

# Supreme Guidance for Wet Growth: Lessons from the High Court on the Powers and Responsibilities of Local Governments

*Michael Allan Wolf*<sup>1</sup>

## I. INTRODUCTION: MOVING WET GROWTH FROM IDEA TO IMPLEMENTATION

When Chapman University School of Law last assembled a set of nationally recognized experts to discuss the idea of managing growth through water law, the convener, Professor Tony Arnold, did a masterful job of summing up the “Wet Growth” movement.<sup>2</sup> He noted,

There is a need for a concept of “wet growth”: integration of concerns about water quality and the availability of water supply into the density, form, pattern, and location of land development. This “wet growth idea”—that growth and land use should be sustainable with respect to aquatic ecosystems and water resources—may simply be an aspect of a broad smart growth agenda (or an even broader sustainability agenda) or may carve out its own identity as a planning and regulatory concept.<sup>3</sup>

While several commentators (academics and practitioners alike) have endorsed this merger of water law and planning, and although there has been some experimentation on (and below) the ground, we have not yet seen widespread adoption of integrative controls on the local and state level. In other words, there has not yet been an extensive shift from the idea stage to the implementation stage.

Before such a shift can occur, local and state regulators need

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<sup>1</sup> Richard E. Nelson Chair in Local Government Law, Levin College of Law, University of Florida. The author thanks two outstanding University of Florida law students—Leslie Utiger and Steven Wernick—for their first-rate research assistance. This article was prepared for, and presented as part of, the well-organized and provocative *Chapman Law Review* Symposium on “The Slippery Slope: Urban Runoff, Water Quality, and the Issue of Legal Authority,” January 27, 2006, Chapman University School of Law.

<sup>2</sup> Craig Anthony (Tony) Arnold, *Is Wet Growth Smarter Than Smart Growth?: The Fragmentation and Integration of Land Use and Water*, 35 ENVTL. L. REP. 10152 (2005); see also WET GROWTH: SHOULD WATER LAW CONTROL LAND USE (Craig Anthony (Tony) Arnold ed. 2005) (including chapters written by participants at a conference at Chapman University School of Law in February, 2003) [hereinafter WET GROWTH].

<sup>3</sup> Arnold, *supra* note 2, at 10154.

strong guidance from experts in the field, not only in extra-legal fields such as planning, hydrology, geology, engineering, biology, and transportation, but also in mainstream legal areas including legislation (local, state, and federal), administrative law, and enforcement. The purpose of this article is to identify a somewhat unorthodox source of guidance—the United States Supreme Court, specifically the Rehnquist Court from October, 1984, through June, 2005, a period of remarkable stability for the nation’s highest tribunal. From the October 1994 Term, when Associate Justice Stephen Breyer joined the Court, through the October 2004 Term, after which Chief Justice William Rehnquist died, the membership of the Court did not change, making it the longest-serving group of nine Justices in the history of the Court.<sup>4</sup>

Part II of this article presents a hypothetical local jurisdiction—appropriately named Hydro City—which is experimenting with various wet growth controls. The purpose of the controls is to regulate land development to minimize harm to precious water resources in and around the community. Part III shifts the locus of the article from the mythical community to the very real Supreme Court building in the nation’s capital, in which nine Justices sit, deliberate, and formulate opinions on a wide range of important topics. This section of the article asks the reader to conceive of the modern Supreme Court not as a “court of the last resort,” but as a body of legal commentators.

The powers and responsibilities of local governments comprised one of the significant areas addressed by the legal commentators comprising the Rehnquist Court from the eleven terms during which there was no change in Court membership, as demonstrated in Part IV. This article refers to several Supreme Court cases involving local governments, decided during those selected Terms, which contain lessons from the commentators pertinent to the application of wet growth controls. The facts, outcomes, and rationales of fourteen, highly relevant cases are reviewed, along with the specific lessons they provide.

Part V returns the reader to Hydro City and includes four examples that illustrate how the Court’s lessons can afford guidance to wet growth regulators, to landowners and developers,

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<sup>4</sup> See *The Supreme Court, 2003 Term—Nine Justices, Ten Years: A Statistical Retrospective*, 118 HARV. L. REV. 510, 510, 510 n.1 (2004) (noting that “[t]he 2003 Term marked an unprecedented milestone for the Supreme Court: for the first time in history, nine Justices celebrated a full decade presiding together over the nation’s highest court,” and that “[a] seven-Justice Court sat together for more than a decade only once, from Justice Joseph Story’s appointment in 1812 to Justice Brockholst Livingston’s death in 1823).

and to the public and private sector attorneys who represent their interests. The article concludes with observations concerning the potential usefulness of the Rehnquist Court's lessons in furthering the goals of advocates of wet growth controls.

## II. WET GROWTH CONTROLS IN HYDRO CITY

The imaginary municipality of Hydro City is the county seat of Orange County, located on the coast of California. Hydro City's population stands at one million, and the city is experiencing extreme pressures to grow even more rapidly. The city is located in one of most attractive regions in one of the nation's most populous states, a state that features a long coastal border, many freshwater lakes, and a temperate climate. The Tributaria River flows through the center of Hydro City and empties into the ocean only twenty miles away.

Concerned about the negative externalities attending unbridled real estate development—including, but certainly not limited to, nonpoint source pollution of sensitive surface water bodies and groundwater, the destruction of functional wetlands, and the destruction of critical habitat for endangered and threatened species—the Hydro City Council, after two years of study and consultation with scientific, engineering, legal and planning experts, followed by extensive public hearings, announced a package of proposed new regulations and enforcement strategies.

- Hydro City's proposed "wet growth package" consists of the following ten tools:
- Development moratoria;<sup>5</sup>
- Riparian buffer zones;<sup>6</sup>
- Prohibition of certain uses in lands bordering water bodies;<sup>7</sup>
- Density limitations in watersheds;<sup>8</sup>
- Aquifer recharge overlay zones prohibiting some uses

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<sup>5</sup> See Arnold, *supra* note 2, at 10156 (noting that "growth moratoria imposed because of water concerns have fared much better" than "[t]he use of moratoria on new water supplies in order to control or stop growth"); see also Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302 (2002) (upholding set of development moratoria in face of regulatory takings challenge).

<sup>6</sup> See Arnold, *supra* note 2, at 10173 ("it is also becoming common for local or state governments to adopt riparian or shoreline buffer zones that restrict development within a certain distance of river banks, stream banks, and lake shores."); see also Alan W. Flenner, *Municipal Riparian Buffer Regulations in Pennsylvania—Confronting the Regulatory Takings Doctrine*, 7 DICK. J. ENVTL. L. & POL'Y 207 (1998) (discussing riparian buffer regulations in Kennett Township, Chester County, Pennsylvania).

<sup>7</sup> See Arnold, *supra* note 2, at 10156–57.

<sup>8</sup> See *id.*

and requiring special use permits or the use of best management practices (BMPs) for other uses;<sup>9</sup>

- Aggressive enforcement of existing regulations against certain developers;<sup>10</sup>
- Variable water pricing, increasing cost as usage rises;<sup>11</sup>
- Performance zoning standards;<sup>12</sup>
- Incentive and bonus zoning;<sup>13</sup> and
- Conditional grants of building permits.<sup>14</sup>

In many ways, city officials have cherry-picked some of the wet growth controls that show the greatest potential for success in restricting development that poses the greatest harms to sensitive water bodies and in encouraging positive steps by those who choose to make more intensive use of land.

Not surprisingly, given the litigious climate that has long typified the American ethos, landowners and developers in the region who are skeptical about most, if not all of these proposed regulations, have already lined up some skillful legal talent to investigate the possibility of a frontal attack on any new tools that the local government chooses to employ. Indeed, several legal activists who champion private property rights have offered their services in the national struggle against regulations these true believers deem to be confiscatory, arbitrary, and retributive.<sup>15</sup>

Rather than wait for the inevitable facial or as-applied challenge to their wet growth tools, counsel for the city should—*before* the local legislature votes on any ordinances and before local regulators implement new enforcement policies, incentives, or conditional permitting—conduct research into the legality, feasibility, and advisability of the proposed package.

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<sup>9</sup> See *id.* at 10157 (describing the Edwards Aquifer Recharge Zone in San Antonio, Texas).

<sup>10</sup> See *id.* at 10157–58 (citing actions taken by the Santa Ana Regional Water Quality Control Board against a well-known developer in Orange County, California).

<sup>11</sup> See *id.* at 10159 (quoting Barton H. Thompson, Jr., *Water Management and Land Use Planning: Is It Time for Closer Coordination?*, in WET GROWTH, *supra* note 2, at 103).

<sup>12</sup> See Arnold, *supra* note 2, at 10173.

<sup>13</sup> See *id.* at 10174.

<sup>14</sup> See *id.*

<sup>15</sup> See, e.g., Charles M. Haar & Michael Allan Wolf, *Euclid Lives: The Survival of Progressive Jurisprudence*, 115 HARV. L. REV. 2158, 2163 n.14 (2002) (“The ‘property rights movement’ has been active in promoting takings legislation and in supporting court challenges to allegedly confiscatory land-use and environmental regulations . . .”); see also Douglas T. Kendall & Charles P. Lord, *The Takings Project: A Critical Analysis and Assessment of the Progress So Far*, 25 B.C. ENVTL. AFF. L. REV. 509, 511 (1998).

Most of research sources consulted by the local government attorneys will be routine: ordinances from other California communities, state and federal decisional law, and the commentary written by experts from law, environmental science, and related fields. As the next part of this article explains, today there is one additional source of guidance available to Hydro City's counsel and to the living and breathing local government attorneys who are actually advising real municipalities—the legal commentary of the Rehnquist Court.

### III. CONCEIVING OF THE HIGH COURT AS A BODY OF LEGAL COMMENTATORS

Very earlier in the tribunal's history, when the Justices still "rode circuit," members of the United States Supreme Court were fairly accurately viewed as a court of last resort.<sup>16</sup> In fact, a variation on that phrase was employed by the Justices in their respectful, but resistant, response to President George Washington's request (forwarded by Secretary of State Thomas Jefferson on July 18, 1793) for the judges' advice regarding important issues facing the new nation struggling to maintain its neutrality as war consumed Europe:

The war which has taken place among the powers of Europe produces frequent transactions within our ports and limits, on which questions arise of considerable difficulty, and of greater importance to the peace of the United States. These questions depend for their solution on the construction of our treaties, on the laws of nature and nations, and on the laws of the land, and are often presented under circumstances which do not give a cognisance of them to the tribunals of the country.<sup>17</sup>

Chief Justice John Jay and his colleagues responded:

We have considered the previous question stated in a letter written by your direction to us by the Secretary of State on the 18th of last month [regarding] the lines of separation drawn by our Constitution between the three departments of the government. These being in certain respects checks upon each other, and *our being judges of a court in the last resort*, are considerations which afford strong arguments against the propriety of our extra-judicially deciding the questions alluded to,

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<sup>16</sup> See, e.g., 1 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 58 (rev. ed. 1926) ("By the provisions of [the Judiciary Act], the country had been divided into three Circuits (the Eastern, Middle, and Southern), to each of which two Supreme Court Judges were permanently assigned and directed to hold Court twice a year in each District, in company with the District Judges.").

<sup>17</sup> LETTER FROM THOMAS JEFFERSON TO JOHN JAY, JULY 18, 1793, reprinted in 4 THE FOUNDERS' CONSTITUTION, at 257 (Philip B. Kurkland & Ralph Lerner eds., The University of Chicago Press 1987); see also *Muskrat v. United States*, 219 U.S. 346, 354 (1911) (quoting 3 THE CORRESPONDENCE AND-PUBLIC PAPERS OF JOHN JAY 486 (Henry P. Johnston ed., 1970)).

especially as the power [given] by the Constitution to the President, of calling on the heads of departments for opinions, seems to have been *purposely* as well as expressly united to the *executive* departments.<sup>18</sup>

By the third decade of the twentieth century, however, with the development of *certiorari* review and a restructuring of the federal judiciary,<sup>19</sup> the High Court's role had begun to shift significantly.

Today, district courts and courts of appeal resolve the overwhelming majority of disputes in the federal system.<sup>20</sup> As the number of cases decided by lower federal courts skyrocketed in the closing years of the last century, the Supreme Court significantly reduced its caseload.<sup>21</sup> For example, in 1965, the Warren Court Justices granted certiorari review in twelve percent of the cases not filed in forma pauperis (124 cases were granted review out of 1,164 cases on the docket).<sup>22</sup> Ten years later, the number of such cases on the docket of the Burger Court climbed to 2,352, while the number of cases reviewed nearly doubled to 244 (ten

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<sup>18</sup> LETTER FROM JOHN JAY TO GEORGE WASHINGTON ON AUGUST 8, 1793, reprinted in 4 THE FOUNDERS' CONSTITUTION, at 258 (Philip B. Kurkland & Ralph Lerner eds., The University of Chicago Press 1987) (emphasis added); see also *Muskrat*, 219 U.S. at 354 (quoting 3 THE CORRESPONDENCE AND PUBLIC PAPERS OF JOHN JAY 486 (Henry P. Johnston ed., 1970)).

<sup>19</sup> See Robert Post, *The Supreme Court Opinion as Institutional Practice: Dissent, Legal Scholarship, and Decisionmaking in the Taft Court*, 85 MINN. L. REV. 1267 (2001). Professor Post observed:

The [Judiciary Act of February 13, 1925] represented a fundamental transformation of the role of the Supreme Court. Before the Act, the Court was primarily a tribunal of ultimate resort; it was the highest and the last source of appellate review, whose chief function was correctly to discern and to protect the federal rights of litigants. But the Act's sharp constriction of the Court's mandatory appellate jurisdiction "completely overrode" this "obstinate conception that the Court was to be the vindicator of all federal rights." And the Act's extraordinary enlargement of the Court's discretionary appellate jurisdiction expressed a profound recharacterization of the Court's function.

*Id.* at 1272-73 (footnotes omitted) (quoting FELIX FRANKFURTER & JAMES M. LANDIS, THE BUSINESS OF THE SUPREME COURT 260-61 (1928)); see also Edward A. Hartnett, *Questioning Certiorari: Some Reflections Seventy-Five Years After the Judges' Bill*, 100 COLUM. L. REV. 1643 (2000).

<sup>20</sup> For statistical analysis, see CAROL KRAFKA ET. AL., FED. JUDICIAL CTR., STALKING THE INCREASE IN THE RATE OF FEDERAL CIVIL APPEALS (1995), available at [http://www.fjc.gov/public/pdf.nsf/lookup/rate\\_of\\_appeal.pdf/\\$File/rate\\_of\\_appeal.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/rate_of_appeal.pdf/$File/rate_of_appeal.pdf); see also Leonidas Ralph Mecham, Admin. Office of the U.S. Courts, *Judicial Facts and Figures* (Mar. 2005), available at <http://www.uscourts.gov/judicialfactsfigures/alljfftables.pdf>.

<sup>21</sup> See Arthur D. Hellman, *The Shrunken Docket of the Rehnquist Court*, 1996 SUP. CT. REV. 403, 403-04. Professor Hellman observed:

In the 1970s, when the Supreme Court was giving plenary consideration to 150 cases a Term, the courts of appeals were deciding about 10,000 cases on the merits annually. Today the number of merits decisions by the courts of appeals exceeds 25,000 each year.

*Id.* at 404.

<sup>22</sup> LEE EPSTEIN ET. AL., THE SUPREME COURT COMPENDIUM: DATA, DECISIONS, AND DEVELOPMENTS 69 (3d ed. 2003).

percent).<sup>23</sup> Only twenty years later, the Rehnquist Court granted review in ninety-two of such cases, only four percent of the 2,456 filed.<sup>24</sup> The numbers of reviews granted in in forma pauperis cases showed a similar pattern: Although 1,610 of such cases were filed in 1965, 2,395 in 1975, and 5,098 in 1995, the percentage of cases granted certiorari review fell from three percent in 1965 (forty-three cases), to one percent in 1975 (twenty-eight cases), and three-tenths of a percent in 1995 (thirteen cases).<sup>25</sup>

During the first Term that William H. Rehnquist served as Chief Justice, the Court issued opinions in 159 cases,<sup>26</sup> a number

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<sup>23</sup> *Id.* at 70.

<sup>24</sup> *Id.* at 71.

<sup>25</sup> *Id.* at 69–71.

<sup>26</sup> *The Supreme Court, 1985 Term—Leading Cases*, 100 HARV. L. REV. 1, 304 (1986). The figures in this paragraph derive from the *Harvard Law Review's* annual statistical review of the work of the Supreme Court over the previous Term (“The Statistics.”). Here is a summary of the annual number of cases in which the Supreme Court issued opinions for the last twenty-six, full Terms:

1979 Term (Berger, C.J.)—149

1980 Term—138

1981 Term—167

1982 Term—162

1983 Term—163

1984 Term—151

1985 Term (Rehnquist, C.J.)—159

1986 Term—152

1987 Term—142

1988 Term—143

1989 Term—139

1990 Term—120

1991 Term—116

1992 Term—114

1993 Term—87

1994 Term—86

1995 Term—79

1996 Term—86

1997 Term—93

1998 Term—81

1999 Term—77

2000 Term—86

2001 Term—81

2002 Term—78

2003 Term—83

2004 Term—79.

The above figures derive from the corresponding *Harvard Law Review Leading Cases-Statistics* summary printed annually:

The Supreme Court, 1979 Term- The Statistics, 94 HARV. L. REV. 289, 289 (1980); The

in line with that of several of the preceding terms. By the 1990 Term, the total number of opinions issued decreased to 120 (down nineteen from the previous year), and then dropped to 116 (1991 Term) and 114 (1992 Term).<sup>27</sup> For the twelve remaining Rehnquist Court Terms, the totals ranged from a high of ninety-three cases (1997 Term) to a low of seventy-seven cases (1999 Term).<sup>28</sup> Given these reduced numbers, it might be hard for some to realize that, during the 1970s and 1980s, there was active debate over various proposals to reduce the Supreme Court's heavy workload, such as the "creation of a National Court of Appeals which would screen all petitions for review now filed in the Supreme Court, and hear and decide on the merits many cases of conflicts between the circuits."<sup>29</sup>

The reduced number of cases resulting in fewer Court opin-

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Supreme Court, 1980 Term- The Statistics, 95 HARV. L. REV. 339, 339 (1981); The Supreme Court, 1981 Term- The Statistics, 96 HARV. L. REV. 304, 304 (1982); The Supreme Court, 1982 Term- The Statistics, 97 HARV. L. REV. 295, 295 (1983); The Supreme Court, 1983 Term- The Statistics, 98 HARV. L. REV. 307, 307 (1984); The Supreme Court, 1984 Term- The Statistics, 99 HARV. L. REV. 322, 322 (1985); The Supreme Court, 1985 Term- The Statistics, 100 HARV. L. REV. 304, 304 (1986); The Supreme Court, 1986 Term- The Statistics, 101 HARV. L. REV. 362, 362 (1987); The Supreme Court, 1987 Term- The Statistics, 102 HARV. L. REV. 350, 350 (1988); The Supreme Court, 1988 Term- The Statistics, 103 HARV. L. REV. 394, 394 (1989); The Supreme Court, 1989 Term- The Statistics, 104 HARV. L. REV. 359, 359 (1990); The Supreme Court, 1990 Term- The Statistics, 105 HARV. L. REV. 419, 419 (1991); The Supreme Court, 1991 Term- The Statistics, 106 HARV. L. REV. 378, 378 (1992); The Supreme Court, 1992 Term- The Statistics, 107 HARV. L. REV. 372, 372 (1993); The Supreme Court, 1993 Term- The Statistics, 108 HARV. L. REV. 372, 372 (1994); The Supreme Court, 1994 Term- The Statistics, 109 HARV. L. REV. 340, 340 (1995); The Supreme Court, 1995 Term- The Statistics, 110 HARV. L. REV. 367, 367 (1996); The Supreme Court, 1996 Term- The Statistics, 111 HARV. L. REV. 431, 431 (1997); The Supreme Court, 1997 Term- The Statistics, 112 HARV. L. REV. 366, 366 (1998); The Supreme Court, 1998 Term- The Statistics, 113 HARV. L. REV. 400, 400 (1999); The Supreme Court, 1999 Term- The Statistics, 114 HARV. L. REV. 390, 390 (2000); The Supreme Court, 2000 Term- The Statistics, 115 HARV. L. REV. 539, 539 (2001); The Supreme Court, 2001 Term- The Statistics, 116 HARV. L. REV. 453, 453 (2002); The Supreme Court, 2002 Term- The Statistics, 117 HARV. L. REV. 480, 480 (2003); The Supreme Court, 2003 Term- The Statistics, 118 HARV. L. REV. 497, 497 (2004); The Supreme Court, 2004 Term- The Statistics, 119 HARV. L. REV. 420, 420 (2005).

<sup>27</sup> See table *supra* note 26.

<sup>28</sup> See table *supra* note 26.

<sup>29</sup> Note, *Of High Designs: A Compendium of Proposals to Reduce the Workload of the Supreme Court*, 97 HARV. L. REV. 307, 310 (1982) (quoting FED. JUDICIAL CTR., REPORT OF THE STUDY GROUP ON THE CASELOAD OF THE SUPREME COURT 6 (1972), *reprinted in* 57 F.R.D. 573, 581 (1972)) [hereinafter *High Designs*]. There were other proposals designed to tackle the time needed to review adequately the growing number of certiorari petitions. Justice John Paul Stevens promoted two such fixes. Justice Stevens first "called for [the] establishment of a new court having the sole task of screening certiorari petitions and selecting the docket of the Supreme Court." *High Designs*, *supra* note 29, at 311 (citing John Paul Stevens, *Some Thoughts on Judicial Restraint*, 66 JUDICATURE 177, 182 (1982)). Justice Stevens also proposed to "redefine the review of certiorari petitions to require majority approval for the grant of a writ," replacing the "rule of four" with "a rule of five." *Id.* at 318 (citing J. Stevens, *The Life Span of a Judge-Made Rule* (Oct. 27, 1982) (James Madison Lecture delivered at the New York University School of Law) (available on request from the Public Information Office, U.S. Supreme Court)).



ions, and the stable membership of the Court, though noteworthy developments on their own,<sup>30</sup> in combination have afforded a unique opportunity to view the *institution* of the Supreme Court in a new way. These same nine jurists have begun to focus their attention on a relatively small number of issues, for example, by choosing not to accept every question upon which the circuits have split. While the Court is subject to criticism for allowing too many important questions to remain unresolved on a national scale,<sup>31</sup> the Justices, perhaps, though not necessarily, by design,<sup>32</sup>

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<sup>30</sup> See, e.g., Thomas W. Merrill, *The Making of the Second Rehnquist Court: A Preliminary Analysis*, 47 ST. LOUIS U. L.J. 569, 570 (2003) (“The second Rehnquist Court started in October 1994 and is still with us. This Court has had no change in its membership, has decided just half the number of cases the Court did in 1986, and is increasingly dominated by a single bloc of five Justices.”). Professor Merrill also noted that “the first Rehnquist Court experienced extensive and frequent changes in membership, while the second Rehnquist Court has experienced no change in membership—it has functioned with the same cast of characters now for over eight uninterrupted years.” *Id.* at 638. See also Hellman, *supra* note 21, at 403.

<sup>31</sup> See, e.g., Mary Garvey Algero, *A Step In the Right Direction: Reducing Intercircuit Conflicts by Strengthening the Value of Federal Appellate Court Decisions*, 70 TENN. L. REV. 605, 610 (2003):

The time has come for Congress and the courts to take action to reduce conflicts among the federal appellate courts regarding federal law. The current system is bursting at the seams as the federal appellate courts and the Supreme Court receive appeals and petitions for writs of certiorari in record numbers.

See also Split Circuits: A Blog Dedicated to Tracking Developments Concerning Splits Among the Federal Circuit Courts, <http://splitcircuits.blogspot.com/> (last visited Apr. 8, 2006).

<sup>32</sup> Professor Merrill has offered this informed speculation:

There is no evidence . . . that William Rehnquist assumed the office of Chief Justice with any intention to cut back on the number of cases heard by the Court. As an Associate Justice, Rehnquist was a frequent filer of dissents from denial of certiorari, implicitly advocating that more, rather than fewer, cases be heard. On the eve of his appointment, he published an article bemoaning the inability of the Court to decide more cases and urging the creation of the National Court of Appeals to take up the slack. Moreover, at his confirmation hearings in 1986, he told the Senate—“I think the 150 cases [per year] that we have turned out quite regularly over a period of 10 or 15 years is just about where we should be at.”

In contrast, we know from published reports that Justice Scalia, from his early years on the Court, strongly favored reducing the number of cases heard by the Court in order to allow more time for each case and improve the quality of the Court’s deliberations.

. . .

I am not inclined to attribute any deep strategic significance to what I have surmised to be Justice Scalia’s advocacy of a smaller case load. The decline has little to do with the politically-significant cases, which are too few in number to explain the shrinkage of the docket we have witnessed. What has happened is that the number of more routine cases involving statutory interpretation and civil and criminal procedural rights issues has been cut roughly in half. If pressed to explain Justice Scalia’s motivation for wanting to get rid of half of the lower-profile cases, I would suggest that it may have something to do with the fact that he is heavily involved in drafting and revising the opinions that issue under his name. The prospect of doing this against a base of 150

have offered important commentary on a number of significant legal issues. These issues include, but are certainly not limited to: the position and legal status of states in a federal system;<sup>33</sup> the importance of original intent;<sup>34</sup> the tension between textualism and a more organic view of the words of the Constitution;<sup>35</sup> the balance between, and separation of, governmental powers;<sup>36</sup> the most effective methods of statutory interpretation;<sup>37</sup> the appropriateness of relying on legislative history;<sup>38</sup> the relevance of foreign sources of law;<sup>39</sup> the role and status of administrative agencies;<sup>40</sup> and the powers and responsibilities of local govern-

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decisions a year is far more exhausting than doing so against a base of 80 decisions a year. Other Justices who joined the Court during the first Rehnquist years, including Justices Souter and Breyer, are also heavily involved in the opinion-production process. So they too might welcome relief from having to produce their share of an extra seventy opinions, most of which involve rather routine and unexciting issues.

Merrill, *supra* note 30, at 643–44 (footnotes omitted).

<sup>33</sup> See, e.g., *Alden v. Maine*, 527 U.S. 706, 714 (1999) (“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”).

<sup>34</sup> See, e.g., *Eldred v. Ashcroft*, 537 U.S. 186, 219 (2003) (“The Copyright Clause and First Amendment were adopted close in time. This proximity indicates that, in the Framers’ view, copyright’s limited monopolies are compatible with free speech principles. Indeed, copyright’s purpose is to promote the creation and publication of free expression.”).

<sup>35</sup> See, e.g., *Johnson v. United States*, 529 U.S. 694, 705 n.7 (2000) (“That is virtuoso lexicography, but it shows only that English is rich enough to give even textualists room for creative readings.”).

<sup>36</sup> See, e.g., *Hamdi v. Rumsfeld*, 542 U.S. 507, 535–36 (2004) (“[T]he position that the courts must forgo any examination of the individual case and focus exclusively on the legality of the broader detention scheme cannot be mandated by any reasonable view of separation of powers, as this approach serves only to *condense* power into a single branch of government.”).

<sup>37</sup> See, e.g., *Koons Buick Pontiac GMC, Inc. v. Nigh*, 543 U.S. 50, 65–66 (2004) (Stevens, J., concurring) (“Common sense is often more reliable than rote repetition of canons of statutory construction.”).

<sup>38</sup> See, e.g., *Bank One Chi., N.A. v. Midwest Bank & Trust Co.*, 516 U.S. 264, 280–81 (1996) (Scalia, J., concurring in part and concurring in the judgment) (citations omitted):

Our opinions using legislative history are often curiously casual, sometimes even careless, in their analysis of what “intent” the legislative history shows. Perhaps that is because legislative history is in any event a make-weight; the Court really makes up its mind on the basis of other factors. Or perhaps it is simply hard to maintain a rigorously analytical attitude, when the point of departure for the inquiry is the fairyland in which legislative history reflects what was in “the Congress’s mind.”

<sup>39</sup> See, e.g., *Roper v. Simmons*, 543 U.S. 551, 604 (2005) (O’Connor, J., dissenting) (citation omitted) (“I disagree with Justice Scalia’s contention that foreign and international law have no place in our Eighth Amendment jurisprudence. Over the course of nearly half a century, the Court has consistently referred to foreign and international law as relevant to its assessment of evolving standards of decency.”).

<sup>40</sup> See, e.g., *United States v. Mead Corp.*, 533 U.S. 218, 228 (2001) (footnotes omitted) (“The fair measure of deference to an agency administering its own statute has been understood to vary with circumstances, and courts have looked to the degree of the agency’s care, its consistency, formality, and relative expertise, and to the persuasiveness of the agency’s position.”).

ments.<sup>41</sup>

From the October 1994 Term through the October 2004 Term, the Justices wrote opinions in nearly seventy cases that directly addressed the powers and responsibilities of local governments.<sup>42</sup> While the great majority of those cases have relatively minimal relevance to the various wet-growth tools reviewed in Part II of this article, there are several cases that deserve closer attention for the instructive lessons they contain.

#### IV. GLEANING LESSONS FROM THE COMMENTATORS

During the eleven Terms in which the membership of the United States Supreme Court remained stable, this body of legal commentators issued opinions in fourteen cases that provide important guidance for local governments seeking to implement or enforce wet-growth tools. While only half of these cases actually concerned land-use planning,<sup>43</sup> and only a couple addressed wet-growth controls,<sup>44</sup> the lessons they convey apply to situations far beyond, though analogous to, the facts of each dispute.

#### **Lesson #1: The Court Looks at Actual Intent and Does Not Accept Sham Purposes**

In *McCreary County v. ACLU of Kentucky*,<sup>45</sup> two Kentucky counties made multiple attempts to post the same version of the Ten Commandments in their courthouses—first as a free-standing display; then, after the American Civil Liberties Union brought suit claiming a violation of the Establishment Clause, surrounded by other religion-related historical texts; and finally, after switching legal counsel, “by eliminating some documents, expanding the text set out in another, and adding some new ones.”<sup>46</sup> The five-member majority in *McCreary County* found that the counties had violated the first prong of the familiar, but

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<sup>41</sup> See *infra* notes 32–154 and accompanying text; see *Cook County v. United States*, 538 U.S. 119, 133–34 (2003) (wherein the Court declares that local governments may be held liable for filing false claims in order to obtain federal funds).

<sup>42</sup> For a list of these cases, see <http://lic.law.ufl.edu/~wolfm/localgovt.htm> (last visited Apr. 17, 2006).

<sup>43</sup> *Kelo v. City of New London*, 125 S. Ct. 2655 (2005); *San Remo Hotel, L.P. v. City & County of San Francisco*, 125 S. Ct. 2491 (2005); *City of Cuyahoga Falls v. Buckeye Cmty. Hope Found.*, 538 U.S. 188 (2003); *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302 (2002); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Village of Willowbrook v. Olech*, 528 U.S. 562 (2000); *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999).

<sup>44</sup> *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302 (2002); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001).

<sup>45</sup> 125 S. Ct. 2722, 2727–28 (2005).

<sup>46</sup> *Id.*

not universally popular, test derived from *Lemon v. Kurtzman*:<sup>47</sup> “First, the statute must have a secular legislative purpose; its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster ‘an excessive government entanglement with religion.’”<sup>48</sup> The *McCreary County* Court found “as seismic as they are unconvincing,” the counties’ assertions that “true ‘purpose’ is unknowable, and its search merely an excuse for courts to act selectively and unpredictably in picking out evidence of subjective intent.”<sup>49</sup>

Given the shifting tactics employed by county officials to secularize their religious intent, it is no surprise that their counsel sought to discredit the notion that courts can discern purpose. In essence, the majority suspected that the local governments were being much less than genuine, noting that:

the Court often does accept governmental statements of purpose, in keeping with the respect owed in the first instance to such official claims. But *in those unusual cases where the claim was an apparent sham*, or the secular purpose secondary, the unsurprising results have been findings of no adequate secular object, as against a predominantly religious one.<sup>50</sup>

In other words, there is a limit of judicial toleration for government officials who employ pretense in their attempts to avoid constitutional restraints.

## **Lesson #2: The Court Is Skeptical About Claims to Property That Are Unsubstantiated by State Law**

In *Town of Castle Rock v. Gonzales*,<sup>51</sup> a seven-member majority rejected a lawsuit brought under 42 U.S.C. § 1983,<sup>52</sup> alleging that “an individual who has obtained a state-law restraining order has a constitutionally protected property interest in having the police enforce the restraining order when they have probable cause to believe it has been violated.”<sup>53</sup> The plaintiff, a mother of three children murdered by her husband, claimed that the town violated her Due Process rights “because its police department had ‘an official policy or custom of failing to respond properly to complaints of restraining order violations’ and ‘tolerated the non-enforcement of restraining orders by its police officers.’”<sup>54</sup>

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<sup>47</sup> *Id.* at 2735, 2745; *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

<sup>48</sup> *Lemon*, 403 U.S. at 612–13 (citation omitted) (quoting *Walz v. Tax Comm’n of New York*, 397 U.S. 664, 674 (1970)).

<sup>49</sup> *McCreary County*, 125 S. Ct. at 2734.

<sup>50</sup> *Id.* at 2736 (emphasis added).

<sup>51</sup> 125 S. Ct. 2796 (2005).

<sup>52</sup> *Id.* at 2800, 2802.

<sup>53</sup> *Id.* at 2800.

<sup>54</sup> *Id.* at 2802 (quoting App. to Pet. for Cert. 129a).

Reversing an en banc Tenth Circuit opinion recognizing a procedural due process claim by the plaintiff,<sup>55</sup> the Court instructed:

The procedural component of the Due Process Clause does not protect everything that might be described as a “benefit”: “To have a property interest in a benefit, a person clearly must have more than an abstract need or desire” and “more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.” *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972). Such entitlements are “of course, . . . not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law.”<sup>56</sup>

Furthermore, the majority explained that “a benefit is not a protected entitlement if government officials may grant or deny it in their discretion.”<sup>57</sup> By narrowing the conception of entitlements the Court in turn reduces the chances that a successful procedural due process claim can be brought against government officials.

### Lesson #3: Comprehensive Planning Earns Deference and Trumps Private Rights-Based Arguments

In one of the Rehnquist Court’s most controversial cases,<sup>58</sup> *Kelo v. City of New London*,<sup>59</sup> five Justices upheld the use of eminent domain by the New London Development Corporation in furtherance of an ambitious economic revitalization plan for ninety acres in the Fort Trumbull area of the economically distressed Connecticut city.<sup>60</sup> The majority, affirming the holding of the Supreme Court of Connecticut and following two key precedents—*Berman v. Parker*,<sup>61</sup> and *Hawaii Housing Authority v. Midkiff*<sup>62</sup>—concluded that the real property of the plaintiffs was taken “for public use.”<sup>63</sup> Noting that the “Court long ago rejected any literal requirement that condemned property be put into use

<sup>55</sup> *Id.* at 2802, 2811.

<sup>56</sup> *Id.* at 2803 (quoting *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972), and *Paul v. Davis*, 424 U.S. 693, 709 (1976) (quoting in turn *Roth*, 408 U.S. at 577)).

<sup>57</sup> *Id.* at 2803.

<sup>58</sup> See generally John M. Broder, *States Curbing Right to Seize Private Homes*, N.Y. TIMES, Feb. 21, 2006, at A1 (discussing the reaction to the decision rendered in *Kelo v. City of New London*).

<sup>59</sup> 125 S. Ct. 2655 (2005).

<sup>60</sup> *Id.* at 2658–59.

<sup>61</sup> 348 U.S. 26 (1954) (allowing the use of eminent domain as part of a redevelopment project for a blighted neighborhood).

<sup>62</sup> 467 U.S. 229 (1984) (allowing the use of condemnation to transfer fee interests from landlords to tenants in order to combat the evils of “land oligopoly”).

<sup>63</sup> *Kelo*, 125 S. Ct. at 2658, 2660–61, 2669.

for the general public,”<sup>64</sup> Justice John Paul Stevens, writing for the majority, explained that the case “turns on the question whether the City’s *development plan* serves a ‘public purpose.’ Without exception, our cases have defined that concept broadly, reflecting our longstanding policy of deference to legislative judgments in this field.”<sup>65</sup>

In fact, the city’s development plan was the focus of the majority’s discussion in several key parts of the opinion,<sup>66</sup> particularly the following passage:

Those who govern the City were not confronted with the need to remove blight in the Fort Trumbull area, but their determination that the area was sufficiently distressed to justify a program of economic rejuvenation is entitled to our deference. The City has carefully formulated an economic development plan that it believes will provide appreciable benefits to the community, including—but by no means limited to—new jobs and increased tax revenue. As with other exercises in urban planning and development, the City is endeavoring to coordinate a variety of commercial, residential, and recreational uses of land, with the hope that they will form a whole greater than the sum of its parts. To effectuate this plan, the City has invoked a state statute that specifically authorizes the use of eminent domain to promote economic development. Given the comprehensive character of the plan, the thorough deliberation that preceded its adoption, and the limited scope of our review, it is appropriate for us, as it was in *Berman*, to resolve the challenges of the individual owners, not on a piecemeal basis, but rather in light of the entire plan. Because that plan unquestionably serves a public purpose, the takings challenged here satisfy the public use requirement of the Fifth Amendment.<sup>67</sup>

The result was deference to state and local officials who engage in comprehensive planning efforts, despite serious claims of private property rights violations.<sup>68</sup>

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<sup>64</sup> *Kelo*, 125 S. Ct. at 2662 (quoting *Midkiff*, 467 U.S. at 244).

<sup>65</sup> *Id.* at 2663 (emphasis added).

<sup>66</sup> See, e.g., *id.* at 2658 (“the city of New London approved a development plan”), *id.* at 2659 (“the NLDC finalized an integrated development plan, “[t]he development plan encompasses seven parcels,” “NLDC intended the development plan to capitalize on the arrival of the Pfizer facility,” “the plan was also designed to make the City more attractive and to create leisure and recreational opportunities”), *id.* at 2661 (“The takings before us, however, would be executed pursuant to a ‘carefully considered’ development plan”), and *id.* at 2667 (“Such a one-to-one transfer of property, executed outside the confines of an integrated development plan, is not presented in this case.”).

<sup>67</sup> *Id.* at 2664–65 (footnote omitted).

<sup>68</sup> See, e.g., *id.* at 2684–85 (Thomas, J., dissenting) (“[I]t is backwards to adopt a searching standard of constitutional review for nontraditional property interests, such as welfare benefits . . . while deferring to the legislature’s determination as to what constitutes a public use when it exercises the power of eminent domain, and thereby invades individuals’ traditional rights in real property.”).

#### **Lesson #4: Ripeness Requirements Continue to Be Significant Hurdles for Those Bringing Regulatory Takings Challenges**

Although in theory regulations that go “too far” amount to unconstitutional takings,<sup>69</sup> in practice it remains a difficult task for a property owner to receive just compensation or other relief for allegedly confiscatory land regulations. That task was made even more arduous by the Supreme Court in 2005, when it issued its holding in *San Remo Hotel, L.P. v. City & County of San Francisco*.<sup>70</sup> The City Planning Commission assessed a \$567,000 “conversion fee” against the hotel for changing residential hotel units into tourist units, and the result was a set of lawsuits brought by the hotel owners: the first suit was a mandamus action in state court, followed a month later by a federal case alleging (among other claims) a regulatory taking.<sup>71</sup>

The federal district court granted summary judgment in the government’s favor; in the Ninth Circuit, the hotel owners requested that the federal court abstain and not hear their federal claims, so the parties returned to state court.<sup>72</sup> However, the hotel owners made a fatal tactical error. Instead of reserving their takings claims, as instructed by the court of appeals, the owners actually raised claims before the federal district court that closely resembled those they were supposed to have reserved.<sup>73</sup> Ultimately, the California Supreme Court, applying a “reasonable relationship” test, denied the facial and as-applied challenges to the city’s Hotel Conversion Ordinance (HCO).<sup>74</sup> When the hotel owners returned to federal court, they did not get a warm reception, as the district court and court of appeals found that the owners’ takings claims had been precluded.<sup>75</sup>

The specific issue before the United States Supreme Court was “whether federal courts may craft an exception to the full faith and credit statute, 28 U.S.C. § 1738, for claims brought under the Takings Clause of the Fifth Amendment.”<sup>76</sup> Complicating the matter was the fact that the hotel owners were required to go to state court in accordance with the Court’s decision in *William-*

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<sup>69</sup> See *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922) (“The general rule at least is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.”).

<sup>70</sup> 125 S. Ct. 2491 (2005).

<sup>71</sup> *Id.* at 2496–97.

<sup>72</sup> *Id.* at 2497.

<sup>73</sup> *Id.* at 2499–2500.

<sup>74</sup> *Id.* at 2500.

<sup>75</sup> *Id.* at 2499–2500.

<sup>76</sup> *Id.* at 2495.

*son County Regional Planning Commission v. Hamilton Bank*,<sup>77</sup> a 1985 case holding “that takings claims are not ripe until a State fails ‘to provide adequate compensation for the taking.’”<sup>78</sup> Nevertheless, the *San Remo* majority was ultimately unsympathetic with property owners who had failed to make wise litigation decisions:

At base, petitioners’ claim amounts to little more than the concern that it is unfair to give preclusive effect to state-court proceedings that are not chosen, but are instead *required* in order to ripen federal takings claims. Whatever the merits of that concern may be, we are not free to disregard the full faith and credit statute solely to preserve the availability of a federal forum. The Court of Appeals was correct to decline petitioners’ invitation to ignore the requirements of 28 U.S.C. § 1738.<sup>79</sup>

The road to recovery for a regulatory taking would remain, for the foreseeable future, a long, winding, often frustrating path.

#### Lesson #5: The Text Trumps Legislative History

Efforts by government officials to reduce air pollution in metropolitan Los Angeles were negated by the Supreme Court’s finding of federal preemption in *Engine Manufacturers Ass’n v. South Coast Air Quality Mgmt. District*.<sup>80</sup> In 2000, the South Coast Air Quality Management District (SCAQMD) was charged with “developing and implementing a ‘comprehensive basinwide air quality management plan’ to reduce emission levels and thereby achieve and maintain ‘state and federal ambient air quality standards.’”<sup>81</sup> SCAQMD adopted six Fleet Rules (for vehicles such as street sweepers, passenger vehicles, public transit vehicles, and others) specifying the “the types of vehicles that fleet operators must purchase or lease when adding or replacing fleet vehicles.”<sup>82</sup> The Fleet Rules mandated the purchase or lease of alternative-fuel vehicles or of vehicles, such as Low-Emission and Zero-Emission Vehicles, among others, that “meet certain emission specifications established by the California Air Resources Board (CARB).”<sup>83</sup>

The Engine Manufacturers responded in turn with a federal suit, “claiming that the Fleet Rules are pre-empted by § 209 of the CAA [Clean Air Act], which prohibits the adoption or attempted enforcement of any state or local ‘standard relating to

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<sup>77</sup> 473 U.S. 172 (1985).

<sup>78</sup> *San Remo*, 125 S. Ct. at 2495 (quoting *Williamson*, 473 U.S. at 195).

<sup>79</sup> *Id.* at 2507.

<sup>80</sup> 541 U.S. 246, 248, 258–59 (2004).

<sup>81</sup> *Id.* at 249 (quoting CAL. HEALTH & SAFETY CODE § 40402(e) (West 1996)).

<sup>82</sup> *Engine Mfrs.*, 541 U.S. at 248–49.

<sup>83</sup> *Id.* at 250, 250 n.1, 250 n.3.



the control of emissions from new motor vehicles or new motor vehicle engines.”<sup>84</sup> The district court granted summary judgment to SCAQMD,<sup>85</sup> and the court of appeals affirmed,<sup>86</sup> but the Supreme Court reversed in an opinion for eight Justices written by Justice Scalia.<sup>87</sup>

The Court’s decision was directed primarily at the word “standard,” the key term found in § 209(a).<sup>88</sup> Turning to one of his most trusty interpretive sources—“Webster’s Second”<sup>89</sup>—Justice Scalia noted:

Today, as in 1967 when § 209(a) became law, “standard” is defined as that which “is established by authority, custom, or general consent, as a model or example; criterion; test.” Webster’s Second New International Dictionary 2455 (1945). The criteria referred to in § 209(a) relate to the emission characteristics of a vehicle or engine. To meet them the vehicle or engine must not emit more than a certain amount of a given pollutant, must be equipped with a certain type of pollution-control device, or must have some other design feature related to the control of emissions. This interpretation is consistent with the use of “standard” throughout Title II of the CAA (which governs emissions from moving sources) to denote requirements such as numerical emission levels with which vehicles or engines must comply, *e.g.*, 42 U.S.C. § 7521(a)(3)(B)(ii) [42 USCS § 7521(a)(3)(B)(ii)], or emission-control technology with which they must be equipped, *e.g.*, § 7521(a)(6).<sup>90</sup>

Because it was “likely that at least certain aspects of the Fleet

<sup>84</sup> *Id.* at 251 (quoting 42 U.S.C. § 7543(a) (2000)).

<sup>85</sup> *Id.* at 251.

<sup>86</sup> *Id.* at 252.

<sup>87</sup> *Id.* at 247.

<sup>88</sup> *Id.* at 252–59.

<sup>89</sup> For other Supreme Court opinions in which Justice Scalia relied on the second edition of Webster’s New International Dictionary to define terms, many of which are parts of everyday usage, see *Vieth v. Jubelirer*, 541 U.S. 267, 274 (2004) (“gerrymander”); *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23, 31 (2003) (“origin”); *Branch v. Smith*, 538 U.S. 254, 264, 298 (2003) (“enact” and “until”); *Republican Party of Minnesota v. White*, 536 U.S. 765, 776 (2002) (“impartial”); *Whitman v. Am. Trucking Ass’n.*, 531 U.S. 457, 465 (2001) (“public health”); *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320, 333–34 (2000) (“abridge”); *Pa. Dep’t of Corr. v. Yeskey*, 524 U.S. 206, 211 (1998) (“eligible” and “participate”); *Textron Lycoming Reciprocating Engine Div. v. United Auto., Aerospace & Agric. Implement Workers of America*, 523 U.S. 653, 656–57 (1998) (“for”); *Brogan v. United States*, 522 U.S. 398, 400–01 (1998) (“statement”); *Allentown Mack Sales & Serv., Inc. v. Nat’l Labor Relations Bd.*, 522 U.S. 359, 367, 367 n.2 (1998) (“doubt” and “objective”); *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (“subject to”); *Walters v. Metro. Educ. Enters., Inc.*, 519 U.S. 202, 207–08 (1997) (“have”); *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 763 (1995) (“endorsement”); *Asgrow Seed Co. v. Winterboer*, 513 U.S. 179, 187 (1995) (“market”); *MCI Telecomms. Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 227–28, 242 n.5 (1994) (“modify”); *Deal v. United States*, 508 U.S. 129, 131 (1993) (“conviction”); *Bray v. Alexandria Women’s Health Clinic*, 506 U.S. 263, 274 (1993) (“invidious”); *Harmelin v. Michigan*, 501 U.S. 957, 976 (1991) (“unusual”); *Chan v. Korean Air Lines, Ltd.*, 490 U.S. 122, 128 (1989) (“irregularity”); *Pierce v. Underwood*, 487 U.S. 552, 564 (1988) (“substantial”).

<sup>90</sup> *Engine Mfrs.*, 541 U.S. at 252–53.

Rules are pre-empted” by § 209,”<sup>91</sup> the decision of the court of appeals was vacated, and the case was remanded for further proceedings.<sup>92</sup>

In contrast, Justice David Souter, the sole dissenter, argued that “legislative history should inform interpretive choice, and the legislative history of this preemption provision shows that Congress’s purpose in passing it was to stop States from imposing regulatory requirements that directly limited what manufacturers could sell.”<sup>93</sup> Justice Souter also highlighted the difference between his approach to the case and the majority’s:

In sum, I am reading “standard” in a practical way that keeps the Act’s preemption of standards in tune with Congress’s object in providing for preemption, which was to prevent the States from forcing manufacturers to produce engines with particular characteristics as a legal condition of sale. The majority’s approach eliminates this consideration of legislative purposes, as well as the presumption against preemption, by acting as though anything that could possibly be described as a standard must necessarily be a “standard” for the purposes of the Act: a standard is a standard is a standard. The majority reveals its misalliance with Gertrude Stein throughout its response to this dissent.<sup>94</sup>

Even though the legislative history strongly indicated that the Fleet Rules were consistent with congressional intent, the words in the text of the preemptive provision ultimately controlled.

### **Lesson #6: Judges Appreciate the Administrative Burdens Faced by Local Officials**

In *City of Los Angeles v. David*,<sup>95</sup> a car owner “made a federal case out of it” when he had to wait twenty-seven days for a hearing at which the city denied his claim that trees blocked his view of a “no parking sign.”<sup>96</sup> In a Per Curiam opinion, the Court rejected Edwin David’s claim “that the city, in failing to provide a sufficiently prompt hearing, had violated his federal right to ‘due process of law,’”<sup>97</sup> reversing the Ninth Circuit’s decision “that the Constitution required the city to provide an earlier payment-recovery hearing, perhaps within 48 hours of the towing and at least within 5 days.”<sup>98</sup>

Central to the Supreme Court’s decision were the practical

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<sup>91</sup> *Id.* at 258.

<sup>92</sup> *Id.* at 259.

<sup>93</sup> *Id.* at 261 (Souter, J., dissenting).

<sup>94</sup> *Id.* at 263–64 (Souter, J., dissenting) (footnote omitted).

<sup>95</sup> 538 U.S. 715 (2003).

<sup>96</sup> *Id.* at 716.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

difficulties faced by a large city in processing hearings of this kind:

The nature of the city's interest in delay is one of administrative necessity. The city points out that it "conducts more than a thousand vehicle impound hearings annually." Pet. for Cert. 8. It holds about five percent of these hearings—those involving individuals who are unable to afford the impoundment fees—within 48 hours. It "takes time to organize hearings: there are only so many courtrooms and presiding officials; the city has to contact the towing officer and arrange for his appearance; the city may have to find a substitute to cover that officer's responsibilities while he attends the hearing." And the Ninth Circuit's holding, which presumably would require the city to schedule annually 1,000 or more hearings, instead of 50 hearings, within a 48-hour (or 5-day) time limit, will prove burdensome. The administrative resources available to modern police departments are not limitless.<sup>99</sup>

The protections afforded private property owners by the Due Process Clause, far from absolute, are assessed in relation to the significant administrative tasks performed by local government and other public officials.

#### **Lesson #7: Congress May Subject Municipalities to Suit in State Court Without Violating "State Sovereignty"**

In 1996, Susan Jinks, the widow of a man who died in a Richland County, South Carolina, detention center, brought claims in federal district court under 42 U.S.C. § 1983 and the South Carolina Tort Claims Act.<sup>100</sup> By the time the federal trial court dismissed both claims, the state's two-year statute of limitations had run, which was the basis of the South Carolina Supreme Court's reversal of a state court jury verdict in Jinks's favor.<sup>101</sup> The United States Supreme Court, in *Jinks v. Richland County*, agreed to hear the case after the state high court "held that 28 U.S.C. § 1367(d), which required the state statute of limitation to be tolled for the period during which petitioner's cause of action had previously been pending in federal court, is unconstitutional as applied to lawsuits brought against a State's political subdivisions."<sup>102</sup>

First, Justice Scalia, in an opinion for a unanimous Court, dismissed the notion that Congress had exceeded its enumerated powers in enacting § 1367(d).<sup>103</sup> The opinion then moved to the respondent county's assertion "that § 1367(d) should not be in-

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<sup>99</sup> *Id.* at 718 (quoting *David v. City of Los Angeles*, 307 F.3d 1143, 1149 (2002) (Kozinski, J., dissenting), *rev'd*, 538 U.S. 751 (2003)).

<sup>100</sup> *Jinks v. Richland County*, 538 U.S. 456, 460 (2003).

<sup>101</sup> *Id.* at 460.

<sup>102</sup> *Id.* at 458.

<sup>103</sup> *Id.* at 457, 461.

terpreted to apply to claims brought against a State's political subdivisions," which the Court found "also to be without merit."<sup>104</sup> The body of Rehnquist Court commentators, which in other cases supported an expansive notion of sovereign immunity,<sup>105</sup> made an important distinction between the elevated status of a state and its more vulnerable municipalities:

In respondent's view, § 1367(d)'s extension of the time period in which a State's political subdivisions may be sued constitutes an impermissible abrogation of "sovereign immunity." That is not so. Although we have held that Congress lacks authority under Article I to override a State's immunity from suit in its own courts, see *Alden v. Maine*, 527 U.S. 706 . . . (1999), it may subject a *municipality* to suit in state court if that is done pursuant to a valid exercise of its enumerated powers, see *id.*, at 756 . . . . Section 1367(d) tolls the limitations period with respect to *state-law* causes of action brought against municipalities, but we see no reason why that represents a greater intrusion on "state sovereignty" than the undisputed power of Congress to override state-law immunity when subjecting a municipality to suit under a federal cause of action. In either case, a State's authority to set the conditions upon which its political subdivisions are subject to suit in its own courts must yield to the enactments of Congress. This is not an encroachment on "state sovereignty," but merely the consequence of those cases (which respondent does not ask us to overrule) which hold that municipalities, unlike States, do not enjoy a constitutionally protected immunity from suit.<sup>106</sup>

In other words, for immunity purposes, the hierarchy of nonfederal governments remains basically intact.

### **Lesson #8: It Takes Egregious or Arbitrary Government Conduct for Property Owners to Prove Substantive Due Process Violations**

In *City of Cuyahoga Falls v. Buckeye Community Hope Foundation*, a unanimous Supreme Court, in an opinion by Justice Sandra Day O'Connor, found that an Ohio city did not violate an affordable housing developer's equal protection or due process rights when city officials submitted a referendum repealing the ordinance approving the developer's site plan.<sup>107</sup> Although the developer was successful in convincing the Ohio Supreme Court that the ordinance was not a proper subject of a referendum under state law<sup>108</sup> and in advancing its constitutional claims in the

<sup>104</sup> *Id.* at 465.

<sup>105</sup> See, e.g., *Alden v. Maine*, 527 U.S. 706, 712 (1999) ("[T]he powers delegated to Congress under Article I of the United States Constitution do not include the power to subject nonconsenting States to private suits for damages in state courts.").

<sup>106</sup> *Jinks*, 538 U.S. at 465–66.

<sup>107</sup> 538 U.S. 188, 190–91, 199 (2003).

<sup>108</sup> *Buckeye Cmty. Hope Found. v. City of Cuyahoga Falls*, 697 N.E.2d 181, 186 (Ohio

federal Sixth Circuit,<sup>109</sup> the Justices were much less sympathetic.

The developer's failure to offer proof of racially discriminatory intent or purpose, in accordance with the requirements of *Village of Arlington Heights v. Metropolitan Housing Development Corp.*,<sup>110</sup> proved fatal to the equal protection claim.<sup>111</sup> On the due process claim, while the Sixth Circuit had held, "as a threshold matter, that respondents had a legitimate claim of entitlement to the building permits, and therefore a property interest in those permits, in light of the city council's approval of the site plan,"<sup>112</sup> the Supreme Court felt no need to "decide whether respondents possessed a property interest in the building permits, because the city engineer's refusal to issue the permits while the petition was pending in no sense constituted egregious or arbitrary government conduct."<sup>113</sup> The Justices were equally unimpressed with the developer's assertion "that the City's submission of an administrative land-use determination to the charter's referendum procedures constituted *per se* arbitrary conduct."<sup>114</sup> In this way, the Court sent a strong signal to landowners that the protections afforded by Due Process Clause were reserved for those penalized by the most "egregious" and "arbitrary" instances of official misconduct.

### **Lesson #9: The Court Endorses Careful Planning for Environmentally Sensitive Lands**

One of the most important regulatory takings cases decided by the legal commentators comprising the Rehnquist Court involved a comprehensive and controversial wet-growth regulatory scheme to protect the pristine waters of Lake Tahoe. In *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*,<sup>115</sup> five colleagues joined Justice Stevens in declining to hold that "a moratorium on development imposed during the process of devising a comprehensive land-use plan constitutes a *per se* taking of property requiring compensation under the Takings Clause of the United States Constitution."<sup>116</sup> The delays faced by landowners seeking to develop their property were not

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1998).

<sup>109</sup> *Buckeye Cmty. Hope Found. v. City of Cuyahoga Falls*, 263 F.3d 627, 645 (6th Cir. 2001), *rev'd in part, vacated in part*, 538 U.S. 188 (2003).

<sup>110</sup> 429 U.S. 252, 265 (1977).

<sup>111</sup> *Cuyahoga Falls*, 538 U.S. at 194.

<sup>112</sup> *Id.* at 198.

<sup>113</sup> *Id.*

<sup>114</sup> *Id.* "The subjection of the site-plan ordinance to the City's referendum process, regardless of whether that ordinance reflected an administrative or legislative decision, did not constitute *per se* arbitrary government conduct in violation of due process." *Id.* at 199.

<sup>115</sup> 535 U.S. 302 (2002).

<sup>116</sup> *Id.* at 305–06, 342–43.

insignificant:

This case actually involves two moratoria ordered by respondent Tahoe Regional Planning Agency (TRPA) to maintain the status quo while studying the impact of development on Lake Tahoe and designing a strategy for environmentally sound growth. The first, Ordinance 81-5, was effective from August 24, 1981, until August 26, 1983, whereas the second more restrictive Resolution 83-21 was in effect from August 27, 1983, until April 25, 1984. As a result of these two directives, virtually all development on a substantial portion of the property subject to TRPA's jurisdiction was prohibited for a period of 32 months.<sup>117</sup>

Nevertheless, the Court concluded "that the interest in 'fairness and justice' will be best served by relying on the familiar *Penn Central* [ad hoc balancing] approach when deciding cases like this, rather than by attempting to craft a new categorical rule."<sup>118</sup>

The *Tahoe Sierra* Court's decision not to recognize another category of *per se* regulatory taking can be attributed in a significant way to the majority's recognition of and respect for careful planning, especially in environmentally sensitive regions. This aspect of the decision is illustrated by the following excerpts from the majority opinion:

A narrower rule that excluded the normal delays associated with processing permits, or that covered only delays of more than a year, would certainly have a less severe impact on prevailing practices, but it would still impose serious financial constraints on the planning process. . . . [M]oratoria like Ordinance 81-5 and Resolution 83-21 are used widely among land-use planners to preserve the status quo while formulating a more permanent development strategy. In fact, the consensus in the planning community appears to be that moratoria, or "interim development controls" as they are often called, are an essential tool of successful development. . . .

The interest in facilitating informed decisionmaking by regulatory agencies counsels against adopting a *per se* rule that would impose such severe costs on their deliberations. Otherwise, the financial constraints of compensating property owners during a moratorium may force officials to rush through the planning process or to abandon the practice altogether. To the extent that communities are forced to abandon using moratoria, landowners will have incentives to develop their property quickly before a comprehensive plan can be enacted, thereby fostering inefficient and ill-conceived growth. . . .

We would create a perverse system of incentives were we to hold that landowners must wait for a takings claim to ripen so that planners can make well-reasoned decisions while, at the same time, holding that those planners must compensate landowners for the delay.

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<sup>117</sup> *Id.* at 306.

<sup>118</sup> *Id.* at 342.

Indeed, the interest in protecting the decisional process is even stronger when an agency is developing a regional plan than when it is considering a permit for a single parcel.<sup>119</sup>

The message to regulators and landowners that emerges from this decision is that, in order to maintain the proper equilibrium between private property rights and public needs, a balancing test that considers the specific circumstances in which the regulatory power is exercised is, except in limited circumstances, more appropriate than a *per se* approach.

### **Lesson #10: Regulators Must Ensure That Landowners Retain Something More Than Token Value**

In a second wet growth case, a five-Justice majority, in an opinion written by Justice Anthony Kennedy, refused to find that a landowner whose real property retained \$200,000 in development value even after the application of state wetlands restrictions was entitled to bring a *per se* regulatory takings challenge alleging a “total deprivation.”<sup>120</sup> Although the majority in *Palazzolo v. Rhode Island* remanded the case for a determination of whether the landowner could prevail under an alternative takings test,<sup>121</sup> before it let go of the dispute, the Court explained that the fact that a property owner acquires a parcel after a regulation goes into effect does not necessarily preclude a regulatory takings challenge.<sup>122</sup> Justice Kennedy cautioned: “[a] blanket rule that purchasers with notice have no compensation right when a claim becomes ripe is too blunt an instrument to accord with the duty to compensate for what is taken.”<sup>123</sup>

The *Palazzolo* decision contains another, potentially important victory for landowners affected by environmental regulations. While, as noted above, the property in the case before the Court retained significant development value, there may be occa-

<sup>119</sup> *Id.* at 337–40 (footnotes omitted).

<sup>120</sup> *Palazzolo v. Rhode Island*, 533 U.S. 606, 610, 616, 632 (2001).

<sup>121</sup> *See id.* at 632 (“The claims under the *Penn Central* analysis were not examined, and for this purpose the case should be remanded.”); *see also* Peter B. Lord, *Westerly Wetlands Dispute Finally Over*, PROVIDENCE JOURNAL, Sept. 14, 2005, at B3:

Anthony Palazzolo’s wetlands dispute with the state of Rhode Island has grown in recent decades to become one of the state’s longest-running and most widely studied legal cases. This week, it quietly came to an end. . . .

During 23 years of administrative proceedings and 17 years of litigation, Palazzolo has tried to win permission to build his subdivision on the south shores of Winnapaug Pond, just north of Atlantic Avenue in Westerly. . . .

The Supreme Court sent the case back to the Rhode Island Superior Court for further consideration. After more testimony, Superior Court Judge Edwin Gale issued a 32-page ruling in July that went against Palazzolo once again.

<sup>122</sup> *Palazzolo*, 533 U.S. at 627.

<sup>123</sup> *Id.* at 628.

sions in which a landowner suffers a dramatic, though less-than-total, deprivation. In that event, the Court instructed, “[a]ssuming a taking is otherwise established, a State may not evade the duty to compensate on the premise that the landowner is left with a token interest.”<sup>124</sup>

### Lesson #11: Judges Will Not Tolerate Backdoor Strategies

Persistence and creativity did not pay off for Santa Fe High School officials in Texas, whose practice of electing a school chaplain to deliver Christian prayers over a public address system before varsity football games was declared to be in violation of the Establishment Clause of the First Amendment.<sup>125</sup> School officials then opted for an alternative system, which they worked out over the summer and fall of 1995:

The August policy, which was titled “Prayer at Football Games,” . . . authorized two student elections, the first to determine whether “invocations” should be delivered, and the second to select the spokesperson to deliver them. Like the July policy, it contained two parts, an initial statement that omitted any requirement that the content of the invocation be “nonsectarian and nonproselytising,” and a fallback provision that automatically added that limitation if the preferred policy should be enjoined. . . .

The final policy (October policy) is essentially the same as the August policy, though it omits the word “prayer” from its title, and refers to “messages” and “statements” as well as “invocations.” It is the validity of that policy that is before us.<sup>126</sup>

Six Justices, in an opinion penned by Justice Stevens, were not convinced that the school had gone far enough.<sup>127</sup> In *Santa Fe Independent School District v. Doe*, the Court concluded that “this policy does not provide the District with the constitutional safe harbor it sought.”<sup>128</sup>

One of the messages sent by the Rehnquist Court commentators is that it is a difficult task for government officials to purge an invalid policy of its constitutional defects. Going back to the drawing board with the intent to change the letter but not the spirit of a tainted policy is insufficient. Context and history are important:

This case comes to us as the latest step in developing litigation brought as a challenge to institutional practices that unquestionably violated the Establishment Clause. One of those practices was the

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<sup>124</sup> *Id.* at 631.

<sup>125</sup> *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 294, 301 (2000).

<sup>126</sup> *Id.* at 297–98.

<sup>127</sup> *Id.* at 292, 301.

<sup>128</sup> *Id.* at 317.



District's long-established tradition of sanctioning student-led prayer at varsity football games. The narrow question before us is whether implementation of the October policy insulates the continuation of such prayers from constitutional scrutiny. It does not. Our inquiry into this question not only can, but must, include an examination of the circumstances surrounding its enactment.<sup>129</sup>

Local governments should be advised that trying to sneak a defective program or policy in through the back door is ultimately a formula for failure.

### **Lesson #12: The Equal Protection Clause Remains Potentially Effective as an Avenue of Relief Against Municipalities That Abuse Regulatory Power**

When Grace and Thaddeus Olech requested that the Village of Willowbrook, Illinois, which the Olechs and others had unsuccessfully sued in an unrelated action, tie their property to the public water supply, local government officials responded with a condition that departed from the norm:<sup>130</sup>

The Village at first conditioned the connection on the Olechs granting the Village a 33-foot easement. The Olechs objected, claiming that the Village only required a 15-foot easement from other property owners seeking access to the water supply. After a 3-month delay, the Village relented and agreed to provide water service with only a 15-foot easement.<sup>131</sup>

The federal district court dismissed Grace Olech's claim that the village had violated the Equal Protection Clause (her husband had died),<sup>132</sup> but the Seventh Circuit reversed and held that "a plaintiff can allege an equal protection violation by asserting that state action was motivated solely by a 'spiteful effort to "get" him for reasons wholly unrelated to any legitimate state objective."<sup>133</sup> The Supreme Court, in its per curium opinion in *Village of Willowbrook v. Olech* answered in the affirmative the following question: "whether the Equal Protection Clause gives rise to a cause of action on behalf of a 'class of one' where the plaintiff did not allege membership in a class or group."<sup>134</sup>

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<sup>129</sup> *Id.* at 315.

<sup>130</sup> *Village of Willowbrook v. Olech*, 528 U.S. 562, 563 (2000) (per curium).

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> *Id.* at 563–64. (internal quotation marks omitted) (quoting *Olech v. Vill. of Willowbrook*, 160 F.3d 386, 387 (7th Cir. 1998), *aff'd*, 528 U.S. 562 (2000), and quoting in turn *Esmail v. Macrane*, 53 F.3d 176, 180 (7th Cir. 1995)).

<sup>134</sup> *Olech*, 528 U.S. at 563–65. The Court noted that, in actuality, other neighbors who had joined the Olechs in their previous lawsuit had also been asked to dedicate a 33-foot easement. *Id.* at 564 n.\*. *This led* the Justices to observe, "Whether the complaint alleges a class of one or of five is of no consequence because we conclude that the number of individuals in a class is immaterial for equal protection analysis." *Id.*

While it remains difficult for landowners to bring successful Equal Protection claims, without the benefit of strict scrutiny afforded plaintiffs in cases involving a suspect class or fundamental rights,<sup>135</sup> *Olech* is an important reminder that property owners are still protected from government abuse:

Olech's complaint can fairly be construed as alleging that the Village intentionally demanded a 33-foot easement as a condition of connecting her property to the municipal water supply where the Village required only a 15-foot easement from other similarly situated property owners. The complaint also alleged that the Village's demand was "irrational and wholly arbitrary" and that the Village ultimately connected her property after receiving a clearly adequate 15-foot easement. These allegations, quite apart from the Village's subjective motivation, are sufficient to state a claim for relief under traditional equal protection analysis.<sup>136</sup>

Even if the regulatory takings movement is on the decline,<sup>137</sup> local land use regulators do not have a license to abuse or treat unfairly landowners and developers.

### **Lesson #13: Multiple Refusals of a Landowner's Reasonable Development Requests Could Lead to a Substantial Jury Award**

Over a five-year period in the early 1980s, Del Monte Dunes and its predecessor in interest, landowners in the city of Monterey, California, submitted nineteen site plans in an effort to create a residential development on its 37.6-acre oceanfront parcel.<sup>138</sup> Although the planning commission's professional staff recommended approval of the developer's proposal in 1985 to devote nearly half of the site to public open space and only 5.1 acres to buildings and patios, the commission rejected the recommendation.<sup>139</sup> The next year, the city council followed suit, offering the following reasons for its denial:

[T]he council made general findings that the landowners had not provided adequate access for the development (even though the landowners had twice changed the specific access plans to comply with the

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<sup>135</sup> See, e.g., *Kadrmas v. Dickinson Pub. Sch.*, 487 U.S. 450, 457–58 (1988) ("Unless a statute provokes 'strict judicial scrutiny' because it interferes with a 'fundamental right' or discriminates against a 'suspect class,' it will ordinarily survive an equal protection attack so long as the challenged classification is rationally related to a legitimate governmental purpose.").

<sup>136</sup> *Olech*, 528 U.S. at 565 (citation omitted).

<sup>137</sup> See, for example, the recent local government victories in *San Remo Hotel, L.P. v. City & County of San Francisco*, 125 S. Ct. 2491 (2005), and *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302 (2002).

<sup>138</sup> *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 694, 698 (1999).

<sup>139</sup> *Id.* at 696–97.

city's demands and maintained they could satisfy the city's new objections if granted an extension), that the plan's layout would damage the environment (even though the location of the development on the property was necessitated by the city's demands for a public beach, view corridors, and a buffer zone next to the state park), and that the plan would disrupt the habitat of the Smith's Blue Butterfly (even though the plan would remove the encroaching ice plant and preserve or restore buckwheat habitat on almost half of the property, and even though only one larva had ever been found on the property).<sup>140</sup>

Del Monte Dunes pursued equal protection, regulatory takings, and due process claims, under 42 U.S.C. § 1983, against the city in federal district court.<sup>141</sup> Eventually, a jury returned verdicts in the landowner's favor on the first two grounds, and awarded \$1.45 million in damages.<sup>142</sup>

When the Ninth Circuit affirmed, the city brought its case to the Supreme Court, which agreed to hear the following questions:

(1) whether issues of liability were properly submitted to the jury on Del Monte Dunes' regulatory takings claim, (2) whether the Court of Appeals impermissibly based its decision on a standard that allowed the jury to reweigh the reasonableness of the city's land-use decision, and (3) whether the Court of Appeals erred in assuming that the rough-proportionality standard of *Dolan v. City of Tigard*, 512 U.S. 374 . . . (1994), applied to this case.<sup>143</sup>

While all members of the Court in *City of Monterey v. Del Monte Dunes at Monterey Ltd.* agreed that the Ninth Circuit's discussion of the *Dolan* test was "unnecessary" and "irrelevant to [the Supreme Court's] disposition of the case,"<sup>144</sup> there was a five-four split over the legitimacy of submitting the regulatory takings claim to a jury, with the majority holding in the affirmative.<sup>145</sup>

Justice Kennedy, writing for the Court, concluded that:

to the extent Del Monte Dunes' challenge was premised on unreasonable governmental action, the theory argued and tried to the jury was that the city's denial of the final development permit was inconsistent not only with the city's general ordinances and policies but even with the shifting ad hoc restrictions previously imposed by the city. Del Monte Dunes' argument, in short, was not that the city had followed its zoning ordinances and policies but rather that it had not done so. As is often true in § 1983 actions, the disputed questions were whether the government had denied a constitutional right in acting outside the bounds of its authority, and, if so, the extent of any result-

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<sup>140</sup> *Id.* at 697–98.

<sup>141</sup> *Id.* at 698.

<sup>142</sup> *Id.* at 701.

<sup>143</sup> *Id.* at 702.

<sup>144</sup> *See id.* at 692, 702–03.

<sup>145</sup> *See id.* at 692, 720–22.

ing damages. These were questions for the jury.<sup>146</sup>

The result was a major financial disincentive to local governments that misuse their significant powers to approve some development proposals subject to shifting conditions, and to reject other proposals on the basis of unsupportable or highly suspicious rationales.

#### **Lesson #14: Immunity for Local Legislators Is the Same as That of Their Federal and State Counterparts**

In *Bogan v. Scott-Harris*, Justice Clarence Thomas, writing for a unanimous body of legal commentators, reversed the First Circuit's affirmance of a jury verdict against the mayor (Daniel Bogan) and the vice-president of the city council, Marilyn Roderick, of Fall River, Massachusetts.<sup>147</sup> The city officials were sued by Janet Scott-Harris, the former administrator of the city's Department of Health and Human Services, whose position was eliminated after she brought termination charges against a politically connected employee, Dorothy Biltcliffe, who had made racial and ethnic slurs directed at her (Biltcliffe's) colleagues.<sup>148</sup> In her suit, Scott-Harris "alleged that the elimination of her position was motivated by racial animus and a desire to retaliate against her for exercising her First Amendment rights in filing the complaint against Biltcliffe."<sup>149</sup> The plaintiff was successful in obtaining a favorable jury verdict on First Amendment grounds; the trial and appellate courts rejected the defendant officials' claims that they were entitled to legislative immunity.<sup>150</sup> The Supreme Court disagreed:

It is well established that federal, state, and regional legislators are entitled to absolute immunity from civil liability for their legislative activities. In this case, petitioners argue that they, as local officials performing legislative functions, are entitled to the same protection. They further argue that their acts of introducing, voting for, and signing an ordinance eliminating the government office held by respondent constituted legislative activities. We agree on both counts and therefore reverse the judgment below.<sup>151</sup>

In fact, the Court observed that the officials' acts "were, in form, quintessentially legislative,"<sup>152</sup> and because "the ordinance, in substance, bore all the hallmarks of traditional legislation."<sup>153</sup>

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<sup>146</sup> *Id.* at 722.

<sup>147</sup> 523 U.S. 44, 46-48 (1998).

<sup>148</sup> *Id.* at 46-47.

<sup>149</sup> *Id.* at 47.

<sup>150</sup> *Id.* at 47-48.

<sup>151</sup> *Id.* at 46.

<sup>152</sup> *Id.* at 55.

<sup>153</sup> *Id.*

In this instance, the Court found convincing reasons for treating local lawmakers like their state and federal counterparts, who, according to precedent, are entitled to absolute legislative immunity:

Absolute immunity for local legislators under § 1983 finds support not only in history, but also in reason. The rationales for according absolute immunity to federal, state, and regional legislators apply with equal force to local legislators. Regardless of the level of government, the exercise of legislative discretion should not be inhibited by judicial interference or distorted by the fear of personal liability. Furthermore, the time and energy required to defend against a lawsuit are of particular concern at the local level, where the part-time citizen-legislator remains commonplace. And the threat of liability may significantly deter service in local government, where prestige and pecuniary rewards may pale in comparison to the threat of civil liability.<sup>154</sup>

In the eyes of the Court, local legislators, who often find themselves threats of lawsuits by disgruntled landowners, are entitled to a significant privilege accorded those who are elected to serve in state capitals and Washington, D.C.

#### V. APPLYING THE COMMENTATORS' LESSONS IN HYDRO CITY

As we return to our hypothetical municipality—Hydro City—it is helpful to consider the Supreme Court Commentators' lessons in context. Consider the following four scenarios involving the implementation of wet-growth tools.

##### **Scenario A**

*Hydro City officials have decided to be more rigorous in their inspections during pre-construction and construction phases and to assess additional fines in the event of violations. Some of the developers with poor compliance track records have filed suit against the city and the individual officials, claiming that they (developers) have a property right to fair enforcement of land regulations.*

City officials would be wise to consider the following four lessons in planning their defense for possible lawsuits by these developers: First, the Court is skeptical about claims to property that are unsubstantiated by state law (Lesson #2). A naked assertion of a “property right to fair enforcement” should not be deemed sufficient to trigger judicial concern. Second, the Commentators have emphasized that comprehensive planning earns deference and trumps private rights-based arguments (Lesson #3). If city officials are acting in accordance with standard pro-

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<sup>154</sup> *Id.* at 52 (citations omitted).

cedures in support of published plans, they reduce the likelihood of judicial interference. Third, it takes egregious or arbitrary government conduct for property owners to prove substantive due process violations (Lesson #8). The enforcement of otherwise valid regulations against landowners is not the kind of government activity that triggers heightened judicial scrutiny. The private party challenging the regulation carries a heavy burden in the face of significant judicial deference. Fourth, immunity for local legislators is the same as that of their federal and state counterparts (Lesson #14). While 42 U.S.C. § 1983 provides strong incentives to sue local governments and their officials for constitutional torts, local lawmakers are protected from disgruntled landowners who claim that their constitutional rights have been violated by the enactment of faulty ordinances or by other legislative acts.

### Scenario B

*SuperMegaMart has acquired land for a new discount retail facility on the city's north side. The city has responded by imposing a six-month moratorium on permits for big-box stores, ostensibly pending the drafting and adoption of a new set of regulations for 100,000+ square-foot stores. When the first moratorium was about to expire, a second six-month moratorium followed. While no real work has been performed on the ordinance, the city is considering a third moratorium.*

Four of the lessons from the Court Commentators indicate that Hydro City officials are on shaky ground. First, the court looks at actual intent and does not accept sham purposes (Lesson #1). As each month passes without the introduction of an actual ordinance, the chances grow that a reviewing court will see through this charade. Second, the Justices will not tolerate back-door strategies (Lesson #11). Store counsel can effectively use the legislative history of the series of moratoria in a court challenge brought against the city. Third, the Equal Protection Clause remains potentially effective as an avenue of relief against municipalities that abuse regulatory power (Lesson #12). It is possible that a court will find that local officials have crossed the line between careful deliberation and unreasonable, retributive behavior. Fourth, multiple refusals of a landowner's reasonable development requests could lead to a substantial jury award (Lesson #13). Members of a jury in a § 1983 case, introduced to a landowner complying with existing land-use regulations who has met with a non-responsive or even belligerent response, could inflict costly damage on the taxpayers of Hydro City.

### Scenario C

*No new permanent buildings are permitted in buffer zones bordering the river, and owners of existing structures may not make additions or improvements. Owners who can show a seventy-five percent reduction in value can apply for a variance. Owners who can show a ninety percent reduction will be given rights to develop non-sensitive properties elsewhere.*

There are three lessons from the Court that indicate the difficulties local governments face when implementing environmental regulations that have a significant impact on land values and uses. First, ripeness requirements continue to be significant hurdles for those bringing regulatory takings challenges (Lesson #4). Landowners and developers bringing regulatory takings challenges often find themselves forced to make difficult and time-consuming strategic choices concerning the choice of forum and the need to request permission or a variance after being denied relief initially (or even repeatedly). Second, the Court endorses careful planning for environmentally sensitive lands (Lesson #9). Courts have signaled their support for the development of comprehensive programs directed to reap defined and concrete environmental benefits for the entire community. Third, regulators must ensure that landowners retain something more than token value (Lesson #10). There is a point at which the financial burdens carried by one or a group of landowners are deemed too onerous, and local regulators must be aware of the general and specific effects of their actions.

### Scenario D

*City officials, concerned about water consumption, pass an ordinance that imposes a sliding scale—tying costs to usage (the more usage, the higher the per-unit cost). In order to secure enough votes to pass the ordinance, sponsors of the ordinance exempted existing users and other in-state companies from the new scheme. Lawsuits are threatened.*

The Commentators have provided three lessons that address the fairness questions raised by these hypothetical facts. First, the text trumps legislative history (Lesson #5). If a piece of legislation creates unfair or illegal categories, even the best of intentions preceding its enactment will be deemed irrelevant. Second, judges appreciate the administrative burdens faced by local officials (Lesson #6). Though a separate branch, the judiciary is not unmindful of the significant challenges facing local legislatures today, when raising taxes is extremely difficult (and potentially fatal to a political career) and when financial support from Washington, D.C. is often insubstantial. Third, Congress may subject municipalities to suit in state court without violating “state sov-

ereignty” (Lesson #7). Unlike the states who created them (and have the power to alter their powers and boundaries), municipalities are vulnerable to costly and otherwise injurious litigation. This fact alone should lead to caution by local officials when they create distinctions that leave some landowners outside the benefited class.

## VI. ON THE THRESHOLD OF CHANGE

Only time will tell whether recent changes to the Court’s erstwhile stable membership (Roberts for Rehnquist and Alito for O’Connor) will mean a return to larger numbers of opinions, the formation of new alliances, or the creation of new, internal, institutional developments. For now and the foreseeable future, local government officials engaged in or considering the implementation of innovative wet-growth controls can benefit from heeding the lessons of the body of legal commentators comprising the Rehnquist Court over its last eleven Terms.

Considered together, the fourteen lessons caution a balanced approach to local, environmentally based regulations that have the potential not only to protect sensitive water bodies and lands and to benefit the human and nonhuman life that share our watersheds, but also to reduce the value and potential productive use of land by owners who are particularly burdened by even the wisest regulatory tools. This balance is suggested in the Court’s skepticism about sham purposes and back-door methods on the one hand, and its generous deference to local officials on the other. The balance is embodied in the Justices’ refusal to recognize municipal sovereignty, while shielding local lawmakers with absolute immunity. Most importantly, the balance is reflected in the Rehnquist Court commentators’ strong endorsement of comprehensive land-use and environmental planning, while opening the door to relief for landowners who are left with no more than token value or who are mistreated by arbitrary and non-responsive public servants. It is this author’s hope that, when we look back on the work product of the Roberts Court after it establishes its institutional persona, the same kind of beneficial balance will be readily apparent.