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I. INTRODUCTION

Arising from a flurry of Supreme Court activism since 1987, the shape and direction of a new Takings Clause jurisprudence are now emerging. Of the seven principal clusters of takings doctrine, perhaps the most vitally affected area of contention between the state and the individual property owner is the area of predatory municipal zoning practices. This is the area of ultimate municipal


2. For a discussion of the seven principal clusters of takings doctrine, see infra part II.B.1-7. See infra notes 106-110 and accompanying text for a reconfiguration of these clusters of doctrine in accord with the lengthy dicta in Lucas. See also infra Configuration A.

3. The conduct of municipal government, and other agencies of the state, can frequently result in the destruction of private property values as part of a deliberate plan to acquire property rights for a public purpose. A variety of governmental tools is frequently used in an attempt to "rig" the market in favor of government's enrichment of the public accounts at the expense of private property owners. See San Antonio River Auth. v. Garrett Bros., 528 S.W.2d 266, 274 (Tex. Civ. App. 1975); see also Nemmers v. City of Dubuque, 716 F.2d 1194, 1197-1200 (8th Cir. 1983) (city annexed land already zoned for industrial park purposes—and scheduled for private development—and then proceeded to change the property's preferred use designation at least four times in a four-year period); Archer Gardens, Ltd. v. Brooklyn Ctr. Dev. Corp., 468 F. Supp. 609, 614 (S.D.N.Y. 1979) (holding that a 42 U.S.C. § 1983 claim survives a motion to dismiss when both the
gamesmanship. A governmental unit may employ value-suppressing or value-diminishing regulatory actions in order to obtain an outright transfer of the fee title to land, or lesser property rights, from the private sector at little or no public cost. Because of severe municipal budgetary restraints, coupled with heightened demands for increased public services and public capital amenities, the temptation to engage in value-destroying gamesmanship confronts municipal offices around the country. This municipal gamesmanship is
city and the city’s designated redeveloper act in concert to inhibit the private land owner’s ability to lease, sell, or use its land, thereby creating a cash flow shortage leading to tax delinquencies and ultimately resulting in title forfeiture to the government at amounts far below the agreed-upon renewal acquisition price of $775,000).

Agins v. City of Tiburon, 598 P.2d 25 (Cal. 1979), aff’d on other grounds, 447 U.S. 255 (1980), is one of the most significant takings cases of the past fifteen years. In Agins, entrenched large parcel owners combined with the city to block rezoning for middle- and lower-income residences, thereby depressing residential land values. See id. at 32-35 (Clark, J., dissenting). The Agins court held that a private landowner’s remedy for a temporary regulatory taking does not lie in inverse condemnation but, rather, in uncompensated mandamus or declaratory relief. Id. at 32. However, that portion of Agins was explicitly overruled by the Supreme Court in First English, 482 U.S. at 310-11. See supra note 1 and accompanying text.

Apart from the predatory zoning cases, some municipal agencies have prevailed on the issue of whether inequitable pre-condemnation activities were unreasonable or intended to freeze or lower private property values and thus effect a taking. See, e.g., Cambria Spring Co. v. City of Pico Rivera, 217 Cal. Rptr. 772 (Ct. App. 1985); Redevelopment Agency v. Contra Costa Theatre, Inc., 185 Cal. Rptr. 159 (Ct. App. 1982); Toso v. City of Santa Barbara, 162 Cal. Rptr. 210 (Ct. App.), cert. denied, 449 U.S. 901 (1980).


It has been argued that governmental rent-seeking behavior should be discouraged not because it affects private property owners, but because it adversely affects sound municipal planning, encourages administrative arbitrariness, and increases the possibility of legal campaign donations and illegal bribes. Stewart E. Sterk, Nollan, Henry George, and Exactions, 88 COLUM. L. REV. 1731, 1744-45 (1988).

5. See supra note 3. For example, in Seawall Assos. v. City of New York, 542 N.E.2d 1089 (N.Y.), cert. denied, 493 U.S. 976 (1989), New York City was (and still is) under enormous political pressure to resolve the problem of housing the homeless. There is very little doubt that the ordinance in that case, which required owners of single-room occupancy rental properties to restore and lease such units at controlled rents and which prohibited demolition or vacancy thereof, was
sometimes referred to by economists as government’s “rent-seeking” behavior, and it is a symptom of a centuries-old statist syndrome.

Like many other parts of the Bill of Rights, the Takings Clause reflects the pre- Revolutionary experiences endured by the American colonists during the rule of England’s imperial government. The Takings Clause has classically been construed to permit government to appropriate private property for a nearly limitless range of public purposes, but such

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designed as a method of providing 52,000 housing units for the city's homeless without incurring public costs. Although the New York court conceded that “no one disputes the City's power—indeed its duty—to fashion meaningful solutions to address homelessness,” id. at 1071, the commands of the 1987 takings trilogy required that the instant property owners not be forced “alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.” Id. at 1065 (quoting Armstrong v. United States, 364 U.S. 40, 49 (1960)); see John P. Trevaskis, Measure of Damages for Regulatory Takings, PROB. & PROP., Mar.-Apr. 1989, at 17, 17-18.


7. It was no mere coincidence that Machiavelli warned the Medici princes in Renaissance Italy of the danger to governmental power when taking of property becomes flagrant: “[B]ut above all, a Prince must abstain from taking the property of others for men forget more easily the death of their father than the loss of patrimony. Then also pretexts for seizing property are never wanting.” NICOLÒ MACHIAVELLI, THE PRINCE 90 (Gouss trans., 1952).


English legal policy regarding domestic property rights embraced a strong tradition of compensation for all property taken by the Crown. WILLIAM BLACKSTONE, COMMENTARIES 74 (Bernard C. Gavit ed., 1941) (“[T]he legislature alone can interpose, and compel the individual to acquiesce. It does this not by arbitrarily depriving the party of his property, but by giving him a full indemnification and equivalent for the injury thereby sustained.”). J.P.W.B. McAuslan, Compensation and Betterment, in CITIES, LAW, AND SOCIAL POLICY 77, 86 (Charles M. Haar ed., 1984) (“[A] local planning authority may be required to purchase land rendered incapable of reasonably beneficial use by virtue of the refusal of planning permission . . . .”).


Public safety, public health, morality, peace and quiet, law and order—these are some of the more conspicuous examples of the traditional application of the police power to municipal affairs. Yet they merely illustrate the scope of the power and do not delimit it . . . .

We do not sit to determine whether a particular housing project is or is not desirable. The concept of the public welfare is broad and inclusive . . . . The values it represents are spiritual as well as physical,
takings must be accompanied by payment of just compensation to the private owner. During the past few years, a half-dozen important Supreme Court cases (and numerous state court decisions) have sharply reconfigured Takings Clause jurisprudence. These cases bear generally on all seven classifications of takings law and, for the purposes of this Article, bear importantly upon the core questions involved with predatory governmental land regulation.

Part II of this Article briefly delineates the emerging Takings Clause reconfigurations and defines the predatory regulation class of cases. Part III demonstrates that the concept of “Reasonable Investment-Backed Expectations” aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled. In the present case, the Congress and its authorized agencies have made determinations that take into account a wide variety of values. It is not for us to reappraise them. If those who govern the District of Columbia decide that the Nation's Capital should be beautiful as well as sanitary, there is nothing in the Fifth Amendment that stands in the way.

Id. at 32-33 (citations omitted); see Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229, 233-34 (1984). A good historical perspective on the evolution of direct eminent domain is found in Tony Freyer, Reassessing the Impact of Eminent Domain in Early American Economic Development, 1981 WIS. L. REV. 1263. Professor Tribe quite correctly identifies the doctrine of just compensation as being fundamentally conservative in that the ends (some desired public benefit) can be prevented by undercutting the means (requiring payment, not expropriation). LAURENCE H. TRIBE, CONSTITUTIONAL CHOICES 166-67 (1985).

10. Nothing in Justice Douglas's majority opinion in Berman sanctioned uncompensated takings as a means to achieve government's end. 348 U.S. at 33 ("Once the object is within the authority of Congress, the right to realize it through the exercise of eminent domain is clear. For the power of eminent domain is merely the means to the end.") (emphasis added) (citations omitted).

11. See supra parts II.B.1-7.

12. The warnings of Madison and others are directly on point with predatory municipal gamesmanship in the destruction of property values. It may be a reflection on human nature that such devices [as the Takings Clause] should be necessary to control the abuses of government. But what is government itself but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions.

("R.I.B.E.") has now become central to predatory regulatory takings. Part IV offers the principal alternative legal formulations for "timing" and "value" which are now at the heart of all R.I.B.E. determinations; and suggests some useful extensions and modifications to the Supreme Court's "timing" doctrine.

II. TAKINGS CLAUSE RECONFIGURATION

A. Original Policy Premises

James Madison and his contemporaries, in framing the Bill of Rights, embraced several Lockean notions. Respecting the protections afforded to private property, the Framers' fundamental policy premises concerned the following: a person's inherent right to private property ownership as being prior and morally superior to the state's; the source of private property as being the product of individual labor and ingenuity; and private property as a fundamental expression of one's freedom and its protection as one of the principal reasons for individuals to enter into civilization and create governments. These

13. The Supream [sic] Power cannot take away from any Man any part of his Property without his own consent. For the preservation of Property being the end of Government, and that for which Men enter into Society, it necessarily supposes and requires, that the People should have Property, without which they must be suppos'd to lose that by entering [sic] into society, which was the end for which they entered into it, too gross an absurdity for any Man to own.


14. Id. §§ 137-139.

15. Id. § 138; see THE FEDERALIST No. 54, at 339 (James Madison) (Clinton Rossiter ed., 1961) (discussing whether slaves ought to be considered "citizens" or property). In discussing the facts that exist within a society, Madison also stated:

The diversity in the faculties of men, from which the rights of property originate, is not less an insuperable obstacle to a uniformity of interests. The protection of these faculties is the first object of government. From the protection of different and unequal faculties of acquiring property, the possession of different degrees and kinds of property immediately results . . . .

THE FEDERALIST No. 10, at 78 (James Madison) (Clinton Rossiter ed., 1961). A modern extension of Lockean-Madisonian views is the "new property." In his landmark analysis of 1964, Professor Charles Reich stated:

[Property performs the function of maintaining independence, dignity and pluralism in society by creating zones within which the majority has to yield to the owner. Whim, caprice, irrationality and "antisocial" activities are given the protection of law; the owner may do what all or most of his neighbors decry. The Bill of Rights also serves this function, but while the Bill of Rights comes into play only at extraordinary moments of con-
policy values informed the Madisonian constitutional formulae, that sought at nearly every turn to curb the potential for government using its police powers to abuse the personal and property rights of citizens, of an exploitative predilection that Madison's revolutionary colleague Thomas Jefferson condemned as the "tendency of all human governments." Thus, the Fifth Amendment was enacted in recognition that government's inevitable appetites provide a continual danger to private ownership against which the Constitution must provide bulwarks. The chief bulwark—and in modern jurisprudence very nearly the only bulwark—is the right of the citizen whose property rights are taken to demand payment of just compensation from government.

B. Modern Takings Clause Principles

The judicial content given to the Takings Clause in modern times begins with certain Holmesean notions about the legitimate reach of government's police powers to enact regulations affecting property without continually paying just compensation (what Holmes referred to as "the petty larceny of the police power"). This is coupled with the notion that government

sict or crisis, property affords day-to-day protection in the ordinary affairs of life. Indeed, in the final analysis the Bill of Rights depends upon the existence of private property. Political rights presuppose that individuals and private groups have the will and the means to act independently. But so long as individuals are motivated largely by self-interest, their well-being must first be independent. Civil liberties must have a basis in property, or bills of rights will not preserve them.


16. U.S. Const. amend. V.

17. In a letter from Jefferson to Samuel Kercheval in 1816, the former president wrote:

[T]hat private fortunes are destroyed by public as well as by private extravagance. And this is the tendency of all human governments. A departure from principle in one instance becomes a precedent for a second; that second for a third; and so on, till the bulk of the society is reduced to be mere automatons of misery, and to have no sensibilities left but for sinning and suffering.


18. See supra note 12.

19. See infra note 24 and accompanying text.

20. 1 HOLMES-LASKI LETTERS 457 (Mark D. Howe ed., 1953) ("In this one [case] my brethren, as usual and as I expected, corrected my taste when I spoke of relying upon the petty larceny of the police power, dele [sic] 'the petty larceny of.'"
must not "go too far" in regulation. Some individuals—certain property owners—must not be singled out to bear a disproportionate burden of the cost of public benefits which should be more justly borne by society as a whole through payment of just compensation.

A further basic Holmesian precept is that the magnitude of the public need, the public's urgency to achieve a benefit, is not material. Regulation cannot be used as a shortcut to paying for public benefits merely because the public need for such benefits is great.

Apart from these rather Olympian generalities, until recent years the judicial development of the Takings Clause has been chaotic. What have eventually evolved are seven classifications or clusters of doctrine, only loosely related to one another. In order to understand the sudden emergence of R.I.B.E., timing, and valuation problems as the pivotal questions for legal analysis in the area of predatory municipal practices, it is necessary to take a brief detour through the seven principal clusters of takings doctrine as they have evolved to date.

1. The per se rule

When government uses its coercive force to physically enter or occupy any portion of the property of a private owner,

It is done—our effort is to please.

24. As Justice Cadena of the Texas Court of Civil Appeals put it:
Despite the fact that the crazy-quilt pattern of judicial doctrine in this area has not yet yielded a principle upon which the cases can be rationalized, it is now universally recognized that acts short of actual physical invasion, appropriation or occupation can amount to a compensable taking, and that governmental restrictions on the use of property can be so burdensome as to constitute a compensable taking.

the *per se* takings rule requires payment of just compensation.\(^{25}\) This is true regardless of the trivial economic loss suffered by the private owner (or the trivial amount of compensation to be paid by the state for such a taking) or the magnitude of the state's interest.\(^{26}\) At least since 1987 it has also been clear that both *permanent* and *temporary* physical occupations by the state may constitute *per se* takings.\(^{27}\) The *per se* construct is based upon the late Justice Thurgood Marshall's opinion in *Loretto*,\(^{28}\) which has been unfairly derided with considerable sarcasm by some critics as an example of "fetishism" or "nineteenth century" jurisprudence of a "retrograde" nature.\(^{29}\)

Such criticism misses the mark. *Loretto* derives its considerable force from the original policy premises of Madison and other Founders. Justice Marshall's analysis is wholly consistent with other portions of the Bill of Rights which, directly and through subsequent judicial interpretation, have vigorously restrained government from using its coercive force to enter the private property of citizens, whether government's purposes be to procure criminal evidence, to quarter troops, or to establish a public benefit by the use of such property.\(^{30}\)

2. The *harm-prevention rule*

For 106 years there has existed in Takings Clause juris-
prudence a principle that government may aggressively regulate land uses to prevent loss of life or property which are threatened by the activities on private land by private owners. This rule parallels the public nuisance notions at common law. Pursuant to this line of precedent, government is exempt from paying compensation even though it decrees that illegal breweries must be closed, infected cedar trees must be destroyed, urban brickyard plant operations are banned, gravel and sand mining industries are restricted, underground coal mining activities are limited, and the use of a flood-prone campsite is drastically curtailed. Until 1992, it was widely supposed that this cluster of cases represented the state's most powerful trump card to significantly regulate the use of private property without being deemed to have gone "too far" and without having to pay just compensation. Justice Scalia's opinion in Lucas includes several charged passages of dicta which may or may not result in the future limitation, or even rejection, of this cluster of cases.

Subsequent to Lucas, this group of cases probably still continues to have viability at least with respect to the owner's illegal activities on private property and to firebreaks and other emergency hazards. In both instances, and perhaps in others, the government apparently still retains the constitutional

31. See infra notes 33-38; see also Bruce W. Burton, Regulatory Takings and the Shape of Things to Come: Harbingers of a Takings Clause Reconstellation, 72 OR. L. REV. (forthcoming November 1993).
32. Professor Michelman has opined that regulatory takings have been sorted into two sub-classes: takings which involve regulations preventing noxious or nuisance-like uses and regulations securing affirmative public benefits. Michelman, supra note 24, at 1603. Although it is both useful and correct to divide the public purposes identified by the Court along harm-prevention and benefit-promotion demarcations, this focuses on the governmental ends, not means, and is therefore not particularly helpful to an analysis of government's predatory practices.
40. See Burton, supra note 31.
authority to act decisively upon private property rights without paying compensation.\textsuperscript{42}

3. \textit{Comprehensive Euclidian zoning}

Since the end of the nineteenth century, modern growth patterns in urban America have given rise to a considerable body of law favoring government with regard to comprehensive municipal zoning ordinances affecting land uses.\textsuperscript{43} For most of this century, the Supreme Court and lower courts have ruled that where procedural due process has not been violated and the land use regulations are not arbitrary or irrational,\textsuperscript{44} comprehensive city zoning is a valid exercise of police power and not one which requires compensation to the private landowner.\textsuperscript{45} The general reciprocity of advantage inherent in classic Euclidian zoning has been cited as the primary policy ground for not requiring compensation,\textsuperscript{46} unless predatory or other abusive elements are present.\textsuperscript{47}

4. \textit{Aesthetics/historic preservation/evolving cultural sensibilities}

Statism's weakest reed (and the smallest bundle of case law) flows from the baffling and controversial decision of the Supreme Court in \textit{Penn Central Transportation Co. v. City of New York}.\textsuperscript{48} New York City, for reasons of public aesthetics and historic preservation, was permitted to regulate land use in such a way as to deprive the property owner of all use of the

\textsuperscript{42} Id. For an entertaining polemic where "hyper-Lockean" privatists and other largely unnamed advocates of a foolish "dyadic schema" are contrasted to enlightened triadic Kantian statists in the Takings Clause struggle between claims of the private owner and majoritarian appetites, see Daniel W. Bromley, \textit{Regulatory Takings: Coherent Concept or Logical Contradiction?}, 17 VT. L. REV. 647 (1993).


\textsuperscript{44} See supra note 43.

\textsuperscript{45} 6A EUGENE MCQUILLIN, MUNICIPAL CORPORATIONS § 25.06 (3d ed. 1988). Although injunctive relief (i.e., no damages) was the thrust of most zoning cases until the 1987 trilogy, this approach did not go unchallenged. DANIEL R. MANDELKER, LAND USE LAW §§ 2.17-2.18 (2d ed. 1988). For a cogent account of this "Nectow fallacy," see Robert C. Ellickson, \textit{Suburban Growth Controls: An Economic and Legal Analysis}, 86 YALE L.J. 365, 490-92 (1977).

\textsuperscript{46} See MCQUILLIN, supra note 45, §§ 24.06-24.07.

\textsuperscript{47} Burton, supra note 31.

valuable air space above Grand Central Station.\textsuperscript{49} The specific basis of the \textit{Penn Central} opinion is unfathomable (there may be six or seven viable candidates for the exact holding).\textsuperscript{50} Few cases follow \textit{Penn Central}, suggesting that this doctrinal classification has suffered a significant dilution from whatever force it originally possessed.\textsuperscript{51} In any event, \textit{Penn Central}'s minimal holding would likely be that where government regulations do not deprive the owner of all opportunity to use her property rights consistent with reasonable investment-backed expectations ("R.I.B.E.") and where mitigating factors are also present, regulations premised on historic and aesthetic preservation do not require government to pay just compensation.\textsuperscript{52}

5. \textit{Exactions}/nexus principles

The law of municipal exactions as a facet of takings jurisprudence has evolved rapidly since World War II.\textsuperscript{53} Tradition-
ally, this body of law dealt with the regulatory power of the
government to exact a *quid pro quo* from a developer-landowner
in exchange for certain approvals or permits.\(^\text{54}\) Classically,
the government has the power, without payment of just com-
ensation, to require that the developer dedicate utility easements,
street easements, and similar property rights to the public in return
for receiving authority to subdivide and plat the land.\(^\text{55}\) This concept progressively evolved to embrace the
notion that exactions could also include dedication of land for
parks and schools to service the additional population expected
to arise because of the developer's subdivision and home-build-
ing activities.\(^\text{56}\) Alternatively, the developer may be required
to pay to the city cash sums in lieu of dedication, to be used for
schools and parks in other areas of the city rather than requiring
the dedication of land on site.\(^\text{57}\) This further evolved into
the principle of "linkage" whereby a developer was required to
contribute additional development deemed necessary in other
parts of the city in exchange for being permitted to develop the
land involved in the permit application. For example, a devel-
oper might be required to build low-cost housing in another
part of the city to balance out the entire municipal demographics
goal in return for which the developer would be granted a
building permit for office or retail buildings on the site in ques-
tion.\(^\text{58}\)

The case of *Nollan v. California Coastal Commission*\(^\text{59}\)
introduced several more rigorous legal standards, some of
which go well beyond exactions law. The *Nollan* Court rejected
the twin premises that all human property use activities exist-
ed at the pleasure of government,\(^\text{60}\) and therefore any exac-
tions attached by government to permits and licenses were

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**Compensation** 887 (1992).

54. *Id.*

55. MANDELKER, *supra* note 45, § 9.16.

56. *Id.* § 9.18.

57. DANIEL R. MANDELKER & ROGER A. CUNNINGHAM, *PLANNING AND CON-
TROL OF LAND DEVELOPMENT* 544, 571-72 (3d ed. 1990); John M. Groen, *Developer
Fees and Exactions*, in ALI-ABA, *INVERSE CONDEMNATION AND RELATED GOVERN-
overview of exactions evolution from on-site land dedication to "linkage fees."


60. *Id.* at 833 n.2.
This was established at least insofar as classic fee simple land ownership rights were concerned. 62

Nollan introduced the concept that there must be an appropriate connection ("nexus") between the demanded exaction and the evil which government wishes to defeat, which evil must be generated by the landowner's proposed activity. 63 Nollan, consistent with the original political values of the Takings Clause, determined that there was considerable risk of government's "rent-seeking" behavior when exactions were being demanded of a landowner in return for a permit which merely allowed the landowner to engage in those activities historically found within the concept of the fee simple, such as constructing buildings. 64 The Nollan Court signaled that, at least in the area of exactions, a heightened judicial scrutiny would examine the conduct of government. 65

Finally, Nollan made it clear that mere nexus-asserting verbiage would be insufficient and that the Court would scrutinize very carefully the legislative allegations concerning the nexus between the landowner's proposed activities and the required exaction, thereby indicating a modification of the customary view that all legislative conduct in such matters is presumed constitutional. 66 Subsequent cases have extended the logic of the nexus test into areas not related to exactions law, 67 and the growing scope of Nollan has been widely observed. 68

61. Id.
62. See id. at 831.
63. Id. at 837.
64. Id. at 841-42.
65. In both Nollan and Lucas, the Court made it clear that heightened judicial scrutiny will be applied when property rights are being significantly diminished by regulation or exaction. Evidence of the Court's skepticism about government's motives is clear. Whether formally or informally, government appears to be saddled with a larger burden of proof insofar as regulatory takings are concerned. The government bears at least a burden of persuasion with respect to questions of pre-existing law, linkage between the purpose of the regulation and the evils being regulated, and similar questions. Lucas, 112 S. Ct. at 2895; Nollan, 483 U.S. at 841; cf. United States v. Carolene Prod. Co., 304 U.S. 144, 152 n.4 (1938).
68. Id.
6. *Categorical formulation*

In 1992, Justice Scalia revisited the Takings Clause, writing for a split Court in *Lucas v. South Carolina Coastal Council*. As noted earlier, *Lucas* appears riddled with dicta, but it may represent the most formidable Takings Clause opinion in recent times. *Lucas* appears to vastly undermine the harm-prevention cluster of cases, and hints at additional post-*Nollan* changes in the presumption of validity granted to government's land control legislation. In addition, *Lucas* suggests a variety of significant considerations regarding R.I.B.E., and establishes a new area of seemingly absolute protection of private property. Whenever all valuable use has been prohibited by a government regulation, the "categorical formulation" requires that just compensation shall be paid. This appears to be as much a blanket rule as that found in the physical occupancy cases of Cluster One above. Unraveling the dicta of *Lucas* and predicting its future use will have material implications for all of the other takings clusters.

7. *Predatory municipal zoning practices*

As noted, government's aggressive use of its regulatory power to depress or destroy private values in the interest of furthering governmental plans for an area has often been regarded as a Takings Clause violation which resurrects some of the worst Madisonian fears of governmental powers over the rights of private citizens. When the municipal council in a Michigan city freezes the ability of landowners to find tenants
or purchasers and drives down the value of lands tentatively scheduled for future redevelopment, it is seen as a violation of the protection of private property under the Takings Clause. Similarly, a regulatory taking may result when two or more governmental units in Texas, for instance, collaborate to drive out tenants renting private billboard space preparatory to government's acquiring the land on which the billboard exists, or when a Brooklyn governmental plan creates tax forfeiture foreclosures of private rental property in order to assist the city's sanctioned renewal developers; or when an upscale California municipality uses zoning regulations to block out a low-cost, dense housing development targeted for middle-class and blue-collar residents; where an Iowa city engages in mixtures of annexation and repeated rezoning to forestall the planned development of an outlying industrial park. All of these and a host of similar cases typify this final Takings Clause cluster.

III. THE R.I.B.E. CONUNDRUM: AN OVERVIEW OF THE ISSUES

Market value is driven by land use laws to a very material extent. When a private person (or even a government entity)
acquires an interest in real property (or expends funds in the capital improvement of an existing interest), they may be said to acquire Reasonable Investment-Backed Expectations ("R.I.B.E.").

It is then, as at no other time in commercial activity, that constitutional rights intersect with the marketplace.

The operative word in R.I.B.E. is "reasonable." To determine "reasonableness" one must ask which value-defining expectations are credible within the range of all possible schemes for land use at the moment of investment. Would a reasonable actor in the marketplace ignore local, private, and public nuisance laws which prohibit any economically viable use? Would an actor reasonably ignore existing zoning and subdivision code prohibitions, or the possibility of favorable or adverse

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85. Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2899 (1992). For a stunning illustration of some unpleasant but vital R.I.B.E.-driven truths about capital investment in land and its effects on economic behavior, consider the recent conduct by the South Carolina Coastal Council. After successive legal defeats in the Lucas case, the Council recently settled the matter and purchased the fee simple title to the Lucas lands for $1.5 million. Eschewing its former regulatory behavior, the Council promptly canceled its open space/erosion control regulatory scheme and decided to market the lands for private residential development in order to recoup its capital investment. The Council's array of ecology-preserving principles was of insufficient weight once cash was actually on the line. Richard Miniter, The Shifting Ground of Property Rights, INSIGHT MAG., Aug. 23 1993, at 4, 9.

86. The quest for a determination of fair market value, by definition, includes the concept of the marketplace. This is identical to the calculation of value at a given point in time pursuant to whatever equation is used for purposes of Reasonable Investment-Backed Expectations ("R.I.B.E."). It is predicated upon the reasonable, lawful expectations of a property owner at the time in question, and the search is to determine the value of the land which has been lost to governmental regulation, either permanently or temporarily, and for which compensation must be paid pursuant to the Fifth Amendment. Lucas, 112 S. Ct. at 2899-2900; and upon remand, Lucas v. South Carolina Coastal Council, 424 S.E.2d 484, 486 (S.C. 1992).

87. See supra note 84 and accompanying text.

88. NORMAN WILLIAMS, JR. & JOHN M. TAYLOR, AMERICAN PLANNING LAW: LAND USE AND THE POLICE POWER §§ 5A.14, 5A.15; see also MANDELKER, supra note 45, §§ 6.05, 6.08, 6.13-6.15. Although the United States Supreme Court stayed away from zoning decisions for half a century subsequent to Nectow v. City of Cambridge, 277 U.S. 183 (1928), a very rich body of law has developed with regard to zoning changes in state practice. There is considerable emphasis on the status of the existing zoning regulations, appropriate terms for the amortization of non-conforming improvements or businesses established in reliance upon previous zoning regulations, and the interaction between private use restrictions and zoning regulations. By and large, this body of law reflects a series of accommodations between the public desire for changed land use and respect for the private investments made previously in reliance upon the pre-existing status of land regulations. See MANDELKER, supra note 45, §§ 5.65, 9.20.
zoning changes, or the future enactment of seriously adverse environmental restrictions? Such laws affect value because they modify the reasonable expectations of the actor in the marketplace with an impact equal to such important elements as location, availability of financing, and technical marketability of title.

A. Which Laws?

R.I.B.E. determinations are relevant in all Takings Clause settings, not merely in the "categorical formulation" found in *Lucas*. Nevertheless, the *Lucas* case comes closer than any other decision to fixing the scope of those laws that help to define the R.I.B.E. of any real property. At first blush one would assume that principles of realism require the following be examined as the basis of any R.I.B.E.:

1. Marketplace realism which looks to *all* value-affecting laws, ordinances and regulations from state, local, or federal sources. From this perspective, the experienced real estate practitioner would be aware of such divergent laws as the current local zoning, subdivision and building codes, state flood control regulations, the federal Americans with Disabilities Act, and an array of environmental laws from all levels of

89. See Mandelker, *supra* note 45, §§ 6.05, 6.08.
90. See *supra* note 88.
91. 112 S. Ct. at 2895 n.8.
92. *Id.* at 2901, 2902 n.18.
93. Title insurance is a standardized industry, by and large, throughout the nation with American Land Title Association ("ALTA") forms being the most popular by a wide margin. ROBERT KRA TOVIL & R AYMOND J. WERNER, REAL ESTATE LAW 175 (7th ed. 1979). One also wonders which value-impacting regulations, that have no relationship to title itself, would be seen as R.I.B.E.-determining. Would the FHA and VA design and subdivision regulations be relevant to R.I.B.E. in residential areas? See Friedman, *supra* note 84; see also Williams, *supra* note 88, § 5A.14. Among lawyers who specialize in commercial real estate development projects, it is commonplace when acquiring land to make the acquisition contract conditional upon buyer's satisfactory investigations into zoning, soil conditions, and potential environmental problems (if not using a straightforward option for these same purposes). Accordingly, the R.I.B.E. for such projects are well along the way to definition through party activity before money changes hands between the buyer and seller. In fact, of several dozen such commercial transactions that co-author Burton has been involved with, virtually none involving sizable investment has been without the use of such R.I.B.E.-determining conditions since the late 1970s.
(2) Legal realism requires the inclusion of the above plus all existing case law principles—including Supreme Court and other judge-made Takings Clause doctrines which bear on property rights. To the extent that some statist-favoring judicial doctrines would permit government to regulate the use of property without payment of just compensation to the landowner, R.I.B.E. would be diminished in value. To the extent that some privatist-favoring doctrines would prevent uncompensated regulations, the value of R.I.B.E. would be enhanced.

(3) Legal realism also would import the wide variety of judge-made doctrines regarding valuation which have evolved in direct eminent domain cases. Eminent domain doctrines

97. R.I.B.E., realistically computed, would include a lawyer-like inquiry into such value-impacting regulations of land use and development as Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA" or "Superfund Act"), 42 U.S.C. § 9601 (1988); Clean Air Act ("CAA"), 42 U.S.C. § 7401 (1988), and similar federal or state laws and regulations which often substantially affect the use (and hence the value) of any parcel of land located in the United States. Although the U.S. Highway Beautification Act originally anticipated the use of eminent domain by the states to remove billboards, screen junk yards, and otherwise create aesthetically visual easements along the interstate highway system, many states seek to use police power regulations to amortize billboard investments and remove these "eyesores." 23 U.S.C. § 131 (1988); Kratovil & Werner, supra note 93. This presents an interesting "federalism" of laws impacting R.I.B.E. determinations along the interstate system.


99. It is important, in this regard, to note that even Justice Scalia, in his opinion in Nollan, conceded that a variety of forms of government exactions upon the use of private property would be constitutionally sustained by the Court. 483 U.S. 825, 834, 836 (1987). Moreover, in Lucas, Justice Scalia recognized in dicta at least two areas where the governmental entities could prohibit all use and thereby deprive the owner of all value without the payment of just compensation: prohibiting illegal activities such as breweries on the property and destroying property in order to prevent destruction or death in surrounding areas under the "firebreak" notions. 112 S. Ct. at 2899 n.14, 2900 n.16. Accordingly, the R.I.B.E. must be determined with a firm recognition that not merely local nuisance and property laws are applicable, but the entire evolving body of Takings Clause jurisprudence emanating from the Supreme Court in recent times applies as well.

100. The concept of the "categorical formulation" set forth in Lucas is a prime example of the private property owner's rights pursuant to the Takings Clause being accorded a position paramount to state regulation. 112 S. Ct. at 2895. Moreover, the per se rule found in Loretto also accords the private property owner a nearly absolute position to demand compensation for governmental activities having an impact upon property value, regardless of the trivial nature of such impact. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 434-35 (1982).

control such matters as the potential for zoning changes and variances, whether favorable\textsuperscript{102} or unfavorable to the landowner,\textsuperscript{103} partial takings and remainder parcels.\textsuperscript{104} Estoppel principles and other pertinent legal or equitable doctrines could also be rationally imported into R.I.B.E. analysis.\textsuperscript{105}

Although R.I.B.E. determinations seem to cry out for the use of such principles, ironically \textit{Lucas} is not an opinion steeped in legal or marketplace realism, but quite the contrary.\textsuperscript{106} Justice Scalia’s opinion, taken as a whole, sets forth the following, strikingly narrow, R.I.B.E.-determining measurements:

(1) Pre-existent Takings Clause jurisprudence, especially statist-favoring principles of the harm-prevention line of cases, will not be looked to in R.I.B.E. determinations.\textsuperscript{107}

(2) Exceptions may (or may not) exist for emergency action doctrines and prohibiting unlawful activities as a surviving residue of the harm-prevention cluster of doctrine.\textsuperscript{108}

(3) The relevant law to be examined is local property and tort law.\textsuperscript{109}

(4) With substantial borrowings from the Restatement of Property, \textit{Lucas} sets forth a six-element test for determining the extent to which local property and tort law depress the R.I.B.E. value.\textsuperscript{110}

\textsuperscript{102} See Nichols, supra note 101, § 12C.02[3].

\textsuperscript{103} Id.

\textsuperscript{104} Mandelker, supra note 45, §§ 8.19-8.23; Nichols, supra note 101, §§ 7.05[2][C] n.73, 12D.10[3].

\textsuperscript{105} For example, there exists a line of cases where conduct by the municipal government gives rise to estoppel of the government and a result more favorable to the landowner, although such estoppel principles are very narrowly applied. See Mandelker, supra note 45, §§ 6.14-6.20; Nichols, supra note 101, §§ 8.20[2], 8.20[3].

\textsuperscript{106} The separate concurring opinion by Justice Kennedy is quite informative in this regard. 112 S. Ct. at 2902-04 (Kennedy, J., concurring in judgment).

\textsuperscript{107} Lucas, 112 S. Ct. at 2897-99.

\textsuperscript{108} Id. at 2899 n.14, 2900 n.16.

\textsuperscript{109} Id. at 2900, 2901-02.

\textsuperscript{110} The six factors to be weighed, according to Justice Scalia’s majority opinion, could lead to something of a paradox. The normal presumption-burden of proof allocation of regulatory takings law results in a decision favorable to government “if any state of facts either known or which could be reasonably assumed affords support for it.” Goldblatt v. Hempstead, 369 U.S. 590, 596 (1962) (citing United States v. Carolene Prods. Co., 304 U.S. 144, 154 (1938)). Accordingly, as things stand now, the burden of proof is upon the private property owner, not the government, and any missing factors from Justice Scalia’s six-element formula for determining R.I.B.E. would be resolved favorably to the government until such presumption and burden are changed. Lucas, 112 S. Ct. at 2893 n.6.
Because the _Lucas_ facts involved the unique situation where 100% of the land’s value had been lost to the governmental regulation, one might argue that the R.I.B.E.-determining formula is not meant to apply to the “normal” situation where less than 100% of value has been lost. This narrow reading of _Lucas_ is not warranted in view of the powerful recent momentum in reconfiguration of the Takings Clause.

**B. Laws As of When?**

Local tort and property laws that determine R.I.B.E. are not deemed to be fluid or susceptible of adaptation. Under _Lucas_ these laws are looked to as of the time the landowner acquired R.I.B.E.—an approach to the law as if frozen in amber. This curious result is perhaps an unintended byproduct of Justice Scalia’s repugnance for the harm-prevention cluster of statist-favoring cases. One way in which he deals with this inconvenient body of law is to deny its force rather than face up to a direct elimination or severe modification of the harm-prevention doctrine. The reason for this unrealistic approach is obvious: if the _Lucas_ Court had openly overruled or modified the harm-prevention line of cases it would

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111. Considerable dicta in Justice Scalia’s opinion suggests that neither 100% of all of the parcel of land need be taken, nor 100% of all the value—perhaps just 100% of the value of a single strand of property right within the bundle will suffice. 112 S. Ct. at 2895 n.8.

112. _Id._ at 2899.

113. Justice Scalia repeatedly diminishes the force of the _Mugler_-type line of cases represented in the second cluster. He indicates that they were merely early historical expressions of some general notions of the police power. _Id._ at 2896-97. He ignores the existence of any categorical doctrine favoring government while conceding that much language in earlier cases may have indicated that a governmental preference did exist. _Id._ at 2897. Contradictions are strewn throughout the opinion and other opinions in which Justice Scalia has joined. For example, even in _Lucas_ he suggests at various points that the “firebreak” doctrine would probably continue to exist as a part of the second cluster. _Id._ at 2900 n.16. He further suggests that the absolute prohibition by government of illegal activities such as beer breweries, without the payment of compensation, would continue to exist as a part of the harm-prevention cluster. _Id._ at 2899 n.14.

Moreover, in _First English Evangelical Church v. County of Los Angeles_, 482 U.S. 304, 304 (1987), Justice Scalia joined Chief Justice Rehnquist’s majority opinion, where the Court explicitly stated that it was remanding the case for determination of whether the government would be insulated from the requirement to pay just compensation even though all useful value was taken from the property (clearly what Justice Scalia in _Lucas_ calls a “categorical formulation”) because such activity by government was insulated against payment under the harm-prevention doctrine of _Mugler_ and its progeny. _Id._ at 315-20.
have created a precedent for the alteration of R.I.B.E.-determining laws. By openly eliminating a statist-favoring doctrine in _Lucas_, Justice Scalia would have established the precedent for eliminating a privatist-favoring doctrine in some future cases, and this would make the R.I.B.E. formula subject to future Takings Clause cases.

The Court's current (and mostly correct) privatist-oriented view of the Takings Clause would be jeopardized by any precedent that suggested future changes in case law could affect any R.I.B.E. To avoid this hazard, the R.I.B.E.-affecting laws are fixed in time.

C. Losses of Less Than 100% of Value

As previously noted, _Lucas_ represents the highly unusual fact of a loss of 100% of property value—or at least such was the factual basis of the Supreme Court's decision. But what of the more "normal" circumstance? Is _Lucas_ susceptible of being extended to such cases? The opinion in _Lucas_ strongly suggests that the R.I.B.E. determination formula will be material to lesser value losses.

First, in some textual and footnoted exchanges between the _Lucas_ majority and the dissenting Justices, it appears that although the "categorical formulation" of _Lucas_ is only triggered by 100% loss, the R.I.B.E. formulation is not. Moreover, the all-points attack on the harm-prevention line of cases strongly suggests that _Lucas_ addresses more than the rare case where 100% of property value has been lost.

In addition, _Lucas_ lays down several highly visible markers which signal that 100% loss may be defined as less than 100% in future cases. Much _Lucas_ dicta expressly identifies a number of concepts which would allow such a result. For in-

114. Justice Scalia faced a logical dilemma. If he had realistically stated that the harm-prevention line of cases flowing from _Mugler_ was being set aside or substantially diminished in _Lucas_, this would lead to the conclusion that takings law could be modified by the Court in a fashion which has an impact upon R.I.B.E.—though such impact in _Lucas_ would be favorable to the private property owner.

115. _Supra_ note 114.


117. See _supra_ note 111.

118. 112 S. Ct. at 2895 n.8.

119. _Id._

120. See _supra_ note 111.
stance, the *Lucas* opinion actively speculates as to whether a 100% loss, not of the entire fee simple but of only one strand from the bundle of rights, would open to the private landowner the new constitutional protection of the “categorical formulation.”121 Prior decisions such as *Penn Central*122 and *Keystone*,123 according to *Lucas*, never foreclosed this “single strand” gambit by the private owner.124

Moreover, *Lucas* dicta also speculates about the issue of a 100% value loss on a strip of land that is a part of a larger parcel.125 If a strip of land—less than the entire private owner’s parcel—loses 100% of its value because of government regulation, *Lucas* hints that the “categorical formulation” may protect the landowner.126 (This would certainly bring into play the existing body of takings lore that deals with partial takings, severance damages, statist-favoring statutory rules of compensation such as those in Arkansas,127 and some constitutionally profound questions about smaller tracts as self-sufficient economic units within larger parcels of land.)128

121. See supra note 111.
124. 112 S. Ct. at 2895 n.8.
125. *Id.* at 2894 n.7; see NICHOLS, supra note 101, § 12B.14[4].
126. 112 S. Ct. at 2894 n.7.
127. Arkansas, for example, has a statutory “before-and-after” method of computation designed to subtract from the taking damages awarded to the landowner the amount of any enhancement in value of the remainder parcel attributable to the public project. Property Owners Improvement Dist. v. Williford, 843 S.W.2d 862, 866 (Ark. Ct. App. 1992). Consider whether such a statute is constitutionally appropriate where predatory government gamesmanship has been present in the taking process. In those condemnation actions where both government and the private landowner concede that the remainder parcel lost some value, then a “before-and-after” test would seem appropriate to determine aggregate loss to the entire tract. *Morales v. Chrysler Realty Corp.*, 843 S.W.2d 275, 278 (Tex. Ct. App. 1992).
128. Generally, the determination of fair market value when less than the entire tract is taken presents a series of technical questions, some of which are often deemed to be fact issues and some of which are deemed to be questions of law grounded in constitutional protections:

   (1) The value of the strip of land taken measured by all uses—including the highest and best use to which it could reasonably be adapted within the foreseeable future—represents a portion of the total fair market value.

   (2) The increased value of the remainder, if enhanced by reason of the public project, will not be used as a setoff against the just compensation due to the landowner.

   (3) The decreased value of the remainder resulting from severance from the condemned land will be an additional element of compensation.

   (4) In many cases the question of value turns on the size and configuration of
In both instances, Lucas leaves the door conspicuously open to later enlargement of the private owner's rights where less than 100% of the fee simple value of the entire tract is lost to regulation. Whether such an enlargement will come to include the absolute privatist protections of the "categorical formulation" found in Lucas is uncertain, but on balance the dicta lean that way. Given these open invitations to private owners, it would be foolhardy for a private owner faced with predatory municipal regulatory conduct to ignore using the "categorical formulation," even where less than 100% of the land area was taken by government's predatory regulations. It would be equally foolish to ignore Lucas's R.I.B.E.-determining formula in a predatory takings case where one of the property rights strands, but not a discrete parcel of land, was taken.

D. A Potential R.I.B.E. Synthesis

The existence of Lucas's frozen-in-amber time frame as to the relevant body of R.I.B.E.-determining law and its myopic approach of looking only to local tort and property law are not dispositive of other existing doctrines. First, the sources of

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a self-sufficient economic unit ("unit"), which must be determined as to the value of the strip taken and also as to the value of the remainder.

(5) Sometimes (i) the strip taken is itself a "unit"; sometimes (ii) the strip taken plus some but not all of the remaining entire tract is the appropriate "unit"; (iii) sometimes the entire tract including the strip taken is the appropriate "unit."

(6) Some jurisdictions allow the landowner unilaterally to waive severance damages, and have value turn solely upon class (5)(i); and some even allow the landowner unilaterally to select class (5)(ii). The landowner's key strategy will be to avoid averaging the value of some larger portion of land than the strip taken when this will yield a lower value for the strip taken because the remainder's value is lower than that of the strip alone.

(7) Accordingly, selection of the appropriate "unit" can be crucial to valuation. Some jurisdictions will allow the government to present evidence to the jury of what constitutes the appropriate "unit" rather than a unilateral designation by the landowner.

When predatory municipal conduct creates the taking, it may be particularly inimical to the policies of the Takings Clause to allow the state to thereafter oppose the landowner's selection of the appropriate economic "unit." Such could result in averaging the value of a less valuable remainder parcel with a more valuable taken strip, thus arriving at a fair market value for the taken strip which does not reflect its reasonable fair market value either standing alone as a "unit" or as part of some ideal, smaller-than-everything "unit." See State v. Windham, 837 S.W.2d 73, 76-78 (Tex. 1992); Southwestern Bell Tel. Co. v. Ramsey, 542 S.W.2d 466, 471 (Tex. Ct. App. 1976); Nichols, supra note 101, § 12.03[1].

129. 112 S. Ct. at 2894-95.
130. See supra note 128.
131. 112 S. Ct. at 2895 n.8.
132. It could be argued that local property law, broadly defined, would include
R.I.B.E.-determining laws need not necessarily be limited to local tort and property law. The open invitation found in _Lucas_ for private owners to further explore the possibilities of utilizing the "categorical formulation" for losses of less than 100% of property value admits that further judicial refinement will have a major impact.\textsuperscript{133} Such an invitation is a tacit acknowledgment that evolving Takings Clause legal doctrines bear directly upon the R.I.B.E. calculus.\textsuperscript{134} For this and other reasons noted below, local tort and property law cannot truly be intended to be the sole sources of law for R.I.B.E. determinations.

In addition, it seems reasonable that some of _Lucas's_ six R.I.B.E.-determining elements are broad enough or pliable enough to import into them some of the elements of legal realism otherwise excluded from that opinion.\textsuperscript{135} Moreover, Justice Kennedy's separate concurring opinion also illustrates receptivity to a broader spectrum of legal sources, even among privatist-oriented Justices.\textsuperscript{136} For example, the Restatement of Property's inquiry into questions of suitability or social value of the private owner's uses (as part of the R.I.B.E.-determining legal inquiry) appears to allow inquiry into law and regulations beyond local tort and property law.\textsuperscript{137} The Restatement inquiries into new or changed circumstances or new knowledge also lend themselves to examining a broader range of regulatory laws.\textsuperscript{138} The inquiry into uniformity or equal protection issues any laws and regulations which affect real property value. In other words, Justice Scalia could assert, in defense of his limitation to local law, a notion that federal statutes and decisions which have any impact upon property value are embraced within the notion of local property law. If thus broadly defined, the objections raised by Justice Kennedy in the separate concurring opinion would become moot.

112 S. Ct. at 2895, 2903.

133. See supra note 114.

134. See supra note 98 and accompanying text.


136. Contrast Justice Kennedy's receptivity with the healthy hostility towards legislative determinations found in Justice Scalia's _Lucas_ opinion. 112 S. Ct. at 2898 n.12 (only a "stupid staff" of a legislature would fail to be artful enough to fit Justice Blackmun's standard); id. at 2899 n.14 (legislatures may go about "plundering landowners").

137. Id. at 2901.

138. The Restatement of Property's material criteria are the same as the case law. For instance, _Miller_ examines the degree of harm to nearby private property
respecting dissimilar regulatory treatment of other landowners also opens the door to much non-local constitutional doctrine.\textsuperscript{139}

In light of all this, Lucas cannot rationally be read as having fixed a definitive and final limit on the laws germane to R.I.B.E. calculations.\textsuperscript{140}

\textbf{E. R.I.B.E. Timing and Predatory Municipal Practices}

Naturally, not all governmental regulatory conduct which occurs amid land value fluctuations amounts to a compensable taking. Normal delays involving zoning or other legislative activity do not work a compensable regulatory taking, even though property values may drop.\textsuperscript{141} Such fluctuations are among the ordinary incidents of ownership.\textsuperscript{142} Predatory municipal gamesmanship is quite another matter for purposes of Takings Clause analysis.\textsuperscript{143} Exactly when is a private landowner's property taken by predatory municipal actions that constitute a regulatory taking cause of action in inverse condemnation? The R.I.B.E. calculus found in Lucas would lead to the conclusion that the date of private acquisition or other investment is the critical date for R.I.B.E. calculation.\textsuperscript{144} However, such a reading can be traced to the particular factual circumstances of Lucas. At the time Lucas acquired the land, the then-existing land regulations allowed him to build a sin-

\footnotesize{\textsuperscript{139} See supra note 138.  
\textsuperscript{140} 112 S. Ct. at 2899 n.8.  
\textsuperscript{141} 112 S. Ct. at 2899-900. 
\textsuperscript{142} Id.  
\textsuperscript{143} See supra note 3.  
\textsuperscript{144} First English Evangelical Lutheran Church v. County of Los Angeles, 258 Cal. Rptr. 893, 899-901 (Ct. App. 1989).}
gle-family residence.\textsuperscript{145} Subsequently enacted land use restrictions prohibited construction (and the courts below determined that the property owner had been deprived of all effective use of the land, hence 100% of its value).\textsuperscript{146} Thus, the R.I.B.E. inquiry formulated by the \textit{Lucas} Court would look only to the tort and property laws bearing upon the land's value at the time of Lucas's acquisition.\textsuperscript{147}

This formulation would not be suitable, however, in many instances of predatory regulatory takings. For example, suppose that a private owner has owned a strip of land parallel to a highway for many years. Its current use is quite valuable since it is rented to a nearby business for parking or for sign pylons and billboards. As is customary in such transactions, the rent escalates periodically, and the capitalized value of those increased rents\textsuperscript{148} represents a large and rising fair market value to the owner. Suppose that, in order to condemn the strip of land in the future for highway expansion purposes, various agencies of government collaborate in a predatory fashion to dislodge the tenant by altering the signage ordinance or revoking the signage permit. If a court determined that these precondemnation steps were taken to destroy private value to obtain a future public right-of-way expansion at a lower price, then relief would likely be available under the seventh cluster of Takings Clause doctrines.\textsuperscript{149}

Under such predatory circumstances, the more appropriate way to calculate R.I.B.E. would be to look to the legal status of the property as it existed just before the municipal governing bodies began their predatory activities.\textsuperscript{150} It would not be sensible to value the land on the earlier dates when it was first acquired or when the improvements were first built. After all,
the reasonable economic expectations of an owner with improvements in place, a lease signed, and a tenant in occupancy are certainly not less than the fair market value of such income-producing property immediately before the government began its predatory actions. The earlier date of raw land acquisition would not represent the reality of the R.I.B.E. baseline. Accordingly, the status of law applicable to income-generating property when predatory conduct first began seems the only sensible R.I.B.E.-determining body of law to be investigated. In a normal market, this method of R.I.B.E. calculation will protect the owner's increasing values, and such a result harmonizes with the overall anti-statist philosophy of Lucas.

F. R.I.B.E. and Temporary or Permanent Regulatory Taking

First English established, among other things, that the private property owner's cause of action for regulatory taking is derived directly from the Constitution and is available for both temporary and permanent takings. In 1992 the South Carolina court, upon remand in Lucas, dealt with the element of temporary takings in a detailed fashion. The court identified prior periods of time for which just compensation was due for temporary takings and expressly identified future possible temporary takings dependent upon future governmental regulatory conduct.

This feature leads to the inquiry as to exactly how the R.I.B.E. formulation should be dealt with for a period of temporary predatory taking. The logic inherent in the Lucas analysis

151. To the extent that the Takings Clause has been interpreted over the past century to include a prohibition of governmental regulation which destroys private land values or otherwise interferes with the enjoyment of the fee simple in the fashion as indicated in Clusters 1 through 7, see infra Configuration A, the choice of any date which yields a minimal return to the property owner subsequent to the commencement of predatory steps by the government would frustrate the judicial tendencies pursuant to Cluster 1, Cluster 5, and Cluster 7. This would be highly unlikely when the government itself has precipitated the regulation through predatory conduct, not merely through some Euclidian zoning principle or other protected statist activities.

152. Lucas emphasizes its skepticism of value-destroying governmental activities throughout the opinion. See, e.g., 112 S. Ct. at 2894, 2895 n.8, 2896 n.12, 2900, 2901-02.


155. Id.
leads to several conclusions. First, predatory governmental conduct is most often achieved by means of local land use regulatory activities; hence, on the surface, the R.I.B.E. calculation under *Lucas* would seemingly include such value-affecting regulations. However, because it is the very predatory regulation itself that generates a regulatory taking, the R.I.B.E. cannot include all municipal use of regulatory power. Because the predatory regulatory takings cases usually include not one but an interwoven series of governmental acts (discouraging tenants, revising zoning or building ordinances, crimping fire and police protection, limiting access, harassing inspections being among the most frequent tactics employed by local governments), it may be necessary to seek to sort out some non-predatory R.I.B.E.-affecting laws from others which are predatory. This would be a statist-benefitting approach since local laws and regulations would not be invidious if they were not part of a pattern of predatory regulation. Some sorting out would be needed. The *Lucas* opinion brushed aside the historic deference to legislative action. There is a long and, until recently, potent tradition of honoring the presumption of legislative correctness in zoning and other land use regulation cases—although this presumption has been called into question. A shift in the presumption of legislative correctness might be appropriate to force the government to carry the burden of sorting out the predatory from non-predatory conduct to determine when the predatory conduct commenced.

A more privatist-oriented view of this issue is also possible. The Supreme Court has expressed strong skepticism towards governmental conduct in Takings Clause cases. The Court has indicated its “closer judicial scrutiny” of the heightened risks to

156. It is important to note that, literally, Justice Scalia referred to local tort and property law. *Lucas*, 112 S. Ct. at 2899-902. However, the ability of local government to affect property uses, and hence property values, through local ordinance and regulation is at the very core of the Takings Clause evolution. It would constitute a supreme paradox if, in fact, these value-diminishing regulations and ordinances were in effect permitted to undermine private values simultaneously with their being the core of a challenge to the conduct by the government itself pursuant to the Cluster 7 predatory cases. See supra notes 3-5.

157. See supra notes 3-5 and accompanying text.

158. See supra note 150 and accompanying text.

private rights whenever government attempts land use exactions; the majority's recent cynicism about legislative motives in this area is not masked. Thus, if the Court finds a predatory pattern of regulatory actions, perhaps all local laws should be excluded from R.I.B.E. calculations—an extreme privatist-oriented outcome.160

Such an outcome could be possible, even likely. The Rehnquist-Scalia combination has exercised extraordinary force in Takings Clause matters in recent years.161 If that power center remains intact, and since predatory municipal conduct presents the local legislative body in its most unflattering and rent-seeking light, not much in the way of judicial deference toward local ordinances and regulations should be expected in R.I.B.E. calculations.162 This could prove to be a large economic benefit to the private landowner since the parcel's value would be calculated subject only to local tort law restrictions and, perhaps, some prior benign zoning which pre-dates the government's predatory abuses.163

Quite apart from these important policy features and the issues concerning presumptions and burdens of proof lies the question of how value calculations should be approached in the many variables of predatory regulation cases which now fall within the purview of the Court's new R.I.B.E. exposition.

IV. THE MECHANICS OF VALUE CALCULATIONS

Payment of "just compensation" is the constitutional requirement for both direct eminent domain and the indirect confiscation of private property rights by regulatory takings.164 In the area of conventional eminent domain (a straightforward condemnation without government's regulatory conduct being at issue), there is a considerable body of doctrine concerning value determinations. The fact that formal condem-

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160. In the event that the Court, led by Justice Scalia, is intent upon crushing the last vestiges of Cluster 2, such an extreme position could be expected. However, within the anti-statist camp with respect to Takings Clause questions, Justices O'Connor, Kennedy, and Souter appear moderately inclined in this regard. See Lucas, 112 S. Ct. at 2902, 2925; Yee v. City of Escondido, 112 S. Ct. 1522, 1531-34 (1992).
162. Compare supra notes 3-5 with note 150.
163. See 112 S. Ct. at 2901.
nation proceedings are not instituted does not change the essential nature of the claim, and the condemnee's rights are not qualified by the form of the remedy.¹⁶⁵ Since 1987, private causes of action to recover just compensation for regulatory takings and conventional condemnations have both been directly grounded in the identical provisions of the Fifth Amendment.¹⁶⁶ As such, virtually identical calculations should be used to determine the value of the property rights appropriated by government in both types of takings.¹⁶⁷

The critical issue is whether the rules governing “valuation timing” protect the private property rights embraced by the Fifth Amendment so as to encourage investment by discouraging the state's predatory misuse of its vast regulatory powers. In theory at least, the timing of such valuation could be pegged at one of six possible, and widely distinct, moments. Logically, an individual's R.I.B.E. for property being condemned could be valued at the time of (i) original acquisition, (ii) the most recent investment for capital improvements, (iii) formal state action announcing or designating the project, (iv) actual predatory state conduct, (v) the court or condemnation commission's award determination, or (vi) the actual payment of the award. The correct choice of timing significantly impacts the calculation of the value being determined.

Because diminution of the value of the property taken by government is at the very core of any pattern of municipal predatory land regulation, the landowner in such a scenario must make calculations involving several considerations.

A. Interests Taken

Just compensation is required for takings of any interest in property.¹⁶⁸ The taking of a property interest amounting to less than fee ownership requires compensation measured by the extent of the interest taken.¹⁶⁹ Consideration of Lucas’s new “categorical formulation” and its potential application to takings of less than all strands of the fee simple needs to be

factored into the calculus of any regulatory taking.

In Texas, ancillary losses, such as the regulatory deprivation of special values attributable to the property's unique suitability for the conduct of a particular business, can be introduced as evidence in establishing the market value of just compensation. Some states liberally permit wide-ranging evidence, by statute or constitution. For example, while Texas eminent domain statutes allow compensation for damages to real property only, the Texas Constitution provides for compensation for the taking, damaging, or destruction of all species of property. This includes, importantly, any unreasonable or unnecessary damage to a business, even one whose value consists exclusively of good will, such as a restaurant. The Texas Constitution also provides for compensation for lost profits in some instances.

In *City of Austin v. Casiraghi*, the court held that such constitutional damages need to be pled as a separate cause of action to be joined in the statutory condemnation action. It should be noted that Texas is one of the majority of states which constitutionally mandate compensation for both the property taken and damage to or destruction of the remainder of the property caused by governmental action. Texas requires damages to be valued by the same willing buyer-seller standard as is used to value takings.

**B. Considerations in Picking the Date of Property Valuation**

It is critical to the spirit of the emerging Takings Clause doctrine that the rules governing "valuation timing" be formulated to advance at least two primary societal goals. First, as guaranteed by the Fifth Amendment, the rules should protect against uncompensated or unjustly compensated takings of private property rights. Second, timing and valuation rules should be properly structured to encourage investment by discouraging the state's predatory gamesmanship or other abuses of the governing process. Accordingly, determining the date for mea-

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172. *See City of Austin v. Avenue Corp.*, 704 S.W.2d 11, 12 (Tex. 1986).
173. *Casiraghi*, 656 S.W.2d at 579-80.
suring fair market value payable to the landowner is particularly vital when the values have changed during the condemnation process. Such a determination becomes increasingly difficult when the condemnation is not a direct taking but involves predatory municipal practices. There are four primary situations which may be involved:

Situation A: The landowner's parcel gains value during the proceedings because of economic circumstances unrelated to the public project. For instance, a landowner's farm-land becomes more valuable due to an increase in the market price of the crop grown on it.

Situation B: The parcel appreciates in value during the same time period due to the market's anticipation of the project's impact, such as the enhanced value due to upgraded highway frontage resulting from the project.

Situation C: During the condemnation process the property loses value due to economic circumstances not caused by the public project.

Situation D: The land value drops because of the market's anticipation of the project's negative impact on the land's productivity.

As presented in Situation A, the landowner should be able to collect the enhanced value attributable only to general economic conditions unrelated to the prospective highway. This gain represents a normal benefit of fee simple ownership, and "just compensation" would seem to embrace this growth in value until the owner has been paid and can invest the funds.176

Under Situation B, the landowner would receive none of the enhanced value since all of it was attributable to the public project.177 Under Situation C, the decline in value normally would be borne by the landowner.178 The loss would also be borne by the landowner in Situation D, even if the government's predatory conduct consisted of delay which postponed the payment date. However, if such delay were excessive179 or accompanied by either undue governmental interference with the owner's use and enjoyment of the property180

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177. Id.
179. Barshop, 442 S.W.2d at 685.
or surrounding condemnations which left the targeted parcel as an obviously mandatory future taking, the landowner may be entitled to compensation.\textsuperscript{181} These Texas holdings are squarely consistent with the overall predatory-gamesmanship line of cases.

Under current Texas law, which is somewhat statist-oriented, the date of value computation usually will be the actual date of the award's payment by the government to the landowner.\textsuperscript{182} Normally this will be the same time as the award determination by the commissioners. However, Texas's eminent domain statutes require the state to pay at that time only if it needs to take possession.\textsuperscript{183} If either party objects to the award, there will be a trial \textit{de novo} on all issues, including value, which normally will not be determined until the award is paid.\textsuperscript{184} This rule opens the door for predatory state conduct prior to the award's payment. Essentially the state is given an option to buy at the price of the commissioner's award. The state may then object to that award—delay payment, withholding its "time-value" from the condemnee—and then pay later, either when it needs to take possession or after the market value of the land has dropped to reflect the reality of the damage caused by the condemnation.

One thesis of this Article is that such an approach, found in some current law, is inconsistent with constitutional takings analysis. The historic, underlying policy premises of the Takings Clause should, at least, preclude statutes which encourage undue delay and predatory conduct by the government. Further, consistency with the Fifth Amendment demands that whenever government is found to have an incentive to act in a predatory or rent-seeking fashion toward the private landowner, the law should require procedural and valuation rules which remove the incentive and deter such conduct.

There is a spectrum of approaches, ranging from extremely privatist to moderate orientations, which would help deter such predatory abuse of private property rights. The most privatist-oriented approach might award \textit{all} value increases to the land-

\textsuperscript{error refused n.r.e.} (1974).


\textsuperscript{182.} City of Fort Worth \textit{v.} Corbin, 504 S.W.2d 828, 830 (Tex. 1974).

\textsuperscript{183.} TEX. PROP. CODE ANN. \textsection{} 21.041 (West 1984).

\textsuperscript{184.} \textit{Id.} \textsection{} 21.019.
owner and charge all value decreases to the state whenever a pattern of predatory state conduct is shown to exist. Faced with such potent protections of private ownership rights, the state would be foolish to risk value-depleting regulatory conduct. This rule would not interfere with the normal delays or charge governments with the value fluctuations which the First English Court expressly recognized as an incident of ownership. In fact, such a rule would fit First English’s holding that temporary takings and non-permanent interferences with private ownership rights are compensable.185

In situations A and C, a more moderate approach might maintain the landowner’s rights to bear the loss or enjoy the reward arising from value changes due to changes in general economic circumstances during the condemnation process. However, once a pattern of predatory municipal conduct is established by the landowner, the state would bear the burden of proof to make clear and convincing showings (1) as to how much of any value increase or decrease was due solely to general economic conditions wholly unrelated to the public project and permissible normal delays which were not part of a predatory pattern, and (2) that any delay in payment, whether past, present, or future, was not part of a continuing pattern of predatory conduct by government. Absent such showings by the state, the landowner would recover all value increases while the state would suffer all value decreases. The shift in the burden of proof would also deter government’s predatory conduct.

In instances of predatory conduct, the critical period of valuation fluctuations should be measured from the earliest governmental step which is part of a pattern leading to the deprivation or diminution of the landowner’s rights to the use and enjoyment of the private property. For example, in Texas case law, where the delay is excessive or the interference with property rights is particularly egregious, the rule should protect the property owner.186


186. Uehlinger, 387 S.W.2d at 432. It must be noted, however, that in Texas the relevant statutes tend to encourage abuse by predatory government-condemnors in more subtle ways, and this is not in keeping with the tenor of the opinions in Lucas, 112 S. Ct. at 2900-01; Nollan, 483 U.S. at 831; or First English, 482 U.S. at 316-17.
C. Potential Future Legal Changes Favoring the Owner

The privatist-oriented decision in *Lucas* makes it clear that changes destroying the legal uses of a property after the creation of the owner's R.I.B.E. will not be considered in valuing just compensation for the property's taking by regulation.\(^{187}\) While the *Lucas* opinion did not address the other possibility—legal changes which might increase value—state courts have grappled with the question of how to consider potential future changes in zoning or other value-impacting land regulations which might increase the value of lands involved in eminent domain takings. In other words, what if the R.I.B.E. of a private landowner includes, at the moment before government commences its predatory conduct, a reasonable expectation that zoning will be changed to a more valuable classification? What if the landowner has a reasonable expectation that variances or permits for a more valuable land use will be issued in the future?

Courts in both Tennessee and Texas have considered potential future rezoning for business uses in computing awards to residential property owners for tracts taken by city governments.\(^{188}\) In a Texas appellate case, the City of Austin charged as error that the factfinder had been allowed to consider the commercial value of the tract when its commercial use would violate valid existing city zoning ordinances. Recognizing that "[i]t is a matter of common knowledge that cities frequently lift zoning ordinances or reclassify property in particular zones when the business or wants of the community justifies that type of action," the court refused to establish a rule barring evidence of such property use.\(^{189}\) Rather, the court stated that the trial judge should admit such evidence if satisfied "that the wants and needs of the particular community may result, within a reasonable time, in the lifting of restrictions."\(^{190}\) The jury should consider the evidence related to such probability and apply it in arriving at the market value of the property taken.\(^{191}\)

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189. *Cannizzo*, 267 S.W.2d at 815.
190. *Id*.
191. *Id*. 
This rule has been interpreted in basically two ways. First, evidence of the probability of change in restrictions is inadmissible in the absence of testimony that the proscribed use would be the highest and best use of the property taken. Second, if the court is satisfied that there is no reasonable probability that existing zoning restrictions will be changed within a reasonable time, it should exclude evidence of market value based on the property's use for any purpose other than that to which it is presently restricted.

This issue presents the privatist-statist clash in a vivid fashion. A statist-oriented lawmaker, stuck with Lucas, would argue that since value-eroding land regulations which government may adopt subsequent to the date of R.I.B.E. determination are not allowed—at least if such regulations fit within Lucas's evolving categorical formulation—then logical consistency should exclude any such value-enhancing changes as well.

A privatist-oriented lawmaker would respond that logical consistency is not the proper question. Given the policy origins of the Fifth Amendment, the balance should always weigh most heavily towards maximizing the R.I.B.E. formula for calculating just compensation of the deprived landowner, particularly in predatory situations. Accordingly, reasonably foreseeable zoning variances and other changes benefitting the private property's value should be part of the R.I.B.E. calculus.

D. R.I.B.E. and Illegality of Present Uses

A closely related question deals with the existence of illegal uses. For example, in United States v. 320.0 Acres, the government was attempting to disallow compensation for cabins which they maintained were illegal. The Fifth Circuit ruled that if the cabins were legal and unobjectionable, the owners were entitled to full compensation for them, and when the government is attempting to keep the values of existing structures from the factfinder on the basis of their illegality, the illegality must be established as a threshold issue. "As a

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194. 605 F.2d 762, 821-22 (5th Cir. 1979).
195. Id.
preliminary matter, it is the Government's burden to prove that an existing structure is unlawful and therefore should not, as a matter of public policy, be compensated.\textsuperscript{196}

Once that threshold has been achieved, the property owner must prove that the structure was built legally with a valid permit.\textsuperscript{197} However, even if the owner fails in that burden, he can still introduce evidence that the relevant regulatory authority would otherwise allow the structure to remain:\textsuperscript{198}

\[
\text{[C]ompensation for an existing and otherwise valuable structure can be completely denied only if it was an illegal use at the time it was built. If it is only by virtue of \textit{supervening laws and regulations} that the structure has become an illegal use, the owner does not forfeit his constitutional right to be justly compensated for his property.}\textsuperscript{199}
\]

Note the parallel between the court's analysis on illegality of structures and the essential elements of predatory governmental gamesmanship. Moreover, in the area of predatory gamesmanship, the problem of illegal use is compounded. The predatory regulations themselves may make the valuation of just compensation more difficult since the market value of the structure may have been altered by those laws. "But the difficulties involved in ascertaining 'just compensation' in these circumstances do not warrant denying compensation altogether."\textsuperscript{200} It appears, under the Fifth Circuit's rule, that it would be an abuse of discretion for a trial judge to exclude consideration of the value of such a structure on the basis that its present, but not original, illegality would make consideration of the now proscribed use speculative, remote, or irrelevant.

In the case of predatory regulations, this may be another instance where the burden of proof should shift to government. Certainly, employing the presumption of constitutional correctness has no place where predatory governmental activities have been involved. It would not be an undue burden on the municipalities to show that the use was illegal at the time of R.I.B.E. determination, and not as the result of predatory regulation. Moreover, \textit{Lucas} strongly suggests that, unless the pre-
sumption of correctness is put aside, hollow statutory language can paper over the fundamental questions, and statist appetites will remain unchecked.\textsuperscript{201}

Diminishing the compensable value of property taken for public projects is at the heart of predatory municipal regulations, and declaring an existing use unlawful is merely a subset of such predatory practices. An individual’s R.I.B.E. for property being condemned could be valued at any time between the property’s initial acquisition by the landowner and the taking of the property by the state through occupation or deed. Predatory conduct can be discouraged by rules protecting the property owner’s right to just compensation. Otherwise, predatory conduct and gamesmanship will be encouraged by rules that permit regulatory tactics to diminish value and reduce compensation.

\section*{E. Value Determinations, the Evolving Public Project and Predatory Municipal Conduct}

Public projects naturally require time to be planned, to evolve and to take shape. Therefore, courts and parties have extraordinary difficulty in determining compensability of value changes which occur during the course of condemnation, particularly those caused by the project. In federal jurisdictions, recovery is limited to the amount of value which has accrued to the property as of the earliest time that the property can be said to lie “probably within the scope of the project.”\textsuperscript{202} It is at this point in time that a taking is considered to have occurred.\textsuperscript{203}

This is not to say that “mere fluctuations in value during the course of governmental decision making” are compensable takings by the constitutional standard. In \textit{First English}, the Court observed that “depreciation in value of the property by reason of preliminary activity is not chargeable to the government.”\textsuperscript{204}

Similarly, in \textit{United States v. 2,175.86 Acres}, the Fifth Circuit held that where government has proceeded by straight condemnation, “[a] reduction or increase in the value of proper-

\textsuperscript{201} Lucas, 112 S. Ct. at 2900.
\textsuperscript{202} United States v. Miller, 317 U.S. 369, 377 (1943).
\textsuperscript{203} See id.
\textsuperscript{204} First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 320 (1987).
ty . . . by reason of legislation for or the beginning or completion of a project . . . are incidents of ownership. [Such increases and decreases] cannot be considered as a 'taking' in the constitutional sense. 205 The court fixed the time of "taking" as the time of payment of the award, when government has not substantially interfered with landowners' rights in their property prior to payment. 206

That ruling was affirmed in 1984 when the Supreme Court held that a taking takes place on the date of deposit of the award, provided that the landowner failed to show any constitutionally significant impairment of its interests that amounted to an earlier taking, since that deposit constituted acquiescence by the condemnor. 207 In First English, the Court in dicta commented that even though, as a matter of law, an illegitimate taking might not occur until the government refuses to pay, interference that rises to the level of a taking might begin much earlier, and compensation could be measured from that earlier time. 208 Thus, it appears to be critical to differentiate between acceptable preliminary activity and unacceptable substantial interference or constitutionally significant impairment of the landowner's interest.

In 1985, the Fifth Circuit ruled that where the condemnor had not deposited security with the court (thereby defining the scope of the project and constructively taking the property), the relevant date of taking for purposes of valuing the compensation was the date of trial. 209 However, since the facts indicated that the condemning authority (here a telephone utility company) had significantly impaired landowner Hazel Gully's property rights prior to the time of trial, the court held that she should be compensated for that impairment as well. The company's delays in pursuing the condemnation action were held to be compensable. In a telling statement, the Gully court wrote that "time is money, and the jury believed that the time Gully spent waiting for Bell to do something cost her $92,000." 210

206. Id. at 356.
208. First English, 482 U.S. at 320.
210. Id. at 1292.
The Fifth Circuit has noted that rules and standards to be applied in measuring just compensation under the Fifth Amendment are not absolute and invariable.211 If the scope of the project ("SOP") is enlarged, additional property need not be shown to have been specified as involved in the project at the outset for the scope of the project to apply, so long as the need for additional property became known during the course of planning or original construction.212 Here again, a strong premise exists to look at the date of the earliest municipal conduct where predatory actions are involved. Making the determination of timing even more equity-oriented, the court held that the crucial inquiry is whether serious anticipation of the condemnation diminished any potential purchaser's reasonable expectations as to its uses.213 This part of the holding is, at its core, the very essence of the Supreme Court's concept of R.I.B.E.

The trial judge has primary responsibility to determine these SOP issues.214 The Fifth Circuit stated that the SOP rule operates like a presumption, disregarding both positive or negative effects on compensation that are attributable to the project itself. "The key to a just determination of the SOP issue is to set the date as of which the rule is triggered with due regard for the compensation consequences, so that the presumption does not unfairly favor either the Government or the landowner."215

In the context of most predatory zoning by state and local governments, government's conduct is intended to depress the targeted property's value. While value-enhancement issues, such as possible zoning changes which would allow more profitable use of the property, are subject to the limitations noted earlier, state-caused diminutions properly should be ignored in determining compensation. For instance, the Texas Supreme Court has conditioned the determination of compensation for property taken by eminent domain by stating that "fair market value must, by definition, be computed as if there were no proceedings to eliminate that market."216 This language focuses

211. United States v. 320.0 Acres, 605 F.2d 762, 781 (5th Cir. 1979).
212. Id. at 793.
213. Id. at 807.
214. Id.
215. Id. at 806.
upon the direct condemnation proceedings themselves, but its essence is to neutralize the negative effect on market value created by government's activities. It follows that, in the area of predatory takings, the value-impacting conduct by the government should be neutralized in property value calculations in the same way that straightforward proceedings to condemn are neutralized in a direct taking for purposes of determining value. The "just compensation" mandated by the Constitution should not be diminished because government has chosen rent-seeking conduct—predatory gamesmanship—rather than a straightforward taking.217

F. Future Value

Three future-value doctrines overlap in shaping a property owner’s R.I.B.E. and must be considered together.

1. "Remote or speculative" versus R.I.B.E.

The rules for exclusion of "remote or speculative" evidence of land value should not be used to foreclose R.I.B.E. proof in predatory zoning cases. Normally, the proper way for the court to limit the effect of evidence which should not influence its determination of market value is by excluding it.218 Attempting to instruct the jury as to which elements it is to consider or what weight those elements should be given is not proper for the court.219

If... a proffered potential use is not reasonably practicable or probable, so that no reasonably minded trier of fact faithfully applying the law could find that it represents an element of fair market value, then of course the landowner is not entitled to have evidence concerning that use considered by the trier of fact.220

Valuation of just compensation may depend on the timing of the valuation itself. "Remote, speculative, and conjectural" uses of the property certainly might include those which are contrary to existing governmental zoning or restriction. These uses may be prospective or existing. Existing uses may predate the

220. United States v. 320.0 Acres, 605 F.2d 762, 818 (5th Cir. 1979).
restrictions which seek to limit or eliminate the pre-existing uses. The zoning restrictions themselves are subject to a wide range of possible revisions or elimination.\textsuperscript{221} They may change the legality of a use during the eminent domain proceedings.\textsuperscript{222} If the timing of the valuation is based on the time of "taking," and if the existing use of the property at that time is presumptively legal, based on an existing permit allowing that use, then that use should be one of the factors for determining the compensable value of the property being taken.\textsuperscript{223} More importantly, if any restrictions upon the existing use are found to be part of the municipality's pattern of predatory regulation, such restrictions logically should be ignored in formulating the value of the taking. In such an analysis, it is not "remote or speculative" to allow the fair market value for compensation purposes to reflect an R.I.B.E. which, but for government's predatory behavior, would truly be a reasonable expectation.

As to reasonable future uses that would be embraced within R.I.B.E., most of the case law regarding the admissibility of evidence pertaining to values of prohibited uses of the property relates to prospective uses. The landowner must say that the property should not be valued based on its existing usage, but rather, should be based on a more valuable prospective use which is currently restricted or prohibited.\textsuperscript{224} Thus, the timing of the government's predatory regulation is essential to questions of both current and potential future market value.

2. \textit{Highest and best use and R.I.B.E.}

Not all reasonable expectations of value are tied to current land use, and a future expectation could exist only to be frustrated by subsequent predatory conduct of government. We have noted that \textit{Lucas} requires that local property and tort laws, as they exist on the date of acquisition by the private landowner, form the basis for determining R.I.B.E.\textsuperscript{225} However, it can be maintained that the earliest date of government's predatory activity should be the R.I.B.E.-determining date in a predatory regulatory taking. However, both views run afoam of two classical

\begin{itemize}
\item \textsuperscript{221} City of Austin v. Cannizzo, 267 S.W.2d 808, 815 (Tex. 1954).
\item \textsuperscript{222} Id.
\item \textsuperscript{223} 320.0 Acres, 605 F.2d at 821.
\item \textsuperscript{224} See State v. Cox, 840 S.W.2d 357, 361 (Tenn. Ct. App. 1991); NICHOLS, supra note 101, §§ 12.02(1), 12B.12.
\item \textsuperscript{225} Lucas, 112 S. Ct. at 2901.
\end{itemize}
eminent domain concepts that look to future uses in exploring the damages suffered by the private owner: (1) the concept of "highest and best use," and (2) the corollary concept that allocates the benefit of probable future regulatory changes to the property owner.

In valuing the compensation to be paid owners for property taken from them by the government for public use, "[t]he objective of the judicial process under the Constitution and statutes is to make the landowner whole and to award him only what he could have obtained for his land in a free market." This market value may be shown by the property's most profitable use. Accordingly, appropriate compensation is determined by the market value of the property, considering its highest and best use. The rules of evidence are necessarily liberal regarding such proof of market value. To be consistent with the value-laden safeguards erected in state and federal constitutions to protect citizens from the effects of an abusive exercise of the power of eminent domain by government, requirements for compensation should be liberally construed. Similarly, compliance by government with the established procedural requirements of condemnation should be strictly demanded.

Traditionally, the factfinder is entitled to consider every factor determining what could have been obtained for the property in a transaction between the hypothetically prudent, willing, and able buyer and seller. All matters that tend to increase or diminish the present market value are properly admitted. All factors which would be given weight in negotiations between a buyer and seller are to be considered. Thus, the measure of just compensation for market value is not

limited to the value of the property's present use, but includes any additional value added by realistic prospects for developing it to a higher and more suitable purpose. \(^{235}\) This concept, providing that market value equals the value of the investors' reasonable marketplace expectations as to the development potential of the property rights being taken, is materially similar to the R.I.B.E. approach pointed to by the *Lucas* Court to better identify property values which must be compensated if taken by government's regulatory actions. \(^{236}\)

3. *Future value: Unique suitability and R.I.B.E.*

One reasonable expectation of an owner is tied to prospective business uses of a parcel of land. Special values attributable to the property's unique suitability for the conduct of a particular future business can be introduced as evidence establishing its market value. \(^{237}\) Examples of such special values might include proximity to competing businesses, availability of zoning variances, and differences in applicable restrictive covenants. \(^{238}\) In determining future value, unique suitability is an important element of market value, and location has been described as the keystone and soul of the economics of market value of real property. \(^{239}\) In this regard, there exists a presumption in favor of the existing use of land. \(^{240}\) Again, most states value the damages arising out of loss of unique suitability based on the willing buyer-seller equation. \(^{241}\)

The factors involved in "future-looking" value determinations are not unlimited, even if they are aspects of a willing buyer-seller formulation. For instance, the Texas Supreme Court has observed that "purely speculative uses" which are wholly unavailable to the property's buyer or seller would not be factors in their decision to buy or sell and, thus, should be excluded from consideration of market value. \(^{242}\) Most importantly, in their

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\(^{235}\) United States v. 320.0 Acres, 605 F.2d 762, 781 (5th Cir. 1979).


\(^{241}\) City of Austin v. Cannizzo, 267 S.W.2d 808, 814 (Tex. 1954).

\(^{242}\) *Id.*
opinion in City of Austin v. Cannizzo, the Texas court used language bearing upon the future market value for use in the jury instruction:

You are instructed that the term “market value” is the price which the property would bring when it is offered for sale by one who desires, but is not obliged to sell, and is bought by one who is under no necessity of buying it, taking into consideration all of the uses to which it is reasonably adaptable and for which it either is or in all reasonable probability will become available within the reasonable future.243

The critical determination is whether unique suitability for a particular future business site as a potential future use is contemplated in the proffered evidence and reflected in the value placed on the property by reasonable market expectations. Lucas poses the following question: Would the marketplace possess certain R.I.B.E. characteristics as to future uses such as a unique suitability for a particular business that would impact the current value? If not, then “[e]vidence should be excluded [when it relates] to remote, speculative, and conjectural uses, as well as injuries, which are not reflected in the present market value of the property.”244

The courts play a particularly difficult role in determining whether future value is applicable. It is the role of the court to determine what evidence is to be presented to the finder of fact in its determination of market value.245 The trial judge is vested with considerable discretion in determining the admissibility of evidence as to market value, and the reviewing court is “not authorized to substitute [its] rulings for [the trial court’s] exclusion of evidence unless it appears that [it] has abused [its] discretion.”246

G. State Deterrence and R.I.B.E. Calculations

Personal freedoms are protected from predatory state conduct through a variety of mechanisms, most of which center around denying the state any significant rewards of conduct inimical to the Bill of Rights. By giving the state a disincentive to engage in certain conduct, that conduct, it is hoped, will be

243. Id. at 815.
discouraged. For instance, the exclusionary rule hangs like the proverbial Sword of Damocles over constitutionally impermissible federal actions involving coerced confessions or wrongfully seized evidence.\footnote{Weeks v. United States, 232 U.S. 383 (1914).} In 1961 this rule was applied to actions by the separate states securing individual liberties against state encroachment.\footnote{Mapp v. Ohio, 367 U.S. 643 (1961).} Creating disincentives for predatory state conduct would be equally persuasive in Takings Clause jurisprudence.

A basic premise of the drafters of the Constitution, revisited in the \textit{Lucas} opinion, is that constitutional safeguards of individual property rights, as well as personal freedoms such as speech\footnote{Lucas, 112 S. Ct. at 2904.} and religion,\footnote{Id. at 2907.} deserve the highest dignity and protection.\footnote{Id. at 2901.} Under \textit{Lucas} it would appear constitutionally impermissible for the state to benefit from its predatory conduct and escape from paying for value added by the condemnation project. Moreover, it seems offensive to the Takings Clause to reward the state with the fiscal advantage of an award based on the diminished marketability of the project after the condemnation has become \textit{de facto} certain. The R.I.B.E. of property owners are certainly affected by the state's action, and just compensation is required. In order to provide protections of equal dignity between property rights under the Fifth Amendment and those guaranteed for other constitutional rights and freedoms, the most appropriate moment in time to determine value is whatever moment would do the most to discourage predatory state conduct.

\textbf{V. CONCLUSION}

The R.I.B.E. calculus is perhaps the ultimate issue in most Takings Clause contests in the wake of five years of significant Supreme Court revision. This calculus requires unique consideration of each of the clusters of Takings Clause doctrines. In the instance of predatory municipal zoning practices, the approach requires that R.I.B.E. determinations address (i) the timing of the regulatory "taking" as distinct from the timing of the owner's capital investment; (ii) the body of law that must be brought to bear upon the R.I.B.E. formulation; (iii) the
percentages of value of the fee simple of the entire tract as contrasted to that of the portions of the tract or the single strands of rights within the entire fee simple bundle; and (iv) the traditional concept of "highest and best use," which accounts for future value, and how the highest and best use should be ascertained in light of the R.I.B.E. timing issues.

The Supreme Court has come a great distance in just a few years to bring greater order out of Takings Clause chaos. It now remains for government and private counsel to persuade courts to resolve the open R.I.B.E. issues of timing and the applicable body of law.
APPENDIX A

AUTHORITY RELATED TO PREDATORY ZONING PRACTICES


California has been a particularly fertile source of litigation involving temporary regulatory takings of a predatory nature. Many landowners have been successful in their lawsuits against municipalities. See, e.g., Martino v. Santa Clara Valley Water Dist., 703 F.2d 1141 (9th Cir.), cert. denied, 464 U.S. 847 (1983); Richmond Elks Hall Ass'n v. Richmond Redevelopment Agency, 561 F.2d 1327 (9th Cir. 1977); City of Torrance v. Superior Court, 545 P.2d 1313 (Cal. 1976); Klopping v. City of Whittier, 500 P.2d 1345 (Cal. 1972); City of Los Angeles v. Tilem, 191 Cal. Rptr. 229 (Ct. App. 1983); Taper v. City of Long Beach, 181 Cal. Rptr. 169 (Ct. App. 1982); People ex rel. Dep't of Pub. Works v. Peninsula Enters., Inc., 153 Cal. Rptr. 895 (Ct. App. 1979).

See also Urbanizadora Versalles, Inc. v. Rivera Rios, 701 F.2d 993 (1st Cir. 1983) (property owner brought a 42 U.S.C. § 1983 action where government "froze" development of land without actually condemning it so as to reduce its market value and thereby reduce compensation required upon eventual taking); Board of Comm'rs v. Tallahassee Bank & Trust Co., 108 So. 2d 74, 86 (Fla. Dist. Ct. App. 1958) ("The conclusions . . . are further supported by the many decisions which condemn the arbitrary adoption of a zoning ordinance for the sole purpose of depressing land values preliminary to eminent domain proceedings."); Bruce A. Ackerman, Beyond Carolene Products, 98 HARV. L. REV. 713, 723 (1985).
APPENDIX B

AUTHORITY RELATED TO THE DEVELOPMENT OF TAKINGS LAW


Patrick A. Randolph, Jr., Updating the Takings Trilogy, 7 ACREL NEWSL. 3 (1989).


