because *Lucas* confirmed the "denial of all viable uses" type of taking, what constitutes the "land" for purposes of making that determination is of critical importance. In *Lucas* itself, the entire tract had been rendered undevelopable, so the parcel definition question was not addressed, other than in a footnote.[48] This means that the courts may continue to offset the loss of value of a portion of the property with development value on the remainder to determine whether the total value has been reduced too much under *Pennsylvania Coal* or whether there has been a total deprivation of viable uses under *Lucas*.

The U.S. Supreme Court's 1994 decision in *Dolan v. City of Tigard*[49] also addresses the "whole parcel" question. The Court held that denial of development rights to preserve an unobstructed floodplain on 10 percent of the whole parcel was not a taking.[50] This conclusion *perforce* must result from application of the "whole parcel" rule. Then, the Court held that forced conveyance of title to that portion as a condition for the granting of a building permit was a taking.[51] This was the main thrust of the decision, that the exaction imposed as a condition for regulatory permission must bear a "rough proportionality" to the adverse public impacts being mitigated by the regulation. The Court concluded that conveyance of title to the undeveloped green space was not necessary to protect the flood flow capacity of the regulatory floodplain located on a portion of landowner's land; a development prohibition on that portion of the land would be sufficient.

Lower federal courts since *First English* in 1987 and *Lucas* in 1992 generally have refused to dismiss taking claims based on permit denials,[52] but will not find a taking upon mere designation of land as a wetland.[53] On the substantive merits, federal courts sometimes have found regulatory takings,[54] but more frequently have not.[55] State courts mostly have upheld wetlands permit denials, finding no takings.[56] Hence, although the language of *First English* and *Lucas* is dramatic, the impact of these decisions on takings analysis in wetlands and floodplains cases is unclear.

Even if *Lucas* is seen as a reduction in value takings case, since *Lucas* involved a near total reduction in value, it does not represent much of a change.

Pennsylvania Coal involved a much lower reduction in value holding that a 50 percent reduction was excessive. Two lower federal cases have held that a reduction in value in excess of 80 percent was too much and constituted a taking.[57]

While those lower federal court reduction in value cases found takings, they may also represent a breach of the whole parcel rule. In *Florida Rock I*, the reduction in value calculation focused on a 98 acre parcel within a 1560 acre tract.[58] In *Loveladies Harbor*, the court of claims focused on 11.5 acres of wetland and 1.0 acres of upland out of a total of 57.4 acres of unsold land within an original 250 acre tract.[59] In *Formanek*, the Corps denied a permit to develop a portion of wetlands within a tract of 99 acres of wetlands and 12 acres of uplands; the reduction in value constituted a taking.[60] In each case, the reduction in value calculation was based on a portion of the entire tract owned by the affected landowner.

In 1994 in the remand of *Florida Rock Industries*, the Federal Circuit suggested the possibility of proportionate compensation.[61] On appeal, the court held that the wetland property, where the Corps had denied a dredging and mining permit, had substantial speculative value in spite of the permit denial, precluding a *per se* taking under *Lucas*.[62] But it suggested that "a partial deprivation" may have occurred which could be a partial taking.[63] The court suggested that a balancing test be used to determine proportionate compensation.[64] However, the change in the reduction in value calculation in *Florida Rock II* does not appear to change the focus of *Florida Rock I* on a portion of the entire tract for making that calculation.

Conclusion

Today, the reduction in value and total deprivation of use tests for regulatory takings have been invigorated by the U.S. Supreme Court and the lower federal courts. The percentage reduction in value that will be "too much" probably has not been changed significantly. Total deprivation of use was a taking before the recent spate of Supreme Court decisions. However, *First English* applied the total deprivation of use test to temporary development prohibitions. It remains to be seen whether any temporary ban is compensable or whether only those which exceed the normal permit processing time. *Lucas* did not address what land is to be considered in making the reduction in value and total deprivation of use analyses, but the lower federal courts in recent years, in cases like *Florida Rock*, *Loveladies Harbor* and *Formanek*, have focused the analyses on the portion of land which is affected by the development constraint, and have not considered the development and use options retained on the remainder of the landowner's land. This is a major shift in focus from that employed traditionally by the state courts. However, the U.S. Supreme Court in *Dolan* applied the traditional "whole parcel" rule in applying the taking tests. If the lower federal courts continue to focus only on the affected portion of land in applying the *Pennsylvania Coal* reduction in value and the *First English* and *Lucas* total deprivation of use tests, and the Supreme Court continues to refuse to hear those cases, then the combination of case decisions over the past ten years will cause a dramatic limitation on the federal and states governments' abilities to preserve wetlands and floodplains. Neither can be totally protected from development, because the combination of decisions requires that the landowner be left with some significant residual value and significant economic uses. Unless the governments can afford to purchase those wetlands and floodplains, broad area preservation will become impossible as a practical matter.

Nonetheless, the impact on floodplain regulation may be less dramatic than on wetlands regulation. Even though *Lucas* held that land use constraints to prevent public harm of types not encompassed by nuisance law are compensable, blocking or filling the path of floodwaters may in many circumstances be considered public and private nuisances. Hence, the impact of *Lucas's* limitation of the public harm justification for uncompensated land use regulation ought to be less severe on floodplain regulation than on wetlands regulation.

Peter N. Davis is the Isidor Loeb Professor of Law, Univ. of Missouri-Columbia, since 1970. B.A. 1959 Haverford 1959, LL.B. 1963 Univ. of Wisconsin, S.J.D. 1972 Univ. of Wisconsin. Member of Bars of Missouri, Wisconsin, District of Columbia, U.S. Supreme Court, and U.S. Patent & Trademark Office. Prof. Davis introduced the water law, environmental law, and land use controls courses at the university and continues to teach them.

BIBLIOGRAPHY

2 W. RODGERS, ENVIRONMENTAL LAW § 4.13(A)(1) (1986, supp. 1996); W. WANT, LAW OF WETLANDS REGULATION § 10.05 (1989-96); 5 WATER AND WATER RIGHTS §§ 61.02, 61.03(c)(7) (R. Beck 2d ed. 1991, supp. 1996); 1 F. GRAD, TREATISE ON ENVIRONMENTAL LAW § 3.03[6A][1] (1973-96); D. MANDELKER, LAND USE LAW §§ 2.01-.18, 12.04-.06 (3d ed. 1993, Supp. 1996); 1 N. WILLIAMS & J. TAYLOR, AMERICAN LAND PLANNING LAW cs. 5A, 5B (1985 ed., Supp. 1996); 6 N. WILLIAMS & J. TAYLOR, AMERICAN LAND PLANNING LAW §§ 158.29, .31-.32 (1985 ed., Supp. 1996); L. MALONE, ENVIRONMENTAL REGULATION OF LAND USE § 14.03 (1990-96); N. ROBINSON, ENVIRONMENTAL REGULATION OF REAL PROPERTY § 3.04 (1982-96); 2 K. YOUNG, ANDERSON'S AMERICAN LAW OF ZONING ch. 3A (4th ed. 1996, supp. 1996); 1 U.S. WATER RESOURCES COUNC., REGULATION OF FLOOD HAZARD AREAS 385-431 (J. Kusler 1971); S. EAGLE, REGULATORY TAKINGS (1996); Ausness, *Regulatory Takings and Wetland Protection in the Post*-Lucas *Era*, 30 LAND & WATER L. REV. 349 (1995); Johnson, *Defining the Property Interest: A Vital Issue in Wetlands Takings Analysis After* Lucas, 14 J. ENERGY, NAT. RES. & ENVT'L L. 41 (1994); Mansfield, *When "Private" Rights Meet "Public Rights: The Problems of Labeling and Regulatory Takings*, 65 U. COLO. L. REV. 193 (1994); Sarahan, *Wetlands Protection Post*-Lucas*: Implications of the Public Trust Doctrine on Takings Analysis*, 13 VA. ENVT'L L.J. 537 (1994); Ogle, *The Ongoing Struggle Between Private Property Rights and Wetlands Regulation: Recent Developments and Proposed Solutions*, 64 U. COLO. L. REV. 573 (1993); Mylot, *Is There a Doctrine in the House?: The Nuisance Exception to the Takings Clause Has Been Mortally Wounded by* Lucas, 1992 WIS. L. REV. 1299; Comment, *A Developer's Dream: The United States Claims Court's New Analysis of § 404 Takings Challenges*, 19 B.C. ENVT'L AFF. L. REV. 317 (1991); Laitos, *Water Rights, Clean Water Act Section 404 Permitting, and the Takings Clause*, 60 U. COLO. L. REV. 901 (1989); Klock & Cook, *Condemning of America: Regulatory "Takings" and the Purchase by the United States of America's Wetlands*, 18 SETON HALL L. REV. 330 (1988); Singer, *Flooding the Fifth Amendment: The National Flood Insurance Program and the "Takings" Clause*, 17 B.C. ENVT'L AFF. L. REV. 323 (1990).

ENDNOTES

1.See Davis, Federal Restraints on State and Local Wetlands, Shorelands and Floodplain Regulation (this issue).

2.First English Evangelical Lutheran Church v. Los Angeles County, 482 U.S. 304 (1987); Dolan v. City of Tigard, 114 S.Ct. 2309 (1994).

3.Nollan v. California Coastal Counc., 483 U.S. 825 (1987); Lucas v. South Carolina Coastal Comm'n, 505 U.S. 1003 (1992).

4.Florida Rock Indus., Inc. v. United States, 791 F.2d 893 (Fed. Cir. 1986), *cert. denied* 479 U.S. 1073 (1987), *on remand* 21 Ct.Cl. 161 (1990), *vacated in part* 18 F.3d 1560 (Fed. Cir. 1994), *cert. denied* 115 S.Ct. 898 (1995).

5.San Diego Gas & Elec. Co. v. San Diego, 450 U.S. 621, 657 (1981).

6.*But see* Williams's and Ernst's 13-formulae analysis at Williams & Ernst, *And Now We Are Here On a Darkling Plain*, 13 VT. L. REV. 635, 643-44 (1989), *reprinted* 1 N. WILLIAMS & J. TAYLOR (1985, 1996).

7.United States v. Causby, 328 U.S. 256 (1946).

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

9.First English Evangelical Lutheran Church v. Los Angeles County, 482 U.S. 304 (1987) [temporary denial of floodplain development]; Lucas v. South Carolina Coastal Counc., 505 U.S. 1003 (1992) [denial of development on coastal dune].

10.Kaiser Aetna v. United States, 444 U.S. 164 (1979) [extension of public navigation rights to private nonnavigable pond as condition for permit to connect pond with ocean].

11.Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987) [conveyance to government of public access easement across private land to public beach as condition for granting of building permit]; Dolan v. City of Tigard, 114 S.Ct. 2309 (1994) [conveyance of title to a portion of land in floodplain and of right-of-way for bicycle path as condition for granting of building permit].

12.Mugler v. Kansas, 123 U.S. 623 (1887) [ban on manufacture and sale of alcoholic beverages]; Reinman v. City of Little Rock, 237 U.S. 171 (1915) [ban on slaughterhouses and rendering plants in central city].

13.Hadacheck v. Sebastian, 239 U.S. 394 (1915) [ban on brick kilns in residential area]; Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962) [ban on mining below water table].

14.Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926) [validity of comprehensive land use zoning].

15.Bartlett v. Zoning Comm'n, 282 A.2d 907 (Conn. 1971) [denial of tidal wetland fill permit]; Vatalaro v. Department of Envtl. Regulation, 601 So.2d 1223 (Fla. App. 1992) [only passive recreational uses permitted]; State v. Johnson, 265 A.2d 711 (Me. 1970) ["no commercial value" retained]; *In re* Spring Valley Dev., 300 A.2d 736 (Me. 1973) [total deprivation of all use]; Morris County Land Imp. Co. v. Parsippany-Troy Hills Township, 193 A.2d 232 (N.J. 1963) [no productive use retained; public obtains public benefit at no cost].

16.Graham v. Estuary Properties, Inc., 399 So.2d 1374 (Fla.), *cert. denied* 454 U.S. 1083 (1981); Moskow v. Commissioner, 427 N.E.2d 750 (Mass. 1981); Claridge v. New Hampshire Wetlands Bd., 485 A.2d 287 (N.H.

1984); Just v. Marinette County, 201 N.W.2d 761 (Wis. 1972).

17.Candlestick Properties, Inc. v. San Francisco Bay Conservation & Dev. Comm'n, 89 Cal. Rptr. 897 (Cal. App. 1970); Manor Dev. Corp. v. Conservation Comm'n, 433 A.2d 999 (Conn. 1980); Brecciaroli v. Connecticut Comm'r of Envtl. Protection, 362 A.2d 948 (Conn. 1975); Lovequist v. Conservation Comm'n, 393 N.E.2d 858 (Mass. 1979); Bond v. Department of Natural Resources, 454 N.W.2d 395 (Mich. App. 1990); Sibson v. State, 336 A.2d 239 (N.H. 1975); De St. Aubin v. Flacke, 496 N.E.2d 879 (N.Y. 1986); Milardo v. Coastal Resources Mgt. Counc., 434 A.2d 266 (R.I. 1981); Carter v. South Carolina Coastal Counc., 314 S.E.2d 327 (S.C. 1984); Chokecherry Hill Estates v. Deuel County, 294 N.W.2d 654 (S.D. 1980); Orion Corp. State, 747 P.2d 1062 (Wash. 1987). The landowner need only be allowed some economic use of the wetland, not necessarily the most profitable use. Mock v. Department of Envtl. Resources, 623 A.2d 940 (Pa. Commw. 1993).

18.State v. Schindler, 604 So.2d 565 (Fla. App. 1992); Moskow v. Commissioner, 427 N.E.2d 750 (Mass. 1981); American Dredging Co. v. State, 391 A.2d 1265 (N.J. Ch. 1978). *See* also, Deltona Corp. v. United States, 657 F.2d 1184 (Ct.Cl. 1981), *cert. denied* 455 U.S. 1017 (1982). *Cf.* Bino v. City of Hurley, 76 N.W.2d 571 (Wis. 1956) [lakeshore denied use of lake surface to protect quality of city water diversion -- majority & dissent debated "whole tract" issue].

19.Namon v. State Dep't of Envtl. Reg., 558 So.2d 504 (Fla. App. 1990).

20.Potomac Sand & Gravel Co. v. Governor of Maryland, 293 A.2d 241 (Md.), *cert. denied* 409 U.S. 1040 (1972).

21.Zerbetz v. Municipality of Anchorage, 856 P.2d 777 (Alaska 1993); Gil v. Inland Wetlands & Watercourses Agency, 593 A.2d 1368 (Conn. 1991); Glisson v. Alachua County, 558 So.2d 1030 (Fla. App. 1990); Carabell v. Department of Natural Resources, 478 N.W.2d 675 (Mich. App. 1992); State v. A. Capuano Bros., 384 A.2d 610 (R.I. 1978).

22.Graham v. Estuary Properties, Inc., 399 So.2d 1374 (Fla.), *cert. denied* 454 U.S. 1083 (1981); Claridge v. New Hampshire Wetlands Bd., 485 A.2d 287 (N.H. 1984).

23.Turnpike Realty Co. v. Town of Dedham, 284 N.E.2d 891 (Mass. 1972), *cert. denied* 409 U.S. 1108 (1973); Dur-Bar Realty Co. v. City of Utica, 394 N.Y.S.2d 913 (App. Div. 1977), *aff'd* 380 N.E.2d 328 (N.Y. 1978).

24.Turner v. County of Del Norte, 101 Cal. Rptr. 93 (Cal. App. 1972); Foreman v. State, 387 N.E.2d 455 (Ind. App. 1979); Subaru of New England v. Board of Appeals, 395 N.E.2d 880 (Mass. App. 1979); Krahl v. Nine Mile Creek Watershed Dist., 283 N.W.2d 538 (Minn. 1979); McElwain v. County of Flathead, 811 P.2d 1267 (Mont. 1991), *cert. denied* 112 S.Ct. 868 (1992); Responsible Citizens in Opposition to the Flood Plain Ordinance v. City of Asheville, 302 S.E.2d 204 (N.C. 1983); Usdin v. State, 414 A.2d 280 (N.J.L. 1980), *aff'd* 430 A.2d 949 (N.J. Super. App. Div. 1981); Maple Leaf Invs., Inc. v. State, 565 P.2d 1162 (Wash. 1977).

25.April v. City of Broken Arrow, 775 P.2d 1347 (Okla. 1989).

26.791 F.2d 893 (Fed. Cir. 1986), *cert. denied* 479 U.S. 1073 (1987).

27.Florida Rock Indus., Inc. v. United States, 791 F.2d 893, 904 (Fed. Cir. 1986).

28.Florida Rock Indus., Inc. v. United States, 21 Ct.Cl. 161, 175 (1990), *vacated in part* 18 F.3d 1560 (Fed. Cir. 1994), *cert. denied* 115 S.Ct. 898 (1995). For further proceedings in this case, *see* note 61.

29.482 U.S. 304 (1987).

30.First English Evangelical Lutheran Church v. County of Los Angeles, 258 Cal. Rptr. 893 (Ct. App.), *cert. denied* 493 U.S. 1056 (1989).

31.505 U.S. 1003 (1992).

32.*Id.* at 1009.

33.*Id.* at 1009-10.

34.*Id.* at 1017-18.

35.*Id.* at 1019.

36.*See* Mugler v. Kansas, 123 U.S. 623 (1887) [prohibition against sale or manufacture of alcoholic beverages]; Hadacheck v. Sebastian, 239 U.S. 394 (1915) [ban on operation of brick kilns in residential areas]; Miller v. Schoene, 276 U.S. 272 (1928) [order to destroyed diseased cedar trees to prevent infection of nearby apple orchards]; Goldblatt v. Hempstead, 369 U.S. 590 (1962) [law effectively stopping operation of quarry in residential area]; Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc., 452 U.S. 264 (1981) [prohibition of surface mining on steep slopes]; Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1987) [regulation of coal removal to prevent subsidences].

37.Lucas v. South Carolina Coastal Counc., 505 U.S. at 1023-24.

38.*Id.* at 1026.

39.*Id.*

40.*Id.* at 1029.

41.*Id.* at 1030-31.

42.*Id*. at 1029.

43.*Id.* On remand, the South Carolina Supreme Court held that the common law of public nuisance did not prohibit the construction of a structure on an unstable beach. Lucas v. South Carolina Coastal Counc., 424 S.E.2d 484 (S.C. 1993).

44.Lucas v. South Carolina Coastal Counc., 505 U.S. at 1050 (Blackmun, J., dissenting).

45.Turner v. County of Del Norte, 101 Cal. Rptr. 93 (Ct. App. 1972); Turnpike Realty Co. v. Town of Dedham, 284 N.E.2d 891 (Mass. 1972), *cert. denied* 409 U.S. 1108 (1973); Dur-Bar Realty Co. v. City of Utica, 394 N.Y.S.2d 913 (App. Div. 1977), *aff'd* 380 N.E.2d 328 (N.Y. 1978); April v. City of Broken Arrow, 775 P.2d 1347 (Okla. 1989).

46.438 U.S. 104 (1978) [denial of air rights development over railroad terminal]. The lower federal courts had already been applying the whole parcel rule before the Supreme Court addressed the issue. *See, e.g.,* Jentgen v. United States, 657 F.2d 1210 (Cl.Ct. 1981) [wetland].

47.Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1987) [underground bituminous coal removal limitation to protect overlying land from subsidence].

48.Lucas v. South Carolina Coastal Counc., 505 U.S. at 1016-17, n. 7.

49.512 U.S. 374 (1994).

50.*Id.* at 395.

51.*Id.* at 396.

52.Beure-Co. v. United States, 16 Ct.Cl. 42 (1989) [wetland]; Formanek v. United States, 18 Ct.Cl. 785 (1989) [wetland].

53.United States v. Rivera Torres, 826 F.2d 151 (1st Cir. 1987) [wetland].

54.Dufau v. United States, 22 Ct.Cl. 156 (1990), *aff'd* 940 F.2d 677 (Fed. Cir. 1991) [wetland]; Formanek v. United States, 26 Ct.Cl. 332 (1992) [wetland -- 83 % diminution in value]; Loveladies Harbor, Inc. v. United States, 28 F.3d 1171 (Fed. Cir. 1994) [wetland].

55.McDougal v. County of Imperial, 942 F.2d 668 (9th Cir. 1991) [floodplain]; Ciampitti v. United States, 22 Ct.Cl. 310 (1991) [wetland]; Tabb Lakes, Ltd. v. United States, 10 F.3d 796 (Fed. Cir. 1993) [wetland - cease & desist order against unpermitted filling]; Plantation Landing Resort, Inc. v. United States, 30 Fed.Cl. 63 (1993), *aff'd* 39 F.3d 1197 (Fed. Cir. 1994), *cert. denied* 115 S.Ct. 1822 (1995) [wetland -- developer rejected Corps mitigation conditions]; City Nat'l Bank v. United States, 33 Fed.Cl. 759 (1995) [wetland -- residual value retained]; Marks v. United States, 34 Fed.Cl. 387 (1995) [wetland -- failure to show absence of all economic uses]; Broadwater Farms Joint Venture v. United States, 35 Fed.Cl. 232 (1996) [wetland -- lot within larger tract -- 28% reduction in value].

56.*No Taking:* Zerbetz v. Municipality of Anchorage, 856 P.2d 777 (Alaska 1993) [wetland - failure to apply for permit]; Gil v. Inland Wetlands & Watercourses Agency, 593 A.2d 1368 (Conn. 1991) [wetland- no proof that revised application would be rejected]; McElwain v. County of Flathead, 811 P.2d 1267 (Mont. 1991), *cert. denied* 502 U.S. 1030 (1992) [floodplain]; Volkema v. Department of Natural Resources, 542 N.W.2d 282 (Mich. 1995) [wetland -- residual value in overall tract]; Mock v. Department of Envtl. Resources, 623 A.2d 940 (Pa. Commw. 1993) [wetland].

57.Loveladies Harbor, Inc. v. United States, 21 Ct.Cl. 153 (1990), *aff'd* 28 F.3d 1171 (Fed. Cir. 1994) [wetland -- 99% reduction in value]; Formanek v. United States, 26 Ct.Cl. 332 (1992) [wetland – 83 % reduction in value]. These holdings fall within the parameters of the state cases studies by Kusler 25 years ago. (U.S. Water Resources Counc, 1971)

58.Florida Rock Indus., Inc. v. United States, 21 Ct.Cl. 161 (1990), *on remand from* 791 F.2d 893 (Fed. Cir. 1986), *cert. denied* 479 U.S. 1053 (1987).

59.Loveladies Harbor, Inc. v. United States, 21 Ct.Cl. 153 (1990), *aff'd* 28 F.3d 1171 (Fed. Cir. 1994) [wetland -- 99% reduction in value].

60.Formanek v. United States, 26 Cl.Ct. 332 (1992) [wetland -- 83 % reduction in value in entire tract].

61.Florida Rock Indus., Inc. v. United States, 18 F.3d 1560 (Fed. Cir. 1994), *cert. denied* 115 S.Ct. 898 (1995).

62.*Id.* at 1566-67.

63.*Id.* at 1569-70.

64.*Id.* at 1571.