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THE POLITICS OF LEGAL DOCTRINE: A CASE STUDY OF TEXAS LAND-USE PLANNING UNDER THE SHADOW OF *LUCAS*

David S. Caudill*
Wm. Terry Bray**
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Doctrinal argument seems increasingly complex and ever less able to determine outcomes. . . . The more diverse the sphere of an argument's application, the thinner it seems to become until its manipulability becomes more apparent than its persuasive clout. The result has been ever more polarized arguments, ever more sophisticated doctrinal diversity, and ever more narrowly applicable holdings.¹

[The] pace of litigation in this already litigious field will quicken as a result of the [Lucas] decision. Moreover, the non-deferential test . . . may be nourished by the general confusion in this area and grow without great regard for the presumed intent of the Court that articulated it.²

On its way to the U.S. Supreme Court, the *Lucas* case re-invigorated the ever-present legal controversy over regulatory takings—when does a land-use regulation enacted to protect public health, welfare and safety “go too far” and effect a compensable

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1. David Kennedy, *Critical Theory, Structuralism, and Contemporary Legal Scholarship*, 21 NEW ENG. L. REV. 209, 211-212 (1986).

2. John R. Nolan, *Footprints in the Shifting Sands of the Isle of Palms: A Practical Analysis of Regulatory Takings Cases*, 8 J. LAND USE & ENVTL. L. 1, 14 (1992).

“taking”?³ David Lucas’ claim that South Carolina’s Beachfront Management Act (which prohibited home construction on his two beachfront lots) constituted a compensable taking was successful in the trial court, but the judgment was reversed by the South Carolina Supreme Court.⁴ In the months prior to the U.S. Supreme Court’s opinion in *Lucas*, the case came to symbolize a crossroads both in terms of legal doctrine and of political debate. Doctrinally, planners and land-use attorneys (representing developers or local governments) looked to the “new” Supreme Court for definitional guidance concerning regulatory takings—for new principles or for selection and rejection of existing, conflicting principles. More broadly, the case reflected a national conflict of social visions—between those who focus on environmental concerns and those who focus on property rights. The popular press thus characterized *Lucas* as a show-down of sorts.⁵

The Court reversed and remanded, giving Lucas the possibility of keeping his judgment and, along the way, confirming that a regulation that causes loss of all economically viable use of a property is a taking unless the regulation is clearly a nuisance abatement measure under state law.⁶ Reaction to the Court’s opinion was mixed. Both “sides” were happy (property rights advocates saw the preservation of the regulatory takings doctrine; environmentalists saw narrow facts and a narrow holding), and unhappy (property rights advocates had hoped for more guidance in the form of principles exceeding the narrow facts of the case; environmentalists were concerned with a potential chill on efforts to protect natural resources).⁷ In short, the Court came to the crossroads, and then stopped.

Meanwhile, in Austin, Texas, a controversy over a proposed

3. “While property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.” *Pennsylvania Coal v. Mahon*, 260 U.S. 393, 415 (1922). Prior to the Supreme Court’s opinion in *Lucas*, Roger Findley observed that the case provided an opportunity for “substantial guidance” concerning this *Mahon* test, since “the definitions of ‘property’ and of what constitutes a ‘taking’ are elastic, and have been expanded and contracted by the . . . Court over the years.” Roger Findley, *Foreword: How Far Is Too Far? The Constitutional Dimensions of Property*, 25 LOY. L.A. L. REV. 1221 (1992).

4. See *Lucas v. South Carolina Coastal Council*, 404 S.E.2d 895 (S. Car. 1991).

5. See, e.g., David Kaplan et al., *Pay Me or Get Off My Land*, NEWSWEEK, Mar. 9, 1992, at 70.

6. *Lucas*, 112 S. Ct. at 2895. On remand the restrictions imposed on Lucas were found not to be justified under South Carolina’s nuisance-abatement principles. See *Lucas v. South Carolina Coastal Council*, 1992 WL 358097 (S.C. Nov. 20, 1992).

7. See, e.g., William Flannery, *Everybody Wins*, ST. LOUIS POST DISPATCH, July 13, 1992, at 16BP (summarizing happy and unhappy responses from both “conservatives” and “environmentalists”).

water quality ordinance mirrored the national tension between environmental and property rights interests. As *Lucas* was generating attention after certiorari was granted and again after oral arguments, support was growing in Austin for the "Save Our Springs" ("S.O.S.") ordinance,⁸ which would be passed or defeated in a public vote on August 8, 1992. The ordinance was intended to place severe limitations on development in southwest Austin in order to protect water quality.⁹ On June 29, 1992, after the Court's opinion in *Lucas*, opponents of the S.O.S. ordinance hoped that citizens would be concerned about numerous takings claims and potentially large judgments against the City; however, the ordinance was passed by roughly a two-thirds majority.¹⁰ Throughout the "campaign" over the S.O.S. ordinance, *Lucas* and the regulatory takings doctrine were discussed, but in the end were either ignored, misunderstood, or understood quite well and interpreted as irrelevant.

The purpose of this article is to explore the use of the regulatory takings doctrine in political debate, with Austin's Summer of '92 as our context. Several years ago, we—like so many others—wrote an article about the doctrinal confusion in the field of regulatory takings, and we concluded that local politics was far more significant than legal doctrine in land-use planning.¹¹ Specifically, we argued that the perceptions of who has power (e.g., greedy developers over poor municipalities, or scheming regulators over helpless landowners) were more determinative than the canon of judicial opinions (and commentaries) in planning commission and city council decisions. When land-use restrictions are imposed by popular vote, the argument becomes almost tautologous and local politics *is* determinative. In the Austin campaign, however, perhaps because of *Lucas*, legal doctrine was at least a minor fixture alongside the predictable production of images by supporters and opponents of the S.O.S. ordinance.¹² Interestingly, to the extent that the popular image of land-

8. See *Save Our Springs Initiative Petition*, Aug. 8, 1992 ballot, Austin, Texas, attached as an appendix to this article [hereinafter *Appendix*].

9. See *Appendix*. To prevent water pollution, the ordinance limits impervious cover and requires runoff water quality controls to ensure no increase in 13 identified pollutants; certain tracts and uses are then exempted from these restrictions.

10. See Bill Collier, *S.O.S. initiative springs to landslide win*, AUSTIN AMERICAN STATESMAN, Aug. 9, 1992, at A1 (64% of voters favored the ordinance).

11. See Wm. Terry Bray et al., *Once More, the Trilogy, in Retrospect: An Essay on the Virtues of Development Agreements in Texas*, 32 S. TEX. L. REV. 1, 26-28 (1990); For a similar analysis on which we relied in the above article, see Gregory J. Alexander, *Takings, Narratives, and Power*, 88 COLUM. L. REV. 1752 (1988).

12. See *Divisive battle over springs should be avoided*, AUSTIN AMERICAN-STATESMAN,

use planning controversies involves well-organized developers pitted against weak environmental interests,¹³ the Austin S.O.S. campaign reversed that picture—supporters of the ordinance raised far more money than the opposition and appeared to be better organized.

In Section I below, we describe the history and content of the S.O.S. ordinance. Section II focuses on the use of legal doctrine in Austin's political discourse prior to *Lucas*, and Section III focuses on the five weeks of post-*Lucas* discourse before the vote on the S.O.S. ordinance. Significantly, our discussion is limited to the doctrine of regulatory takings under the United States Constitution, and we do not discuss the questions that arose during the campaign concerning the legality of the S.O.S. ordinance under other constitutional principles or under local and state law.¹⁴ In Section IV, assuming that controversies like Austin's will likely reappear, we argue that the use of legal doctrine in Austin's recent political debate reveals the failure, identified by some legal scholars, of the current regulatory takings doctrine to serve as a guide to the limits on majoritarian control over private property. While no "solution" to the conflict of social visions or doctrinal confusion is readily apparent, we suggest that the S.O.S. controversy highlights a need for change in the standards of review in takings cases. Finally, we recommend that courts begin to take more seriously some of the aphorisms that now clutter their takings opinions, so as to ensure more attention to the regulatory takings doctrine in local efforts to protect the environment.

While we find interesting the question of whether the initiative process, which may not involve public hearings and systematic, administrative data-gathering, is appropriate for land-use regulation, our analysis of the S.O.S. ordinance is not focused on the method of its enactment. That is, although we describe in some detail the initi-

April 8, 1992, at A18 ("For instance, the leaders of the S.O.S. coalition have targeted two developers who have been portrayed as the rascals whose greed will be the city's undoing. In fact, Jim Bob Moffett and Gary Bradley together control less than 3 percent of the land at stake [in the S.O.S. campaign]."). On the other hand, opponents of the S.O.S. initiative characterized the ordinance as having been drafted "behind closed doors without public hearings." See *What Do You Really Know About the S.O.S. Ordinance?*, AUSTIN AMERICAN-STATESMAN, June 27, 1992, at A10.

13. See, e.g., Joseph L. Sax, *Takings, Private Property and Public Rights*, 81 YALE L. J. 149, 160 (1971) (describing the organizational difficulties of environmentalists).

14. For example, the issues of whether the ordinance unlawfully regulates land use (and not just water quality) outside Austin (in its extra-territorial jurisdiction); whether the ordinance conflicts with Texas Water Commission standards; whether the ordinance violates the vested rights of permit holders by setting new expiration dates; and whether the ordinance violates the City Charter, are beyond the scope of this study.

ative process and campaign in Austin, our identification of certain impoverished notions in takings jurisprudence, as well as our proposals for revitalizing those notions, are not limited to the field of regulations passed by popular vote. While the controversy in Austin highlights our concerns, the constitutional arguments that appeared in the campaign, and our critique, would have been the same if the Austin City Council passed the S.O.S. ordinance.

Undoubtedly, some will disagree with our assessment of the S.O.S. initiative and the desirability of such ordinances. Even so, we hope the following study will illustrate one of the ways in which doctrinal disagreements are played out in the local political process. The Supreme Court's confidence that its land-use pronouncements "lessen to some extent the freedom and flexibility of . . . governing bodies of municipal corporations when enacting land use regulations"¹⁶ is perhaps exaggerated whether such regulations are enacted by City Councils or by popular vote.

I. THE S.O.S. ORDINANCE

*A divisive and bitter summer seems to be in the offing. The inevitability of that fight depends on how much each of the factions is encouraged to at least talk with each other.*¹⁶

A. Genesis

In 1986, after months of controversy, the Austin City Council passed its Comprehensive Watersheds Ordinance ("CWO") to control water quality in all of Austin's watersheds by restricting density in various watershed categories (urban, suburban, etc.) and by establishing setback zones, e.g., no development within 50 feet of creeks and streams, severely limited development in the next 100 to 300 feet, etc.¹⁷ Five less extensive watershed protection ordinances had been passed in the previous decade, but the CWO was viewed as a substantial change in Austin's regulatory approach to new development. Opponents of the CWO claimed that a hidden "slow growth" agenda, not water quality, was driving the new approach, and undeniably the previously quiet state capital and university "town" had been in a fast-growth mode in the late 1970's and early 1980's.

15. *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 321 (1987).

16. *Divisive battle over springs should be avoided*, *supra* note 12, at A18.

17. AUSTIN, TX., CITY CODE ch. 13-15, art. II (1981).

The CWO was revised and amended several times during the next few years, but it was not until 1990 that another major watershed controversy arose, this one caused by a proposal to develop 4000 acres in the so-called Barton Creek watershed (a major watershed in the southwest Austin area). On June 7, 1990, more than 800 people, most opposed to the project, signed up "to address the City Council during an all-night marathon meeting."¹⁸ That fall (1990), the city planning staff was directed by the Council to draft a new ordinance to prevent any degradation of the Barton Creek watershed, and a temporary moratorium on development was passed. Hearings continued throughout 1991 on the new ordinance, which was to become part of the CWO and was "expanded" to include restrictions on *all* watersheds contributing to Barton Springs¹⁹ (an area of approximately 150 square-miles). In the fall of 1991, the recently-formed Save Our Springs Coalition appeared before the Council and proposed several strict amendments to the CWO. The compromise version of these amendments adopted in October was viewed generally as too strong by the business community and too weak for the Coalition and other environmentalists.²⁰

Within weeks, the S.O.S. Coalition began collecting signatures to force a citywide vote on its own water quality initiative, and on March 13, 1992, the Coalition filed 26,835 signatures (more than 10 percent of the registered voters) with the city clerk. Following a brief dispute over *when* the S.O.S. initiative would be on the ballot, (May or August), the City Council approved addition of the initiative to an August 8 ballot. By May, an alternative ordinance—generally supported by the business community—was also approved as an addition to the ballot. This alternative ordinance called for reliance upon the existing CWO but also required development of a comprehensive water quality protection plan for the entire Barton Creek watershed in cooperation with state authorities.²¹

18. See *Debate on springs' water quality has a long history*, AUSTIN AMERICAN-STATESMAN, June 25, 1992, at A10.

19. Barton Springs (the "Springs") refers to the large, natural spring-fed swimming facility in one of Austin's downtown parks. The evocative power of the image of Barton Springs to Austin residents should not be underestimated. "The springs were enjoyed by Native Americans for thousands of years before the arrival of Europeans. According to Native American legend, the Great Spirit created the springs by hurling a rainbow against the limestone of the Edwards Aquifer, splitting the rock so that the cool, clear water could flow forth." Collier, *supra* note 10, at A19.

20. *Debate on springs' water quality has a long history*, *supra* note 18, at A10.

21. *Id.* The "alternative" ordinance, not discussed in this article, reflected deference to the Texas Water Commission and its authority to set water quality standards.

Some of the debate that followed approval of the ballot additions took place before the City Council, as the Council had authority to pass the S.O.S. ordinance (or the alternative ordinance) prior to the election. Proponents of the S.O.S. initiative criticized existing regulations *and* the alternative ordinance as inadequate to protect environmentally sensitive areas of the city, primarily because of waiver and exemption provisions. Opponents of S.O.S. warned of tax revenue losses resulting in loss of government services, loss of jobs (particularly because of the potential effect on the local construction industry, but also because companies would be unlikely to expand or to locate in Austin), and economic segregation due to increased cost of housing.²² Outside the council chambers, the *Austin American-Statesman*, Austin's major newspaper, covered the controversy almost daily, interviewing city leaders, owners of undeveloped tracts, and those directly involved in the interest groups and organizations favoring or opposing the ordinance. One member of the S.O.S. Coalition Steering Committee remarked that the ordinance was simply designed to "keep Austin from becoming another Houston or Dallas or some other city that's lost its quality of life. . . . People think this is a no-growth agenda, but that's not the case. We just want to preserve some of the Hill Country that makes this place so special."²³ In opposition to the S.O.S. initiative, a group called "Citizens for Responsible Planning," endorsed by realtors, builders, and the Chamber of Commerce, was formed to convince voters that S.O.S. was a "no-growth", and not really a water quality, ordinance.²⁴ By mid-July, the opposing sides in the campaign had raised about \$460,000, but the S.O.S. Coalition "out-raised" the Citizens for Responsible Planning by a ratio of almost 3-to-1.²⁵

Though comparisons are difficult, proponents of the S.O.S. ordinance pointed out that other communities have adopted strict limits on development to protect water quality—some stricter than the S.O.S. limits—and that takings lawsuits in some of those communities were unsuccessful.²⁶ An article in the *Austin American-States-*

22. Mike Todd, *S.O.S. initiative stirs debate at hearing*, AUSTIN AMERICAN-STATESMAN, April 21, 1992, at B1.

23. Bill Collier, *Environment battle being fought on many fronts*, AUSTIN AMERICAN-STATESMAN, June 25, 1992, at A12 (quoting Helen Ballew).

24. See *What Do You Really Know About the S.O.S. Ordinance?*, *supra* note 12, at A10.

25. Bob Burns, *\$460,000 flows to campaigns in water debate*, AUSTIN AMERICAN-STATESMAN, July 11, 1992, at A1.

26. John McAllen Scanlan, *Other cities test waters with ordinances*, AUSTIN AMERICAN-

man noted that Boulder, Colorado, and Raleigh, North Carolina, have thrived under slow-growth laws, thus challenging claims by S.O.S. opponents that Austin would suffer economically under the S.O.S. ordinance.²⁷

Two well-attended conferences were held at the LBJ School of Public Affairs (University of Texas at Austin), one entitled "Watershed Management: A Regional Approach to Improving Water Quality" and one entitled "Austin's Environment and its Economy: Can They Prosper in Harmony?" Both were intended to educate the voters on the August 8 ballot issues, but the latter was a special attempt to encourage cooperation between the two "sides" in the campaign. However, no significant cooperation was evident, and as the polls began to indicate that a majority of the voters favored the S.O.S. ordinance, landowners who would be most affected by the ordinance began to consider the courts as their only recourse against what they viewed as a confiscatory regulation.

In the weeks immediately following the vote on the S.O.S. initiative, only one lawsuit was filed against the city challenging the S.O.S. ordinance, and an appeal of the ordinance's validity was filed with the Texas Water Commission. However, one City Council member said he expected numerous suits, and the mayor said that the Council was "committed now to making a vigorous defense" of the new law.²⁸ Many landowners who would have been affected by the ordinance filed preliminary proposals for development that were approved prior to the election, thus avoiding compliance with the S.O.S. restrictions.

B. Content

*Every landowner will be able to build something under our ordinance. What we've simply done is prohibit high-intensity urban development, galleria-style shopping centers, [and] massive apartment complexes [that] . . . will simply destroy water quality for our creeks, aquifer and springs.*²⁹

STATESMAN, July 9, 1992, at A-17 (referring to towns in New Hampshire, Massachusetts, New York, Delaware, Washington, Missouri, South Dakota, Virginia, and North Carolina).

27. Michael Totty, *Cities: Slow-growth laws helped us grow and Raleigh's rules drive intense development from water supplies*, AUSTIN AMERICAN-STATESMAN, July 5, 1992, at D1.

28. Mike Todd, *City braces for battle over S.O.S.*, AUSTIN AMERICAN-STATESMAN, August 11, 1992, at B1.

29. Bill Bunch et al., Press Conference: *A legal briefing on S.O.S. 5* (Mar. 3, 1992) (transcript on file with authors and Hofstra Property Law Journal) [hereinafter *Conference*].

The first section of the S.O.S. ordinance is a four-part declaration of intent: to preserve water quality, to prevent further degradation of water quality, to provide for consistent administration of the city's watershed ordinances, and to promote the public health, safety and welfare.³⁰ The second section places two restrictions on new development: (a) *impervious cover*³¹ is limited to a maximum of 25% (or 20% within the Barton Creek watershed contributing zone, or 15% within the "recharge" zone³²), but the maximum can be reduced if necessary to prevent pollution; and (b) *runoff*³³ must be managed to ensure no increase in thirteen identified pollutants.³⁴ No exemptions, waivers, or variances are permitted, but the restrictions do not apply to existing (platted) lots or tracts if new development involves (a) construction or renovation of one single family or duplex structure, (b) a maximum of 8000 square feet of impervious cover (impliedly small commercial development), or (c) school construction.³⁵ Previously approved subdivision or site plans will expire under the ordinance unless construction commences within 1-3 years, depending on the date of initial approval.³⁶ Finally, the ordinance includes a limited adjustment provision which allows modification of the ordinance as to a specific tract following a court's final judgment or a City Council decision that the ordinance conflicts with state or federal law.³⁷

Critics of the ordinance questioned the need for *both* impervious cover restrictions *and* a prohibition against increase in pollutant loads; that is, if no degradation of water quality is caused by new development, then the only reason for impervious cover limitations is to target (and prohibit) large developments, encouraging slow growth. Critics also questioned the engineering assumptions behind

30. See *Appendix* at Part 1.

31. Impervious cover is "the total horizontal area of all buildings, roofed or covered spaces, paved surfaced areas, walkways, and driveways. Pools, including but not limited to swimming pools, reflecting ponds, and fountains, are not included in calculating impervious coverage." Austin, Tex., City Code, title XIII, § 13-2-1 (1981).

32. The "recharge" zone is, generally, the land over an aquifer that serves to transmit a significant amount of surface water into the subsurface strata of the aquifer. For a definition of an aquifer, see *infra* note 88.

33. Runoff is "that part of the precipitation which reaches a stream, drain, or sewer." CITY OF AUSTIN DRAINAGE CRITERIA MANUAL G-6 (1988). Precipitation is defined as "any moisture that falls from the atmosphere, including snow, sleet, rain and hail." *Id.* at G-5.

34. See *Appendix* at Part 2.

35. *Id.* at Parts 3-4.

36. *Id.* at Part 5.

37. *Id.* at Part 6.

the ordinance, namely the designation of 25% (or less) impervious cover as the point beyond which development seriously affects water quality.³⁸ Proponents, however, suggested design creativity for future development (e.g., cluster homes surrounded by open land, or tall parking structures), and relied on engineering studies indicating that "it's essentially impossible to maintain high water quality when your impervious cover goes much above 15%."³⁹ Throughout the campaign, engineering data was presented by one side and discredited by the other to the extent that the influence of environmental science on the election was likely minimal.⁴⁰

In the remainder of this article, we focus on the claim made by opponents of the S.O.S. initiative that the ordinance may, as to properties severely affected, constitute a large number of takings without compensation.

II. PRE-LUCAS TAKINGS DOCTRINE IN THE S.O.S. CONTROVERSY

*"[The S.O.S. initiative] has a life of its own," said George Avery of the Austin group of the Sierra Club. "It's anti-growth, anti-development, anti-wealth, anti-politics. It's not just a coalition of environmentalists. It's a train."*⁴¹

A. Background

1. Penn Central

In 1978, the U.S. Supreme Court upheld New York City's landmark preservation law, which prohibited construction of a proposed office tower, in *Penn Central Transportation Co. v. City of New York*.⁴² After first noting that regulatory takings questions are

38. See C. White, *S.O.S.—about water quality, or political control?*, THE WESTBANK PICAYUNE, June 17, 1992, at 32 ("Rick Coneway, [an outspoken opponent of the S.O.S. initiative and] an environmental engineer . . . agrees that the engineering for the S.O.S. is flawed.").

39. *Conference*, *supra* note 29, at 18.

40. See Bill Collier, *Study: Water quality at Barton Springs has not deteriorated*, AUSTIN AMERICAN-STATESMAN, June 23, 1992, at B1.

A new study by an Austin water-quality consulting firm concludes there is no evidence that the quality of water in Barton Springs has deteriorated. . . . But the study . . . was quickly disputed by environmentalists who contend the springs have been degraded and will get worse unless voters approve the [S.O.S.] ordinance on Aug. 8.

Id.

41. Bill Collier, *New Faces bring new tactics to old war over springs*, AUSTIN AMERICAN-STATESMAN, May 24, 1992, at A15.

42. 438 U.S. 104 (1978).

case-by-case, "ad hoc, factual inquiries," the Court identified several factors that have "particular significance" in such analyses.⁴³ The degree of "economic impact of the regulation on the claimant" (particularly, the "extent to which the regulation has interfered with distinct investment-backed expectations"), and whether "the interference with property can be characterized as a physical invasion by government," are primary considerations when a landowner claims that a compensable taking has occurred.⁴⁴ On the other hand, mere "diminution in property value, standing alone," cannot establish a compensable taking.⁴⁵ Moreover, considerations of public "health, safety, morals, or general welfare" are sometimes sufficient to uphold "land-use regulations that destroyed or adversely affected recognized real property interests."⁴⁶

Penn Central therefore provides a comparative, balancing test for determining when a particular land use regulation constitutes a compensable taking. A regulation can constitute a taking if it is "not reasonably necessary to the effectuation of a substantial public purpose" or if it has "an unduly harsh impact upon the owner's use of the property."⁴⁷ A regulation will not effect a taking if it is "substantially related to the promotion of the general welfare" and permits an owner "reasonable beneficial use"⁴⁸ of property "for its intended purposes and in a gainful fashion."⁴⁹ In *Agins v. City of Tiburon*,⁵⁰ the Court continued to develop this standard for review of land use regulations. Regulations effect a taking if they do not "substantially advance legitimate state interests . . . or [if they deny] an owner economically viable use of his land."⁵¹ The Court reaffirmed that regulatory takings questions necessarily require a "weighing of private and public interests."⁵²

Even for those who are not overly cynical, the problems with the foregoing "doctrine" are obvious—how do we measure "economic impact"?; what *is* a "distinct" investment-backed expectation?; when can a regulation be characterized as a physical invasion?;

43. *Id.* at 124.

44. *Id.*

45. *Id.* at 131.

46. *Id.* at 125.

47. *Id.* at 127.

48. *Id.* at 138.

49. *Id.* at 138 n.36.

50. 447 U.S. 255 (1980).

51. *Id.* at 260.

52. *Id.* at 261.

which public needs justify "destruction" of property interests?; when is an impact "unduly harsh"?; what is "reasonable" beneficial use?; when is an interest "substantially" advanced?; and so on. The professed establishment of weighty factors and significant considerations barely hides the absence of reliable guidelines. Richard Epstein, author of *Takings: Private Property and the Power of Eminent Domain*, and Jeremy Paul,⁵³ one of his harshest critics, recognized in the early 1980's that the Court was unable "to find principled ways to sanction government action."⁵⁴ Even if one appreciates the Court's honesty in acknowledging its "ad hoc" approach,⁵⁵ everybody seems to recognize that almost any land-use regulation can be characterized as a taking or not based on some combination and interpretation of the factors to be considered.⁵⁶ The history of judicial deference to land-use regulators and reluctance to find a taking can be understood as doctrinal consistency, but might also be attributed to doctrinal confusion. By the late 1980's, the Court was willing to acknowledge and address the perceived chaos in the field of regulatory takings.⁵⁷

2. The Trilogy

In 1987, the U.S. Supreme Court decided three major land use cases: *Keystone Bituminous Coal Association v. DeBenedictis*,⁵⁸ *First English Evangelical Lutheran Church v. County of Los Angeles*,⁵⁹ and *Nollan v. California Coastal Commission*.⁶⁰ Each of these opinions included an attempt to clarify the way land use regulation questions will be decided under the Fifth Amendment. *Keystone* re-

53. See Jeremy Paul, *Searching for the Status Quo*, 7 CARDOZO L. REV. 743 (1986) (book review).

54. *Id.* at 775.

55. *Id.*

56. See *id.* at 744 (Epstein "illuminates flaws in contemporary judicial reasoning"); *id.* at 775-780 (discussion of open-ended nature of the various factors to be considered in a takings analysis).

57. In 1977, Bruce Ackerman observed the confused judicial responses to the compensation clause and the "pervasive judicial recognition" that the field "is in need of a fundamental reconsideration." Bruce A. Ackerman, PRIVATE PROPERTY AND THE CONSTITUTION 3 (1977). In 1986, Berger and Kanner found no "reliable legal doctrine of sufficient substance to guide landowners and governmental entities in their dealings with each other." Michael M. Berger & Gideon Kanner, *Thoughts on the White River Junction Manifesto: A Reply to the "Gang of Five's" Views on Just Compensation for Regulatory Taking of Property*, 19 LOY. L.A. L. REV. 685, 695 (1986).

58. 480 U.S. 470 (1987).

59. 482 U.S. 304 (1987).

60. 483 U.S. 825 (1987).

fined the *Penn Central* standard of review, suggesting that a regulation aimed at the abatement of an illegal or injurious use—a public nuisance—does not constitute a compensable taking.⁶¹ *First English* fashioned a new takings remedy for landowners, holding that even a temporary taking, specifically a temporary loss of all use of the land, could warrant government compensation.⁶² In the area of impact fees, exactions, and other conditions on land development imposed by governmental authorities, *Nollan* also altered the *Penn Central* standard of review by demanding demonstration of an “essential nexus” between an exaction imposed on the landowner and the legitimate state interest to be furthered by that exaction.⁶³

61. 480 U.S. at 491. In *Keystone*, the Pennsylvania Bituminous Mine Subsidence and Land Conservation Act, Pa. Stat. Ann. tit. 52 secs. 1406.1 - 1406.21 (1966 & Supp. 1991) (prohibiting mining that causes subsidence damage to existing buildings, dwellings, and cemeteries), was challenged by the plaintiff as a taking without compensation. Relying on the *Penn Central* test, as restated in *Agins*, the Court found no compensable taking had occurred. 480 U.S. at 485. The Court had little difficulty satisfying the first prong of the test, finding that there was a substantial and legitimate public interest in preventing subsidence damage, which is akin to a nuisance, and that the Subsidence Act appeared to be effective in serving that interest. *Id.* As to the second prong, denial of economically viable use, the Court held that the Subsidence Act did not make “it impossible for petitioners to profitably engage in their business.” *Id.* (emphasis added). Specifically, there was no claim by petitioners that the Subsidence Act “makes it commercially impracticable for them to continue mining . . . coal . . . in western Pennsylvania.” *Id.* at 495-96 (emphasis added).

62. 482 U.S. at 318. In *First English*, the plaintiff challenged as a regulatory taking (or “inverse condemnation”) an interim flood protection area ordinance which purportedly prohibited all use of plaintiff’s land located within the flood protection area. *Id.* at 308. The Court, without deciding whether a taking had occurred, held that “where the government’s activities have already worked a taking of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective.” *Id.* at 321.

63. 483 U.S. at 837. In *Nollan*, the California Coastal Commission required a public access easement across plaintiffs’ beachfront property as a condition to granting a permit to rebuild on that property. *Id.* at 828. Relying on the *Penn Central* test, as restated in *Agins*, the Court found a compensable taking had occurred. *Id.* at 832. The Court focused on the requirements of the first prong of the test, which provides that a land use regulation must substantially advance a legitimate state interest to avoid characterization as a compensable taking. *Id.* at 834. Even assuming a legitimate state interest in providing public view of the beach, the Court failed to find an “essential nexus” between the public access easement condition imposed on the building permit and the state interest. *Id.* at 837. Although *Nollan* confirms the validity of many of the conditions on land development imposed by governmental authorities, the heightened scrutiny of development restrictions after *Nollan* could curb overly-aggressive development requirements. Moreover, since *Nollan*’s “essential nexus” requirement (part of *Penn Central*’s first prong test) can be interpreted as broadly applicable to all takings questions (and not just to permit conditions), *Nollan* could represent a significant limitation on the power of regulators over property owners.

After the 1987 Trilogy decisions, the Court in *Pennell v. City of San Jose*, 485 U.S. 1 (1988), held that a challenge to a San Jose, California, rent control ordinance was “premature,” noting there was no evidence that the tenant hardship clause had ever been applied to

Any unbounded optimism following *Keystone* on the part of proponents of aggressive environmental regulation was likely mediated by the remainder of the Trilogy. While those concerned with property rights generally were quite hopeful following *First English* and *Nollan*,⁶⁴ many remained concerned that the Trilogy left takings jurisprudence in flux. The three opinions, each of which included a takings analysis, reveal differences in emphasis and terminology, and, of course, the facts in each case are unique. Some scholars believed that the quest for a comprehensible takings doctrine was in worse shape than ever after the Trilogy.⁶⁵ For example, *Nollan's* "nexus" requirement, seemingly a barrier to regulators, may be easily met by better articulation of the purpose of an ordinance.⁶⁶ The various factors from *Penn Central* remained, after the Trilogy, without "precise content or substantive bite."⁶⁷

Nevertheless, numerous legal scholars believed that the Trilogy, in combination with earlier cases, constituted a consistent and defensible analytical scheme. For example, one commentator⁶⁸ argued that the Trilogy cases are theoretically, if not facially, consistent: "When considering all three of the challenged regulations, the

reduce a tenant's rent, and that reduction of rent on the grounds of tenant hardship was not mandatory under the ordinance. *Id.* at 9-10. In his dissent, Justice Scalia, the author of *Nollan*, joined by Justice O'Connor, found it incomprehensible that appellant's claim could be avoided as "premature." *Id.* at 15-16. He remarked that "it is surprising that we have so soon forgotten" the *Keystone* holding which permitted a similar facial challenge to a statute. *Id.* at 16. Clearly concerned that the Court was backsliding on the *Nollan* "essential nexus" requirement, Justice Scalia also questioned whether the tenant hardship clause of the San Jose rent control ordinance substantially advanced a legitimate state interest. *Id.* at 18. He concluded, "the neediness of renters . . . is not remotely attributable to the particular landlords that the [o]rdsinance singles out. . . ." *Id.* at 21 (alteration in original). In other words, because there was no cause-and-effect relationship between the property use restricted (the amount of economic return to owner), and the social evil that the regulation sought to remedy (the existence of some renters who are too poor to afford even reasonably priced housing), Justice Scalia would have found that the ordinance effected a taking of property without just compensation. *Id.* at 24.

64. See, e.g., Fred Strasser & Maroia Coyle, *Powell's Resignation Wasn't the Only Bombshell*, NAT'L L.J., July 20, 1987, at 5 (*First English* "effectively clipp[ed] the wings" of local regulatory officials); William Fulton, *Zoning Decision Still Leaves Room for City Regulation*, L.A. DAILY J., June 29, 1987 (*Nollan* as a "Sword of Damocles [hanging] over the heads of all local zoning authorities").

65. See Wm. Terry Bray et al., *supra* note 10, at 20-23 (discussing the assessments of the Trilogy by John Martinez, Richard Wilkins, Robert Asher, and others).

66. *Id.* at 21 (citing Richard Wilkins, *The Takings Clause: A Modern Plot for an Old Constitutional Tale*, 64 NOTRE DAME L. REV. 1 (1989)).

67. Wilkins, *supra* note 66, at 45.

68. Sylvia Lynn Gillis, Note, *A Blow for Land-Use Planning?—The Takings Issue Re-examined*, 49 OHIO ST. L.J. 1107 (1989).

strength of the public purpose and its direct relationship to the terms of the regulation remain strong considerations in favor of validity. . . . The Court's concern with a valid purpose regulated through appropriate means is clear throughout each opinion."⁶⁹ Michael Simon observed that the Trilogy "clarifies some of the questions and provides a more solid framework that state courts can use to analyze takings claims."⁷⁰ Michael Berger, who represented the property owner in *First English*, also believed that the Trilogy answered many questions, and established numerous ground rules.⁷¹ Some of the new rules identified by Berger include the following: (1) *valid* regulation may require compensation if private property is taken in the process; (2) all *takings*, permanent or temporary, require compensation; (3) property owners have a *right* to build subject only to reasonable regulation; (4) dedication to the government as a condition to obtaining a development permit is not a voluntary act by the owner; and (5) exactions require the *Nollan* nexus.⁷² Richard Epstein, convinced that *Keystone* could be read as a dangerous expansion of state power,⁷³ thought courts would find coherent principles in *First English* and *Nollan*.⁷⁴ Epstein is famous for his concern that the police power concept has an unfortunate tendency to swallow up the concept of private property, especially as the traditional safety-health-welfare litany of police power gives way "to a more pallid formulation which rejects challenges to a zoning ordinance, for example, when it can be shown that the ordinance 'bears any rational relationship to a legitimate state interest,' which, given the looseness of the language, it almost always does."⁷⁵ For Epstein, the "police power

69. *Id.* at 1122-23.

70. Michael Simon, *The Supreme Court's 1987 "Takings" Triad: An Old Hat in a New Box or a Revolution in Takings Law?*, 1 U. FLA. J.L. & PUB. POL'Y 103, 132 (1987). Of course, the Court "did not completely clarify this area of the law"; the Trilogy provides "small but significant insights into the direction of future land use decisions." *Id.* at 131.

71. Michael M. Berger, *Happy Birthday, Constitution: The Supreme Court Establishes New Ground Rules for Land-Use Planning*, 20 URB. LAW. 735, 743 (1988).

72. *See id.* at 744-48.

73. Richard A. Epstein, *Takings: Descent and Resurrection*, 1987 SUP. CT. REV. 1, 4 (1987). According to Epstein, following *Keystone* "there was really no place to go but up" in *First English* and *Nollan*. *Id.* at 23.

74. *Id.* at 44.

75. Richard A. Epstein, *Takings: Private Property and the Power of Eminent Domain*, at 108-09 (1985) (quoting *Construction Indus. Ass'n v. Petaluma*, 522 F.2d 897, 906 (9th Cir. 1975), *cert. denied*, 424 U.S. 934 (1976)). A recent version of this argument is found in the dissent by Chief Justice Rehnquist in *Keystone*:

A broad exception [for nuisance regulations] to the operation of the Just Compensation Clause based on the exercise of multifaceted health, welfare, and safety regula-

cannot be interpreted as an unrestricted grant of state power to act in the public interest, for then the exception will overwhelm the [takings] clause."⁷⁶

Between 1988 and 1991, the Trilogy (or one or two of the Trilogy cases) was cited in hundreds of state and federal cases.⁷⁷ Sometimes the reference was not to dispositional authority, but merely a bibliographical aid to further reading. Much of the time, however, the Trilogy appeared to provide doctrinal guidance. *First English*, for example, seemed to be particularly helpful to courts in defining excessive regulation and various remedies;⁷⁸ *Nollan's* "nexus" requirement was popular;⁷⁹ and *Keystone* was useful in nuisance cases.⁸⁰ A return to the S.O.S. controversy, however, reveals that contemporary takings law can justify contradictory interpretations of the constitutionality of an ordinance.

B. Interpretations

To put it into perspective, turn to a landowner [like Ira Yates who] owns some 72 acres. . . . If the S.O.S. passes, Yates said, 85 percent of his land becomes immediately useless because of the impervious cover requirements.

*Yates says OK, if I can't use it, pay me for it. But payment for land is not part of S.O.S.*⁸¹

tions would surely allow government much greater authority than we have recognized to impose societal burdens on individual landowners, for nearly every action the government takes is intended to secure for the public an extra measure of "health, safety and welfare."

Keystone Bituminous Coal Assoc. v. DeBenedictis, 107 S. Ct. 1232, 1256-57 (1987) (Rehnquist, J., dissenting).

76. Epstein, *supra* note 73, at 109.

77. This estimate is based on a WESTLAW computer search conducted in early 1992.

78. See, e.g., *Smith v. City of San Francisco*, 225 Cal. App. 3d 38, 45, 275 Cal. Rptr. 17, 21 (1990); *Wilson v. Commonwealth*, 31 Mass. App. Ct. 757, 764, 583 N.E.2d 894 (1992).

79. See, e.g., *Surfside Colony, Ltd. v. California Coastal Comm'n*, 226 Cal. App. 3d 1260, 1267, 277 Cal. Rptr. 371, 377-378 (1990) (*Nollan* requires a "substantial" connection between burden imposed by project and condition imposed by government); *Cobb v. Snohomish*, 64 Wash. App. 451, 829 P.2d 169, 178 (1992).

80. See, e.g., *Tahoe-Sierra Preservation Council v. State Water Resources Control Bd.*, 210 Cal. App. 3d 1421, 1444 n. 10, 259 Cal. Rptr. 132, 148 n. 10 (1989); *Birnbaum v. State*, 73 N.Y.2d 638, 541 N.E.2d 23, 543 N.Y.S.2d 23 (1989).

81. White, *supra* note 38, at 15.

1. A Litigation Nightmare, or "The 1992 Attorneys' Relief Act"

Attorneys in Austin opposed to the S.O.S. initiative were quick to point out that the ordinance, if passed, would invite takings claims. The *Austin American-Statesman*, in an effort to educate the voters, ran a regular "S.O.S. question and answer" column during the campaign. On June 20, the question was "Would the [S.O.S.] ordinance, if adopted, make the city more vulnerable to litigation?" The S.O.S. coalition representative consulted by the newspaper answered that the ordinance contains an adjustment provision to ensure its legality (Part 6 of the ordinance)⁸²; but City Council Member Bob Larson replied, "[w]e've had three separate sets of attorneys [hired by the City] who have told us we're going to get our pants sued off if this thing passes."⁸³ Several features of the ordinance support the view that substantial litigation, or at least an "adjustment" process that looks like litigation, is likely.

The question of whether the S.O.S. ordinance will be challenged is, of course, different from the question of whether any such challenges will be successful. Proponents of the ordinance were genuinely confident that no such challenges would be successful,⁸⁴ that no "serious" attorney would view the ordinance as unconstitutional,⁸⁵ and that while lawsuits may be filed, the motivation would be harassment rather than a hope of victory.⁸⁶ Given the current state of regulatory takings doctrine, we express no confidence as to the outcome of such challenges. Rather, the purpose of this section is to demonstrate that the S.O.S. ordinance is arguably suspect under current doctrine.

For example, the Declaration of Intent (Part 1) of the S.O.S. ordinance contains three specific objectives—to preserve a clean and safe drinking water supply,⁸⁷ to prevent further degradation of Barton Creek, Barton Springs, and the Barton Springs Edwards Aquifer,⁸⁸ and to provide for fair and consistent administration of existing

82. See *Appendix*.

83. *S.O.S. Question and Answer*, AUSTIN AMERICAN-STATESMAN, June 20, 1992, at B7.

84. See *infra* sections II.B.2., III.B.

85. *Conference*, *supra* note 29, at 12. Jim Frederick said that "this thing isn't open to attack by serious legal people." *Id.*

86. *Id.* at 22. Brigid Shea stated that one developer with "unlimited resources . . . has made clear his willingness to use . . . lawsuits to try and punish the City." *Id.*

87. See *Appendix* at Part 1.

88. *Id.* An aquifer is "[a]n underground bed or layer of earth, gravel, or porous stone that yields water." THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 92 (3d. ed. 1992).

watershed protection ordinances.⁸⁹ While there can be little doubt that these intentions are laudable, one might reasonably ask, in view of *Nollan*, whether there are unstated intentions or goals behind the express Declaration, e.g., to slow growth. Next, one might ask whether the land use restrictions in the ordinance will effectively serve the stated intentions. The mere recital that a fourth intention of the ordinance is to “promote the public health, safety, and welfare” should not, by itself, satisfy the requirement in *Nollan* that a regulatory burden placed on a landowner be substantially related to the burden which the proposed use places on the public. In other words, is there an “essential nexus” between the otherwise valid purpose of the ordinance and the burdens placed on landowners?

Beyond the questions of whether the ordinance has a valid purpose or appropriately serves its purpose, even a valid regulation can effect a taking. If the S.O.S. ordinance, upon consideration of its economic impact and the investment-backed expectations of landowners, causes some persons to lose all “economically viable use” of their land, the City of Austin will be required either to “adjust” the ordinance or to compensate the owners for such losses. While *Keystone* suggested that compensation is not required when a public nuisance is identified and the particular injurious use is prohibited, not every exercise of police power is directed toward nuisances.⁹⁰ If the notion of nuisance-abatement is used to characterize land use regulation generally, the takings doctrine would be rendered obsolete. In any event, the S.O.S. ordinance is arguably more than a nuisance abatement regulation—the limitations on impervious cover, for example, would apply to an undeveloped tract *even if* a more intense use of the tract could be shown to meet the water quality standards in the ordinance.

In view of the potential for claims that the S.O.S. ordinance effects a taking with respect to a particular tract of land, Part 6 of the ordinance includes an adjustment provision to meet the requirements of existing law. The provision allows for adjustment following

89. See *Appendix* at Part 1.

90. 480 U.S. at 488-493. “Thus, the Court seems by implication to sort the class of regulatory public purposes into two subclasses. One subclass includes . . . preventing nuisance-like uses. . . . The other subclass contains regulations . . . securing . . . other public benefits. . . . [The Court is] divided sharply about where to draw the line between the two.” Frank Michelman, *Takings 1987*, 88 COLUM. L. REV. 1600, 1603 (1988) (footnotes omitted). Ambiguity remained as to whether a nuisance-abatement regulation is never a taking or is not a taking if it passes the other takings tests. *Id.* at 1604 n.19. See *infra* note 119 and accompanying text.

a court's final judgment, but also following a three-quarters majority vote by the City Council after a public hearing. The intention of this provision, with respect to the availability of a hearing before the City Council, is obviously to provide a "safety valve" against litigation. However, landowners challenging the ordinance will be required under current proposals for processing adjustment claims to submit a legal brief prior to the hearing. Even those who do petition the City Council are not precluded from filing a lawsuit if the ordinance is not adjusted in their favor. Moreover, any adjustments in favor of landowners will likely lead to more petitions, briefs and hearings, and each hearing will look a lot like takings litigation.

We consider below several distinct takings challenges which could be raised against the S.O.S. ordinance. Significantly, the effects of the ordinance will vary among landowners. Nevertheless, those who are adversely affected will have several doctrinal bases to support their takings claims.

a. Purpose

While the stated purpose of water quality protection appears uncontroversial, the purpose of the S.O.S ordinance becomes an issue to the extent that the terms of the ordinance do not substantially advance that purpose. For example, the impervious cover limitations in the S.O.S. ordinance (15-25%) are coupled with a requirement that landowners control runoff to ensure no increase in the average annual loadings of specified pollutants.⁹¹ This formulation of pollution prevention calls into question the impervious cover limitations, since it is difficult to imagine how the existence of 26% impervious cover with no increase in pollutant load fails to serve the goal of water quality, while limiting impervious cover to 25% of a tract somehow furthers that goal. Given such dissonance between the purpose of the ordinance and the regulation itself, the purpose of the ordinance may have been "converted", in terms of *Nollan*, into another purpose, namely the taking of property without compensation. Of course, one may speculate the impervious cover requirements are not intended, specifically, to prevent pollutant loading but are intended, generally, to make water quality protection easier. One might also, however, speculate that supporters of the ordinance are more interested in slowing growth than in water quality, and to the extent that a landowner or a class of landowners can show that the

91. See *Appendix* at Part 2(a).

pollution control standards in the ordinance are *impossible* to meet, then the ordinance does not *really* allow new development at all regardless of the amount of permissible impervious cover.⁹²

One could also reasonably argue that supporters of the S.O.S. ordinance lack confidence in the City's ability to enforce water quality controls, thus an unreasonable regulatory scheme was contrived to stop development because of the fear that a reasonable scheme will not work.⁹³ If the purpose is actually government reform, then the S.O.S. ordinance lacks a legitimate purpose in the context of land use planning. But even assuming that the original purpose—pollution prevention—is legitimate, the purpose *becomes* illegitimate when the terms of the ordinance do not substantially advance the original purpose.

b. Nexus

The S.O.S. ordinance could also be challenged for the lack of an "essential nexus" between the goals of the ordinance and its provisions. This argument differs slightly from the above challenge that the stated purpose of the ordinance is not advanced by its terms. Here, the focus is shifted from conversion of the stated purpose to an illegitimate purpose (e.g., pollution prevention is legitimate, while an

92. Tom Schueler, a water quality expert, said it was not possible for water quality devices to filter 100% of pollutants after property is developed. See Kim Tyson, *Water quality factors argue impact of S.O.S.*, AUSTIN AMERICAN-STATESMAN, July 5, 1992, at A12. "Neither Brigid Shea, director of the Save Our Springs Coalition, nor [Coalition attorney] Bunch could provide an example of how a property could be developed and still meet the proposed S.O.S. ordinance." *Id.* Austan Librach, director of Austin's Environmental and Conservation Services Department, said that "annual average loadings statistics do not exist for many of the parameters listed [in the S.O.S. ordinance] and no methodology for establishing these loads is offered." Bob Burns, *If it Passes, Implementing S.O.S. Initiative Could Take Months — Even Years*, AUSTIN AMERICAN-STATESMAN, August 2, 1992, at A17. Other engineers said that even if the data was available, "it would still be impossible to develop land because many of the 13 pollutants aren't found on raw land, which means [a developer] would have to design devices to remove 100 percent of the pollutants. That, they say is technologically impossible." *Id.*

93. In a press conference, Coalition attorney Jim Couser asked, Can the city . . . say . . . we really think only 20% impervious cover is safe, but, if you will promise that you would not [permit] dangerous levels of runoff from your property we are going to let you have 50 or 60[?] [The] problem . . . is that for the city that is not an enforceable promise. . . . Because, where the city is fairly good at permitting, frankly the city is lousy at policing activities that have already been permitted. And that is a practical problem and a legal problem.

See *supra* note 29, at 20. A television commercial in July sponsored by the S.O.S. Coalition featured the voice of a businessman, Lee Walker, saying "It's a simple question. Who are you going to trust to protect the creek, the [city] council or the SOS ordinance?" S.O.S., *Business Group Unveil Television Ads*, AUSTIN AMERICAN-STATESMAN, July 14, 1992, at B2.

intention to take without compensation is illegitimate) to a direct analysis of how successful the ordinance is in advancing the purpose, *assuming it is legitimate*.

The first "part" of the *Penn Central* and *Agins* analyses—that a land use regulation must substantially advance a legitimate state interest⁹⁴—seemed to gain a new significance in *Nollan's* "rational nexus" requirement:

[In] our verbal formulations in the takings field . . . [we] have required that the regulation "substantially advance" the "legitimate state interest" sought to be achieved . . . , not that "the State 'could rationally have decided' that the measure adopted might achieve the State's objective."⁹⁵

Some have identified in such statements a shift in the presumption of constitutionality of land use regulations.⁹⁶ At the very least, *Nollan* raises questions about the Texas cases that emphasize the "extraordinary burden" on one challenging the rational relationship of a land-use ordinance to a legitimate state interest,⁹⁷ and that if reasonable minds can differ on the necessary relationship, the ordinance will be sustained.⁹⁸ Such standards may represent a tradition of presumption against judicial intervention that has been eroded by recent U.S. Supreme Court cases. That is, "the recent 'federalization' of land-use law has given state courts a variety of new doctrines to justify more intense scrutiny."⁹⁹ The shift toward greater judicial scrutiny of the "presumed" nexus between the terms of a regulation and a legitimate state interest is perhaps a recognition that the pace of land use regulation has increased to the point where one can no longer assume that every ordinance passed is reasonably related to a legitimate state interest.

Limitations on development, in the form of impervious cover restrictions, if isolated from all other factors, obviously bear some rela-

94. See *Penn Central*, 438 U.S. at 124; see also *Agins*, 447 U.S. at 260.

95. *Nollan*, 483 U.S. at 834 n.3 (citations omitted).

96. See, e.g., Daniel R. Mandelker & A. Dan Tarlock, *Shifting the Presumption of Constitutionality in Land-Use Law*, 24 URB. LAW. 1 (1992); see also Bruce W. Burton, *Predatory Municipal Zoning Practices: Challenging the Presumption of Constitutionality in the Wake of the "Takings Trilogy"*, 44 ARK. L. REV. 65 (1991); but see Frank Michelman, *Takings 1987*, 88 COLUM. L. REV. 1600, 1605-14 (1988), for a qualified reading of *Nollan's* heightened-scrutiny message.

97. *City of College Station v. Turtle Rock Corp.*, 680 S.W.2d 802, 805 (Tex. 1984).

98. *City of Brookside Village v. Comeau*, 633 S.W.2d 790, 792-93 (Tex.), cert. denied, 459 U.S. 1087 (1982).

99. Mandelker & Tarlock, *supra* note 96, at 3.

tionship to water quality—no development is one way of preventing pollutants, and unrestricted development, with no water quality controls, will likely produce pollutants. Similarly, an ordinance that requires control of runoff to protect water quality is valid as long as the required controls substantially advance water quality. The S.O.S. ordinance, however, combines standards for runoff with impervious cover limitations, thereby arguably losing any essential nexus between both those restrictions and the goal of water quality. In the face of such a challenge, the City of Austin could argue that the double-restriction ensures water quality because one control mechanism may break down. Such an argument appears to be an admission that the drafters of the ordinance could not decide which restriction was rational, but the City would surely argue that a certain level of redundancy is justified for a goal as important as water quality protection.

Given the perceived shift in constitutional presumptions, the S.O.S. ordinance seems to invite challenges on the basis that the ordinance may contribute to, but does not substantially advance, the stated goals of the ordinance. Moreover, the “adjustment” provision to resolve conflicts with constitutional (and other) law makes clear the invitation to test the legality of the ordinance instead of making the ordinance more palatable to landowners affected by the ordinance.

c. Evaluation of Loss

Even ordinances that substantially advance a legitimate regulatory interest can effect a taking. The beachfront owner in *Lucas*, for example, did not challenge the purpose or terms of the regulation that rendered his residential lots useless—he simply asked for compensation. In contrast, the mining corporations in *Keystone* based their takings claim on both the purpose, and effectiveness, of the Subsidence Act *and* on the Act’s effect on economically viable uses and investment-backed expectations. Unable to show a severe impact on mining operations or profitability, the mining corporations were denied compensation for loss of economically viable use of their land.

State courts have struggled with the concept of “economically viable use,” since no clear definition exists in U.S. Supreme Court jurisprudence. An Arizona Court of Appeals, for example, expressed concern in 1986 that the earlier Arizona Supreme Court’s *Fehlner* definition—“use for any purpose to which [the subject property] is reasonably adapted”—might be inconsistent with federal standards,

since the definition would include an unprofitable use.¹⁰⁰ A new definition of economically viable use—one that allows “a reasonable return on the property”—was then adopted.¹⁰¹ In a similar effort to clarify the meaning of “economically viable use,” the Indiana Supreme Court in 1989 introduced the terms “productive use.”¹⁰² Despite their ambiguity, the “reasonable return” and “productive use” standards are obviously intended to counter the perception, culminating in *First English*, that no taking has occurred if a landowner has any use whatsoever left after a regulation. As Justice Souter said in a 1985 New Hampshire Supreme Court opinion, quoting an earlier opinion, the “owner need not be deprived of all valuable use of his property. If the denial of use is substantial, and is especially onerous, a taking occurs.”¹⁰³

The extent of the losses which would be caused by the S.O.S. ordinance is not yet known, but the highly restrictive terms of the ordinance suggest that “economically viable uses” of some tracts will be denied, thus interfering with “investment-backed expectations”. (Of course, the success of such claims will depend on how those terms are defined.) Calculating the economic impact of an ordinance may not be the same as calculating the amount of land lost by impervious cover limitations; under the Arizona and Indiana tests above, economically viable use conceivably could be lost by restricting impervious cover to twenty-five percent. For example, if a large tract was recently purchased for middle-income, single-family, small lot, residential development, in response to, and for a price reflecting, a market indicating a demand for such housing (and not a demand for large lot homes or cluster homes), a limitation of 25% impervious cover could make the project unprofitable and reduce the land value significantly. Moreover, the impervious cover allowances (15-25%) can be reduced even further, to prevent water pollution, under Part 2(a) of the S.O.S. ordinance. Apart from the impervious cover limitations, if the standards for pollutant loads are impossible to satisfy *or* are only attainable by prohibitively expensive measures, then severe impacts upon land value and investment-backed expectations

100. See *Ranch 57 v. City of Yuma*, 731 P.2d 113, 121-22 (Ariz. App. 1986) (citing *City of Phoenix v. Fehlner*, 363 P.2d 607, 611 (Ariz. 1961)).

101. 731 P.2d at 121, (citing *National Merrit, Inc. v. Weist*, 41 N.Y.2d 438, 445-46 (1977) as consistent with the federal standard).

102. See *Department of Natural Resources v. Indiana Coal Council, Inc.*, 542 N.E.2d 1000, 1003 (Ind. 1989).

103. See *Soucy v. State of New Hampshire*, 506 A.2d 288, 290, quoting *Burrows v. City of Keene*, 432 A.2d 15, 19-20 (N.H. 1981).

should theoretically provide the basis for takings claims.

Because there is no set formula for determining when economically viable use of a tract is denied, each inquiry requires a lawsuit or "adjustment" hearing—the specific property, the particular economic impact, and the landowner's reasonable expectations must be analyzed.¹⁰⁴ Unlike many areas of law, therefore, the outcome of one lawsuit (e.g., challenging the S.O.S. ordinance) will not necessarily help in predicting the outcome of other lawsuits.

d. Compensation

"Just compensation" for property taken by the government generally means market value on the date of taking.¹⁰⁵ Regulatory takings claims, as opposed to eminent domain awards, are complicated by the possibility that the claimant will receive fair market value for, and yet retain some use of, the "inversely" condemned property.¹⁰⁶ Moreover, abandonment by the government of the regulation that created the taking remains available as an alternative to payment of just compensation.

Even if a challenged ordinance is abandoned or adjusted by a governmental body, a claim for a temporary taking may remain. *First English*, which established the remedy for temporary takings, assumed a *complete* loss of all use while the regulation was in place. Nevertheless, the Court found no difference in kind between temporary and permanent takings,¹⁰⁷ which suggests that the remedy is available in any case where a taking is established and the regulation is discontinued.

The potential legal weaknesses of the S.O.S. ordinance outlined in this section may represent, to some, an overly generous reading of takings jurisprudence. If so, another (and very different) assessment of the S.O.S. ordinance was available to provide comfort to the voters in Austin last summer.

2. Nightmares Aren't Real

Early in the campaign for the S.O.S. ordinance, several Coalition attorneys appeared in a press conference to address concerns with the regulatory takings doctrine. Noting the ambiguity of

104. See *Keystone*, 480 U.S. at 495.

105. See generally R. Rotunda, J. Nowak & J. Young, *TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE* § 15.14 (1986).

106. See *infra* note 123 and accompanying text.

107. 482 U.S. at 318.

Holmes' term "too far,"¹⁰⁸ attorney Bill Bunch explained that in

subsequent cases down the line [after *Mahon*] there has almost never been a regulation that has been held to go too far. On the other hand, there have been literally hundreds of cases that have found that . . . regulations to protect legitimate public interest[s] . . . did not go too far but were rather legitimate exercises of governmental authority. . . .¹⁰⁹

Bunch also characterized the S.O.S. ordinance as a regulation preventing owners of land from harming others, e.g., nuisance regulation.¹¹⁰ Another attorney, Jim Cousar, remarked that the *Lucas* case (not yet decided at the time of the press conference) would not in any event affect the S.O.S. ordinance: "This ordinance would not have a similar effect of rendering land undevelopable, it would not render land valueless, it would not be like the government coming in and taking the land for its own use."¹¹¹ Turning to Texas constitutional law,¹¹² Cousar noted the two threshold takings questions from *Turtle Rock*¹¹³: (1) is there a legitimate public purpose, and (2) is

108. See *supra* note 3.

109. *Conference, supra* note 29, at 5.

110. *Id.*

111. *Id.* at 6.

112. Like the United States Constitution, the Constitution of the State of Texas prohibits the taking of a person's property for a public use without adequate compensation. TEX. CONST. art. I, § 17. However, a municipality is not required to compensate for losses caused by the proper and reasonable exercise of its police power. *City of College Station v. Turtle Rock Corp.*, 680 S.W.2d 802, 804 (Tex. 1984) (*citing* *Lombardo v. City of Dallas*, 73 S.W.2d 475, 478 (Tex. 1934)).

113. In *Turtle Rock, supra* note 112, the Houston Court of Civil Appeals affirmed the trial court decision that a College Station, Texas ordinance, which required parkland dedication (or money in lieu thereof) as a condition of subdivision plat approval, was invalid as a matter of law. 666 S.W.2d 318 (Tex. Civ. App.), *rev'd*, 680 S.W.2d 802 (Tex. 1984). The Texas Supreme Court reversed and remanded, however, explaining that an ordinance which required parkland dedication was "not inherently different from other types of municipal land use regulations such as density controls and street dedication requirements." *Turtle Rock*, 680 S.W.2d at 806. Two related requirements for the valid exercise of the police power were identified: "First, the regulation must be adopted to accomplish a legitimate goal; it must be 'substantially related' to the health, safety, or general welfare of the people. Second, the regulation must be reasonable; it cannot be arbitrary." *Id.* at 805. The court found that "the concept of public welfare has a broad range" and that a "presumption favors the validity of the ordinance." *Id.* Thus, the court rejected the court of appeals' holding that "as a matter of law, a parkland dedication requirement does not bear a substantial relation to the health, safety, or general welfare of the community." *Id.* (The court of appeals' holding was based on *Berg Development Co. v. City of Missouri City*, 603 S.W.2d 273, 275 (Tex. Civ. App. 1980) which found a similar parkland dedication requirement unconstitutional.) The court remanded directing that the College Station ordinance be tested for arbitrariness and unreasonableness, the second of its two requirements for the valid exercise of the police power. *Turtle Rock*, 680

the ordinance reasonable (i.e., not arbitrary)? Protecting water quality, Cousar explained, is clearly a legitimate purpose, if not a duty under the Texas Water Code, and as to the second inquiry,

there is a strong presumption of reasonableness. . . . Now when the court [asks] is this measure arbitrary and is it unreasonable . . . [, t]he issue is not [whether this is] the best way . . . [or] . . . the least intrusive way to protect water quality. Instead a . . . measure is going to be found reasonable by a Texas court if there is any reasonable basis for the governmental body to believe that this measure is going to achieve [its] goals.¹¹⁴

If reasonable minds can differ, Cousar concluded, then an enactment will "pass Texas Constitutional muster."¹¹⁵

Finally, Cousar identified two additional guidelines in Texas takings jurisprudence, including the principle that a regulation that totally destroys the value of property or renders it wholly useless is probably a taking, and the principle that the government cannot regulate property for an invalid purpose, such as to create a buffer zone without paying for it.¹¹⁶ On the first issue, the authors of the S.O.S. initiative clearly believed that allowing 15-25% buildable area insulates the ordinance from a "loss of economically viable use" claim. On the second issue, even though a genuine possibility for a claim of subterfuge exists in Austin, Cousar shifted his analysis and remarked that the City of Austin is obviously not trying to reduce the value of land in order to acquire it.¹¹⁷ One cannot be too critical of Cousar, speaking as a lobbyist at the press conference, for his characterization of the takings doctrine, yet the most vulnerable features of the S.O.S. ordinance were not addressed in his remarks. Given the history of judicial deference to governmental land-use regulation, however, Cousar's comments are not unreasonable.

During the last week of June, just over a month before the vote on the ordinance, the U.S. Supreme Court issued its *Lucas* opinion, which might have been seen to challenge the understanding of regulatory takings held by S.O.S. Coalition attorneys.

S.W.2d at 808.

114. *Conference, supra* note 29, at 7-8; see *Turtle Rock*, 680 S.W.2d at 805.

115. *Conference, supra* note 29, at 8.

116. *Id.*; see *City of Austin v. Teague*, 570 S.W.2d 389 (Tex. 1978) (denial of permit to acquire a scenic easement was invalid use of police power).

117. *Conference, supra* note 29, at 9.

III. POST-*LUCAS* TAKINGS DOCTRINE IN THE S.O.S. CONTROVERSY

A. *Doctrinal Refinements*

Because *Lucas*¹¹⁸ was just another “ad hoc, fact-based” inquiry, there was no reason to expect more than general guidance from the Court on the status of regulatory takings doctrine. In the context of the S.O.S. controversy in Austin, however, *Lucas* seemed to suggest that the potential for takings claims following an aggressive environmental regulation should not be dismissed so quickly.

For example, the characterization of the S.O.S. ordinance as a nuisance abatement measure, typically discussed as an exception to the obligation to compensate landowners, is similar to the characterization by the South Carolina Supreme Court that the 1988 Beachfront Management Act (prohibiting construction on Lucas’s two oceanfront lots) as a law which “merely” regulated use and prevented “a serious public harm.” That rationale was rejected by the U.S. Supreme Court, which confirmed that recitation of a nuisance justification does not remove environmental regulations from the scope of the takings clause.¹¹⁹ The loss by Lucas of all economically viable use of his land is a compensable taking unless the Coastal Council can point to clear “background principles” of nuisance law that prohibit his proposed use—something which the Court did not consider likely; on remand, the prediction came true.¹²⁰ Characterization of the prohibition on beachfront development as nuisance pre-

118. In 1986, David Lucas, a South Carolina real estate developer, bought two lots on a coastal barrier island near Charleston. At the time, no regulation prohibited development of the lots, and he planned to construct two houses. In 1988, however, South Carolina passed a new Beachfront Management Act that barred any permanent habitable structures close to the high water mark, and Lucas’ lots were within the restricted area. Lucas sued in state court, conceding that the Act advanced a legitimate public interest, but as applied to him and his lots resulted in an unconstitutional taking without compensation. The trial court concluded that the Act deprived Lucas of any reasonable economic use of the land, and agreed that this amounted to a taking that required compensation. The South Carolina Supreme Court reversed, *see* 404 S.E.2d 895 (S.C. 1991), deferring to the legislature’s finding that new construction in the coastal zone threatened a valuable public resource, reasoning that Lucas has failed to attack the Act’s validity, and holding that the takings doctrine does not require compensation for loss of land use by reason of regulations enacted to prevent serious public harm. The South Carolina Supreme Court characterized the Act as a law that “merely” regulated use to abate a public nuisance.

As described in the text above, the U.S. Supreme Court reversed and remanded for review of “background principles of [South Carolina] nuisance and property law.” 112 S. Ct. 2886, 2901-02 (1992).

119. *Lucas*, 112 S. Ct. at 2897-99.

120. *Id.* at 2895; *see Lucas*, 1992 WL 358097 (S.C.) (Nov. 20, 1992).

vention, a dissenting South Carolina Supreme Court judge pointed out, "would totally eviscerate the takings clause."¹²¹ This concern with interpreting the "nuisance exception" too broadly echoes the concern of the dissenting justices in *Keystone*, who reminded the majority that nuisance regulation is not intended to prevent an essential use, and that "our cases have never applied the nuisance exception to allow complete extinction of the value of a parcel of property."¹²²

Significantly, the Court found that Lucas had been deprived of all economically feasible use even though he could use the property to construct wooden walkways and decks, or for recreational purposes, or even to sell or lease beach access to others.¹²³ Thus, loss of "all economically feasible use" does not appear to mean "wholly useless" or "loss of all value" as suggested by the S.O.S. Coalition attorneys. Moreover, *Lucas* confirms that a "landowner whose deprivation is one step short of complete" may be entitled to compensation:

Such an owner might not be able to claim the benefit of our categorical formulation [i.e., all economically viable use], but, as we have acknowledged time and again, "the economic impact of the regulation on the claimant and . . . the extent to which the regulation has interfered with distinct investment-backed expectations" are keenly relevant to takings analysis generally.¹²⁴

While not exactly encouraging compensation claims, the Court's language will likely add some Austin plaintiffs to the field of takings litigation.

On the presumption of reasonableness that the S.O.S. attorneys suggested should protect municipalities from takings claims, the *Lucas* court was hesitant to "indulge [its] usual assumption that the legislature is simply 'adjusting the benefits and burdens of economic life,' . . . in a manner that secures an 'average reciprocity of advantage' to everyone concerned. . . ."¹²⁵ Again, these words must be read as part of a case involving a "total" loss by the landowner, but the Court seems to be chipping away at earlier presumptions. Moreover, the Court rejects any presumption of reasonableness based on a recital that a regulation prevents harm: "Since such a justification can be formulated in practically every case, this amounts to a test of

121. *Lucas*, 404 S.E.2d at 905 (Harwell, J., dissenting).

122. 480 U.S. at 513 (Rehnquist, C.J., dissenting).

123. *Lucas*, 112 S. Ct. at 2890.

124. *Id.* at 2895 n.8, (quoting *Penn Central*, 438 U.S. at 124).

125. *Id.* at 2894 (citations omitted).

whether the legislature has a stupid staff."¹²⁶ The Court thus appears to be creating at least a mood of concern for those who were not worried about takings claims prior to *Lucas*, as well as for those who thought the outcome in *Lucas* would not matter.¹²⁷

Should *Lucas* matter? More to the point for the S.O.S. initiative, could it be made to matter, politically, in the final weeks of the campaign?

B. *The TPPF Study*

One of the present authors, David Caudill, was hired in late June by the Texas Public Policy Foundation ("TPPF") to make an assessment of the potential for takings litigation in the event the S.O.S. ordinance was passed.¹²⁸ TPPF is an independent, conservative research center dedicated to influencing public policy debate in Texas. Earlier conferences and studies supported by TPPF focused on numerous educational, tax and legal issues, and included contributions to the debate over the so-called litigation crisis which were critical of current liability, malpractice, and contingency fee policies in Texas. The decision by the TPPF Board to enter the fray in Austin, however, probably represented a concern not with the litigation "explosion" but with economic growth and with open and responsive government.

In the final weeks of the S.O.S. campaign, opponents of the ordinance questioned the City Council's failure to disclose the results of its own staff's, as well as its outside counsel's, investigation into the potential for lawsuits against the City of Austin should the S.O.S. ordinance pass.¹²⁹ Certain members of the S.O.S. opposition appeared before the City Council to argue that the voters needed that information since they, not the Council, would decide whether to adopt the S.O.S. ordinance. A request for disclosure was made under the Texas Open Records Act, but the City Attorney declined

126. *Id.* at 2898 n.12.

127. Richard Reuben, *Taking Cover*, CALIFORNIA LAWYER, Jan. 1993, at 32 (interview with Joseph Sax and Michael Berger where Professor Sax opines that the Court in *Lucas* is "beating the drum" by "saying some things that are supportive of property owners in order to make regulators back off").

128. See David S. Caudill, *Austin's "Save Our Springs" Ordinance: The Legal Implications of Going Too Far*, TEXAS PUB. POLICY FOUND. (July 1992).

129. Early in the S.O.S. campaign, the City of Austin asked its own legal staff and two outside counsel (Bickerstaff, Heath & Smiley of Austin, and Taylor & Fielding of Fort Worth) to analyze the legality of the ordinance. The results were presented to the City Council in closed executive session. See Bob Burns, *Council to Consider releasing S.O.S. studies*, AUSTIN AMERICAN-STATESMAN, Aug. 5, 1992, at B1.

to release the information, claiming attorney-client privilege.¹³⁰ Of course, the opponents of the S.O.S. initiative thought that the information would serve to question the legality of the ordinance and would predict a rash of litigation.

In order to provide a litigation risk assessment to the voters, the TPPF presented its study at a press conference in July. The study generally reflected the analysis of the ordinance given in Section II.B.1. of this article, and was used by opponents of the S.O.S. initiative to support their attack on the ordinance by suggesting that the study represented the information held back from the voters by the City Council.¹³¹

C. *The Shadow of Lucas Disappears*

In the final weeks of the campaign, the media coverage of the Texas Open Records Act request again placed *Lucas* and the regulatory takings doctrine into the S.O.S. controversy. In response to any concerns that might have been raised about the constitutionality of the ordinance, the S.O.S. Coalition turned to several legal scholars for assessments, publicizing the results. A letter from Professor Joseph Sax to the S.O.S. Coalition campaign manager concluded that the ordinance was not vulnerable to a takings challenge; Sax pointed out the difference between the prohibition in *Lucas* and the allowance of *some* structure in Austin, and also observed that in the rare event that someone's "economically beneficial use" is lost, the adjustment provision insulates the ordinance from any facial challenge.¹³² Four University of Texas law professors also prepared a memorandum concluding that the ordinance, whatever its wisdom "as a matter of public policy, . . . does not violate the Constitution."¹³³ The memorandum emphasized the deference typically given

130. The City Council was advised by the city legal staff that it could vote to waive the attorney-client privilege and release the studies. That option was made an agenda item for the last meeting of the City Council prior to the election, but the item was withdrawn by the Council Member who placed it on the agenda. *Id.*

131. A publication, entitled AUSTIN COURIER, was prepared by the Citizens for Responsible Planning, and sent to over 90,000 Austin residents, citing the TPPF Study and warning the voters of potential liability to the City from takings claims. *Foundation Study: "SOS" Ordinance Fatally Flawed*, AUSTIN COURIER, July 1992, at 3.

132. See letter from Joseph Sax, Research Studies & Services, to Mark Yznaga, Campaign Manager, Save Our Springs Coalition, (July 21, 1992) (copy on file with the Hofstra Property Law Journal).

133. Memorandum Regarding S.O.S. Ordinance from Jordan Steiker, Douglas Laycock, Sanford V. Levinson & Thomas O. McGarity (July 22, 1992) (copy on file with the Hofstra Property Law Journal).

to local authorities as well as the irrelevance of the "total taking" standard in *Lucas*.

Despite the confidence of such assessments, they do not necessarily imply a belief in doctrinal consistency in the field of regulatory takings. One might, for example, believe that there *are* hard cases which problematize current takings doctrine and highlight its ambiguities, but then conclude that the S.O.S. ordinance is an easy case, a "run-of-the-mill health and safety regulation."¹³⁴ One might also believe that current takings doctrine is flexible enough to justify almost any result in Austin—the view of the present authors—but also believe that judicial deference is almost guaranteed, perhaps due to the lack of any real guidelines. Whatever the basis for finding the S.O.S. ordinance bullet-proof, it is likely that many voters concerned with the legality of the ordinance believed that it was.

IV. THE POLITICS OF DOCTRINE

*It's not even about water quality. . . . It's a battle about political control in Austin.*¹³⁵

The adoption of the S.O.S. ordinance in Austin can be understood or "read" in various ways. While the turnout for the vote on the ordinance was only about one-fourth of the registered voters,¹³⁶ the initiative process represents a striking example of direct citizen control over local land-use planning. From the perspective of S.O.S. proponents, this process was necessary due to the failures of the elected City Council and the planning commission to adopt and enforce regulations to protect water quality. On the other hand, those opposed to the ordinance viewed the process as one in which the powerful image of deteriorating water quality eclipsed any serious consideration of whether the ordinance will be effective, of property rights, and of the need for economically sound development. While the polarization of the community into environmentalist and economic development factions was not new in Austin, the shift from City Council and planning commission chambers as the locus of land use planning to the field of political campaigns was new.

The significance of that shift is not that the land-use planning process became politicized—lobbying for or against a proposed project before the City Council is highly political—but that appeals to

134. *Id.*

135. White, *supra* note 38, at 1 (quoting Austin attorney Terry Irion).

136. See Collier, *supra* note 10, at A19.

the relevant legal doctrines were made in a new forum. Land-use regulation in Austin, as in many cities, typically takes the form of ordinances passed by the City Council after public hearings and debate among those interested, together with an approval process for particular projects, again involving public hearings and debate before the City Council and/or its planning commission. Typically, as well, concessions are made by the proponents and opponents of an ordinance or project proposal, such that no "side" gets everything it wants. In the process of drafting ordinances, the City Attorney and his or her staff is involved, and attorneys representing particular interests typically appear in public hearings to make suggestions. The goal, obviously, is to create a regulatory scheme fair to all citizens and landowners balancing health, safety, and welfare concerns against perceived property rights.

Recall that the S.O.S. ordinance appeared first as a draft proposal for City Council consideration, and became a ballot initiative out of concern that it had been watered down in negotiations over a final ordinance. Indeed, the S.O.S. Coalition campaigned on the basis that Austin's existing regulations had too many waiver provisions and exemptions, and were thus ineffective in protecting the environment. Earlier ordinances were viewed by the S.O.S. Coalition as having been infected with developer lobbyists and City Council campaign contributions.¹³⁷

Once the process became a political campaign for public approval of the ordinance, the City Attorney's assessment as well as the assessment of attorneys hired by the city of the legality of the S.O.S. ordinance was kept within the closed sessions of the City Council. In the public forum, the debate over regulatory takings was either ignored or "won" by the S.O.S. Coalition attorneys. The pattern in Austin during the campaign seemed to be that opponents of the S.O.S. ordinance, with the advice of attorneys, would raise the specter of regulatory takings claims, in a press conference or newspaper interview or in campaign materials, and then the S.O.S. Coalition attorneys would explain that the proposed ordinance was legal *and* that any argument to the contrary was mere political rhetoric

137. See *Conference*, *supra* note 29, at 2:

By eliminating all of those special dispensations that can be granted by City Councils at the behest of lobbyists and with the influence of campaign contributions we hope to have an ordinance that is applied fairly to everyone, the little guy and the big guys as well so that big guys don't essentially buy their way out of it.

Id.

paid for by developers who cared little for the environment. One explanation for the victory of the S.O.S. Coalition, if the appeal to legal doctrine was significant in the campaign, is that its attorneys were right—the Austin ordinance is *not* unconstitutional. On the other hand, to the extent that current regulatory takings doctrine is a set of ambiguous factors with few guidelines for their applicability, then its role as an aid to political debate is somewhat illusory.

A. *Appeals to an Unappealing Doctrine*

Given the doctrinal confusion that follows the takings clause, neither municipal planners nor voters in land-use initiative campaigns are likely to feel constrained by constitutional considerations. If the regulatory takings doctrine is in a state of flux, then its limits arguably *should*, for the public welfare, be tested; in the rare event a challenge is successful, then the courts have done their job and the challenged regulation can be lifted. Even if some cost to the municipality results, the risk was small in light of the controversy among judges and academics over the definition of a taking as well as the damages to be assessed. Notwithstanding this logic, opponents of the S.O.S. ordinance hoped that the regulatory takings doctrine would be viewed by voters as a significant limitation on land-use planning by initiative, even though that doctrine

poses an almost imponderable question. How can the same government which is to protect the property rights of the citizenry be charged with creating and altering those rights? The takings clause is designed to remind us of this question and never to allow the government to act without examining whether indeed it has gone “too far.” In this sense defining the takings question is itself “the answer” and a detailed understanding of the riddles the question poses is our best protection against both majoritarian tyranny and the illegitimate claims of the economically entrenched.¹³⁸

In Austin, Texas, and probably in most cities, those viewed as “the economically entrenched” have trouble in political discourse making a convincing claim of “majoritarian tyranny.” Large developers typically are assumed to have ample resources to influence legislators, regulators and courts, thus courts arguably need not worry about the impact on developers of majoritarian legislation.¹³⁹ The

138. Paul, *infra* note 140, at 1524.

139. See Burton, *supra* note 96, at 95 (citing Mandelker, *Reversing the Presumption of Constitutionality in Land Use Litigation: Is Legislative Action Necessary?*, 30 WASH. U.J. URB. & CONTEMP. L. 5, 14 (1986)); *but cf.* Mandelker & Tarlock, *supra* note 96, at 32 n.120

S.O.S. ordinance campaign, however, may serve to challenge that presumption. First, the business community, including developers, was not particularly successful in the campaign arena; second, the ordinance *targeted* large developers—most property owners of developed residential or commercial properties were unaffected by the ordinance, and owners of small undeveloped tracts not requiring subdivision were exempt unless more than 8000 square feet of impervious cover was proposed for development. Not only was the image of losing the environment far more powerful in the S.O.S. campaign than the image of losing property rights, but the loss of property rights was limited generally to a minority not likely to be viewed as helpless victims. The Summer of '92 in Austin was not, therefore, an atmosphere conducive to reflection of the need to clarify the rights of property owners.

The form of the S.O.S. ordinance is significant because it highlights the goal of preserving water quality before exempting all existing, including large, development *and* future development of existing lots for residential or small commercial use (less than 8000 square feet of impervious cover). The ordinance could easily be rewritten, with no change in its content, to confirm that the restrictions on impervious cover and the requirement of runoff controls apply *only* to new development of large tracts—all new intensive residential or commercial development is prohibited by the impervious cover restrictions *even if* runoff is controlled, and all existing properties (including large developments) that contribute to degradation of water quality are unaffected by the ordinance. Admittedly, new small development is not as likely to degrade the environment as large development. Nevertheless, under this reading of the S.O.S. ordinance, the prevention of growth through the denial of develop-

(suggesting that "all contenders in the land-use decision-making process [are equally] deserving of judicial protection through presumption-shifting").

For analyses of the takings dilemma that focus on the political power of those affected by regulation, see S. Levmore, *Just Compensation and Just Politics*, 22 CONN. L. REV. 285, 308-321 (1990). "[T]he law reflects a concern for minorities that are unlikely to be able to take care of themselves through the political process." *Id.* at 310; see also Gregory S. Alexander, *Takings and the Post-Modern Dialectic of Property*, 9 CONST. COMMENTARY 259, 269-74 (1992). "Persons who are part of a political coalition or who can easily form one have a weaker basis for objecting when regulators place restrictions on them since they can protect their interests through politics." *Id.* at 271; see also G. Lunney, *A Critical Reexamination of the Takings Jurisprudence*, 90 MICH. L. REV. 1892, 1948-1955 (1992). "The Constitutional compensation requirement can be seen as a tool to remedy the failure of voice that would otherwise occur when a concentrated and a dispersed group struggle over property." *Id.* at 1954.

ment "rights", and not water quality preservation, is more clearly revealed as its primary goal.

Our alternative reading of the ordinance was not hidden during the campaign, as most voters realized that the ordinance did not affect them, except perhaps by increasing the value of their property. Moreover, those campaigning for the ordinance emphasized that the most significant degradation of water quality is caused by large developments, so that limiting the effect of the ordinance to new large developments made perfect sense. The problem, however, is that the terms of the ordinance betray a desire to prohibit new intensive development on aesthetic grounds. The purely aesthetic, and not water quality, rationale for the ordinance is demonstrated by its prohibition even of large developments that might find a way to preserve water quality.

Attempts to disclose the "no-growth" agenda behind the ordinance were either unsuccessful or they backfired—that is, people may have actually voted for the ordinance to slow growth in Austin. While preserving water quality is a good reason to reduce development, targeting large tract owners to pay—by reducing impervious cover and establishing water quality controls—for a new water quality program to benefit everyone appears to be a regulatory takings scenario. The situation is analogous to one in which a developer is required to contribute to a fund to protect water quality when the developer's own project does not degrade water quality.

B. *Pauline Structuralism*

After all, the takings clause cannot serve as a protection of individual rights if the courts defer to mercurial majority beliefs.¹⁴⁰

Jeremy Paul, in an important and lengthy contribution to the already massive canon of takings scholarship,¹⁴¹ presents a compelling critique of recent attempts, by the Court and by respected scholars, to bring order to the doctrinal chaos of takings law. Paul identifies in takings jurisprudence a series of recurring tensions between individual rights and collective interests,¹⁴² between formalism and

140. Jeremy Paul, *The Hidden Structure of Takings Law*, 64 S. CAL. L. REV. 1393, 1527 (1991).

141. See Paul, *supra* note 140.

142. *Id.* at 1402-03. For another account of the tension in takings jurisprudence between property rights and communitarian principles, see Alexander, *supra* note 139, at 259.

ad hoc balancing,¹⁴³ and between physicalist and market models of property rights.¹⁴⁴ He also attempts to demonstrate our inability to resolve those tensions by recounting the failures of those who have tried.¹⁴⁵ Reminiscent of his earlier critique of Epstein,¹⁴⁶ however, Paul relies upon and finds much to admire in those whom he attacks. Moreover, because the targets of his latest criticism are spread across the entire "political" spectrum, Paul is able almost to transcend political differences and show both (i) that everybody is half right, and (ii) that irreconcilable notions are part of property law. Paul does not conclude, however, that nothing can be done, but rather makes some modest suggestions as to the directions that courts might take—each involving acknowledgment of contradictory visions of property in our laws—to give the takings clause meaning without sacrificing either individual rights or collective needs in the process.¹⁴⁷ Without attempting to capture Paul's comprehensive survey, we briefly summarize his arguments and then turn to his recommendations as a prelude to our own.

Paul identifies two styles of adjudication preferred, respectively, by two different types of critics of contemporary takings jurisprudence: fidelity to a unified theory¹⁴⁸ and the balancing of conflicting values.¹⁴⁹ The former approach, which promises predictability, is plagued with "too many compelling and conflicting theories for any to account accurately for American attitudes toward the takings dilemma."¹⁵⁰ The latter approach, to which the Supreme Court professes allegiance, is preferred by Paul, but this "ad hoc" approach is often a cover for hidden, formalist pre-commitments.¹⁵¹ The virtue of the formalist approach—the attempt to identify fundamental values—is missing in the ad hoc approach: "the Court is often willing to apply its many factors without explicitly linking them to the Court's underlying vision of the values private property serves in a democratic society."¹⁵²

143. See Paul, *supra* note 140 at 1399-1401.

144. *Id.* at 1416-29.

145. *Id.* at 1429-1542.

146. See Paul, *supra* note 53.

147. Paul, *supra* note 140, at 1542-48.

148. *Id.* at 1399-1400.

149. *Id.* at 1400-01.

150. *Id.* at 1401.

151. *Id.* at 1401 (stating that "[a]ctual application of the multi-factor balancing test reveals a commitment to precisely the same formal modes of property that wreak havoc with attempts to develop a single unified theory").

152. *Id.* at 1402.

In contemporary attempts to draw a line between individual and collective property rights, Paul identifies a "physicalist" and a "market" model of property, each of which is supposed to help break out of the circle implied by the government's role in establishing and then protecting property rights. Since "[c]ourts could use their authority to set social practices to which they could then seemingly defer as the noncontroversial source of property rights, [physicalism—control and possession of something—offers] . . . a feature of social life that appears largely independent of judicial manipulation."¹⁵³ The physicalist model sometimes appears to work and provides a foundation for much of property law, but it provides no resolution in many cases, as Paul's examples illustrate, and the resolutions it provides seem to result from judicial manipulation of the model.¹⁵⁴ Enter the market model, emphasizing the sequence in the property circle: the government makes the rules and then protects the regime, e.g., by requiring compensation if the public demands rule changes.¹⁵⁵ However, the distinction between a new rule, which can be characterized as a mere extension of existing law, and an established rule is hazy and, again, leaves plenty of room for judicial manipulation.¹⁵⁶ Both models are used by courts, sometimes in the same opinion, and both provide an opportunity for courts to avoid "squarely facing their role as repeated definers of property rights."¹⁵⁷

The Supreme Court, by its rejection of unified theories in favor of an ad hoc approach, impliedly rejects the generalizations of the physicalist and market models. The ad hoc approach thus gives the Court (i) more leeway than a market model would allow, (ii) an opportunity "to pay lip service" to traditional definitions of property while "upholding a wide array of regulations," and (iii) an ability to adapt to new situations without either altering existing doctrine *or* articulating its own theory of property.¹⁵⁸ However, like the return of the repressed in Freudian theory, the physicalist and market models alternatively reappear (with all their inadequacies) as courts weigh in a takings challenge the *character* of the governmental action, the

153. *Id.* at 1418.

154. *See id.* at 1416-23.

155. *Id.* at 1423.

156. *Id.* at 1423-25.

157. *Id.* at 1429.

158. *Id.* at 1430-31. "Taken to its logical extreme, the market model would . . . freeze government." *Id.* at 1479.

severity of economic impact, and the extent of interference with investment-backed expectations.¹⁵⁹ Without condemning the ad hoc approach, Paul argues that “the Court needs substantive criteria for deciding when physicalist notions will prevail and when the simpler market model will justify compensation because there has been a change in the rules.”¹⁶⁰ Such criteria should not be “highly general formulations . . . [that] provide little guidance on the connection between rule and application,” but might include developing “paradigm cases in which government must or need not pay.”¹⁶¹ Paul also suggests that judicial willingness to deviate from the “market value compensation” rule for takings, which rule could make regulation expensive and thus leads courts to defer to legislatures, might allow courts to see the merits of opposing readings of the takings clause, and encourage courts “to focus more precisely on which economic values the takings clause protects.”¹⁶² In his attempt to supplement the ad hoc approach with a “vision of the values property serves in a democratic republic,” Paul suggests that the right to shelter may be a core human need that deserves protection.¹⁶³

The search for a unified theory to stabilize takings law, Paul observes, risks becoming either an appeal to pre-existing values—which requires ignoring conflicting values that seem just as pre-existent—or an appeal to majoritarian values—which renders the takings clause meaningless.¹⁶⁴ Theories based on the harm/benefit¹⁶⁵ or right/freedom¹⁶⁶ distinctions suffer from “multiple charac-

159. *Id.* at 1432.

160. *Id.* at 1457-58.

161. *Id.* at 1463.

162. *Id.* at 1491-92.

[A] rethinking of the rule that requires market compensation in eminent domain cases would have a marked “debundling” effect on the idea of property. . . . An alternative approach to the valuation problem would emphasize that each physical taking involves the alternation of many legal rules and that only some of those rules deserve protection against majoritarian redistribution.

Id.

163. *Id.* at 1524, 1544.

164. *Id.* at 1525-26. The first error is found in Epstein, *supra* note 75, and the second in Andrea Peterson, *The Takings Clause: In Search of Underlying Principles: Part II—Takings as Intentional Deprivations of Property Without Moral Justification*, 78 CAL. L. REV. 55 (1990). “Professor Peterson has merely suggested that a sacrifice is not unfair if the public believes a citizen would be wrong not to make it.” Paul, *supra* note 140, at 1525; see also *supra* note 119 and accompanying text.

165. Paul, *supra* note 140, at 1529 (referring to Joseph L. Sax, *Takings, Private Property and Public Rights*, 81 YALE L. J. 149, 161-65 (1971)).

166. Paul, *supra* note 140, at 1532-33 (referring to John A. Humbach, *A Unifying Theory for the Just-Compensation Cases: Takings, Regulation & Public Use*, 34 RUTGERS L.

terizations of the same events."¹⁶⁷ Similarly, appeals to generalizations like utility, fairness, or "just shares" of governmental burdens are "open to such vast differences in interpretation that it is not clear whether [they] can settle any particular controversy."¹⁶⁸ Such anomalies lead Paul to recommend development of "an intermediate level of generality"¹⁶⁹ in takings jurisprudence—"a doctrinal framework that helps to identify, but does not determine, when private claims to economic stability fit within the Constitution's contemplated safeguards."¹⁷⁰

In agreement with Paul's analysis generally, but not wanting to develop his "right-to-shelter-as-core-human-need" inquiry, we highlight two of the numerous takings principles that require elucidation, and we suggest formulations of each that might ensure that the takings clause is taken seriously. We consider briefly, but reject, several legislative and executive attempts to clarify recurrent doctrinal confusion, and we conclude that the judiciary must, and realistically could, respond to some of the deficiencies in current takings law.

C. *Taking Doctrine Seriously*

Finding "intermediate" guidelines that are neither determinative nor utterly manipulable is necessary if the takings clause is to remain meaningful in political controversies over land use control. We focus below on two principles underlying the takings clause—the requirement that a regulation substantially advance a legitimate state interest and the requirement to compensate those singled out to bear a public burden—and suggest how those principles—weak as they are in current doctrine—might be strengthened even in the absence of a unified theory.

1. Substantial Advancement

Whether or not a governmental action affecting property rights "substantially advances a legitimate state interest" is not a particularly hard test to pass. . . . It has been rare for a court to find that a regulation does not "substantially advance" a legitimate

REV. 243, 262-67 (1982)).

167. Paul, *supra* note 140, at 1533.

168. *Id.* at 1536-40 (referring to Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165 (1967), and Costonis, *Presumptive and Per Se Takings: A Decisional Model for the Takings Issue*, 58 N.Y.U. L. REV. 465 (1983) ("just share" theory)).

169. Paul, *supra* note 140, at 1543.

170. *Id.*

*governmental interest.*¹⁷¹

While scholars concerned with the presumption that almost any regulation advances a public purpose were encouraged by *Nollan*,¹⁷² Jeremy Paul, in his analysis of the indeterminacy of current takings doctrine, is less than enamored with Justice Scalia's "attack on previously settled takings jurisprudence."¹⁷³ That is, Paul is less concerned with the flexibility of the current "substantial advancement" test than he is with the Court's reluctance to examine self-critically its vision(s) of property, and *Nollan* represents for Paul that persistent reluctance.¹⁷⁴ Not only are inquiries into legislative intent difficult, but the ambiguities of the harm/benefit distinction, and of the substantial/insubstantial duality, leave the *Nollan* test in disarray.¹⁷⁵

Paul does not, however, explore contemporary legislative efforts to offer some level of predictability to the field of land-use planning. While we share Paul's conviction that courts, and not merely legislatures, must respond to the takings controversy, a brief summary of several extra-judicial efforts to fill some of the gaps in takings jurisprudence may provide insights as to how courts should react.

Consider Colorado's vested property rights statute, passed "to ensure reasonable certainty, stability and fairness in the land use planning process. . . ."¹⁷⁶ Given that vested rights analysis can be as indeterminate as takings analyses,¹⁷⁷ Texas has a similar statute con-

171. J. Burling, *Property Rights, Endangered Species, Wetlands, and other Critters — Is It Against Nature to Pay for a Taking?*, 27 LAND & WATER L. REV. 309, 335 (1992) (discussing those rare cases, including *Nollan*, where the test was given serious consideration).

172. *See id.*

173. Paul, *supra* note 140, at 1398.

174. *Id.* at 1463-65.

175. *Id.* at 1434-35.

The *Keystone* opinion resuscitated Professor Freund's . . . [argument] that . . . the government should be required to pay compensation when it required one citizen to sacrifice for the benefit of the community but . . . not . . . when the government prevents a citizen from harming neighbors or the community.

Professor Michelman . . . demonstrates that when government engages in activities designed to increase the public welfare by favoring one resource over another there is no readily discernable way to determine whether a harm has been prevented or a benefit created.

Id. at 1438-39.

176. COLO. REV. STAT. ANN. §§ 24-68-101 to 24-68-106 (West 1990).

177. Vested rights doctrines vary considerably from state to state, and the disputed issue in vested rights cases is usually, when does a landowner have a right to build? Upon conditional approval? Final approval? Upon issuance of a building permit? Upon moving dirt around? After construction of a foundation? *See generally* Walter F. Witt, *Vested Rights in Land Uses—A View From The Practitioner's Perspective*, 21 REAL PROP., PROB. & TRUST J. 317 (1986).

firming that conditional approval of a building permit generally "freezes" the regulations applicable to the project.¹⁷⁸ Consider, as well, development agreement statutes, which enable cities to fix by contract the regulations that apply to a project in an effort to reduce cost, waste, and inefficiency in the development process.¹⁷⁹ While development agreements are common even without statutory guidance, problems that arise concerning their legality and political desirability are minimized when a statutory framework for such agreements is available to planners and developers.¹⁸⁰ Finally, and most important for the present inquiry, impact fee statutes passed by some states, in the wake of *Nollan*, are intended to provide guidance to municipal planners by establishing an orderly, relatively predictable process for the adoption and assessment of impact fees on developers.

The Texas Impact Fee Act,¹⁸¹ for example, contemplates initial and continual scrutiny of impact fees by (i) requiring thorough research, analysis, and data-based justification;¹⁸² (ii) defining a limited array of capital improvements that may be funded by such fees;¹⁸³ and (iii) demanding rigid accountability for the expenditure of fees collected.¹⁸⁴ Fees can only be assessed to fund the cost of roads and water, waste water, or drainage facilities necessitated by and attributable to the proposed development.¹⁸⁵ Service demands must be empirically established in a "plan," and fees imposed must be proportionate to those service demands.¹⁸⁶ The Texas Impact Fee Act also provides for notice and public hearings, and appointment of an advisory committee, whose members must include representatives of the real estate, development or building industries, prior to levying an impact fee.¹⁸⁷ The plan and its assumptions must be updated at least every three years.¹⁸⁸

178. See TEXAS GOV'T CODE ANN § 481.143.

179. See, e.g., CAL. GOV'T CODE § 65865 (West 1983 & Supp. 1990); FLA. STAT. ANN § 163.3229 (West Supp. 1987).

180. See Wm. Terry Bray et al., *supra* note 11, at 28-35; see also Bruce M. Kramer, *Development Agreements: To What Extent Are They Enforceable*, 10 REAL. EST. L. J. 29 (1981); Judith Welch Wegner, *Moving Toward the Bargaining Table: Contract Zoning, Development Agreements, and the Theoretical Foundations of Government Land Use Deals*, 65 N.C. L. REV. 957 (1987).

181. TEX. LOC. GOV'T CODE ANN. §§ 395.001-395.080 (Vernon Supp. 1990).

182. *Id.* §§ 395.014, 395.012, 395.024.

183. *Id.* § 395.012.

184. *Id.* § 395.024.

185. *Id.* § 395.012; see also § 395.001(1).

186. *Id.* §§ 395.014-395.015.

187. *Id.* § 395.044; see also § 395.058.

188. *Id.* § 395.052.

Several features of the Texas Impact Fee Act seem to provide a model approach to the takings dilemma, at least with respect to the overly flexible "substantial advancement" test. First, attention is focused on the regulatory process *as if* there is a problem, as if too much unpredictability is harmful.¹⁸⁹ Second, the burden of justification and quantification is shifted to the regulator *as if* such matters should be addressed prior to adoption of an ordinance, not in takings litigation.¹⁹⁰ Third, the burdens imposed on a developer must be proportionate to the public needs created by the development, *as if* there must be "reciprocity of advantage" in land-use regulation.¹⁹¹ Fourth, in addition to a notice and hearing requirement, an advisory committee (impliedly with members from the business community as well as planning professionals) is established to ensure that the municipality hears from those representing various interests, *as if* there is a growing possibility that business interests will be ignored.¹⁹² Fifth, and finally, allowable and inappropriate types of regulation are specified, *as if* there is a "risk that private property [can be] pressed into some form of public service under the guise of mitigating serious public harm."¹⁹³ Significantly, however, shifting the problem of judicial failure to provide guidelines (to local regulators and the regulated) to the state legislature does not significantly address the problem of establishing limits on majoritarian control.¹⁹⁴ Any "heightened scrutiny" established by the legislature can be as easily disestablished.

In a similar effort to draw guidance from the Trilogy, Executive Order No. 12630 was issued in 1988 requiring a takings implication assessment from any federal agency proposing a regulation affecting land use.¹⁹⁵ The assessment must set forth both the risks that a compensable taking will occur and the potential financial exposure from the action if a taking does occur. The order, however, has been criticized as unworkable, primarily because the doctrine of regulatory

189. See *supra* note 184 and accompanying text.

190. See *supra* note 186 and accompanying text.

191. See *Keystone*, 480 U.S. at 491-93 (1987).

192. See *supra* note 187 and accompanying text.

193. See *Lucas*, 112 S. Ct. at 2895.

194. See Lunny, *supra* note 139, at 1943-44 ("[The] constitutional requirement of compensation makes sense only if it is intended as a limit on the legislature's authority in this area. . . . [The] presence of the compensation requirement in the Fifth Amendment [and in almost all state constitutions] suggests that we are not willing to trust our elected representatives [to provide compensation when appropriate].").

195. Exec. Order No. 12,630, 3 C.F.R. 554 (1988).

takings is so unclear and the guidelines accompanying the order do little to clarify that doctrine.¹⁹⁶ Like an impact fee statute, the order reflected a kind of "burden of proof" shift—a responsibility was placed on regulators to draft regulations under the shadow of the takings doctrine. Nevertheless, until courts are willing to entertain the possibility of shifting the burden of justification to regulators,¹⁹⁷ and to give regulators some guidance as to when a legitimate interest is "substantially advanced", legislative and executive attempts to define property rights are a guessing game.

On the Monday following the weekend passage of the S.O.S. ordinance, the *Austin American-Statesman* was already predicting that opponents would turn to the legislature to address their concerns.¹⁹⁸

Environmentalists will characterize the battle [in the legislature] as "Austin-bashing", while developers and landowners just outside the city [who were affected by the S.O.S. ordinance but could not vote] will say they are trying to stop "the People's Republic of Austin" from violating their property rights in the name of water-quality protection.¹⁹⁹

Another debate in another arena will likely reveal, once again, the need for judicial guidance in the field of land-use regulation.

This is why Jeremy Paul recommends a judicial, not legislative, effort "to defend certain aspects of property as more central to the idea of constitutional protection," or to provide "increased protection for selected property rights,"²⁰⁰ even though he concedes that "each

196. See generally Charles R. Wise, *The Changing Doctrine of Regulatory Taking and the Executive Branch: Will Takings Impact Analysis Enhance or Damage the Federal Government's Ability to Regulate?*, 44 ADMIN. L. REV. 403 (1992).

197. But see *Taking Cover*, *supra* note 127, at 33, where Professor Sax stated:

I don't think courts [after *Lucas*] are going to treat legislatures as if they were plaintiffs in a lawsuit and make them prove their case by a preponderance of evidence. That . . . would significantly undercut the whole notion of deference to legislatures. . . . I agree the language of [*Lucas*] suggests a . . . strong judicial movement—toward opening up legislative decisions to questioning. But I would be astonished if it happens.

However, Justice Blackmun, in his *Lucas* dissent, argued that the majority's approach places on the state the "burden of showing the regulation is not a taking." *Lucas*, 112 S.Ct. at 2909.

198. See Laylan Copelin, *S.O.S. fight may spill over into Legislature*, AUSTIN AMERICAN-STATESMAN, August 10, 1992, at A1. The turn to the legislature in response to Austin's regulatory activities would be a *re-turn*, as legislation seemingly directed at Austin has been adopted several times in the last five years.

199. *Id.*

200. Paul, *supra* note 140, at 1545; *cf.* Wise, *supra* note 196, at 405 ("[It could] be argued that the President and the executive branch have a constitutional responsibility to es-

generation must decide for itself . . . which kinds of sacrifice constitute the price of civilization and which sacrifices are themselves uncivilized."²⁰¹ Richard Epstein, whose views often seem to have little in common with Paul's, agrees that

[t]here is simply no consensus as to what the basic stratum of property rights is. . . . And what we have to do therefore is perhaps be less certain of our ability to organize this system in a comprehensive fashion, and try to figure out modestly and cautiously how we can make a fair approximation as to what should be the right and the wrong answers.²⁰²

Just as the adoption of the S.O.S. ordinance in Austin reflected distrust of municipal government, property rights advocates like Epstein recommend a "politics of distrust" toward governments engaged in land-use regulation: "If I really did believe . . . that local governments . . . had the perfect welfare of the public at heart in each and every transaction that they initiated, I would be in favor of a very weak system of property rights. But I don't believe that."²⁰³ In Epstein's perspective, governments—subject as they are to influence—need to be constrained in their dealings with private individuals just like individuals are with each other.²⁰⁴ The regulatory takings doctrine, for Epstein, provides a supervisory function to ensure that the government and landowners operate within the same system, that is, to ensure a balance between public benefits and private rights.²⁰⁵ While this emphasis on private property rights is not uncontroversial,²⁰⁶ one need not become a disciple of Epstein to recognize that a judicial posture of deference to regulators in takings cases undermines the "substantial advancement" standard.

Perhaps "distrust of regulators", including initiative voters, provides a guiding but indeterminate "intermediate" standard for re-

establish a regulatory framework that is properly respectful of property rights as embodied in the Constitution.").

201. Paul, *supra* note 140, at 1547.

202. See *WRC Conference debates environmental takings: remarks of Richard A. Epstein, Private Property and the Politics of Distrust*, WASH. RES. COUNCIL NOTEBOOK, Vol. 7, No. 4, June 1992, at 7 [hereinafter *WRC Conference*]; see also Lunney, *supra* note 139, at 1938 ("The early Court's decision to give greater authority to the individual, rather than the community, reflected not so much a desire to provide greater protection to those with property as a distrust of the legislative process.") (footnotes omitted).

203. *WRC Conference, supra* note 202, at 7.

204. *Id.*

205. *Id.*

206. For a conservative view of property rights with an acknowledgement of opposing views and their sources, see Burling, *supra* note 171, at 322-27.

view of contemporary land-use regulations. Indeed, the attempt to capture the notion of "substantial advancement" in the Texas Impact Fee Act, with its complex accounting rules (e.g., segregation of funds in clearly identified interest-bearing accounts, expenditure within a prescribed period or refund, etc.),²⁰⁷ clearly reflected a distrust of local government. Moreover, such efforts indicate the type of guidance that courts might offer to ensure that a process of justification precedes land-use regulation.

From almost any perspective, the U.S. Supreme Court has not provided the kind of guidance needed by governmental regulators and landowners with respect to the regulatory takings doctrine. One response to this doctrinal inadequacy is to seek legislative solutions, but majoritarian review of majoritarian excess is—in terms of the Fifth Amendment—no review at all. Another response is to decry the adversarial legalism that looks to the judicial process as a "trump card" in debates over legal entitlements, and to propose cooperation as we balance environmental enhancement with economic gain.²⁰⁸ The motivation to cooperate, however, seems to depend upon the tension between two justifiable interests, that is, two interests recognized as legally significant. For example, the incentive for regulatory bodies and owners of large projects to enter into development agreements is the parties' understanding that there are limitations on land-use regulation as well as on land use. If the limitations on regulations are perceived to be relaxed, then cooperation is less likely and landowners will turn to the courts for recognition of property rights.

Whether *Nollan* and/or *Lucas* indicate a move toward heightened scrutiny of the purpose and effectiveness of a regulatory scheme, the tradition of deference to regulators has become a barrier to judicial reflection on the nature of contemporary property rights. Those who drafted the S.O.S. initiative relied on the fact that no serious justification of the purpose and the effectiveness of the ordinance would ever be required. If its purpose is called into question by identifying its redundant restrictions on impervious cover and runoff pollution, courts have not uniformly identified "overkill" as a suspect regulatory category. The responsibility to give meaning to "substantial advancement" has been evaded, or left to legislatures, along with the responsibility to help define property rights generally.

In his recent "ruminations" on *Lucas*, Epstein argued that

207. See TEX. LOC. GOV'T CODE ANN. § 395.024.

208. See John J. Lormon, *Adversarial Legalism*, ENVIRONMENTAL ADVISOR, Spring 1992, at 1, 3.

South Carolina's Beachfront Management Act "should be viewed with suspicion if any attention is paid to [its] statement of purposes."²⁰⁹

There are many purposes listed, including preservation of open spaces, [which] undercuts the proposition that the [Act] was passed in order to control the risk of hurricane damage. . . . At the very least, the constant reiteration of purposes that have nothing to do with harm prevention should place a heavy burden on South Carolina to show that this statute falls within the traditional conception of police power.²¹⁰

Moreover, Epstein observed, a building on Lucas' island lots presents far less risk of hurricane damage than rebuilding in densely populated areas, like Charleston, thus the "selective nature of building restriction [on Lucas] speaks volumes about the actual purpose behind the" Act.²¹¹ Finally, Epstein argues that the "scope of the restriction [on Lucas] is far broader than necessary to achieve its end[;] . . . far more moderate restrictions would do relatively little to the private value from the use of the land, but would answer virtually all of the concerns with hurricane damage."²¹² Even if one is not willing to join Epstein in his recurrent call for "adoption of a regime for the protection of private property and economic liberties" similar to "the edifice" protecting freedom of speech,²¹³ the argument for intellectual honesty by regulators is appealing. Moreover, no great departure from Supreme Court aphorisms is needed for courts to require, in takings cases, demonstration of a public need that is effectively advanced, with a minimum intrusion on recognized property rights.

Another responsibility of the judiciary in takings claims, rarely explored even when acknowledged, is to identify when a regulation is "forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."²¹⁴ Any

209. See Richard A. Epstein, *Ruminations on Lucas v. South Carolina Coastal Council: An Introduction to Amicus Curiae Brief*, 25 LOY. L.A. L. REV. 1225, 1229 (1992).

210. *Id.*

211. *Id.* at 1229-30.

212. *Id.* at 1230. The State could have specified restrictions on size, shape, and materials used in buildings; or required storm cellars; or imposed clean-up costs. *Id.*

213. Richard A. Epstein, *Property, Speech, and the Politics of Distrust*, 59 UNIV. CHI. L. REV. 41, 42-43 (1992). Michelman, surely, is not so willing. See Frank I. Michelman, *Liberties, Fair Values, and Constitutional Method*, 59 U. CHI. L. REV. 91 (1992) (critical response to Epstein).

214. *Armstrong v. United States*, 364 U.S. 40, 49 (1960), quoted in *First English*, 482

attempt to clarify this constitutional prohibition requires some level of definition beyond "fairness" and "justice."

2. Spreading Burdens

[Courts hearing takings claims must] consider whether the legislature is seeking to prevent the claimant from acting unjustly or whether the claimant is being asked to serve his community in a fashion above and beyond the call of duty.²¹⁵

Land-use regulation is typically aimed at new development, but this can lead, in certain circumstances, to an apparently unfair burden. Even in the absence of a "right to develop" in property law, identification of a problem such as water runoff pollution followed by a requirement of less intense *new* development seems to permit existing runoff pollution. If a mere potential for serious water quality degradation exists, preventing further development is certainly a solution, but then the cost of preventing serious pollution is borne solely by the owners of undeveloped land. If courts limited broad "grandfather" exemptions and required that remedial ordinances, even severe restrictions, spread the burden among those benefitted (or, alternatively, if a court adopted this hypothetical as a paradigm taking for its constitutional analysis), the pressure and cost of local regulation would be felt by the entire community.

Even though such a rule does not address the strange result in post-*Lucas* takings jurisprudence that a total loss results in compensation, while a landowner with 95% loss will get nothing,²¹⁶ which may be an unsolvable puzzle due to both the ambiguity of the term "loss" and the seeming desire to establish rules even if they do not make sense,²¹⁷ the notion of fairness is given an initial baseline. The Texas Impact Fee Act not only echoed *Nollan's* "essential nexus" guidelines, but also confirmed that the burden of remedying an acknowledged harm not directly caused by new development should be shared by all of the beneficiaries. Such efforts clarify the principle that a few should not bear the burdens of the many.

U.S. at 318-19. For a thorough analysis of this requirement coupled with an appeal to public choice theory, see Lunney, *supra* note 139.

215. Paul, *supra* note 140, at 1435.

216. *Lucas*, 112 S. Ct. at 2895 n.8.

217. In *Lucas*, "the Court adopted a categorical rule that prevents inquiry into the rationale for a new regulation if that regulation creates a total loss. . . . Such a rule is wholly arbitrary." Jeremy Paul, *Scalia's Pursuit of Property's Holy Grail Has Its Price*, CONN. L. TRIB., July 20, 1992, at 2.

After the Court's opinion in *Nollan*, Douglas Kmiec pointed out that "the nexus requirement . . . measures not just the closeness of the fit between regulatory means and ends but also whether the burden of the regulation is properly placed on *this* landowner."²¹⁸ The two principles mentioned above—the substantial advancement test and the placement of burdens on those benefitted—are thus related in Kmiec's reading of *Nollan*.²¹⁹ Recall as well Justice Scalia's dissent in *Pennell*, where "the neediness of renters" was, in his view, "not remotely attributable to the *particular* landlords that the [challenged rent-control] ordinance singles out. . . ."²²⁰ This connection, between means/end analysis and unfair burdens, is demonstrated by conceiving the requirement of substantial advancement as calling for *effective* regulation. If an ordinance enacted to prevent some social harm affects only a few, it may be ineffective because only a few have been burdened by the regulation—in other words, all who contribute to the harm should be targeted. On the other hand, if an ordinance accomplishes its end but affects only a few, then its propriety is called into question—if the harm is not caused by those few who are burdened, why should they bear the cost of eliminating the harm? The S.O.S. ordinance is effective under the first category if the current level of land use (together with allowed small development) will not degrade water quality, but new large developments will; but then the double burden of runoff control and impervious cover limitations is unjustifiable under a strong reading of the "substantial advancement" test. More likely, the S.O.S. ordinance falls into the latter category; those burdened by the regulation will not contribute to the harm—water pollution—to be prevented, and those who do contribute are exempt.

Professor Lunney recently criticized Supreme Court takings jurisprudence for both its flawed reading of early takings cases and the "resulting factor test [that] fails to . . . prevent the government from unfairly 'forcing some people alone to bear public burdens.'"²²¹ Aside from the first critique, Lunney suggests "that the taking-regulation line should depend primarily on differences in effective size

218. Douglas Kmiec, *The Original Understanding of the Takings Clause is Neither Weak Nor Obtuse*, 88 COLUM. L. REV. 1630, 1651 (1988).

219. Justice Scalia's dissent in *Pennell v. City of San Jose*, 485 U.S. 1 (1988), "the *Nollan* nexus requirement clearly is linked, not just to a facile matching of the state's means or ends, but to whether compensation is required because the end . . . places a disproportionate burden on a landowner." Kmiec, *supra* note 218, at 1653.

220. 485 U.S. at 21.

221. Lunney, *supra* note 139, at 1927.

between the group burdened and the group benefitted when the government shifts or interferes with existing property rights."²²² Whatever the merit of such an approach, Lunney's reconsideration of unfair burdens reflects the sort of attention to takings aphorisms that we propose.

Of course, without a stronger requirement that regulations must "substantially advance" a legitimate state interest, and a stronger prohibition against placing a disproportionate burden on certain landowners, the S.O.S. ordinance is a "run-of-the-mill" land use regulation.

V. CONCLUSION

The genesis, campaign for, and ultimate victory of the S.O.S. ordinance in Austin provides a model for land-use planning when local government appears unresponsive to popular causes. While the model may generate envy among environmentalists nationwide, we sense that an essential part of the land-use planning process—namely, recognition of the regulatory takings doctrine and its associated principles of property rights—was missing in the Austin experience. Like many others, we blame the U.S. Supreme Court for its failure to clarify the takings doctrine, although we are aware of some who think that clarity in this field is neither possible nor desirable.²²³ We agree with those who appeal to the Court to develop (i) intermediate principles—not mere generalizations and not a unified theory that denies the persistence of contradictory visions within property law—based on a candid recognition of our various models of property and their weaknesses, and (ii) guiding paradigms of appropriate and inappropriate regulation, to provide some of the miss-

222. *Id.* at 1954.

If the Court consistently focused on whether the rights of the very few have been burdened for the benefit of the many in resolving the compensation issue, then the very few would not need to organize into a concentrated group and protect themselves in the legislature; they could be certain that they would be compensated. Furthermore, if society as a whole, rather than the members of the concentrated group, will bear the expected cost of a given government action, then a dispersed group, taxpayers, will replace the concentrated group that would otherwise have opposed the proposed measure. As a result, the compensation requirement can convert a dispersed-concentrated conflict, with its accompanying failure of voice, into a dispersed-dispersed conflict in which the voices the legislature hears will accurately reflect . . . the desire of society as a whole.

Id.

223. See, e.g., Frank Michelman, *Takings 1987*, 88 COLUM. L. REV. 1600, 1621-29 (1988).

ing guidance—not the missing solution—in takings jurisprudence. Statutes that require a justification process and provide examples of unfair regulations offer a model approach for courts facing the takings dilemma.

APPENDIX

Save Our Springs Initiative Petition

AN ORDINANCE INITIATED BY PETITION BY THE CITIZENS OF AUSTIN TO PREVENT POLLUTION OF BARTON SPRINGS, BARTON CREEK, AND THE BARTON SPRINGS EDWARDS AQUIFER; RESTRICTING IMPERVIOUS COVER; LIMITING EXEMPTIONS, VARIANCES, ETC.; REDUCING RISKS OF ACCIDENTAL CONTAMINATION OF BARTON SPRINGS AND OTHER WATER BODIES; REQUIRING FAIR, CONSISTENT, AND COST EFFECTIVE ADMINISTRATION OF AUSTIN'S WATER QUALITY ORDINANCES; CONTAINING OTHER PROVISIONS RELATING TO THESE SUBJECTS; AND PROVIDING AN EFFECTIVE DATE.

BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF AUSTIN:

PART 1. DECLARATION OF INTENT: The people of the City of Austin declare their intent to preserve a clean and safe drinking water supply, to prevent further degradation of the water quality in Barton Creek, Barton Springs, and the Barton Springs Edwards Aquifer, to provide for fair, consistent, and cost-effective administration of the City's watershed protection ordinances, and to promote the public health, safety and welfare. The City of Austin recognizes that the Barton Springs Edwards Aquifer is more vulnerable to pollution from urban development than any other major groundwater supply in Texas, and that the measures set out in this ordinance are necessary to protect this irreplaceable natural resource.

PART 2. POLLUTION PREVENTION REQUIRED: (a) In the watersheds contributing to Barton Springs, no development nor any revision, extension, or amendment thereof, may be approved unless it is designed, carried out and maintained on a site-by-site basis to meet the pollution prevention requirements set forth below for the life of the project. In order to prevent pollution, impervious cover for all such development shall be limited to a maximum of fifteen (15) percent in the entire recharge zone, twenty (20) percent in the contributing zone within the Barton Creek watershed, and twenty-five (25) percent in the remainder of the contributing zone. The impervious cover limits shall be calculated on a net site area basis. In addition, runoff from such development shall be managed through water quality controls and onsite pollution prevention and assimilation techniques so that no increases occur in the respective average annual loadings of total suspended solids, total phosphorus, total nitrogen, chemical oxygen demand, biochemical oxygen demand, total lead, cadmium, fecal coliform, fecal streptococci, volatile organic compounds, total organic carbon, pesticides, and herbicides from the site. For a given project, impervious cover shall be reduced if needed to assure compliance with these pollutant load restrictions.

(b) Within the watersheds contributing to Barton Springs, Section 13-7-23 of the Land Development Code is amended so that in no event shall the boundary of the critical water quality zone be less than 200 feet from the centerline of a major waterway or be less than 400 feet from the centerline of the main channel of Barton Creek. No pollution control structure, or residential or commercial building, may be constructed in the critical water quality zone in these watersheds.

PART 3. NO EXEMPTIONS, SPECIAL EXCEPTIONS, WAIVERS OR VARIANCES: The requirements of this ordinance are not subject to exemptions, special exceptions, waivers, or variances allowed by Article V of Chapter 13-2 of the Land Development Code. Adjustments to the application of this ordinance to a specific project may be granted only as set out in Part 6 below.

PART 4. APPLICATION TO EXISTING TRACTS, PLATTED LOTS, AND PUBLIC SCHOOLS: (a) This ordinance does not apply to development on a single platted lot or a single tract of land that is not required to be platted before development if: (1) the lot or tract existed on November 1, 1991, and (2) the development is either

- (i) construction, renovation, additions to, repair, or development of a single-family attached, or a duplex structure used exclusively for residential purposes, and construction of improvements incidental to that residential use; or
- (ii) development of a maximum of 8,000 square feet of impervious cover, including impervious cover existing before and after the development.

(b) This ordinance does not apply to development of public primary or secondary educational facilities if the City and the school district enter into a development agreement approved by a three-quarters vote of the City Council protecting water quality pursuant to Section 13-2-502(o)(7) of the Land Development Code.

PART 5. EXPIRATION OF PRIOR APPROVALS: Within the watersheds contributing to Barton Springs, the following provisions shall govern the expiration of certain prior approvals:

A. PREVIOUSLY APPROVED PRELIMINARY SUBDIVISION PLAN:

(a) Unless it has or will have expired sooner, a preliminary subdivision plan initially approved before the effective date of this ordinance expires one year after the effective date of this ordinance, or two years after its initial approval, whichever date is later, unless an application for final plat approval is filed before this expiration date and a final plat is approved no later than 180 days after filing.

(b) No approved preliminary plan, and no portion of an approved preliminary plan, shall be valid or effective after the expiration date established by this part, or shall be extended, revised or renewed to remain effective after the expiration date, except according to subpart C.

B. PREVIOUSLY APPROVED SITE PLAN: (a) Unless it has or will have expired sooner, a site plan or phase or portion thereof initially approved before the effective date of this ordinance shall expire one year after the effective date of this ordinance, or three years after its initial approval, whichever date is later, unless:

- (1) an application is filed before this expiration date for building permits for all structures shown on the site plan or phase or portion thereof and designed for human occupancy, and the building permits are approved and remain valid and certificates of occupancy are issued no later than two years after this expiration date; or
- (2) if no building permits are required to construct the structures shown on a site plan described in subpart (a), construction begins on all buildings shown on the site plan or portion or phase thereof before this expiration date, and the buildings are diligently constructed and completed, and certificates of compliance or certificates of occupancy are issued no later than two years after this expiration date.

(b) No approved site plan, and no separate phase or portion of an approved site plan, shall be valid or effective after the expiration date established by this part, or shall be extended, revised, or renewed to remain effective after the expiration date, except according to subpart C.

C. APPROVED PLANS WHICH COMPLY: An approved preliminary subdivision plan, portion of a preliminary plan, approved site plan, or separate phase or portion of an approved site plan that complies with this ordinance or that is revised to comply with this ordinance does not expire under subpart A or subpart B and remains valid for the period otherwise established by law.

PART 6. LIMITED ADJUSTMENT TO RESOLVE POSSIBLE CONFLICTS WITH OTHER LAWS: (a) This ordinance is not intended to conflict with the United States Constitution or the Texas Constitution or to be inconsistent with federal or state statutes that may preempt a municipal ordinance or the Austin City Charter.

(b) The terms of this ordinance shall be applied consistently and uniformly. If a three-quarters majority of the City Council concludes, or a court of competent jurisdiction renders a final judgment concluding, that this ordinance, as applied to a specific development project or proposal, violates a law described in subpart (a), then the City Council may, after a public hearing, adjust the application of this ordinance to that project to the minimum extent required to comply with the conflicting law. Any adjustment shall be structured to provide the maximum protection of water quality.

PART 7. CONSTRUCTION OF ORDINANCE: This ordinance is intended to be cumulative of other City ordinances. In case of irreconcilable conflict in the application to a specific development proposal between a provision of this ordinance and any other ordinance, the provision which provides stronger water quality controls on development shall govern. If a word or term used in this ordinance is defined in the Austin City Code of 1981, as that code was in effect on November 1, 1991, that word or term shall have the meaning established by the Austin City Code of 1981 in effect on that date, unless modified in this ordinance.

PART 8. REDUCE RISK OF ACCIDENTAL CONTAMINATION: Within one year of the effective date of this ordinance the City of Austin Environmental and Conservation Services Department shall complete a study, with citizen input, assessing the risk of accidental contamination by toxic or hazardous materials of the Barton Springs Edwards Aquifer and other streams within the City of Austin and its extraterritorial jurisdiction. The assessment shall inventory the current and possible future use and transportation of toxic and hazardous materials in and through Austin, and shall make recommendations for City actions to reduce the risk of accidental contamination of the Barton Springs Edwards Aquifer and of other water bodies. Within 60 days of completion of the study, and following a public hearing, the City Council shall take such actions deemed necessary to minimize risk of accidental contamination of city waters by hazardous or toxic materials.

PART 9. EFFICIENT AND COST-EFFECTIVE WATER QUALITY PROTECTION MEASURES: In carrying out City of Austin efforts to reduce or remedy runoff pollution from currently developed areas or to prevent runoff pollution from currently developed or developing areas, the City Council shall assure that funds for remedial, retrofit, or runoff pollution prevention measures shall be spent so as to achieve the maximum water quality benefit, and shall assure that the need for future retrofit is avoided whenever feasible.

PART 10. SEVERABILITY: If any provision, section, subsection, sentence, clause, or phrase of this ordinance, or the application of the same to any person, property, or set of circumstances is for any reason held to be unconstitutional, void, or otherwise invalid, the validity of the remaining portions of this ordinance shall not be affected by that invalidity; and all provisions of this ordinance are severable for that purpose.

PART 11. AMENDMENT, CODIFICATION, AND EFFECTIVE DATE: (a) The adoption of this ordinance is not intended to preclude the adoption, at any time, by a majority vote of the City Council of stricter water quality requirements upon development in the watersheds contributing to Barton Springs or of further measures to restore and protect water quality.

(b) If this ordinance is enacted by the Austin City Council under subsection (a) of Section 5, Article IV of the Austin City Charter, this ordinance shall be effective ten days after the date of its final passage and, subject to subpart (a) and to controlling law, shall not be repealed or amended by the City Council until two years after its effective date. Thereafter, this ordinance may be repealed or amended only by an affirmative vote of no less than six members of the City Council.

(c) The City Council shall codify the provision of this ordinance into appropriately numbered sections of the Austin City Code without changing the language or effect of this ordinance, except to delete those subparts that do not apply because of the method in which this ordinance became effective.

PASSED AND APPROVED:

_____, 19__

Bruce Todd
Mayor

APPROVED: _____
Iris J. Jones
City Attorney

ATTEST: _____
James E. Aldridge
City Clerk

