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THE SEVEN DEADLY SINS OF TAKINGS LAW: THE DISSENTS IN LUCAS v. SOUTH CAROLINA COASTAL COUNCIL

Richard A. Epstein*

I. TURNABOUT IS FAIR PLAY

An old and familiar adage of great relevance to the Takings Clause is that turnabout is fair play. The recent decision of Lucas v. South Carolina Coastal Council illustrates the soundness of that general proposition, but perhaps not in a sense the Justices might appreciate. Most of the attention to the case is rightly given to the majority opinion of Justice Scalia, with more than a passing nod to the concurrence of Justice Kennedy. These two dominant opinions present a large target, for while they touch upon many of the most important issues of takings law, they falter on at least two critical points. First, as a doctrinal matter, they do not explain why one legal regime should be applied to the tiny, and soon to be extinct, class of total regulatory takings, while accepting a far more lax regime for the far more important class of partial regulatory takings. Second, they do not explain how the idea of reasonable, or investment-backed, expectations, on which both Justices place so much weight, explains or justifies the basic contours of takings law, or for that matter the private law of nuisance, on which the Scalia opinion relies by way of analogy.

On this occasion, however, I shall not direct my fire towards the views of the Scalia or Kennedy opinions, not because I am persuaded by their reasoning, but because I have already reviewed them at length elsewhere. Instead I shall concern myself with the two Lucas dissents. I do so for several reasons. First, it is important to make clear that takings

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1. U.S. Const. amend. V.
3. Id. at 2889-902.
4. Id. at 2902-04 (Kennedy, J., concurring).
5. Id. at 2897-99 (discussing "noxious use" precedents).
law, like any other important head of jurisprudence, cannot be reduced to a one-dimensional opposition between a single thesis and its antithesis. As is the case with religion and speech, the number of permutations of doctrinal analysis is legion. Many other consistent positions may be attractive to those who reject the decision of the Court while seeking to avoid the deadly clutches of the dissent. Second, any conceptual difficulties lurking in the opinions of Scalia and Kennedy are borne of an honest struggle to make sense of the Takings Clause. That task is complicated enough when the constitutional text stands alone, but it has been made more formidable still by the grotesque judicial gloss on the clause that now passes for constitutional interpretation. The errors of Scalia and Kennedy arose in part from their efforts to rehabilitate the Takings Clause as a limit on government action in the teeth of an unbroken line of cases upholding state land use regulation from the days of Village of Euclid v. Ambler Realty Co.\(^7\) to the present.\(^8\)

Justices Blackmun\(^9\) and Stevens\(^10\) have no convenient excuse for their sorry performances in dissent. The inescapable inference from both opinions is that neither Justice believes any land use restriction should ever be struck down under the Takings Clause. Their view is commendable for its enormous simplicity, but is disastrous for the amount of bad state policy and downright mischievous public misconduct it invites. But while these opinions contain little that is novel, they are elaborate and exhaustive defenses of the conventional wisdom on takings. I think it is instructive, therefore, to explain what is wrong with each of the blasts that Justices Blackmun and Stevens level against the Court's modest efforts to reinvigorate the Takings Clause. In this Article I shall therefore examine the Seven Deadly Sins of the Takings Clause.

It is best to begin with a brief catalogue of the relevant arguments that are made by Justice Stevens or Justice Blackmun—treated collectively here as "they." First, they make a methodological argument which holds that on takings issues courts should show deference to the legislative bodies on land use issues. Second, they urge delay in the judicial supervision of takings questions. Third, they claim that landowners should lose on the merits because landowners demonstrate no cognizable

\(^7\) 272 U.S. 365 (1926).

\(^8\) I do not count the landowners' victory in Nollan v. California Coastal Commission, 483 U.S. 825 (1987), as a clear exception to that rule. That case involved a lateral easement that the state wished to impose as a condition for allowing more new construction on the land. Id. at 828. It is therefore an uncertain mix between a trespassory taking and a regulatory taking.

\(^9\) Lucas, 112 S. Ct. at 2904-17 (Blackmun, J., dissenting).

\(^10\) Id. at 2917-25 (Stevens, J., dissenting).
Fourth, they claim that any loss landowners do suffer is justified under an unbounded account of the police power. Fifth, they claim that the Takings Clause applies only to state actions that single out particular individuals and not to statutes that enact general land use regulation. Sixth, they claim that a restricted account of the Takings Clause is necessary to prevent inefficient over-investment by landowners. Seventh, and last, they raise the institutional argument that a narrow conception of the Takings Clause is necessary to avoid the freezing of the common law into inefficient forms. The combined effect of these arguments is to reduce the Takings Clause to a hollow shell. The tragedy is that each of these arguments is wrong, or at the very least, seriously incomplete.

II. THE FIRST DEADLY SIN: DEFERENCE

It has often been said that much of constitutional law revolves around the initial presumptions the Supreme Court uses to evaluate particular cases. Thus any statute to which the Court applies a standard of strict scrutiny is highly unlikely to survive constitutional challenge. In contrast, if the Court applies a rational basis test, then virtually any statute will pass muster. Only if the Court opts for a standard of intermediate review is the outcome of any particular case likely to hang in the balance. Classification, therefore, is critical to the entire constitutional enterprise. If billboard regulation is regarded as speech and thus subject to strict scrutiny review, the billboards stay up, at least if they are concerned with politics and not mere commercial speech. If the regulation is regarded as a matter of aesthetics or land use, and therefore subject to rational basis review, the billboards come tumbling down. Differences in the standards of review, therefore, place a heavy stress on the classification question, a stress that could be avoided if some uniform standard of judgment were applied to, or could be brought to bear on, all constitutional cases.

Issues of classification arise not only across but also within constitutional clauses. Race, sex, age, sexual orientation and wealth all are subject to somewhat different standards of review under the Equal Protection Clause. Within the Takings Clause there is a similar critical division between physical and regulatory takings, whose inexplicable vitality the Supreme Court reaffirmed this past year in Yee v. City of Escondido.

13. U.S. CONST. amend. XIV.
The bottom line is that in cases of physical dispossession, the compensation is well nigh automatic, which is another way of saying that strict scrutiny will apply to these actions.

Yet when some form of regulation is at stake, a far more deferential standard is involved. In *Lucas*, Justice Blackmun reiterates the importance of deference to legislative judgments in the regulatory takings area, citing the familiar line of cases that runs from *Euclid*,15 through *Carolene Products*16 and *Berman v. Parker*,17 to Justice Stevens' recent flawed decision in *Keystone Bituminous*.18 He then concludes triumphantly that this long, undisputed line of decisions should dominate any analysis in *Lucas*. Justice Blackmun writes, "[t]he Court offers no justification for its sudden hostility toward state legislators, and I doubt that it could."19

But it could have. One line of argument is that strict scrutiny requires legislation to pass two hurdles instead of one, a welcome institutional barrier if much of what is legislated is the product of special interest legislation.20 A second response to Justice Blackmun asks whether it is possible to identify any categorical difference between physical and regulatory takings that justifies the different judicial stance in the two cases.

Here, for reasons that have been developed at length, the distinction cannot pass muster.21 If one thinks that state legislators are benevolent when regulating, then why impute to them a set of personal and institutional defects in the physical takings cases? By the same token, if compensation for physical occupation forestalls abuses by either a virulent majority or a well-organized minority, why are these concerns brushed aside in regulatory cases? Suppose that a large tract of land owned by a foreigner—as was the case in a recent phone call I received on the subject—is down-zoned under some land use plan in order to induce him to sell the land at below market levels to the right neighbor who can then cozy up to the other neighbors on the planning board to obtain the appropriate permits for new development. Is there really no reason for hostility to local legislators?

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21. For Justice Stevens' treatment of the distinction in connection with the generality of state regulation, see *infra* notes 49-65 and accompanying text.
Physical takings then present the same pattern of risk as regulatory takings, and vice versa. It follows therefore that some uniform judicial attitude should inform judicial interpretation across the board. Why not, then, adopt an attitude of deference across the board? To read some of the modern scholarship on the subject, it might seem that uniform deference is indeed the correct response. Thus it is commonly said that in many situations, it is not possible to figure out why the state should pay compensation when it seizes the house of an individual citizen when the citizen might, for example, have acquired private insurance against this risk. But surely theories of this sort have to prove too much. The task here is not to decide whether it is appropriate to include a Takings Clause in the Constitution, for if it were, one could ask whether private insurance was equal to the task in question. Rather, the questions are, however archaic they might sound, how to construe the Takings Clause that we have, and whether private property has been taken for public use, in which case just compensation is—with a nod to the police power—ordinarily required. To its credit, the Supreme Court has recognized in at least some cases that the language of the Clause is too clear to admit escape, be it by denying the taking or by automatically stipulating that the compensation has already been given. If that decision rests quite happily on a standard of strict scrutiny, whereby a claim of implicit compensation must be demonstrated and not presumed, then why the difference in the land use cases where the same political forces operate with at least the same vigor they have had in the cases of actual dispossession. The imperfections of politics therefore supply a strong reason to put aside deference and to do what these two dissents strive to avoid—to look at the facts in Lucas on their individual merits.


23. For a critique of the point, see infra notes 77-79 and accompanying text.


25. See, e.g., Carmichael v. Southern Coal & Coke Co., 301 U.S. 495, 522-23 (1937). “The only benefit to which the taxpayer is constitutionally entitled is that derived from his enjoyment of the privileges of living in an organized society, established and safeguarded by the devotion of taxes to public purposes.” Id. at 522.

26. One could argue that an outraged public might object more to the visible dispossession than to a regulation on use, but it is unclear which way this cuts. If the popular sentiment is greater with physical dispossession, then it could well be that the need for legal protection is greater in the regulatory context.
III. THE SECOND DEADLY SIN: DELAY

“Justice Delayed is Justice Denied.” The point of this common aphorism is that a timely result is every bit as important as the correct result. When there is an immediate form of injustice, the ideal response is some intervention by the courts to forestall it. Certainly in dealing with prior restraints on speech, the Court has taken a uniformly hostile attitude. But with property the more delay, apparently the better.

Justice Blackmun makes this point as follows:

This Court has held consistently that a land-use challenge is not ripe for review until there is a final decision about what uses of the property will be permitted. The ripeness requirement is not simply a gesture of good-will to land-use planners. In the absence of “a final and authoritative determination of the type and intensity of development legally permitted on the subject property,” and the utilization of state procedures for just compensation, there is no final judgment, and in the absence of a final judgment there is no jurisdiction.

This rule is “compelled by the very nature of the inquiry required by the Just Compensation Clause,” because the factors applied in deciding a takings claim “simply cannot be evaluated until the administrative agency has arrived at a final, definitive position regarding how it will apply the regulations at issue to the particular land in question.”

Both halves of the argument are erroneous. The lack of final judgment should have nothing to do with the question. If there has been a taking of land by administrative action, then the individual landowner should be allowed to maintain an action for the loss so inflicted. Surely an action could be brought against the state if it took property without bothering to go to court first. And the same should apply here. The loss of rental or use value is critical, whether or not the final judgment has been entered. If the government may properly be asked to pay rent on an ongoing basis when it occupies property for its own use, then it could be

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28. Matters would be somewhat different if prejudgment interest at market rates were offered for the owner who later recovered judgment. But if what is lost is the opportunity for development, a market rate of interest might still leave the owner worse off than prompt permission. See Restatement (Second) of Torts § 913 & cmt. a (1977).
forced to follow the same procedures when it restricts the owner’s use. Compensation for an interim taking should be allowed on the strength of what has been done; it should not be blocked on the strength of what might, but need not, happen. This much it appears the Court in *First English*30 was able to decide.

The second half of the argument is, if anything, more dangerous than the first. Justice Blackmun writes as though a case will wind its way to a final judgment on some predetermined schedule, no matter what legal rules govern the liability of government bodies. But that bland conclusion ignores the powerful incentive effects that the legal rules create. If a landowner is not allowed to ask for compensation from a government until a final judgment is entered, then the government planners have a new and excellent reason to prolong the procedures as long as possible, for in delay they purchase unilateral insulation from accountability for their past conduct.

The situation in *Lucas* itself illustrates the danger. Here, the initial version of the Beachfront Management Act (BMA)31 called for a total prohibition on new construction between the beach and a setback line, established under the criteria set out in the Act. But the 1990 amendments to this statute altered the rules of the game to allow for special permits under certain circumstances. So it appears that the losses between 1988 and 1990 could not be brought into reckoning as long as the proceedings were not drawn to a close because of continued adjudication over the same land on another statute. The jig need not stop here, for if the state denies this next permit, it could reopen the hearings to take into account new evidence. In effect, the entire protection afforded by the Takings Clause could be nullified by a surfeit of due process. And for what purpose? In ratemaking hearings it is common practice to determine whether or not a utility has received a suitable rate of return in each distinct period.32 The gains and losses from prior periods are ignored, because otherwise the matter will never be brought to a close. The same principle should apply in the land use area. The state exercises an extraordinary power when it takes land on its own initiative. It should not be allowed to act on a take now, pay later principle, when later may never come.

IV. The Third Deadly Sin: The Illusion of No Cognizable Injury

Justice Blackmun also invokes the familiar contention that no compensation is required in regulation cases because no property has been taken at all if the sole consequence of the government action is to diminish private values. Thus, in opposition to Justice Scalia, Justice Blackmun notes that "the Court's prior decisions uniformly reject the proposition that diminution in property value, standing alone, can establish a "taking.""33 In making this assertion, Justice Blackmun falls prey to the common mistake of collapsing the question of justification into the question of denial; for the moment he makes his general pronouncement, he veers off into a discussion of police power cases, where the question is whether there is a sufficient justification for the regulation imposed.34 I shall turn to the police power issue in due course, but before doing so it is important to expose the error associated with the denial that land use cases raise cognizable takings claims in the first place.

At the root of the problem is that Justice Blackmun does not understand the difference between a loss of value attributable to competition and a loss of value attributable to a taking. The point here is an old one at common law, for since the case of the schoolmaster, it has been understood that it is one thing to harm an established business by competition

33. Lucas, 112 S. Ct. at 2910 (Blackmun, J., dissenting) (quoting Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 131 (1978)). He then quotes and relies on Professor Sax's well known article: "Professor Sax contends that even Blackstone, 'remembered champion of the language of private property,' did not believe that the compensation clause was meant to preserve economic value." Id. at 2915 n.20 (Blackmun, J., dissenting) (quoting Joseph L. Sax, Takings and the Police Power, 74 Yale L.J. 36, 58-59 (1964)). Blackstone's own view on the subject is more expansive of property rights. See 1 William Blackstone, Commentaries *135, where, in a famous passage, he writes of the limits of legislative power:

But how does it [the legislature] interpose and compel? Not by absolutely stripping the subject of his property in an arbitrary manner; but by giving him a full indemnification and equivalent for the injury thereby sustained. The public is now considered as an individual, treating with an individual for an exchange.

Id. The language of the exchange is apt, for the object of the Takings Clause is to ensure that the citizen does not lose even as the state gains. For that purpose economic value must be protected, and that can only be done if full compensation is made for the injury, including consequential losses. It is simply not enough to satisfy the "no loss" condition that the state provide compensation for the property taken, to the extent that it chooses to use it. Yet the history under the Takings Clause has often led to that unfortunate result. See Monongahela Navigation Co. v. United States, 148 U.S. 312 (1893).

34. Lucas, 112 S. Ct. at 2910 (Blackmun, J., dissenting). "This Court repeatedly has recognized the ability of government, in certain circumstances, to regulate property without compensation no matter how adverse the financial effect on the owner may be." Id. (Blackmun, J., dissenting). The proposition is distinct from that in the text and far narrower, depending on what are those "certain circumstances."
ing with it, and quite another thing to harm it by shooting at its prospective customers. The former is, socially, a positive sum game, and the latter is a negative sum game. The same instincts carry over to the public side. Thus, it is of course correct to note that if the state should decide to go into competition with a private citizen, any diminution in the value of the citizen's land is not compensable, any more than it is compensable if the competition came from another private landowner. To that extent the unwillingness to protect economic value is perfectly consistent with the regime of private property because it prevents the first entrant in any business from securing a de facto monopoly thereof in good mercantilist style. A similar argument can normally be made that many kinds of noninvasive conduct, such as blocking a view of the waterfront, or cutting off light and air, could result in a diminution of value, even though these activities are no more compensable if undertaken by the state than if undertaken by private parties.

But the restrictions involved in Lucas, and indeed in all land use cases, are not cases of competition or cases of blocking of views. They are cases in which an explicit restriction is placed on what can be done with the land by its owner. No such restriction is involved in either of the other cases, and in private interactions any effort to prevent ordinary construction is obtainable only by restrictive covenant, where the landowner is compensated either in cash, or more commonly, by reciprocal undertakings by the other landowner or landowners party to the transaction. It is therefore not simply the loss of value that Lucas complains of in this case; it is the loss of value consequent upon a regulation that restricts what may be done with the land in question, here, by taking a restrictive covenant for which no compensation is paid.

The distinction between these two types of activity is not simply drawn at random, but instead responds to a clear sense of what set of legal rules will maximize the value of the properties subject to these rules. In the ordinary case, if A has built his land with a view, any rule that deprives B the right to build on her land is likely to reduce the value of B's land. The most obvious consequence of the restriction is that we have only one development, with one viewer, A. Yet if construction were allowed, then B would have her view—often the same or better than A's—while A will still retain at least a partial view. It is highly unlikely that the sum of the value of the two parcels will be maximized if the first to build can veto the other's construction which blocks that view. Sec-

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ond, the right to veto other construction creates perverse incentives in
the initial stage of construction, as landowners vie to build as soon as
possible in order to protect their own development rights and to crimp
those of other parties.36

It is clear that in some cases the restrictions on development are
welcome, providing a place for the institution of covenants altogether.
But there is no coherent social account which indicates that total or par-
tial government restrictions on land use are apt to maximize value (or
utility or indeed anything else), which is why the presumption is set
against the creation of veto rights in neighbors, or in the public at large.
There is surely a taking by the regulation, and the only question is
whether it is justified. Justice Stevens mangles the analysis on that ques-
tion as well.

V. THE FOURTH DEADLY SIN: AN UNBOUNDED POLICE POWER

When dealing with the question of the police power, Justice Black-
mun pleads in the alternative. By arguing that there is no taking at all,
he posits that no justification for a taking need be provided. But in the
next breath he addresses the justifications that he thinks should be appli-
cable. His point is that a broad class of justifications has been accepted
by the Court, so that virtually any case of land use regulation can be
brought within their scope. Again his demonstration consists in setting
out the familiar cases from Mugler v. Kansas,37 blocking the use of a
brewery, to Miller v. Schoene,38 ordering the destruction of cedar trees to
save apple trees, to Goldblatt v. Town of Hempstead,39 ordering a cessa-
tion of gravel removal below the water line, in order to show the broad
and capacious nature of the police power. Justice Scalia championed the
nuisance-control rationale,40 which Justice Kennedy rejected.41 Justice
Blackmun’s sympathies clearly run with Justice Kennedy, but he is pre-
pared, if anything, to push the point far harder.

Justice Blackmun’s initial sally is one familiar prerequisite to the
constitutional demolition of any body of law. Justice Blackmun insists

36. The analogy to the case of overdrilling from oil and gas fields under several separate
plots of land should be evident. See generally RICHARD A. EPSTEIN, TAKINGS: PRIVATE
PROPERTY AND THE POWER OF EMINENT DOMAIN 219-23 (1985) (discussing problem of oil
and gas rights and common pool).
37. 123 U.S. 623 (1887).
38. 276 U.S. 272 (1928).
40. Lucas, 112 S. Ct. at 2900-02.
41. Id. at 2903 (Kennedy, J., concurring). For a criticism of Kennedy's position, see Ep-
stein, supra note 6.
that the term nuisance is so “indeterminate” that it has no content at all. Citing the well-known language of Prosser, he observes: “There is perhaps no more impenetrable jungle in the entire law than that which surrounds the word “nuisance.” It has meant all things to all people, and has been applied indiscriminately to everything from an alarming advertisement to a cockroach baked in a pie.”

While there are surely aberrations that have been built into the law of nuisance, its basic content has remained remarkably clear and stable over time. It covers the ground between trespasses—that is, entrances on the real property of others—and nontrespassory invasions of the land of other persons, such as smoke, fumes, noise and the like. In addition it covers a set of noninvasive nuisances, most notably the obligation of lateral support.

Whatever one might wish to say about cockroaches in pies, there has never been a common-law decision that has held that the construction of an ordinary beachfront home is enjoinable as a nuisance. Certainly Lucas could not have enjoined the construction of his neighbor’s home, nor they his, under common-law principles, save by the merest form of sophistry. Nor could Lucas obtain any order for the destruction of existing structures based on those principles. Similarly, the case for stopping the construction on the ground of support depends on a showing that the construction of this house is likely to damage the dune structure, which is unlikely for at least two reasons: No such damage resulted from the construction of similar houses by other persons; and the massive movement of the coastline is attributable to major geological forces that no pathetic beachhouse could either abet or resist.

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43. See Morgan v. High Penn Oil Co., 77 S.E.2d 682, 689 (N.C. 1953). [T]he feature which gives unity to this field of tort liability is the interest invaded, namely, the interest in the use and enjoyment of land; that any substantial nontrespassory invasion of another’s interest in the private use and enjoyment of land by any type of liability forming conduct is a private nuisance.

Id. The words “liability forming” beg important questions, which are not difficult in practice, given the types of conduct covered.


45. Professor Sax develops at length the worst case scenario of what could result from building a house on the beach, but gives no evidence at all that the dire consequences he foresees will ever come to pass. Sax, supra note 42, at 26. Indeed, one feature of modern environmental knowledge is how quickly nature can repair the damage from major disasters. The eruption of Mount St. Helens was followed by an enormous regrowth of the region once
vention was not part of the game plan: What was at stake was an effort to secure a zone of environmental retreat to promote tourism and leisure, and the use of lands for habitat. In sum, there may be some fuzziness about the edge in nuisance cases as there is with all legal categories, but it hardly behooves any court to call the law vague and indeterminate when its own "ad hoc" tests for what counts as a taking are so amorphous as to defy description. The point is especially critical because Justice Blackmun does not articulate any substantive standard to set appropriate boundaries on the police power. Instead, the entire argument necessarily collapses back onto the point of deference. As long as there are no guidelines and signposts around to organize the inquiry, the Court has to defer to legislative judgments as to which harms are serious and which are not. In so doing it necessarily obscures the line between "harm" attributable to the loss of tourism (or the loss of habitat, or the blocking of a view, or the rise of competition), and "harm" attributable to explicit restrictions on land use, and the radically different social consequences that attach to the two practices. Justice Blackmun's formula therefore reduces the protection of the Takings Clause in land use cases to a procedural requirement, one that asks the state to articulate the grounds for its restriction. But these grounds are always available: In this case the serious public harm comes because of the fragile condition of the beach. In the next case it will come from urban congestion and pressure on the highway system. In the next it will come from the need to maintain the character of the neighborhood. Harm is ubiquitous, even if there are rarely nuisances. In order to make credible any attack on the older nuisance formulations, it is necessary to come up with some alternative intelligible line that allows some greater level of state control without permitting all land use restrictions as a matter of course. And it would be nice as well if that line could be defended in terms of the desirable social consequences that it creates. On these matters, however, there is not a single word in either Justice Blackmun's or Justice Stevens' opinion.

VI. THE FIFTH DEADLY SIN: MALEVOLENT GENERALITY

Justice Stevens advances yet another argument to support the BMA: its generality. The argument begins with the familiar quotation from Armstrong v. United States: "The Just Compensation Clause 'was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'" It concludes with the observation that "[w]e have, therefore, in our takings law frequently looked to the generality of a regulation of property." Justice Stevens then notes that "[t]his principle of generality is well-rooted in our broader understandings of the Constitution as designed in part to control the 'mischiefs of faction'" and then gives the now obligatory citation to The Federalist No. 10. The generality requirement in turn is said to lead to the conclusion that regulations are suspect when they "single out" individual landowners to bear the brunt of special exaction, so that any broad based zoning plan is far less likely to meet with constitutional difficulty than a plan targeted to a small group of individuals. In addition, Justice Stevens claims that the singling out normally involved with physical takings accounts for the higher standard of review in these cases.

Armed with this principle, Justice Stevens then identifies the layers of generality that are found in the BMA. It is a statute that "regulates the use of the coastline of the entire State," one that is part of a still more comprehensive federal plan to protect the coastline. "The Act did not single out owners of undeveloped land." Rather, it prevented reconstruction of structures that were destroyed by storms and prohibited the repair of seawalls. "In short, the South Carolina Act imposed substantial burdens on owners of developed and undeveloped land alike. This generality indicates that the Act is not an effort to expropriate owners of undeveloped land."

48. I have a longer discussion of this problem in EPSTEIN, supra note 36, at 195-215.
50. Lucas, 112 S. Ct. at 2923 (Stevens, J., dissenting) (quoting Armstrong v. United States, 364 U.S. 40, 49 (1960)).
51. Id. (Stevens, J., dissenting).
52. Id. at 2923 n.7 (Stevens, J., dissenting) (quoting The Federalist No. 10, at 43 (James Madison) (G. Wills ed., 1982)).
53. Id. at 2923-24 (Stevens, J., dissenting).
54. Id. (Stevens, J., dissenting).
55. Id. at 2924 (Stevens, J., dissenting).
56. Id. (Stevens, J., dissenting).
57. Id. (Stevens, J., dissenting) (footnote omitted).
This last sentence is a gross non sequitur, for what follows from his description is the conclusion that the Act is an effort to expropriate owners of both developed and undeveloped land. To see the source of his error it is necessary to unpack two very different stories that travel under the name of generality. Once isolated it becomes clear that no blind invocation of generality can control the risks of faction that Stevens has rightly identified as one of the functions of the Constitution generally and the Takings Clause in particular.58

In the first case there are two separate groups in a society: one that owns land on the coast and the other that does not. All land is undeveloped. The number of coastal landowners is forty. The number of noncoastal landowners is sixty. The value of each coastal plot is 200, and of each noncoastal plot is 100. The total value of all plots is $40(200) + 60(100) = 14,000$. All plots are located in the same community in which each landowner has one vote. A general regulation is now passed (sixty to forty) restricting the use of coastal land. The net effect of the regulation is that the value of the holdings of the noncoastal owners increases by 25% to 125, while the value of the coastal owners drops by 95% to ten. No compensation is paid. When the dust settles, the total value is now reduced to $40(10) + 60(125) = 7900$. Is there any confiscation? The first and most obvious point is that the total value has dropped to little more than one-half of what it was, so that if the noncoastal owners had to pay the coastal owners, they could not do so, and still come out ahead. The second is that each of the coastal owners has lost equivalently; however, this general impact of the statute does nothing to prevent the confiscation. It only magnifies its effect by allowing faction to operate on a mass production basis.

Justice Stevens referred to a more complex situation, with both developed and undeveloped land,59 but that extension does nothing to change the analysis. Keep the same numbers as before and add a third class of landowners: ten who have built houses on the coast worth 300 before the regulation is put into effect. After the regulation goes into effect (with a sixty to fifty vote) their plots are now worth 200 because they are not allowed to rebuild. The values of the other two groups are unchanged. It follows therefore that to the previous social loss of 6100 we now add an additional loss of 1000, with no offsetting benefit. Does the confiscation of a second group of individuals offset the losses suffered by the first group? Not at all. It is a case of misery loving company. Justice Stevens' argument, transposed to another context is that it is ter-

58. Id. at 2923 (Stevens, J., dissenting).
59. Id. at 2919 (Stevens, J., dissenting).
rible to deport Jews from Germany, but perfectly all right to deport Jews, Gypsies and Turks. Clearly, the greater the generality, the greater the wrong, and the greater the risk of faction. It may be said that these examples are too simple. Some people will vote against their own interest. All are not similarly situated. Logrolling and coalitions are possible. All true, and all irrelevant, for there are just too many situations in which faction will have its due.

What weight should be attached to generality? There is an answer to this inquiry, but it requires us to return to the average reciprocity of advantage that is so conspicuously missing in the example above. Suppose that all the landowners lived along the coast on roughly identical plots, and that the question before them was whether to restrict the use of signs on their coastal lands. If all agreed to the restriction, there would be good reason to believe that each person gains more from the restriction than he suffers: otherwise why give the consent. At this point the usual problem with holdouts arises: One party wants more than an equal share of the gain. To overcome that problem, a regulation that bound all for the benefit of all should normally pass constitutional muster. The key point of difference is this: With the BMA, one group benefits and another group is hurt. It hardly matters how the composition of either group is defined, once we are sure that there is little or no overlap between them.

In the second case I described, there is perfect overlap. At this point, each person labors under incentives that align his private gains and losses with the social gains and losses. Each individual will support legislation only if it provides a net benefit. Because all persons are situated similarly, the generality of the regulation only multiplies the net gain by the number of parties subject to the regulation.

There are of course a vast number of cases in which there is partial overlap between the members of the two classes. In these situations, Justice Stevens argues that the generality of the statute offers protection against the travails of faction, and again he is wrong. To see why, consider the illustration he gives involving the transfer of support rights from coal owners to surface owners. Justice Stevens thus compares the

60. The phrase received its currency from Justice Holmes' opinion in Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922). There was no such reciprocity of advantage on the facts of that case, for the support rights that the coal companies had purchased from surface owners for compensation were taken from them without compensation under the Kohler Act, Act of May 27, 1921, 1921 Pa. Laws 1198 (codified as amended in PA. STAT. ANN. tit. 52, §§ 661-672.10 (1966)), at least until the Supreme Court stepped in to require compensation. The opposition between the coal companies and the surface owners is total, and thus parallels the opposition between coastal and noncoastal owners in the above examples.
situation struck down in *Pennsylvania Coal Co. v. Mahon* with that sustained in *Keystone Bituminous Coal Ass'n v. DeBenedictis*. He writes that "we found significant that the regulatory function of the latter [statutory scheme] was substantially broader. Unlike the Kohler Act, which simply transferred back to the surface owners certain rights that they had earlier sold to the coal companies, the Subsidence Act affected all surface owners—including the coal companies—equally." Again Justice Stevens misses the point. The coal owners may have shared in some portion of the gain, but they sustained all the loss. The differential share of gains and losses still allows for a significant transfer between winners and losers. Thus suppose, on optimistic assumptions, that the coal owners lose 100 when forced to surrender their support rights. If the surface owners gain 100, half to the coal companies in the second role, and half to surface owners who are not coal owners, there is still a net transfer of fifty from coal owners to surface owners. So long as the percentages differ, there is a conflict of interest between the two sides and the opportunity for faction to take place. Where single individuals are selected for restrictions not borne by others, the condition of perfect overlap is not met. It is a fallacy of reasoning from the converse to assume that if the generality condition is satisfied the overlap condition is satisfied as well. *Lucas* is the obvious case where it is not. The use of generality therefore never allows a court to dispense with an examination of the ostensible distribution of benefits and burdens from any land use restriction. The restriction is the taking, and the benefit is the compensation so provided. Generality, without more, is consistent with massive redistribution or none at all.

Once this framework is understood, it becomes clear why Justice Stevens misunderstands the physical takings cases. If the land of one person is occupied for the benefit of all, the condition of perfect overlap is not satisfied. If ten persons each own equal amounts of land bordering a road, the land can be taken from all, and no compensation need be paid. But again context is key. If the road is a no-access highway only for the use of interstate travelers then all landowners should receive full compen-

61. 260 U.S. 393 (1922).
64. The failure to consider mixed cases thus cuts out the power of the disproportionate impact analysis. A similar weakness is found in Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689 (1984), where the willingness to condemn the exercise of "raw" political power only reaches the all-or-nothing situation, but does nothing to meet cases in which all parties are on both sides of the transaction, in unequal proportions. See id. at 1730-32.
sation: The ostensible generality of the statute only magnifies its effect. But if the road is for the local use of those ten persons, then it is quite likely that no one need pay or receive anything. It is of course possible to have mixed cases with physical takings as with regulations. The road is of special benefit to locals, but has benefit to outsiders as well. The regulation on exterior design benefits not only those persons under the regulation but those whose shops are in the neighborhood as well. The principle of generality thus applies to both physical and regulatory takings in the same way, and for the same reasons. The total confusion that Justice Stevens brings to a difficult subject is representative of the hopeless judicial disarray that arises when judges forget that the Takings Clause is about, dare one say it, takings.

VII. THE SIXTH DEADLY SIN: CONDEMNING THE CONDEMNEE

The first five deadly sins are concerned with the judicial attitude toward takings claims, the timing of these claims and the full range of substantive issues, including the scope of the takings doctrine and the patterns of justification and compensation that are available to the state. The sixth deadly sin switches focus somewhat and seeks to make the condemnee the villain of the piece. There is today a fairly extensive literature on the role of strategic behavior by the condemnee, which is dutifully picked up by Justice Stevens who writes:

Even measured in terms of efficiency, the Court's rule is unsound. The Court today effectively establishes a form of insurance against certain changes in land-use regulations. Like other forms of insurance, the Court's rule creates a "moral hazard" and inefficiencies: In the face of uncertainty about changes in the law, developers will overinvest, safe in the knowledge that if the law changes adversely, they will be entitled to compensation.

The argument has been stated in somewhat different, yet more precise form by Daniel Farber on whose work Justice Stevens relied. Farber's statement of the position reads as follows:

Suppose a landowner is considering a further investment in his property, but there is some chance that the property will be flooded by a proposed dam. We would like the owner to consider this possibility when deciding whether to make an in-

65. See, e.g., supra note 22.

66. See Lucas, 112 S. Ct. at 2922 n.5 (Stevens, J., dissenting) (citing Daniel A. Farber, Economic Analysis and Just Compensation, 12 INT'L REV. L. & ECON. 125 (1992)). The same analysis is advanced in Farber, supra note 22.
vestment, since the investment will be wasted if the dam is built. But if the owner can obtain full government compensation for the flooding, she has no reason to take the possibility of the dam into account. (If the dam is not built, the owner can expect a return from her additional investment, while she gets her money back from the government if the dam is built after all.) So the owner is indifferent to the possible construction of the dam and hence will tend to overinvest, with a consequential loss in economic efficiency.67

These two excerpts raise important principles of takings law that require closer examination. The first point to observe is that Stevens and Farber have not made the same point at all. Farber's point is that the construction of the private improvement may go forward, but if the dam is built, and the property flooded, then no compensation should be paid. Whatever the soundness of that proposition, it is a far cry from the point at issue in *Lucas*, which is whether the government can ban the construction in the first place. Indeed, because there was no government project of any sort on the horizon, Lucas would have happily abandoned his lawsuit if he were told that he could build so long as he took the risk of loss from any future government projects: None were planned, and any that might be planned could not create any risk equal to the risks caused by the natural elements. It follows therefore that the ban is inefficient because it prevents construction of projects that could go forward without any expectation of future compensation.

All this is not to say that Farber is correct on his economic analysis of landowner over-investment. He has only identified one efficiency loss associated with allowing compensation for new private construction after a government proposal. But in a world of imperfect coordination, this one problem is solved only at the cost of creating another.

Here, the initial problem is how to determine the proper number and scope of government projects that should be undertaken at all. We cannot assume that government's choices are correct as a matter of course. Quite simply, the government should take into account the losses that its proposed projects will place on private development.68 We can-

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68. There are of course private analogies. A doctrine of contributory negligence as a total bar places strong incentives on the plaintiff, but at the same time induces careless conduct by defendants. See, e.g., Steven Shavell, *Torts in Which Victim and Injurer Act Sequentially*, 26 J.L. & ECON. 589 (1983); Donald Wittman, *Optimal Pricing of Sequential Inputs: Last Clear
not assume, therefore, that this problem has been solved, so all the legal firepower should be directed toward creating optimal incentives for the plaintiff. Instead the regulation of both parties has to be an issue, and to achieve that goal it is possible to devise an alternative that constrains the potential misconduct of both sides simultaneously.

There is a method that better achieves these twin goals. Quite simply, the government has this choice: When it announces its proposals, it can buy out the development rights of private owners, that is, pay them compensation equal to the loss of the potential value of the land use.69 The danger of compensation for wasted structures is thereby averted while at the same time effective limits are placed against the risk of government announcement of a collection of proposals to preserve its options when only a tiny fraction of them can, and will, be seized upon. It is indeed commonplace in the complaints that I have heard on local government behavior that a board announces some road or waste dump in multiple possible sites, freezes development and sale, and then rescinds its announcement. At its best, the practice creates an intolerable source of private loss and uncertainty. At its worst, it is an ill-concealed effort to impose a disguised interim ban on development, without having to pay the price. This alternative is not considered by either Stevens or Farber, even though it corresponds to the mitigation solution that is frequently adopted in contractual settings: Once the defendant is in breach, a plaintiff cannot be an “insistent” performer, but can only recover an amount that leaves the plaintiff indifferent between performance and breach, usually the sum of past expenditures on the contract—less salvage value, if any—plus lost profits.70

To see how far off Farber’s solution is from the ideal, it is useful to revert for a moment to the nuisance law problem of “coming to the nuisance.”71 In those situations the private defendant has built its plant or

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69. See Epstein, supra note 36, at 153-58 (discussing affirmative defense of assumption of risk in takings context).

70. On the complexities, see White & Carter (Councils) Ltd. v. McGregor, 1962 App. Cas. 413. In general the proper approach is not to allow the insistent performer to perform after repudiation has been received, but to grant a contract action equal to the lost profits plus any reliance costs that have been incurred in the interim, unless the contract itself provides otherwise.

factory first, and the question is whether it can be enjoined by a neighbor who thereafter makes a use of his land that is harmed by the defendant's previous activities. The illustrative case is the defendant who has a pig farm in a rural area that is later subdivided. Even when the neighbors come with knowledge of the existing activity, the usual solution is that the pig farmer may be enjoined, after some suitable period, to shut down his operations. There is, moreover, good reason for thinking that this is an efficient solution, if only because it allows the pig farmer to use the land until the actual conflict arises. Just this pattern of behavior took place in Hadacheck v. Sebastian, in which a state statute enjoining the operation of a brickmill worked for the benefit of late arriving owners. The proposition therefore that individual plaintiffs should receive no compensation for flooding when their construction takes place first does not represent an efficient solution. A far superior solution is one that gives the government the right to condemn out easements to cause harm if it so chooses, but to hold the government to the consequences of its behavior when it does not.

There is a second strand to the argument that individual landowners ought not receive compensation when their land is taken by the state. It is that they could always insure against the government takeover in the private market. The short answer is that they can so long as they can find an insurance company foolish enough to underwrite the risk—which the individual landowners will not be able to do given the risk of adverse selection. The moment insurance is written on the property, it will be an added inducement to engage in the acts of condemnation in question. The local opposition to the program will be dulled by the compensation from the outside insurance company. It will become common practice by local governments to tip off local landowners of their plans so that

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72. See Ensign v. Walls, 34 N.W.2d 549 (Mich. 1948).
74. 239 U.S. 394 (1915).
75. Id. at 413-14.
76. For example, see William F. Baxter & Lillian R. Altree, *Legal Aspects of Airport Noise*, 15 J.L. & ECON. 1, 3 (1972), arguing for the following liability rule: "Of two incompatible land uses the one which had but did not take the opportunity to avoid creating costs of incompatibility should bear those costs." Id. at 3 (emphasis omitted). This solution is hard to implement because as long as the first actor has foresight, he may be the cheaper cost avoider, but need not be.
77. See, e.g., Kaplow, *supra* note 22. For an effort to introduce an insurance model of just compensation, see Blume & Rubinfeld, *supra* note 22, at 590-97. The difficulty with that model is that an insurer does not normally create the very risk against which he is asked to provide insurance. Here the just compensation requirement is designed to forestall unwise projects that the government might otherwise undertake.
they can get the insurance just before the condemnation takes place. Insurance companies could try to exclude takings accomplished in order to exploit the insurance, but only at the cost of obscuring the coverage under the contracts.

There is little reason to speculate on the losing nature of this insurance venture because there is adequate proof that these markets could not survive. Presently, regulations on land use, short of total takings, are largely passed at the whim of the state, without compensation. No insurance company faces a legal impediment against offering some form of "lost land use insurance" parallel to lost use insurance available from floods and other natural events. That insurance is just not available, for it would be suicidal to sell it at all. The reason the government has to provide the "insurance" in the form of just compensation is to reduce the likelihood of misbehavior. Insurance provided by a firm that is unable to control the probability and severity of this all too political event has no allocative function, and cannot survive.

In sum, these efforts to defeat the applications of the Takings Clause fail. The concern with excessive investment never justifies the ban on development, but at most justifies a denial of compensation for subsequent government acts. Even that conclusion is suspect because it provides no limitations on the number and type of projects that the government will propose. It is far better to require the government to condemn development easements when it announces its project—or take the risk of subsequent development. Finally, private parties cannot be asked to obtain insurance against confiscation, because no insurer will enter so perilous a market.

VIII. THE SEVENTH DEADLY SIN: UNGLUEING THE COMMON LAW

The last deadly sin of takings law is the assumption that rigorous enforcement of the Takings Clause against general government action will "freeze" the law into an archaic and inefficient pattern. To make adjustments to new times, the state must have the power to experiment with new forms of property rights.

The Court's holding today effectively freezes the State's common law, denying the legislature much of its traditional

78. Kaplow argues that the moral hazard problem with political misbehavior is no greater than the risk with fire insurance. Kaplow, supra note 22, at 537-42. That conclusion presupposes a very optimistic view of the operation of the political process.
power to revise the law governing the rights and uses of property . . .

Arresting 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.79

Justice Stevens then gives several instances of the need for revision: the abolition of slavery and the protection of endangered species, wetlands and coastal lands.80 His point is fashionable, but it deserves an answer on several counts.

First, why is it a bad thing to freeze a system of property rights? There is another way to describe the same condition: Permanence, stability and certainty are all regarded as virtues of a system of property rights. Indeed, David Hume, in offering his justification for the institution of property, spoke of the need for the stability of possession as one of its central features.81 Where the legal system contains clear rules, then private parties need only take into account the inherent business risks of a given transaction. They need not worry that the state will “redefine” property rights in a way that leaves them penniless. Certainly in monetary affairs a stable currency is far more attractive than one that experiences large fluctuations, given the massive dislocations that follow from either major inflations or deflations. And the problems in Eastern Europe stem in large measure from the indefinite structure of property rights, which make it difficult to plan for long-term investment. The power to redefine property rights is not one that should be vested easily in any legislature. Surely it is a vast overstatement of legislative virtue to treat legislatures as disinterested bodies intent on implementing new learning.

79. Lucas, 112 S. Ct. at 2921 (Stevens, J., dissenting).
80. Id. at 2921-22 (Stevens, J., dissenting).
81. DAVID HUME, A TREATISE OF HUMAN NATURE, Bk. 3, § II, at 497 (L.A. Selby-Bigge ed., Oxford, Oxford Univ. Press 1888). "Property must be stable, and must be fix'd by general rules. Tho' in one instance the public be a sufferer, this momentary ill is amply compensated by the steady prosecution of the rule, and by the peace and order, which it establishes in society." Id. Note that his emphasis on a general rule is picked up in all discussions of the takings issue. But Hume's treatment is incomplete because he did not perceive the level of illicit redistribution that could proceed under the guise of general rules. Nor did he (or for that matter Blackstone, Locke or Smith) address the relationship between general regulations and takings of property that is so critical in shaping the modern law.
There are, however, some changing circumstances that do require new property rights. Historically the rules have changed to take into account the spectrum, the airplane and computer software. Yet before one could condemn a strong system for the protection of property rights, one has to show that these changes could not be brought about in a sensible fashion when the Eminent Domain Clause is respected. Yet Justices Blackmun and Stevens offer no demonstration of how innovations in these areas would be blocked by applying the Eminent Domain Clause. Nor is it possible to think that one could be made. The shifts in question are enormously beneficial for society as a whole, and have no odd distributional effects, and thus pass muster under a takings analysis.

Similarly, the particular cases that Justice Stevens does mention do nothing to bolster his stand in this case. Slavery is the antithesis of the system of self-ownership on which any sensible system of property rights rests. Its abolition should be regarded as a restoration of property rights, not as a mere redefinition of them. (One shudders to think that we could reintroduce it by simple "redefinition.")

The regulation of wetlands, endangered species and coastal lands are, of course, complex. Yet the mere invocation of these interests hardly makes the case for complete legislative discretion. There is, for example, no showing of any public benefit in Lucas that is remotely comparable to the loss of one million dollars in private value for Lucas, let alone for the loss of development on the South Carolina coast. Likewise it is highly debatable to think that the right way to handle endangered species is to allow them to eat at will the cattle of private owners, who are not only debarred from taking steps in self-defense, but also from being compensated for their losses.

The current administration of the wetlands laws also raises serious questions because the government that takes has no incentive to take into account the losses that its actions impose on others. In each of these environmental cases we do not have an impersonal invocation of new property laws from which all benefit alike. Instead there are vast domains of administrative discretion that open up areas for faction and political intrigue. These environmental issues are far better handled within the framework of the old property law. Novelty and innovation are not by definition social advantages.

82. U.S. CONST. amend. V.
IX. THE WAGES OF SIN

This survey of the seven deadly sins of takings law explains part of the level of dissatisfaction that is found in this branch of the law.84 The usual doctrines that have been invoked to explain the largely passive role of judicial oversight on land use regulation have little persuasive power, even to the judges and scholars who invoke them. Yet, by the same token, they are unable to break free of the implicit assumption that any coherent account of the Takings Clause has to allow the political process of land use planning, and, more generally, of economic regulation to go forward more or less as it has. Oddly enough, this background assumption explains the unsatisfactory nature of all four substantive opinions in Lucas, for while Scalia and Kennedy were willing to remand this case, they studiously avoided making any statement that cast doubt on partial land use restrictions. Accordingly, their opinions both suffered because they were unable to persuade themselves that the entire area of land use planning was always in tension with the Takings Clause. The two dissents, of course, agree on the major premise that the Court has, at most, a marginal role to play in takings cases. And they invoke the seven deadly sins of takings law to gut its application altogether. It is a worrisome portent of things to come in the New Political Order.

84. "There is no consensus today about takings law—only a general belief that the takings problem is difficult and that takings doctrine is a mess." Farber, supra note 22, at 279.