CONSTITUTIONAL LAW—FIFTH AMENDMENT—REGULATORY TAKINGS DEPRIVING ALL ECONOMICALLY VIABLE USE OF A PROPERTY OWNER'S LAND REQUIRE JUST COMPENSATION UNLESS THE GOVERNMENT CAN IDENTIFY COMMON LAW NUISANCE OR PROPERTY PRINCIPLES FURTHERED BY THE REGULATION—*Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886 (1992).

The Takings Clause of the Fifth Amendment expressly prohibits the government from taking private property for public purposes without compensating the property owner.[1] Analysis of this seemingly straightforward clause has resulted in one of the most muddled areas of the United States Supreme Court's jurisprudence.[2] Initially, the Court's ad hoc analytical framework resulted in a steady trend of government victories, thus denying compensation to property owners.[3] The Court, however, has re-

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[1] U.S. CONST. amend. V. The Fifth Amendment provides in pertinent part: "nor shall private property be taken for public use, without just compensation." *Id.* The government's ability to take private property for public use, provided it pays compensation, is known as the power of "eminent domain." JOHN E. NOWACK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 11.10, at 423 (4th ed. 1991). The eminent domain concept can be traced to early legal scholars and natural law principles which recognized the government's power to exercise dominion over private property for the public good. *Id.* § 11.11, at 424. This power, and its attendant restrictions, has been interpreted by the Supreme Court to be applicable to the states, through the Fourteenth Amendment, as well as to the federal government. *Id.* § 11.11, at 425-26.

Early interpretations of the Takings Clause viewed its language literally, requiring a physical appropriation of property by the government in order for a taking to occur. *Id.* § 11.12, at 430 (quoting Mugler v. Kansas, 123 U.S. 623, 668-69 (1887)). A broader view of what constitutes a taking has evolved as well, including within the definition of a taking a government regulation onerously affecting a property owner's rights. *Id.* (citing Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922)). The attempt to distinguish between regulations that constitute takings and those that do not has been called " 'the most haunting jurisprudential problem in the field of contemporary land-use law.' " LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 9-4, at 595-96 (2d ed. 1988) (citations omitted).

[2] Joseph L. Sax, *Takings and the Police Power*, 74 YALE L.J. 36, 37 (1964) (noting that commentators have described the Supreme Court's takings decisions as a " 'crazy quilt pattern' ") (citation omitted); *see also* Richard A. Epstein, *Takings: Descent And Resurrection*, 1987 SUP. CT. REV. 1, 3 (1987) (declaring that "[n]o matter how hard or often it tries the Supreme Court seems unable to develop any coherent principles" in the takings area). The Court's failure to devise a coherent framework for a takings analysis and adherence to an ad hoc approach to takings issues has been criticized for leading to unpredictable results which thwart investors' attempts to make informed property decisions. Susan Rose-Ackerman, *Against Ad Hocery: A Comment On Michelman*, 88 COLUM. L. REV. 1697, 1700 (1988).

[3] *See, e.g.*, Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 474-75, 476-77 (1987) (holding that statute requiring coal companies to leave certain

cently begun to favor property owners' rights.[4]

In *Lucas v. South Carolina Coastal Council*,[5] the Court continued the recent trend of placing restrictions on governmental power in the takings arena by articulating the general rule that regulatory takings that deny a property owner all economically beneficial use of his land were compensable.[6] Accordingly, the Court limited the "nuisance" or "noxious use" exception employed in past Court decisions[7] by mandating that the government could justify a total economic taking without compensation only by identifying

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coal deposits in the ground to prevent surface subsidence did not require compensation because the statute was preventing a public harm); Penn Central Transp. Co. v. New York City, 438 U.S. 104, 116, 138 (1978) (determining that governmental regulation restricting owner of Grand Central Terminal from building an office tower above the terminal did not require compensation despite the fact that the tower plan conformed with zoning laws); Goldblatt v. Hempstead, 369 U.S. 590, 592, 596 (1962) (declaring that a town ordinance which had the effect of shutting down a company's mining activity on a certain parcel of land did not require compensation as a taking); Miller v. Schoene, 276 U.S. 272, 277, 281 (1928) (deciding that government statute requiring the destruction of cedar trees in order to protect more profitable apple trees from disease did not require compensation to cedar tree owners who could still utilize the felled trees); Mugler v. Kansas, 123 U.S. 623, 656-57, 675 (1887) (asserting that state statute prohibiting the sale and manufacture of alcohol did not constitute a taking of brewery owner's factory and equipment that were useful only for alcohol production).

[4] *See, e.g.*, Nollan v. California Coastal Comm'n, 483 U.S. 825, 828-29, 832 (1987) (ruling that conditioning the grant of a building permit on a property owner's relinquishment of an easement effected a taking); First English Evangelical Lutheran Church v. Los Angeles County, 482 U.S. 304, 307-08, 322 (1987) (declaring that government regulation temporarily preventing property owner from rebuilding on land in a flood zone would require compensation as a temporary taking); Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 426 (1982) (ruling that any physical invasion of property, no matter how slight, required compensation).

[5] 112 S. Ct. 2886 (1992).

[6] *Id.* at 2895.

[7] *Id.* The Court had traditionally held that the government could escape the compensation requirement if it was acting to prohibit a noxious use of property. TRIBE, *supra* note 1, § 9-3, at 593. This principle had been broadly construed and utilized in a variety of contexts. *Id.* § 9-3, at 593 n.4. (citing cases with varying fact situations in which injunctions against noxious uses were not takings requiring compensation); *see also* Arcara v. Cloud Books, Inc., 478 U.S. 697, 698, 707 (1986) (upholding government closure of an adult book store where prostitution solicitation was taking place); Northwestern Laundry v. Des Moines, 239 U.S. 486, 490, 492, 495 (1916) (validating a regulation prohibiting emission of dense smoke); Mugler v. Kansas, 123 U.S. 623, 657, 674-75 (1887) (holding constitutional a state prohibition of alcohol); Fertilizing Co. v. Hyde Park, 97 U.S. 659, 665, 670 (1878) (declaring constitutional a prohibition of animal rendering plant from operating in a residential area)).

The essence of the "noxious use test" was based on the property owner's use of his property, not on his dominion over it. *Developments in the Law—Zoning*, 91 HARV. L. REV. 1427, 1470 (1978) [hereinafter *Zoning*]. Thus, if a property use had

common law nuisance or property principles.[8]

In *Lucas*, petitioner David Lucas purchased two residential lots on a barrier island off the coast of South Carolina for $975,000 in 1986.[9] At the time, neither lot was encumbered by any development restrictions.[10] In 1988, however, the South Carolina Legislature passed the Beachfront Management Act[11] which prohibited Lucas from building on his lots.[12]

Lucas thereafter filed an action in the South Carolina Court of Common Pleas, alleging that his property had been taken without just compensation.[13] The trial court determined that the Act constituted a taking of the property's economic viability and therefore required compensation.[14]

The South Carolina Supreme Court reversed, deferring to the legislature's finding that the regulation was necessary to prevent public harm.[15] The court held that when a State acted to

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an offensive quality that made it "noxious," any regulation of the property that did not entail an actual acquisition was not considered a taking. *Id.*

For a more detailed discussion of the noxious use doctrine see Thomas A. Hippler, Comment, *Reexamining 100 Years Of Supreme Court Regulatory Takings Doctrine: The Principles Of "Noxious Use," "Average Reciprocity Of Advantage," And "Bundle Of Rights" From* Mugler *To* Keystone Bituminous Coal, 14 B.C. ENVTL. AFF. L. REV. 653 (1987).

8 *Lucas*, 112 S. Ct. at 2900.

9 *Id.* at 2889. Lucas was planning to build single-family homes on his lots in the same manner as property owners on neighboring lots had already done. *Id.*

10 *Id.* When Lucas bought the parcels of land they did not fall within the purview of a 1977 Act which required building permits for construction within a certain "critical area." *Id.*

11 S.C. CODE ANN. §§ 48-39-250 to 48- (Supp. 1990) [hereinafter Act].

12 *Lucas*, 112 S.Ct. at 2889. The Beachfront Management Act banned new construction in the area and therefore did not affect Lucas's neighbors who had already built on their lots. *Id.* The only construction permitted on Lucas's property was the erection of "certain nonhabitable improvements" such as small wooden walkways and decks. *Id.* at 2889-90 n.2 (citation omitted).

13 *Id.* at 2890. Lucas conceded that the government did have the power to enact the legislation but argued that the Act had the effect of extinguishing the property's economic value and therefore demanded the payment of compensation. *Id.*

14 *Id.* The trial court determined that when Lucas purchased the lots they were in a zoning area that permitted the construction of single family-homes. *Id.* Because the Beachfront Management Act prohibited such construction on Lucas's property, the trial court concluded, the regulation " 'deprive[d] Lucas of any reasonable economic use of the lots, . . . eliminated the unrestricted right of use, and render[ed] them valueless.' " *Id.* (citation omitted).

15 Lucas v. South Carolina Coastal Council, 404 S.E.2d 895, 898, 899 (S.C. 1991). The court asserted that Lucas's failure to attack the Act's legitimacy was a concession that:

> [T]he beach/dune area of South Carolina's shores is an extremely valuable public resource; that the erection of new construction, *inter alia*, contributes to the erosion and destruction of this public resource; and

prevent a noxious use of property, no compensation was due regardless of the legislation's private economic effects.[16]

The United States Supreme Court reversed the state court's determination, finding that Lucas's property had been taken without just compensation.[17] The Court enunciated a general rule requiring compensation whenever government regulation deprived a property owner of all economically viable use of his property.[18] The Court tempered this assertion, however, by stating that such regulation would be justified if it was designed to abate a common law nuisance.[19]

Mugler v. Kansas[20] was one of the Court's earliest attempts to balance the public and private concerns that arise when government action results in private economic hardship.[21] In *Mugler*, the Court addressed a Kansas act[22] outlawing the manufacture or

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that discouraging new construction in close proximity to the beach/dune area is necessary to prevent a great public harm.

Id. at 898.

16 *Id.* at 899. The court cited several cases for support. *Id.*; *see, e.g.*, Goldblatt v. Hempstead, 369 U.S. 590, 590-91 (1962) (declaring that a regulation prohibiting excavation below the water table did not constitute a compensable taking of property where the regulation had the effect of preventing a property owner from continuing mining activity on a certain lot); Miller v. Schoene, 276 U.S. 272, 277, 280-81 (1928) (holding that government statute requiring the destruction of cedar trees to protect more profitable apple trees from disease did not require compensation to cedar tree owners who could still utilize the felled trees); Hadacheck v. Sebastian, 239 U.S. 394, 405, 414 (1915) (declaring ordinance prohibiting brickmaking within city limits did not constitute a taking of land where the property owner's lot was suitable only for brickmaking); Mugler v. Kansas, 123 U.S. 623, 654, 675 (1887) (upholding a statute banning the manufacture and sale of alcohol because it did not effect a taking of owners' breweries).

17 *Lucas*, 112 S. Ct. at 2901-02.

18 *Id.* at 2895. The majority based this assertion on previous Court decisions indicating that a complete diminution in economic value would constitute a taking. *Id.* at 2893. *See, e.g.* Nollan v. California Coastal Comm'n, 483 U.S. 825, 834 (1987) (stating that the court has "long recognized that land use regulation does not effect a taking if it 'substantially advance[s] legitimate state interests' and does not 'den[y] an owner economically viable use of his land' ") (citations omitted); Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 495 (1987) (declaring that regulating property uses "effects a taking if it 'denies an owner economically viable use of his land.' ") (citations omitted); Agins v. Tiburon, 447 U.S. 255, 260 (1980) ("application of a general zoning law to particular property effects a taking if the ordinance . . . denies an owner economically viable use of his land") (citation omitted).

19 *Lucas*, 112 S. Ct. at 2900.

20 123 U.S. 623 (1887).

21 *Hippler, supra* note 7, at 660. One author suggests that *Mugler* was the Court's "first comprehensive analysis of the relationship between states' police power and the due process and takings clauses."

22 The Act provided in pertinent part:

All places where intoxicating liquors are manufactured, sold, bartered, or given away in violation of any of the provisions of this act, or

sale of intoxicating liquors.[23] The Act had the effect of shutting down breweries, including petitioner Peter Mugler's, even though these establishments had been lawfully operated prior to the amendment.[24] Subsequently, Mugler alleged that the statute violated the Fourteenth Amendment's Due Process Clause by rendering his brewery practically valueless.[25]

In finding that no unconstitutional taking had occurred, Justice Harlan, writing for the Court, examined the scope of the state's police power.[26] Justice Harlan posited that a state's police

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> where intoxicating liquors are kept for sale, barter, or delivery in violation of this act, are hereby declared to be common nuisances, and upon the judgment of any court having jurisdiction finding such a place to be a nuisance under this section, the sheriff, his deputy, or under sheriff, or any constable of the proper county, or marshal of any city where the same is located, shall be directed to shut up and abate such place by taking possession thereof and destroying all intoxicating liquors found therein, together with all signs, screens, bars, bottles, glasses, and other property used in keeping and maintaining said nuisance, and the owner or keeper thereof shall, upon conviction, be adjudged guilty of maintaining a common nuisance and shall be punished by a fine of not less than one hundred dollars nor more than five hundred dollars, and by imprisonment in the county jail not less than thirty days nor more than ninety days. . . .

Mugler, 123 U.S. at 670 (quoting GEN. STAT. KANSAS, 1885, ch., § 13 (1885)).

[23] *Id.* at 655. The Act was passed in response to a popularly approved state constitutional amendment calling for prohibition. *Id.* The Court stated that it was common knowledge that alcohol could endanger the public's health, morals, and safety, thus giving Kansas the right to limit its manufacture and sale. *Id.* at 662. Justice Harlan noted statistical evidence "that the idleness, disorder, pauperism, and crime existing in the country are, in some degree at least, traceable [to alcohol]." *Id.*

[24] *Id.* at 654, 656-57. Mugler was found guilty of selling beer after the Act's enactment. *Id.* at 657.

[25] *Id.* at 654, 657. Mugler argued that his building would be of little economic use if not utilized for the manufacture of alcohol. *Id.* Justice Harlan agreed with this point. *Id.* at 657.

[26] *Id.* at 658. The term "police power" is difficult to define because it is not embodied in the United States Constitution and its scope has been the subject of much debate among judges and legal scholars. RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 107 (1985); *see, e.g.*, Berman v. Parker, 348 U.S. 26, 32 (1954) (stating that the term police power has no exact definition). Generally, the police power entails the government's ability to maintain "peace and good order" by protecting the health, safety and morals of the public. EPSTEIN, *supra* at 108; *see also* NOWACK, *supra* note 1, § 11.10, at 423 (stating that "the term 'police power' is used to designate the inherent power of government to take acts to promote the public health, safety, welfare or morals"); Sax, *supra* note 2, at 36 n.6 (noting that "[i]n its best known and most traditional uses, the police power is employed to protect the health, safety, and morals of the community").

In the takings context, police power is more narrowly construed to encompass the government's ability to regulate land use and personal property without incur-

power mandate to protect the health, morals, and safety of its citizens included the right to outlaw liquor.[27] The Justice rested this assertion on the policy judgment that an individual could not utilize his property in a manner that injured others.[28] According to Justice Harlan, the legislature should be given great deference in determining what property uses would be deemed injurious.[29] Accordingly, Justice Harlan deferred to the legislature's finding of a nexus between the prohibition of alcohol and the goal of protecting the community.[30]

Having established a police power justification for the Act, the Justice next declared that the government was under no duty to compensate for losses incurred as a result of such legislation.[31]

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ring the obligation of paying compensation. NOWACK, *supra* note 1, § 11.10, at 423-24. Thus, the government's police power can be utilized to restrict certain property rights without having to compensate individuals for their losses. Sax, *supra* note 2, at 36 n.6. Proper police power justifications have been found in varying situations. *See, e.g.*, Hadacheck v. Sebastian, 239 U.S. 394 (1915) (permitting the regulation of brickyards); L'Hote v. City of New Orleans, 117 U.S. 587 (1900) (allowing restrictions on prostitution); Fertilizing Co. v. Hyde Park, 97 U.S. 659 (1878) (upholding restrictions on the transportation of noxious waste).

For a historical view of early police power theories, see T.D. Havran, *Eminent Domain and the Police Power*, 5 NOTRE DAME L. REV., 380 (1930); R.S. Wiggin, *The Power Of The State To Restrict The Use Of Real Property*, 1 MINN. L. REV. 135 (1917).

27 *Mugler*, 123 U.S. at 658 (quotation omitted). The Court supported this contention by noting past decisions standing for the proposition that alcohol could be heavily regulated. *Id.* at 659. *See, e.g.*, Foster v. Kansas, 112 U.S. 201, 206 (1884) (positing that the constitutionality of a state statute prohibiting the sale and manufacture of alcohol was well established); Beer Co. v. Massachusetts, 97 U.S. 25, 33 (1877) (noting that laws prohibiting the sale and manufacture of alcohol were valid police regulations that did not violate any section of the United States Constitution); Bartemeyer v. Iowa, 85 U.S. 129, 133 (1873) (determining that state legislatures had the power to regulate and prohibit alcohol trafficking).

28 *Mugler*, 123 U.S. at 660 (quoting Munn v. Illinois, 94 U.S. 113, 124 (1876)). The *Munn* Court based this policy judgment on the principle that members of society, while free to conduct their private affairs without governmental interference, were subject to certain constraints when their acts affected others. *Munn*, 94 U.S. at 124. According to the Latin phrase *sic utere tuo ut alienum non laedas*, the *Munn* Court explained, government was authorized to establish "laws requiring each citizen to so conduct himself, and so use his own property, as not unnecessarily to injure another." *Id.* at 124-25.

29 *Mugler*, 123 U.S. at 660-61. Justice Harlan placed two limitations on the state's police power. *Id.* at 661. The Justice posited that the regulation should be substantially related to the ends sought and could not invade fundamental rights. *Id.*

30 *Id.* at 662. The Justice further declared that the Fourteenth Amendment did not restrict the state's police powers. *Id.* at 664. Justice Harlan asserted that "[i]t cannot be supposed that the States intended, by adopting that Amendment, to impose restraints upon the exercise of their powers for the protection of the safety, health, or morals of the community." *Id.*

31 *Id.* at 668-69. Justice Harlan justified the notion that a proper police power

Refusing to factor in the Act's economic consequences, Justice Harlan asserted that when a state thwarted a noxious use of property it was not obliged to pay the property owner for his or her losses.[32] The Justice further drew a distinction between the exercise of police power and the exercise of eminent domain by noting that a police power action merely limited a property owner's use of the property, not his right of ownership.[33]

The Court refined its police power and eminent domain analysis in *Pennsylvania Coal Company v. Mahon*.[34] The Pennsylvania Coal Company challenged the validity of a state law preventing the company from mining coal under certain parcels of land where subsidence to the surface would occur.[35] The Pennsylvania Supreme Court upheld the regulation as a proper use of the state's police power.[36] The court reached this decision

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action alleviated the government's duty to pay compensation by reasoning that a property owner would still have control over, and use of, his property. *Id.* at 669. Additionally, the Justice noted that such a property owner would be able to freely alienate his land. *Id.* The Justice did observe that if the legislation's "apparent" objective was to deprive individuals of their property "under the guise of police regulation" a taking determination would be warranted and compensation due. *Id.*

[32] *Id.* Justice Harlan's refusal to consider the legislation's economic impact stemmed from the literal view that mere limitations on property did not constitute a taking under the Fifth Amendment. Sax, *supra* note 2, at 36. Justice Harlan rationalized that "[t]he exercise of the police power by the destruction of property which is itself a public nuisance, or the prohibition of its use in a particular way, whereby its value becomes depreciated, is very different from taking property for public use, or from depriving a person of his property without due process of law." *Mugler*, 123 U.S. at 669. This viewpoint was in line with the common view in the late 1800's that absent an explicit expropriation of property, the government would not be liable for a compensable taking unless there was a physical invasion of the property. Frank I. Michelman, *Property, Utility, And Fairness: Comments On The Ethical Foundations Of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1184 & n.36 (1967); *see also Zoning*, *supra* note 7, at 1467 n.25 (noting that " '[i]t seems settled that to entitle the owner to protection under [the Takings Clause] the property must be taken in the physical sense of the word' ") (quoting T. SEDGWICK, A TREATISE ON THE RULES WHICH GOVERN THE INTERPRETATION AND CONSTRUCTION OF STATUTORY AND CONSTITUTIONAL LAW, 519-20 (1857)).

[33] *Mugler*, 123 U.S. at 668-69.

[34] 260 U.S. 393 (1922). For a detailed discussion of the *Pennsylvania Coal* decision, see FRED BOSSELMAN, ET AL., THE TAKINGS ISSUE, 124-38 (1973); Carol M. Rose, Mahon *Reconstructed: Why The Takings Test Is Still A Muddle*, 57 S. CAL. L. REV. 561 (1984).

[35] *Pennsylvania Coal*, 260 U.S. at 412. Entitled the "Kohler Act," the statute prohibited coal mining where cave-ins or subsidence would have adverse effects on public or private dwellings, among other designated areas. *Mahon v. Pennsylvania Coal Co.*, 118 A. 491, 492 (1922).

[36] *Id.* at 493. The Pennsylvania Supreme Court stated that when a statute sought to protect the public's health, safety, or morals, the statute must be substantially related to those goals to be valid. *Id.* In so ruling, the court displayed a highly deferential disposition towards state regulations, stating that "[i]t is primar-

despite Pennsylvania Coal's contract with surface owners to mine under the land, and the surface owners' assumption of all risks resulting from the mining operations.[37]

Writing for the majority, Justice Holmes first scrutinized whether there was a sufficient police power justification to avoid a determination that a taking had occurred.[38] The Justice noted that while the police power would justify certain actions, that power was not without its limits.[39] Among these limitations, the majority explained, was the extent to which the regulation worked an economic diminution in value on the injured party's property.[40] With this framework in mind, Justice Holmes weighed the public concerns furthered by the statute with the private losses incurred by Pennsylvania Coal and concluded that the extent of the diminution in value required compensation.[41]

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ily for the Legislature to consider and decide on the fact of a danger, then meet it by a proper remedy." *Id.* (citation omitted). The Pennsylvania Supreme Court gave great weight to the legislature's statements regarding the public dangers caused by subsidence. *Id.*

[37] *Id.* at 492, 495. Pennsylvania common law recognized three separate estates in land: the surface estate, the subsurface mineral estate, and the support estate. *Pennsylvania Coal*, 260 U.S. at 395 (Plaintiff's Brief). The surface rights in *Pennsylvania Coal* were owned by the Mahons, while the Pennsylvania Coal Company owned the mineral rights and had obtained a contractual waiver of any claim against them for subsidence. BOSSELMAN, *supra* note 34, at 130. Thus, the coal company had the contractual right to undertake mining activity that would destroy the support estate and cause subsidence to the Mahon's land above. *Pennsylvania Coal*, 260 U.S. at 412.

Citing United States Supreme Court precedent, however, the Pennsylvania Supreme Court opined that private contracts could not override a state's legitimate use of its police powers. *Id.* at 494 (quoting Holden v. Hardy, 169 U.S. 366, 392 (1898)). Noting that a state's police power could be utilized to promote the general welfare, the Court stated that this power could not be " 'limited by contract nor bartered away by legislation.' " *Id.* (quoting *Holden*, 169 U.S. at 392).

[38] *Id.* at 413. Justice Holmes asserted that "[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law. As long recognized, some values are enjoyed under an implied limitation and must yield to the police power." *Id.*

[39] *Id.*

[40] *Id.* Justice Holmes refused to set a formula to determine when an economic diminution would demand compensation, opining that such an inquiry depended on a case's "particular facts." *Id.* The Justice acknowledged that legislatures should be given great deference in determining whether certain actions fell within the state's police power but opined that such legislative findings were still open to challenges by interested parties. *Id.*

[41] *Id.* at 413-14. Justice Holmes noted that the harm being averted was to "a single private house." *Id.* at 413. While admitting that such a situation did carry some public interest, the Justice posited that since the resultant damage to the house would not be akin to a public nuisance common to the general public, it was not strongly affected with the public interest. *Id.* Furthermore, Justice Holmes refused to accept safety justifications in support of the Act. *Id.* at 414. The Justice

Despite the conclusion that a taking had occurred in this particular dispute, Justice Holmes went one step further by declaring that the Act itself was unconstitutional in any situation where mining rights had been reserved.[42] The Justice stressed that although the State of Pennsylvania had a rational public objective for adopting the regulation, that fact was not dispositive of whether a taking had occurred.[43] The Justice also asserted that by making it impracticable to mine the coal profitably, the statute effected a physical taking.[44] This reasoning led Justice Holmes to assert that states could regulate property, but "if regulation goes too far"[45] an improper taking would result.[46]

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asserted that safety concerns could be satisfied by providing the public with advance notice of the mining activities. *Id.* Therefore, the Justice found that the public concerns were not strong enough to outweigh the private interest of losing a "very valuable estate." *Id.*

[42] *Id.* The Justice asserted that it was necessary to analyze the statute on its face because various groups had submitted arguments calling the Act's legitimacy into question. *Id.* Thus, the majority averred, "[i]t seems, therefore, to be our duty to go farther in the statement of our opinion, in order that it may be known at once, and that further suits should not be brought in vain." *Id.*

[43] *Id.* at 413, 414-15. Justice Holmes declared that "[t]he protection of private property in the Fifth Amendment presupposes that it is wanted for public use, but provides that it shall not be taken for such use without compensation." *Id.* at 415.

[44] *Id.* at 414. Positing that " 'the right to coal consists in the right mine it,' " Justice Holmes distinguished a similar case in which the Court allowed the state legislature to require coal companies to leave a pillar of coal in the ground between their respective mines. *Id.* at 415 (quoting Commonwealth v. Clearview Coal Co., 256 Pa. 328, 331, and citing Plymouth Coal Co. v. Pennsylvania, 232 U.S. 531 (1914)). The Justice rationalized that the policy behind the *Plymouth* regulation was to provide a safety barrier between the properties and afforded the coal companies an "average reciprocity of advantage" which was akin to just compensation. *Id.*

While commentators have differed over the exact meaning of the phrase "average reciprocity of advantage," it appears to refer to any reciprocal benefits a landowner receives when he is burdened by certain land use regulation. *See Hippler*, *supra* note 7, at 673 & n.110. Thus, these reciprocal benefits act as compensation and thwart a taking determination. *Id.* Despite the seeming import of the reciprocity of advantage doctrine, it was virtually ignored by the Court until its resurrection in the dissent in Penn Central Transp. Co. v. New York City, 438 U.S. 104 (1978). *Id.* at 673 n.110.

[45] *Pennsylvania Coal*, 260 U.S. at 415. Although Justice Holmes refused to provide a formula for how far is "too far," this phrase has been relied upon in numerous court decisions to determine if compensable takings had occurred. *See, e.g.*, MacDonald, Sommer & Frates v. Yolo County, 477 U.S. 340, 348 (1986) (asserting that "appellant must establish that the regulation has in substance 'taken' his property—that is, that the regulation 'goes too far' ") (citing *Pennsylvania Coal*, 260 U.S. at 415); Pruneyard Shopping Center v. Robins, 447 U.S. 74, 83 (1980) (stating that "[w]hen 'regulation goes too far it will be recognized as a taking' ") (citing *Pennsylvania Coal*, 260 U.S. at 415); Kaiser Aetna v. United States, 444 U.S. 164, 178 (1979) (declaring that "the Government's attempt to create a public right of access to the improved pond goes so far beyond ordinary regulation . . . as to amount to a taking under the logic of *Pennsylvania Coal*"). The Court, however, has never quan-

The Court again faced governmental action aimed at preventing a public harm that affected private economic interests in *Goldblatt v. Hempstead*.[47] In *Goldblatt*, a corporation had conducted mining activities on a certain lot for over thirty years, resulting in the formation of a twenty-acre lake around which the town of Hempstead, New York, had expanded.[48] The town subsequently amended an ordinance to prohibit excavation below the water table, thus making further mining on the lot impossible.[49] The town sought an injunction to prevent further mining on the property and the mining company responded by alleging that the ordinance effected an unconstitutional taking.[50]

Writing for a unanimous Court, Justice Clark sought to harmonize the police power standards set forth in the *Mugler* and *Pennsylvania Coal* decisions.[51] As an initial matter, the Court noted that although the ordinance had taken away a beneficial use of the property, that fact alone would not constitute a taking if the town was validly exercising its police powers.[52] The Court

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tified a certain level of economic diminution in value that constitutes a compensable taking, instead opting to make such determinations on a case-by-case basis. Joseph L. Sax, *Property Rights in the U.S. Supreme Court: A Status Report*, 7 U.C.L.A. J. ENVTL. LAW & POL'Y 139, 149 (1988).

46 *Pennsylvania Coal*, 260 U.S. at 415. Justice Holmes asserted that without this limiting principle government would continue to expand the sweep of its police power "more and more until at last private property disappears." *Id.*

47 369 U.S. 590, 591 (1962).

48 *Id.* at 591. The mining company had continuously mined sand and gravel on the thirty-eight acre tract since 1927 and had already excavated below the water table by 1928. *Id.*

49 *Id.* at 592. The ordinance provided that " '[n]o excavation shall be made below two feet above the maximum ground water level at the site.' " *Id.* at 592 n.1. The amendment also placed a duty on property owners to refill excavation work below the water table. *Id.*

50 *Id.* The mining company argued that the ordinance did not merely regulate their business because the law had the effect of totally prohibiting further mining on the site. *Id.* This result, the company contended, acted as a confiscation of property without compensation. *Id.*

51 *Id.* at 593-94. See *supra* notes 20-33 and 34-46 and accompanying text for a discussion of the *Mugler* and *Pennsylvania Coal* decisions.

52 *Id.* at 592-93 (citing Walls v. Midland Carbon Co., 254 U.S. 300 (1920); Hadacheck v. Sebastian, 239 U.S. 394 (1915); Reinmann v. Little Rock, 237 U.S. 171 (1915)). Justice Clark also posited that a property use could be prohibited even if it was not recognized as a nuisance at common law. *Id.* at 593 (citing *Reinmann*, 237 U.S. at 176).

In *Walls*, the Court held that a statute placing restrictions on natural gas and gas wells which had the effect of prohibiting the manufacture of "carbon black" in a factory exclusively designed for that purpose, was a proper exercise of the state's police power. *Walls*, 254 U.S. at 309-10, 325. Similarly, the *Hadacheck* Court declared that a city ordinance prohibiting brick making did not act as an unconstitutional taking of property where the petitioner's property was best suited for

then reiterated the *Mugler* Court's determination that no compensation was required when the government sought to prevent a noxious use of property that would be injurious to the public's health, morals, or safety.[53] Qualifying this assertion, Justice Clark noted that the *Pennsylvania Coal* decision mandated that certain regulations could have such onerous private effects that would require compensation.[54]

Applying the principles espoused in *Mugler* and *Pennsylvania Coal*, Justice Clark set forth several factors for consideration when determining if a state's police power had exceeded constitutional bounds.[55] Justice Clark asserted that the Court should consider the character of the harm being averted, the availability of effective and less drastic remedies, and the diminution in value to appellant's interests as a result of the ordinance.[56] These criteria were not actually weighed in *Goldblatt*, however, because of Justice Clark's finding that there was no evidence on the record to determine the potential danger, less onerous remedies, or the actual economic loss.[57] As a result, the Court deferred to the government's determination.[58]

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brickmaking. *Hadacheck*, 239 U.S. at 404, 414. The Court in *Reinmann* also held that a city ordinance prohibiting livery stables in certain areas did not act as an unconstitutional taking of property simply because petitioner was barred from operating his stable. *Reinmann*, 237 U.S. at 176, 180.

53 *Goldblatt*, 369 U.S. at 593 (quoting Mugler v. Kansas, 123 U.S. 623, 668-69 (1887)).

54 *Id.* at 594 (citing Pennsylvania Coal v. Mahon, 260 U.S. 393 (1922)). Justice Clark stressed that "[t]here is no set formula to determine where regulation ends and taking begins. Although a comparison of values before and after is relevant . . . it is by no means conclusive." *Id.* (citations omitted). The Justice buttressed this statement by noting that the Court had previously refused to find that a compensable taking had occurred in a situation where the property's value had diminished from $800,000 to $60,000. *Id.* (citing Hadacheck v. Sebastian, 239 U.S. 394 (1915)).

55 *Id.* at 595. Justice Clark recognized that the Court had used a "reasonableness" standard in the past rather than relying on any specific criteria. *Id.* at 594. In order to fulfill this reasonableness test, the Justice continued, the regulation would have to further a public interest and the means chosen to further that interest had to be reasonably necessary to achieve the asserted goal. *Id.* at 594-95 (quoting Lawton v. Steele, 152 U.S. 133, 137 (1894)).

56 *Id.* at 595.

57 *Id.* at 595-96.

58 *Id.* at 596. In deferring to the government, Justice Clark noted that the party seeking to overturn a regulation as unreasonable shouldered the burden of showing the regulation's inequity. *Id.* The Court cited numerous cases stating that governmental regulations were presumed constitutional. *Id. See, e.g.*, Salsburg v. Maryland, 346 U.S. 545, 553 (1954) (stating that the government had the presumption of reasonableness on its side); United States v. Carolene, 304 U.S. 144, 154 (1935) (declaring that the decision to regulate milk commerce was a decision for

The next major development in the takings arena took place in *Penn Central Transportation Co. v. New York City*[59] as the Court not only proffered but also applied several factors to determine the constitutionality of governmental action that effectively denied certain property uses.[60] *Penn Central* concerned a dispute over New York City's Landmark Preservation Law[61] under which a commission was empowered to designate certain buildings as landmarks.[62] Once a building was designated a landmark, the building's owner could not make any exterior architectural modifications to the structure without the commission's approval.[63] The commission designated Grand Central Terminal, owned by Penn Central, an historic landmark in August, 1967.[64] Nearly six months later, Penn Central entered into an agreement with an outside corporation to build a multi-story skyscraper above the terminal.[65] Subsequent attempts to obtain the commission's ap-

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Congress to make and a court's judgment "could not be substituted" for the Congress's).

59 438 U.S. 104 (1978).

60 *Id.* at 124, 125-36 (citations omitted).

61 N.Y.C. Admin. Code, ch. 8-A § 205-1.0 *et seq.* (1976). The Act's purpose was to, *inter alia*, protect historic landmarks in order to enhance tourism, foster civic pride, and promote the general welfare of city residents. *Penn Central*, 438 U.S. at 109 (quotations omitted). In order for a property to be deemed a landmark it was required to have " 'a special character or special historical or aesthetic interest or value as part of the development, heritage or cultural characteristics of the city, state or nation.' " *Id.* at 110 (quotation omitted).

62 *Id.* The Landmark Preservation Commission consisted of eleven members and was required to "include at least three architects, one historian qualified in the field, one city planner or landscape architect, one realtor, and at least one resident of each of the city's five boroughs." *Id.* at 110 & n.8 (citation omitted).

63 *Id.* at 111-12. Such approval could be obtained through any of three procedures. *Id.* at 112. First, the owner could attempt to procure an order from the commission approving the desired modifications because they would not affect any of the landmark's architectural features. *Id.* Second, the property owner could apply for a certificate of appropriateness that would be approved if it was determined that the proposed construction "would not unduly hinder the protection, enhancement, perpetuation, and use of the landmark." *Id.* Finally, a certificate of appropriateness could be pursued on an economic hardship theory. *Id.* This option tied into the concept of whether the landmark owner was receiving a "reasonable return" on his investment in the landmark site. *Id.* at 112-13 n.13. If it was proven that the landmark owner was not earning a reasonable return, the Commission would have to develop a new plan to allow the owner to reap the proper economic benefits. *Id.* at 113 n.13. The owner also had the affirmative duty of keeping the structure in good repair. *Id.* at 111-12.

64 *Id.* at 115.

65 *Id.* at 116. Projected rentals for the proposed structure equalled one million dollars per year during the construction period and at least three million dollars annually when the office building opened. *Id.*

proval for the project failed,[66] and Penn Central brought suit.[67]

Justice Brennan began the Court's opinion by positing that takings cases should be analyzed on an ad hoc basis.[68] Although acknowledging that no takings formula existed, Justice Brennan enumerated the factors to be considered in takings cases.[69] First, the Justice stated that the inquiry should focus upon a regulation's economic impact on the property owner and its interference with his or her investment-backed expectations.[70] Secondly, the majority observed that the governmental action's "character" should play a major role in determining whether a taking had occurred.[71]

In analyzing the first prong of this takings analysis, Justice Brennan set forth a number of inquiries to be addressed when examining a regulation's economic impact.[72] The majority first

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66 *Id.* at 116-17. Penn Central submitted two proposals to the commission, both of which complied with the area's zoning ordinances. *Id.* at 116. The first proposal entailed construction of a fifty-five story building that would rest on the Terminal's roof. *Id.* The second proposal called for exterior modifications to the Terminal's facade in order to construct a fifty-three story building. *Id.* at 116-17. The Commission stated that both proposals would have detrimental effects on the Terminal's architectural beauty. *Id.* at 117.

67 *Id.* at 119. The trial court granted Penn Central injunctive and declaratory relief to proceed with construction above the terminal. *Id.* The New York Supreme Court, Appellate Division, reversed, stating that the Act was necessary to achieve the public purpose of landmark preservation and denied Penn Central only the most profitable use of its property. Penn Central Transp. Co. v. City of New York, 377 N.Y.S.2d 20, 29-30 (App. Div. 1975). The New York Court of Appeals affirmed, finding dispositive the fact that Penn Central could still maintain "a reasonable return" on its investment. Penn Central Transp. Co. v. City of New York, 366 N.E.2d 1271, 1274-78, 1279 (N.Y. 1977).

68 *Penn Central*, 438 U.S. at 124. Justice Brennan asserted that "this Court has recognized that the 'Fifth Amendment's guarantee . . . [is] designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.' " *Id.* at 123-24 (quoting Armstrong v. United States, 364 U.S. 40, 49 (1960)). The Justice continued by stating that "this Court, quite simply, has been unable to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons." *Id.* at 124 (citations omitted).

69 *Id.*

70 *Id.* (citing Goldblatt v. Hempstead, 369 U.S. 590, 594 (1962)).

71 *Id.* Justice Brennan asserted that "[a] 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by government, . . . than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good." *Id.* (citing United States v. Causby, 328 U.S. 256 (1946)).

72 *Id.* at 124-28. The Justice noted that the government had been granted a great deal of latitude when its laws had adverse affects on private economic interests. *Id.* at 124. Justice Brennan listed the government's taxing power as one such example. *Id.*

opined that a property owner's "reasonable expectations" would play a major role in any takings analysis.[73] Justice Brennan next asserted that valid police power justifications would be sufficient to override economic impact concerns in many instances.[74] The Justice concluded this economic impact analysis by listing specific cases in which governmental goals outweighed the resultant economic injury.[75]

Turning the Court's attention to Penn Central's particular objections, Justice Brennan rejected the argument that the deprivation of "air rights" over the terminal constituted a taking of property.[76] Justice Brennan asserted that the mere fact that a property owner had lost a certain property right previously believed available was an insufficient basis for a takings claim.[77] In

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[73] *Id.* at 124-25. The Court described "reasonable expectations," for constitutional purposes, as relating to the property owner's understanding of what constituted property for constitutional purposes. *Id.* at 125. In *Lucas*, Justice Scalia described an owner's reasonable expectations as being shaped by "whether and to what degree the State's law has accorded legal recognition and protection to the particular interest in land." Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2894 n.7.

[74] *Penn Central*, 438 U.S. at 125 (citing Nectow v. Cambridge, 277 U.S. 183, 188 (1928)). The Justice noted that zoning laws were an example of this proposition. *Id.* (citing Gorieb v. Fox, 274 U.S. 603, 608 (1927); Euclid v. Ambler Realty Co., 272 U.S. 365, 388 (1962); Welch v. Swasey, 214 U.S. 91, 107 (1909)).

[75] *Id.* at 125-28. One such instance, according to Justice Brennan, occurred in Miller v. Schoene, 276 U.S. 272 (1928). *Penn Central*, 438 U.S. at 125. In *Miller*, the Court upheld a statute calling for the cutting down of diseased cedar trees where the trees threatened more profitable apple trees. *Miller*, 276 U.S. at 279, 281. Justice Brennan posited that the Court's decision in *Miller* stood for the proposition that the government could favor certain classes of property over others as long as there was an important governmental interest. *Penn Central*, 438 U.S. at 126 (quoting *Miller*, 276 U.S. at 279). The Justice noted that in *Miller* the preservation of the state's apple industry was a proper governmental objective. *Id.*

Justice Brennan also cited Goldblatt v. Hempstead, 369 U.S. 590 (1962), and Hadacheck v. Sebastian, 239 U.S. 394 (1915) as examples where government statutes took away the most profitable use of certain property, but nevertheless were upheld because the statutes furthered valid public purposes. *Penn Central*, 438 U.S. at 126-27.

The Justice did note, however, that where governmental action took away all of an owner's "investment-backed expectations" rather than prohibiting a certain profitable use, a taking would occur. *Id.* at 127 (citing Pennsylvania Coal v. Mahon, 260 U.S. 393 (1922)). Justice Brennan also noted that compensation would be due where the government was actively using a part of the property to the detriment of the property owner; for example, low flying planes destroyed property uses on the land below. *Id.* at 128 (quoting United States v. Causby, 328 U.S. 256 (1946)).

[76] *Id.* at 130.

[77] *Id.* Justice Brennan expounded that "[w]ere this the rule, this Court would have erred not only in upholding laws restricting the development of air rights . . . but also in approving those prohibiting both the subjacent, . . . and the lateral, . . . development of particular parcels." *Id.* (citations omitted).

rejecting Penn Central's plea to view the "air rights" as a distinct property interest, Justice Brennan opined that the entire property should be considered when looking at a regulation's economic impact and character.[78]

The Court next rejected Penn Central's argument that the Landmark Act differed from valid zoning laws by forcing Penn Central to give up certain rights without similarly burdening Penn Central's neighbors.[79] While conceding that Penn Central was shouldering an inequitable burden, Justice Brennan asserted that such inequity was not determinative[80] and that the owners of the terminal would indeed be benefitted by the Act.[81]

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[78] *Id.* at 130-31. The Justice stated:

> "Taking" jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature and extent of the interference with the rights in the parcel as a whole—here, the city tax block designated as the "landmark site."

Id.

Justice Brennan's view effectively rejected a principle defined by one commentator as "conceptual severance." Margaret J. Radin, *The Liberal Conception of Property: Cross Currents In The Jurisprudence Of Takings*, 88 COLUM. L. REV. 1667, 1676 (1988). Under this theory, a property owner would be able to sever a piece of property from the whole and treat it as a distinct property interest. *Id.* Such a scenario would then allow the property owner to argue that all economic value in that particular piece of the whole had been lost, thus demanding compensation. *Id.*

In dissent, then-Justice Rehnquist implicitly adopted conceptual severance by opining that Penn Central's loss of its "air rights" constituted a complete taking of that property interest. *Penn Central*, 438 U.S. at 142-43 (Rehnquist, J., dissenting). Chief Justice Rehnquist recommended the conceptual severance doctrine again in his Keystone Bituminous Coal Ass'n v. DeBenedictis dissent, opining that the twenty-seven million tons of coal that could no longer be mined by a coal company because a state statute prohibited the mining should be considered as a separate property interest from the company's other holdings. *Keystone*, 480 U.S. at 470 (Rehnquist, J., dissenting). See *infra* notes 91-120 and accompanying text for a discussion of the *Keystone* decision.

[79] *Penn Central*, 438 U.S. at 133.

[80] *Id.* Justice Brennan stated that the Court had previously denied takings claims where property owners had been uniquely burdened. *Id.* (citations omitted). *See, e.g., Goldblatt*, 369 U.S. at 591-92 (denying compensation to mining company that was prohibited from further mining activity on a parcel of land where excavation below the water table had occurred); *Miller*, 276 U.S. at 277, 280-81 (rejecting cedar tree owner's claim that statute requiring destruction of the trees effectuated a taking); *Hadacheck*, 239 U.S. at 404-05, 414 (denying compensation to brickyard operator who was statutorily barred from utilizing his property as a brickyard). *Id.*

[81] *Penn Central*, 438 U.S. at 134-35. Justice Brennan deferred to the New York City Council's determination that "the preservation of landmarks benefits all New York citizens and all structures, both economically and by improving the quality of life in the city as a whole. . . ." *Id.* at 134.

Justice Rehnquist, writing in dissent, focused on the "average reciprocity of

Despite the Court's traditional aversion to set formulas in the takings context, the Court did set forth a *per se* rule in *Loretto v. Teleprompter Manhattan CATV Corp.*[82] Justice Marshall, writing for the Court, held that government authorization of a "permanent physical occupation" of private property constituted a taking regardless of the public interests furthered by the occupation.[83] The Court required the State of New York to compensate apartment building landlords for the forced installation of cable television equipment on the exterior of their buildings.[84]

In arriving at this *per se* rule, the majority provided a laundry list of cases mandating that permanent physical invasions demanded compensation.[85] The Court then provided policy rationales for the rule.[86] Justice Marshall termed permanent physical

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advantage" concept set forth by Justice Holmes in *Pennsylvania Coal*. *Id.* at 140 (Rehnquist, J., dissenting) (quoting Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922)). The dissenting Justice asserted that, in this instance, the government was not preventing a nuisance-like harm that would be dangerous to the general public's health, safety, or morals. *Id.* at 144-45 (Rehnquist, J., dissenting). Thus, the Justice continued, a "reciprocity of advantage" would have to be found to uphold the regulation because it was not preventing an injurious use. *Id.* at 147 (Rehnquist, J., dissenting) (quoting *Pennsylvania Coal*, 260 U.S. at 415). Asserting that no reciprocity of advantage existed because Penn Central was uniquely burdened, Justice Rehnquist found a taking deserving of just compensation. *Id.* at 147-48 (Rehnquist, J., dissenting). *See supra* note 44 for a discussion of Justice Holmes's reciprocity of advantage doctrine in *Pennsylvania Coal*.

82 458 U.S. 419 (1982). For a detailed discussion of the *Loretto* decision, see John J. Costonis, *Presumptive And Per Se Takings: A Decisional Model For The Taking Issue*, 58 N.Y.U. L. REV. 465 (1983); Steven N. Berger, Note, *Access for CATV Meets The Taking Clause: The Per Se Takings Rule of* Loretto v. Teleprompter Manhattan CATV Corp., 25 ARIZ. L. REV. 689 (1983); Michael L. Gold, Note, Loretto v. Teleprompter Manhattan CATV Corp.: *The Propriety Of A Per Se Rule In Takings Claims*, 16 J. MARSHALL L. REV. 419 (1983); Ray Mulligan, Comment, Loretto v. Teleprompter Manhattan CATV Corporation: *Another Excursion into the Takings Dilemma*, 17 URB. LAW. 109 (1985); Valerie Welch, Note, *New Per Se Taking Rule Short Circuits Cable Television Installations in New York:* Loretto v. Teleprompter Manhattan CATV Corp., 25 B.C. L. REV. 459 (1984).

83 *Loretto*, 458 U.S. at 426.

84 *Id.* at 438, 441. The installation included the affixing of boxes, plates, screws, and wires to the buildings. *Id.* at 438. Justice Marshall emphasized, however, that neither the size nor the extent of the invasion was relevant. *Id.* at 438 n.16.

85 *Id.* at 427-31. *See, e.g.*, United States v. Pewee Coal Co., 341 U.S. 114, 116 (1951) (ruling that government seizure of coal mine during wartime constituted a taking because government took possession and control); United States v. Causby, 328 U.S. 256, 261 (1946) (analogizing low flying airplanes above landowner's property to a physical invasion constituting a taking); St. Louis v. Western Union Telegraph Co., 148 U.S. 92, 98-99 (1893) (stating that the erection of telegraph poles on public streets merited compensation); Pumpelly v. Green Bay Co., 80 U.S. 166, 181 (1872) (declaring that flooding of plaintiff's land as a result of dam construction constituted a taking).

86 *Loretto*, 458 U.S. at 435-38.

occupations as the most serious type of governmental interference with property.[87] Characterizing property rights as the right to possess, utilize, and dispose of property, the Justice asserted that permanent physical invasions destroyed an owner's ability to use property and exclude others.[88] Justice Marshall further opined that while the extent of the invasion was irrelevant in determining whether a taking had occurred, such an inquiry would become germane only when formulating the amount of compensation required.[89] The majority concluded by stating that the holding was extremely narrow and did not implicate the government's substantial power to regulate an owner's use of property.[90]

Thereafter, the Court reverted to the trend of conferring great latitude to the government in takings cases with the decision in *Keystone Bituminous Coal Ass'n v. DeBenedictis*.[91] The facts in *Keystone* bore a striking similarity to the factual scenario in *Pennsylvania Coal*.[92] In *Keystone*, the State of Pennsylvania passed an

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[87] *Id.* at 435. The Justice opined that when the government takes such action it "does not simply take a single 'strand' from the 'bundle' of property rights: it chops through the bundle, taking a slice of every strand." *Id.* (citing Andrus v. Allard, 444 U.S. 51, 65-66 (1979)).

[88] *Id.* at 435-36 (quotation omitted). The Court also focused on the "special" injury suffered when the taking is in the form of a physical invasion. *Id.* at 436. Justice Marshall stated that "property law has long protected an owner's expectation that he will be relatively undisturbed at least in the possession of his property. To require, as well, that the owner permit another to exercise complete dominion literally adds insult to injury." *Id.*

[89] *Id.* at 437. The issue of whether a taking should be found has been analogized to the liability determination in common-law tort actions while the just compensation issue has been compared to the damages inquiry. Gold, *supra* note 82, at 429 n.52. The Court did not determine how much compensation was due in *Loretto*, instead remanding the issue back to state court. *Loretto*, 458 U.S. at 441.

[90] *Id.* Justice Marshall stated that the Court was merely affirming "the traditional rule that a permanent physical occupation of property is a taking." *Id.* This assertion, while giving the appearance of being grounded upon a clear mandate, was not uniformly accepted by commentators prior to the decision. *See, e.g.*, Michelman, *supra* note 32, at 1227-28 (criticizing the physical/non-physical invasion distinction); Joseph L. Sax, *Takings, Private Property and Public Rights*, 81 YALE L.J. 149, 163 (1971) (stating that physical invasions of land should not always require compensation).

[91] 480 U.S. 470 (1987). For a detailed discussion of this case, see Epstein, *supra* note 2, at 5; Frank Michelman, *Takings, 1987*, 88 COLUM. L. REV. 1600, 1601 (1988); Susan J. Krueger, Comment, Keystone Bituminous Coal Association v. DeBenedictis: *Toward Redefining Takings Law*, 64 N.Y.U. L. REV. 877 (1989); Monique Van Damme, Comment, Keystone Bituminous Coal Association v. DeBenedictis: *A "Regulatory Taking"?*, 89 W. VA. L. REV. 803 (1987).

[92] *Keystone*, 480 U.S. at 474-77. *See supra* notes 35-37 and accompanying text for facts of *Pennsylvania Coal*; *see also* Epstein, *supra* note 2, at 5 (asserting that "[t]he social and economic background of both cases is identical.").

Act prohibiting coal mining in certain areas where subsidence damage could occur.[93] Despite the factual similarities between *Keystone* and *Pennsylvania Coal*, Justice Stevens, writing for a five-to-four majority, reached a different conclusion by denying compensation to petitioners who had lost valuable coal reserves.[94] Justice Stevens began the Court's inquiry by noting the hazards caused by coal mine subsidence.[95] Having established the public harms the Act was attempting to avert, Justice Stevens next contended that the *Pennsylvania Coal* decision was based on private, not public, concerns.[96] The Justice also emphasized that the Kohler Act, at issue in *Pennsylvania Coal*, had made the mining of some coal reserves "commercially impracticable."[97] Thus Justice Stevens concluded that *Pennsylvania Coal* mandated that courts should determine whether the regulation in question was a valid exercise of a state's police power and whether the regulation made profitability a commercially impracticable goal.[98] Justice Stevens opined that these principles had evolved into a test under which a regulatory taking would be found when the regulation did not "substantially advance legitimate state interests, . . . or denie[d] an owner economically viable use of his land."[99]

Applying this test, the majority reiterated that a valid purpose justified the Subsidence Act.[100] Justice Stevens posited that a regulation's character played a key role in takings determinations, opining that the Court would be hesitant to declare a tak-

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93 *Keystone*, 480 U.S. at 476-77.

94 *Id.* at 474; Epstein, *supra* note 2, at 5 (stating that the only difference between the two cases was the outcome). Petitioners were a group of coal mine operators and corporations involved in underground mining in western Pennsylvania. *Keystone*, 480 U.S. at 478.

95 *Id.* at 474-75. The Justice noted that mining activities could cause damage to, *inter alia*, buildings, houses, pipes, cables, wells and underground streams. *Id.* at 475 n.2.

96 *Id.* at 484. Justice Stevens observed that Justice Holmes had observed, in the *Pennsylvania Coal* opinion, that "a single private house" was at the center of the dispute. *Id.* at 483 (quoting Pennsylvania Coal v. Mahon, 480 U.S. 393, 413 (1922)). The Justice buttressed the view that *Pennsylvania Coal* evoked private concerns by pointing out that the Kohler Act did not apply when the coal company itself owned the surface rights above the mine, while the Subsidence Act in *Keystone* made no such distinction. *Id.* at 486.

97 *Id.* at 484.

98 *Id.* at 484 & n.13 (quoting *Pennsylvania Coal*, 480 U.S. at 414-15).

99 *Id.* at 485 (quoting Agins v. Tiburon, 447 U.S. 255, 260 (1980)).

100 *Id.* Justice Stevens opined that while the Kohler Act in *Pennsylvania Coal* was primarily concerned with safety, the Subsidence Act in *Keystone* was "designed to accomplish a number of widely varying interests, with reference to which petitioners have not suggested alternative methods through which the Commonwealth could proceed." *Id.* at 486.

ing where the government was trying to quell a public nuisance.[101] According to Justice Stevens, this determination squared with the "reciprocity of advantage" doctrine set forth in *Pennsylvania Coal*.[102] One property owner forced to endure an onerous restriction, the Justice explained, would be benefitted by similar restrictions placed on others.[103] Adopting the general statement that a property owner could not use his property in a manner that injured others, Justice Stevens determined that there was a public interest in preventing the nuisance-like effects of mining subsidence justifying the Subsidence Act's validity.[104]

The majority further decided that the petitioners had not suffered a sufficient diminution of value in their property to constitute a taking.[105] Reiterating that only an owner's loss of economically viable use of his land would necessitate compensation,[106] Justice Stevens observed that the regulation did not completely prevent petitioners from mining coal on any parcel of land.[107] The Justice then rejected petitioners' attempt to classify the unmineable coal as a narrowly defined property segment requiring compensation if lost.[108] Justice Stevens cited previous Court decisions that disfavored such an approach and viewed property rights as a whole rather than individually.[109] Moreover, the Court found that the property's "support estate"

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101 *Id.* at 488, 491. Justice Stevens opined that the definition of public nuisance had been liberally construed in earlier cases and did not necessitate that the Court determine whether the harm being prevented would have been termed a nuisance at common law. *Id.* at 490 (quoting Miller v. Schoene, 276 U.S. 272, 280 (1928)). The Justice observed that in *Miller*, the Court had stated that it was unnecessary to determine if the cedar trees being cut down by state mandate, in order to prevent the spread of disease to apple trees, constituted a nuisance at common law. *Id.* (quoting *Miller*, 276 U.S. at 280).

102 *Id.* at 491. See *supra* note 44 for a discussion of the reciprocity of advantage doctrine.

103 *Id.* at 491 (citing Penn Central Transp. Co. v. New York City, 438 U.S. 104, 144-50 (1978) (Rehnquist, J., dissenting)). See *supra* note 81 for an explanation of Justice Rehnquist's reciprocity of advantage analysis in *Penn Central*.

104 *Id.* at 491-92 (citations omitted).

105 *Id.* at 493.

106 *Id.* at 495 (quoting Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc., 452 U.S. 264, 296 (1981)).

107 *Id.* at 495-96. Justice Stevens noted that while the Act would prevent the mining of twenty-seven million tons of coal, that amount was less than two percent of the total coal reserves still available to petitioners. *Id.* at 496.

108 *Id.* at 496-97. This decision was consistent with Justice Brennan's rejection in *Penn Central* of the conceptual severance doctrine. See *supra* note 78 and accompanying text for an explanation of the doctrine.

109 *Id.* at 497 (quoting Penn Central Transp. Co. v. New York City, 438 U.S. 104, 130-31 (1987); Andrus v. Allard, 444 U.S. 51, 65-66 (1979)).

was part of the property as a whole and not a distinct segment.[110]

In a forceful dissent, Chief Justice Rehnquist disagreed with the majority's determination that *Pennsylvania Coal* was factually distinguishable from *Keystone*.[111] Contrary to the majority's assertions, the Chief Justice argued that the Kohler Act in *Pennsylvania Coal* was aimed at averting public harms and promoting the general welfare.[112] The dissenting Justice postulated that *Pennsylvania Coal*'s decision instructed that the Act's public purposes were insufficient to warrant a denial of just compensation.[113] Thus, the dissent continued, the nature of the governmental purposes behind the regulation would be relevant because the Court had long recognized that the prevention of nuisances would not effect a taking.[114] Chief Justice Rehnquist narrowed this nuisance exception by stating that a regulation should have the discrete purpose of preventing a nuisance.[115] The Justice added that the

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[110] *Id.* at 500. Pennsylvania law recognized the support estate as being separate from other estates in a parcel of property such as the mineral or surface estates. *Id.* Petitioners argued that since they owned support estates, these estates were being entirely taken by the legislation. *Id.* Justice Stevens rejected this argument, stating that "our takings jurisprudence forecloses reliance on such legalistic distinctions within a bundle of property rights." *Id.* The Justice also analogized to *Penn Central*, in which the Court refused to recognize "air rights" above the terminal as a distinct property interest. *Id.* (citing *Penn Central*, 438 U.S. at 130).

[111] *Id.* at 509 (Rehnquist, C.J., dissenting).

[112] *Id.* at 509-10 (Rehnquist, C.J., dissenting) (citations omitted). Chief Justice Rehnquist noted that the legislative intent of the Act was " 'to cure existing evils and abuses' " that resulted in " 'wrecked and dangerous streets and highways, collapsed public buildings, churches, schools, factories, streets, and private dwellings, broken gas, water and sewer systems, the loss of human life. . . .' " *Id.* at 509 (Rehnquist, C.J., dissenting) (quoting Mahon v. Pennsylvania Coal Co., 118 A. 491, 492, 493 (1922)).

[113] *Id.* at 510 (Rehnquist, C.J., dissenting). The Chief Justice stated that Justice Holmes had "made clear that the mere existence of a public purpose was insufficient to release the government from the compensation requirement: 'The protection of private property in the Fifth Amendment presupposes that it is wanted for public use, but provides that it shall not be taken for such use without compensation.' " *Id.* (quoting Pennsylvania Coal v. Mahon, 260 U.S. 393, 415 (1922)).

[114] *Id.* at 511-12 (Rehnquist, C.J., dissenting) (citing Goldblatt v. Hempstead, 369 U.S. 590 (1962); Hadacheck v. Sebastian, 239 U.S. 394 (1915); Mugler v. Kansas, 123 U.S. 623 (1887)). Chief Justice Rehnquist emphasized that this nuisance exception to the general just compensation rule was a narrow one that applied when property was misused or illegally used. *Id.* at 512 (Rehnquist, C.J., dissenting) (citations omitted).

[115] *Id.* at 513 (Rehnquist, C.J., dissenting) (citing Goldblatt v. Hempstead, 369 U.S. 590 (1962); Hadacheck v. Sebastian, 239 U.S. 394 (1915); Mugler v. Kansas, 123 U.S. 623 (1887)). The Chief Justice opined:

> The central purposes of the Act, though including public safety, reflect a concern for preservation of buildings, economic development, and maintenance of property values to sustain the Commonwealth's tax base. We should hesitate to allow a regulation based on essen-

regulation could not completely destroy a property interest or take away all of its uses.[116] Applying these narrowing principles, the Chief Justice concluded that the Subsidence Act was not narrowly drawn[117] and prohibited all use of certain coal reserves.[118]

The dissenting Justice next attacked the majority's unwillingness to classify the twenty-seven million tons of coal remaining in the ground as a distinct property interest that had been taken.[119] Chief Justice Rehnquist asserted that the coal had been taken just as if it had been physically appropriated and thus required full compensation.[120]

The Court's historical deference to the government in takings cases began to change just three months after the *Keystone* decision with the pronouncement in *First English Evangelical Lutheran Church v. Los Angeles County*.[121] In *First English*, massive

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tially economic concerns to be insulated from the dictates of the Fifth Amendment by labeling it nuisance regulation.

Id.

116 *Id.* Calling this principle the more important of the two, Chief Justice Rehnquist posited that past cases denying compensation to property owners had all involved situations where the owner was still left with some use of his land. *Id.* at 513-14 (Rehnquist, C.J., dissenting) (citing Goldblatt v. Hempstead, 369 U.S. 590 (1962); Miller v. Schoene, 276 U.S. 272 (1928); Mugler v. Kansas, 123 U.S. 623 (1887)).

117 *Id.* at 513 (Rehnquist, C.J., dissenting). The Chief Justice declared that while public safety was a purpose behind the Act, so too were concerns about economic development and the maintenance of the state's tax base by sustaining property values. *Id.* These diverse goals led Chief Justice Rehnquist to conclude that the legislation was not narrowly drawn simply to prevent nuisances. *Id.*

118 *Id.* at 514 (Rehnquist, C.J., dissenting). Chief Justice Rehnquist observed that the parties had stipulated that twenty-seven million tons of coal would be left in the ground as a result of the Act. *Id.* at 515 (Rehnquist, C.J., dissenting). Furthermore, the Chief Justice opined that the coal had absolutely no value if not mined because " 'the right to coal consists in the right to mine it.' " *Id.* at 514 (Rehnquist, C.J., dissenting) (quoting *Pennsylvania Coal Co.*, 260 U.S. at 414).

119 *Id.* at 515 (Rehnquist, C.J., dissenting). Chief Justice Rehnquist opined that the majority's refusal to reclassify the property was based solely on the fact that the alleged taking was regulatory and not a physical invasion. *Id.* at 515-16 (Rehnquist, C.J., dissenting).

120 *Id.* at 518 (Rehnquist, C.J., dissenting). The Chief Justice averred that when a total regulatory taking had the effect of a physical taking it was unnecessary to analyze factors such as economic impact, interference with investment-backed expectations, or the character of the action. *Id.* at 516-17 (Rehnquist, C.J., dissenting). This was so, according to the Chief Justice, because an actual physical taking would not necessitate such an inquiry. *Id.* at 517 (Rehnquist, C.J., dissenting).

121 482 U.S. 304 (1987). For a detailed discussion of this case see Epstein, *supra* note 2, at 23; Michelman, *supra* note 91, at 1614; Carol Kirk, Note, First Church *Decides Compensation is Remedy for Temporary Regulatory Takings—Local Governments are "Singing the Blues"*, 21 IND. L. REV. 901 (1988); Anne E. Sheppard, Note, First English: *The Fifth Amendment Requires Just Compensation For A Regulatory Taking*, 33 VILL. L. REV. 925 (1988).

flooding caused substantial damage to a campground for handicapped children operated by the First English Evangelical Lutheran Church of Glendale.[122] Following the flood, Los Angeles County passed a temporary ordinance prohibiting the Church, and other property owners within the flood zone, from rebuilding.[123] The Church brought suit, claiming that it had been denied all use of its property by the ordinance.[124]

In adjudicating the claim, Chief Justice Rehnquist narrowed the Court's inquiry to whether the government had to pay compensation for temporary regulatory takings.[125] After positing that compensation was due when governmental regulatory action amounted to a taking,[126] the majority asserted that situations where the government had temporarily taken property were no different from permanent takings.[127] Chief Justice Rehnquist justified this assertion by emphasizing that the loss of a property interest for a certain time period could result in great economic

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122 *First English*, 482 U.S. at 307.

123 *Id.* The ordinance was passed as a safety precaution. *Id.*

124 *Id.* at 308. The Church alleged that the county had contributed to the flooding by maintaining dangerous conditions on properties upstream from the campground and by engaging in the practice of cloud seeding during the storm that flooded the property. *Id.* The Church sought recovery on the theory of inverse condemnation. *Id.*

125 *Id.* at 313. The Chief Justice expressly stated that the Court had "no occasion to decide whether the ordinance at issue actually denied appellant all use of its property or whether the county might avoid the conclusion that a compensable taking had occurred by establishing that the denial of all use was insulated as part of the State's authority to enact safety regulations." *Id.* (citations omitted).

126 *Id.* at 315-17. Chief Justice Rehnquist quoted precedent stating:

> "It would be a very curious and unsatisfactory result, if. . . it shall be held that if the government refrains from the absolute conversion of real property to the uses of the public it can destroy its value entirely, can inflict irreparable and permanent injury to any extent, can, in effect, subject it to total destruction without making any compensation, because, in the narrowest sense of that word, it is not *taken* for the public use."

Id. at 316-17 (quoting Pumpelly v. Green Bay Co., 80 U.S. 166, 177-78 (1872).

127 *Id.* at 318 (citing San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621, 657 (1981) (Brennan, J., dissenting)). In *San Diego Gas & Electric*, Justice Brennan asserted that "[t]he fact that a regulatory 'taking' may be temporary . . . does not make it any less of a constitutional 'taking.' Nothing in the Just Compensation Clause suggests that 'takings' must be permanent and irrevocable." *San Diego Gas & Electric*, 450 U.S. at 657. The majority analogized the *First English* case to the Court decisions recognizing the right to compensation where the government temporarily used and occupied certain property during World War II. *First English*, 482 U.S. at 318 (citations omitted). Justice Stevens, writing in dissent, discounted this analogy by stating that the cases cited by the majority all constituted physical takings. *Id.* at 331 (Stevens, J., dissenting).

hardship.[128] Furthermore, the Chief Justice continued, mere invalidation of the ordinance at a later date would not alleviate the government's duty to compensate for the property owner's loss during the interim period.[129]

The majority stressed that its decision would not force the government to acquire property involuntarily through eminent domain, thus bypassing the legislature's function in making such decisions.[130] Instead, the Chief Justice maintained that once a temporary taking had been found, the government could not subsequently correct the taking without providing just compensation.[131] Although cognizant of potential problems that the holding could create for land use planners, Chief Justice Rehnquist nevertheless declared that such problems could not override Fifth Amendment concerns.[132]

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128 *Id.* at 319 (citation omitted).

129 *Id.* The Chief Justice distinguished Agins v. Tiburon, 447 U.S. 255, 263 n.9 (1980), and Danforth v. United States, 308 U.S. 271 (1939), as "stand[ing] for the unexceptional proposition . . . that depreciation in value of the property by reason of *preliminary* activity is not chargeable to the government." *First English*, 482 U.S. at 320 (emphasis added). Chief Justice Rehnquist opined that it would be illogical to extend these cases to require a given regulation to be held invalid before a taking could occur. *Id.*

The *Agins* Court stated that "mere fluctuations in value during the process of governmental decisionmaking, absent extraordinary delay, are 'incidents of ownership.' " *Agins*, 447 U.S. at 263 n.9. The *Danforth* Court declared that no compensation was warranted during the time when condemnation proceeding was taking place. *Danforth*, 308 U.S. at —.

130 *First English*, 482 U.S. at 321. Chief Justice Rehnquist rationalized that the government could still amend or withdraw the regulation to avoid a permanent taking classification, or exercise its eminent domain powers once a taking had been determined. *Id.*

131 *Id.*

132 *Id.* The Chief Justice posited that "[a]s Justice Holmes aptly noted more than 50 years ago, 'a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change.' " *Id.* at 321-22 (quoting Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 416 (1922)).

The Court's decision in *Nollan v. California Coastal Commission* completed the celebrated 1987 "trilogy" of takings cases by ruling that governmental action had to " 'substantially advance[] legitimate state interests' " to alleviate the government's duty to pay just compensation. Nollan v. California Coastal Comm'n, 483 U.S. 825, 834 (1987) (quoting *Agins*, 447 U.S. at 260). In so ruling, the *Nollan* Court held that such a legitimate interest did not exist where the government had conditioned the issuance of a building permit to a landowner on the landowner's relinquishment of an easement across his property. *Id.* at 837. In Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886 (1992), however, the burdened landowner conceded that there was a legitimate state interest for the challenged regulation. *Lucas*, 112 S. Ct. at 2890; see *supra* note 13 for a discussion of Lucas's concession.

Against this backdrop, the Supreme Court continued the recent trend of favoring property owners' rights with the decision in *Lucas v. South Carolina Coastal Council*.[133] As a preliminary matter, Justice Scalia, writing for the majority, opined that the dispute was ripe for judicial review.[134] In so ruling, Justice Scalia discounted the South Carolina Legislature's amendment to the Beachfront Management Act that provided administrative remedies authorizing construction on restricted properties in special circumstances.[135] The Justice asserted that the South Carolina Supreme Court's decision to render a final judgment in the case, despite the existence of the new administrative remedy, made the dispute justiciable.[136] Furthermore, the majority argued that the case was ripe for review, despite the lack of a finality created by the existence of a new administrative remedy because Lucas had suffered an unrectifiable temporary taking during the interim period between the Act's enactment and its subsequent amendment.[137]

Turning to the takings issue, Justice Scalia embarked on a brief historical assessment of the Court's takings jurisprudence.[138] The Justice asserted that a regulation amounting to a physical invasion[139] or depriving an owner of all economically viable use of property[140] required compensation regardless of the

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133 112 S. Ct. 2886 (1992).

134 *Id.* at 2890-92.

135 *Id.* at 2890-91. This administrative remedy allowed for the issuance of special permits. *Id.* The legislature created the remedy following the parties' argument in front of the South Carolina Supreme Court but before the court had issued its opinion. *Id.* at 2891.

136 *Id.* Justice Scalia conceded that the claim would not have been ripe if the South Carolina Supreme Court had disposed of the matter on ripeness grounds. *Id.*

137 *Id.* (citing First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304 (1987)). Justice Scalia opined that the temporary taking issue could be considered even though the issue was not raised in the lower courts. *Id.* The Justice rationalized that Lucas never had any reason to address a temporary taking cause of action, because the administrative remedy did not exist when he was first arguing his case in the lower courts. *Id.*

138 *Id.* at 2892-93. Justice Scalia noted that *Pennsylvania Coal* marked one of the Court's earliest recognitions of regulatory takings. *Id.* (citing Pennsylvania Coal v. Mahon, 260 U.S. 393, 414-15 (1922)). The Justice also acknowledged that takings cases had traditionally been determined on an ad hoc basis. *Id.* at 2893 (quoting Penn Central Transp. Co. v. New York City, 438 U.S. 104, 124 (1978); Goldblatt v. Hempstead, 369 U.S. 590, 594 (1962)).

139 *Id.* at 2893 (citing Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982)). See *supra* notes 82-90 and accompanying text for an explanation of *Loretto*'s *per se* takings rule.

140 *Id.* (citing Nollan v. California Coastal Comm'n, 483 U.S. 825, 834 (1987);

case's specific facts or the public interests involved.[141] Justice Scalia observed the inherent difficulty in determining when all economically viable use had been lost, articulating that such an inquiry might be connected to a property owner's reasonable expectations as shaped by the state's property laws.[142]

The majority next criticized the South Carolina Supreme Court's assertion that the Act was a proper use of the state's police power to prevent public harms.[143] Conceding that the Court had previously intimated that "harmful or noxious uses" of property could be prevented without compensation, Justice Scalia termed such an approach as outdated.[144] Instead, the Justice

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Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 495 (1987); Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc., 452 U.S. 264, 295-96 (1981)). The Justice stated that "the Fifth Amendment is violated when land-use regulation 'does not substantially advance legitimate state interests *or denies an owner economically viable use of his land.*' " *Id.* at 2894 (quoting Agins v. Tiburon, 447 U.S. 255, 260 (1980)).

141 *Id.* at 2893. Justice Scalia posited a number of possible theories explaining why the denial of economic viability constituted a *per se* taking. *Id.* at 2894-95. The Justice opined that total economic deprivation had the same effect as a physical appropriation of property. *Id.* at 2894 (citing San Diego Gas & Elec. Co. v. San Diego, 450 U.S. 621, 652 (1981) (Brennan, J., dissenting)). Justice Scalia further asserted that when a regulation effectuated a total taking of private property it was more likely that the property was being taken for the public's benefit rather than for preventing a public harm. *Id.* at 2894-95 (citing Annicelli v. South Kingstown, 463 A.2d 133, 140-41 (R.I. 1983); Morris County Land Improvement Co. v. Parsippany-Troy Hills Township, 40 N.J. 589, 552-53, 193 A.2d 232, 240 (1963)). Later in the opinion, the Justice also opined that the public's historical perception was that land could not be wholly taken without compensation. *Id.* at 2900.

142 *Id.* at 2894 n.7. Justice Scalia opined that a property owner's reasonable expectations could be shaped by "whether and to what degree the State's law has accorded legal recognition and protection to the particular interest in land with respect to which the takings claimant alleges a diminution in (or elimination of) value." *Id.* The Justice refused to implement this reasonable expectations test, however, deferring to the trial court's determination that Lucas's property had been left valueless. *Id.*

143 *Id.* at 2896-97. Justice Scalia observed that the South Carolina Supreme Court relied on the Act's legislative intent which was aimed at preventing beach erosion and discouraging construction near the beach. *Id.* at 2896 (citation omitted). The Justice noted that the South Carolina Supreme Court ruled that this legislative intent, not disputed by Lucas, brought the case within the line of decisions that allowed the government to prohibit public nuisance-like activities. *Id.* at 2896-97 (citing Goldblatt v. Hempstead, 369 U.S. 590 (1962); Miller v. Schoene, 276 U.S. 272 (1928); Hadacheck v. Sebastian, 239 U.S. 394 (1915); Mugler v. Kansas, 123 U.S. 623 (1887)).

144 *Id.* at 2897. The Justice claimed that if the Court allowed state legislatures to escape paying compensation simply because they could proffer "harm-preventing" rationales for their actions, the policies behind the Takings Clause would be subverted. *Id.* at 2898 n.12. The majority explained that "[s]ince such a [harm-preventing] justification can be formulated in practically every case, this amounts to a test of whether the legislature has a stupid staff. We think the Takings Clause

posited that the proper inquiry would be whether the regulation "substantially advance[d] legitimate state interests."[145]

Having established the general rule that compensation had to accompany a government regulation that took away the economically beneficial use of a property interest, Justice Scalia exempted situations where the prohibited land use was not part of the owner's title.[146] Whether a property interest fell within an owner's title, according to Justice Scalia, depended on public perceptions of what constituted property and what power the government had over that property.[147] The Justice decided that the government's ability to destroy all economically beneficial use of an owner's property was not part of this public understanding.[148] As a result of this decision, the Justice articulated a test for total regulatory takings.[149] According to Justice Scalia, compensation would be due unless the state could show common law property or nuisance principles that would justify the desired result.[150] Such an inquiry, Justice Scalia continued, would neces-

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requires courts to do more than insist upon artful harm-preventing characterizations." *Id.* Furthermore, Justice Scalia pointed to the *Penn Central* opinion in which Justice Brennan had stated that courts should not inquire into the noxiousness of certain uses but should instead decide whether governmental restrictions were reasonably related to a specific goal. *Id.* at 2897 (quoting Penn Central Transp. Co. v. New York City, 438 U.S. 104, 133-34 n.30 (1978)).

145 *Id.* (quoting *Nollan*, 483 U.S. at 834). Justice Scalia justified the abandonment of the noxious use doctrine by emphasizing the difficulty in distinguishing "harm preventing" from "benefit-conferring" legislation. *Id.* In fact, the Justice continued, it would be impossible to make this distinction on an objective basis. *Id.* at 2899. Furthermore, Justice Scalia asserted that no takings case had utilized the noxious use doctrine where total economic viability had been lost. *Id.* (citing Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 513-14 (1987) (Rehnquist, C.J., dissenting)).

146 *Id.* at 2899.

147 *Id.*

148 *Id.* at 2900. Justice Scalia analogized this decision to physical takings which always required compensation. *Id.* (citing Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 426 (1982)).

149 *Id.*

150 *Id.* Justice Scalia justified this nuisance exception to the general no compensation rule by opining that:

> A law or decree with [the effect of denying an owner the economically viable use of his land] must . . . do no more than duplicate the result that could have been achieved in the courts—by adjacent landowners (or other uniquely affected persons) under the State's law of private nuisance, or by the State under its complementary power to abate nuisances that affect the public generally, or otherwise.

Id. The Justice asserted that laws denying permits to either a landfill operation, to prevent flooding, or to a nuclear power plant, because it wanted to build on an earthquake fault, would fall within these traditional powers. *Id.*

sitate an analysis of a number of factors.[151]

Justice Scalia concluded the opinion by remanding the case and strongly suggesting that Lucas should be compensated for the taking of his property.[152] In addition, the Justice warned that South Carolina could not simply assert that Lucas's proposed use would violate the public interest.[153] Instead, the Justice required that the state identify background nuisance and property principles that would make the regulation valid without compensation.[154]

Justice Kennedy, concurring in the judgment, sought to clarify the Court's opinion while expressing reservations about some of the majority's conclusions.[155] The concurring Justice emphasized that the Court was considering Lucas's temporary taking remedy only and not his permanent taking claim which was made moot by the new administrative remedy.[156] Furthermore, Justice Kennedy noted that the Court was not rendering a final decision on whether a temporary taking had occurred.[157] Instead, the Justice continued, the South Carolina Supreme Court would have to determine if Lucas was actually planning to build on the lot during the time when his construction rights were taken.[158] Justice Kennedy added that the state court could also consider whether

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151 *Id.* at 2901. Justice Scalia asserted:

> The "total taking" inquiry we require today will ordinarily entail . . . analysis of, among other things, the degree of harm to public lands and resources, or adjacent private property, posed by the claimant's proposed activities, . . . the social value of the claimant's activities and their suitability to the locality in question, . . . and the relative ease with which the alleged harm can be avoided through the measures taken by the claimant and the government (or adjacent private landowners) alike . . . . The fact that a particular use has long been engaged in by similarly situated owners ordinarily imports a lack of any common-law prohibition . . . . So also does the fact that other landowners, similarly situated, are permitted to continue the use denied to the claimant.

Id.

152 *Id.* The Justice averred that denying an "essential use" of land would rarely conform with common law nuisance principles. *Id.* (citing Curtin v. Benson, 222 U.S. 78, 86 (1911)).

153 *Id.*

154 *Id.* at 2901-02.

155 *Id.* at 2902-04 (Kennedy, J., concurring).

156 *Id.* at 2902 (Kennedy, J., concurring). Justice Kennedy agreed with the majority's assertion that the temporary takings claim was ripe for review because the South Carolina Supreme Court chose to render a final decision in the matter. *Id.*

157 *Id.*

158 *Id.*

the regulation had rendered the property valueless.[159] Justice Kennedy further disagreed with the majority's reliance on common law nuisance principles in determining whether a total taking was compensable, opting for a broader view of permissible state action under the Fifth Amendment's Takings Clause.[160]

In a vigorous dissent, Justice Blackmun criticized every aspect of the majority's opinion while expressing the fear that the Court's decision would have grave effects on takings jurisprudence.[161] The Justice noted that the South Carolina Supreme Court had based its determination on two principles: the state's power to prevent harmful property uses and the presumption of constitutionality afforded to state statutes.[162] Terming these principles "unassailable," Justice Blackmun cited caselaw buttressing the view that the government could regulate noxious property uses, without providing compensation, despite onerous economic burdens on the property owner.[163]

Turning to the case itself, Justice Blackmun initially attacked

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159 *Id.* at 2902-03 (Kennedy, J., concurring). Justice Kennedy noted that the Court was barred from determining the economically beneficial use question because of procedural reasons. *Id.* at 2903 (Kennedy, J., concurring) (citations omitted). The Justice did, however, express the opinion that the construction restrictions most likely did not leave the property devoid of value. *Id.*

160 *Id.* Justice Kennedy did agree with Justice Scalia's ruling that the public's understandings and expectations with regard to property law were determinative in deciding whether a total taking had occurred. *Id.* Justice Kennedy, however, stated:

> In my view, reasonable expectations must be understood in light of the whole of our legal tradition. The common law of nuisance is too narrow a confine for the exercise of regulatory power in a complex and interdependent society. . . . The State should not be prevented from enacting new regulatory initiatives in response to changing conditions, and courts must consider all reasonable expectations whatever their source.

Id. (citation omitted).

161 *Id.* at 2904 (Blackmun, J., dissenting). Expressing the view that the majority had gone too far by relying on the trial court's determination that the land had been rendered valueless, Justice Blackmun charged that "[t]oday the Court launches a missile to kill a mouse. . . . I protest not only the Court's decision, but each step taken to reach it. More fundamentally, I question the Court's wisdom in issuing sweeping new rules to decide such a narrow case." *Id.*

162 *Id.* at 2905 (Blackmun, J., dissenting).

163 *Id.* at 2905, 2906 (Blackmun, J., dissenting) (citing Goldblatt v. Hempstead, 369 U.S. 590, 592-93 (1962); Euclid v. Ambler Realty Co., 272 U.S. 365, 388 (1926); Gorieb v. Fox, 274 U.S. 603, 608 (1927); Mugler v. Kansas, 123 U.S. 623, 669 (1887)). The Justice posited that " '[l]ong ago it was recognized that all property in this country is held under an implied obligation that the owner's use of it shall not be injurious to the community . . . . ' " *Id.* at 2906 (Blackmun, J., dissenting) (quoting Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 491-92 (1987)).

the Court's failure to dismiss the matter on ripeness grounds.[164] The Justice disapproved of the majority's decision to hear Lucas's temporary taking claim because Lucas had never pursued administrative remedies that would have allowed him to challenge his property's classification under the Act.[165] According to Justice Blackmun, this failure to pursue administrative remedies mooted Lucas's temporary taking assertion.[166]

Justice Blackmun next took exception to the Court's reliance on the trial court's finding that all economically viable use of the land had been taken by the regulation.[167] The dissenting Justice reasoned that Lucas retained several valuable property interests including the ability to exclude others from his land,[168] the right to utilize the property for recreational purposes,[169] and the right to sell the land.[170] Justice Blackmun maintained that the trial court had erred by apparently equating the diminution of property values with the complete loss of all economic value, in contravention of the Court's takings precedents.[171] The Justice, therefore, disapproved of the majority's decision to decide the case as if a complete economic taking had occurred.[172]

Justice Blackmun also averred that the majority had incorrectly placed the burden on the government to justify its legisla-

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164 *Id.* at 2906-08 (Blackmun, J., dissenting). Justice Blackmun declared that "the factors applied in deciding a takings claim 'simply cannot be evaluated until the administrative agency has arrived at a final, definitive position regarding how it will apply the regulations at issue to the particular land in question.' " *Id.* at 2907 (Blackmun, J., dissenting) (quoting Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S 172, 190, 191 (1985)).

165 *Id.*

166 *Id.*

167 *Id.* at 2908 (Blackmun, J., dissenting). Justice Blackmun maintained that the trial court's determination would be reviewable by the South Carolina Supreme Court on remand. *Id.* at 2908 n.6 (Blackmun, J., dissenting).

168 *Id.* at 2908 (Blackmun, J., dissenting). Justice Blackmun posited that this right was " 'one of the most essential sticks in the bundle of rights that are commonly characterized as property.' " *Id.* (quoting Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979)).

169 *Id.* The Justice noted state court opinions ruling that recreational uses had economic value. *Id.* (citing Hall v. Board of Envtl. Protection, 528 A.2d 453 (Me. 1987); Turnpike Realty Co. v. Dedham, 284 N.E.2d 891 (Mass. 1972), *cert. denied*, 409 U.S. 1108 (1973); Turner v. County of Del Norte, 101 Cal. Rptr. 93 (Cal. Ct. App. 1972).

170 *Lucas*, 112 S. Ct. at 2908 (Blackmun, J., dissenting). Justice Blackmun contended that the land would be valuable to adjoining landowners or other individuals interested in a beachfront lot without a house. *Id.*

171 *Id.* (citing Goldblatt v. Hempstead, 369 U.S. 590, 592 (1962)).

172 *Id.*

tive determinations.[173] Contending that judicial deference to legislative findings was firmly embedded in the Court's jurisprudence, Justice Blackmun pointed out that claimants had traditionally borne the burden of proof in takings cases.[174] According to the Justice, this historical burden was shifted to the government as a result of the majority's assertion that state legislatures could not merely proffer harm-preventing rationales to justify onerous property regulations.[175]

The dissenting Justice continued the analysis by questioning the majority's rule that regulatory takings, depriving all economic use, should be compensated unless rooted in nuisance or property law.[176] Justice Blackmun first noted the Court's aversion to categorical rules in the takings arena.[177] The Justice further explained that the government had traditionally been given great latitude in enforcing regulations that resulted in severe private economic hardships.[178] In rejecting the majority's rule, Justice Blackmun charged that the majority had erroneously concluded that a denial of economically viable use demanded compensation.[179] Justice Blackmun asserted that the proper inquiry in such situations was whether the government interest outweighed

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173 *Id.* at 2909 (Blackmun, J., dissenting).

174 *Id.* (citing Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 485 (1987); *Goldblatt*, 369 U.S. at 594)).

175 *Id.* Justice Scalia countered this assertion by stating that Lucas had the burden of proving whether he had lost all economically viable use of his land. *Id.* at 2893 n.6.

176 *Id.* at 2909-10 (Blackmun, J., dissenting).

177 *Id.* at 2910 (Blackmun, J., dissenting) (quoting Agins v. Tiburon, 447 U.S. 255, 261 (1980). The *Agins* Court asserted that when deciding whether a taking has occurred, the Court's determination must be based on "a weighing of private and public interests." *Agins*, 447 U.S. at 261. Justice Blackmun also cited United States v. Central Eureka Mining Co., 357 U.S. 155, 168 (1958). *Lucas*, 112 S. Ct. at 2910 (Blackmun, J., dissenting). The *Central Eureka* Court declared that takings determinations must be based on "the particular circumstances of each case". *Central Eureka*, 357 U.S. at 168.

178 *Id.* at 2910-11 (Blackmun, J., dissenting) (citing *Goldblatt*, 369 U.S. at 594; Miller v. Schoene, 276 U.S. 272 (1928); Hadacheck v. Sebastian, 239 U.S. 394, 405 (1915); Powell v. Pennsylvania, 127 U.S. 678, 682 (1888)). *See Goldblatt*, 369 U.S. at 594 (stating that while economic diminution is a factor to consider, "it is by no means conclusive"); *Miller*, 276 U.S. at 279 (opining that a statute mandating the destruction of cedar trees did not constitute a taking because the government could favor the public interest over private property rights); *Hadacheck*, 239 U.S. at 414 (stating that a prohibition on brickmaking was valid despite the fact that the property owner's land was only viable as a brickyard); *Powell*, 127 U.S. at 682, 687 (upholding legislation outlawing the manufacture of oleomargarine even though property owner alleged that the law would render his property valueless).

179 *Id.* at 2911-12 (Blackmun, J., dissenting).

the private hardship caused by the regulation.[180] If this balancing of interests tipped in favor of the government, Justice Blackmun continued, the amount of value left to the property owner would be irrelevant.[181]

Having rejected the Court's newly crafted *per se* rule, Justice Blackmun criticized the majority's common law nuisance exception.[182] By forcing the government to show that the regulated activity amounted to a common law nuisance, the dissenting Justice asserted that the majority had unnecessarily restricted the government's ability to prevent public harms.[183] Instead, Justice Blackmun declared that courts should rely on the legislature's determination of what regulations were harm-preventing.[184]

Justice Blackmun concluded by criticizing the majority's assertion that the taking of all economically viable use of property without compensation was inconsistent with historical public perceptions.[185] Stating that such a decision was historically insupportable, Justice Blackmun noted that property theorists and judges, before and after the Fifth Amendment's adoption, had not discussed economic viability as being relevant in takings inquiries.[186]

Justice Stevens, also writing in dissent, similarly would have

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180 *Id.* at 2912 (Blackmun, J., dissenting).

181 *Id.* Justice Blackmun emphasized that "[i]t would make no sense under this theory to suggest that an owner has a constitutionally protected right to harm others, if only he makes the proper showing of economic loss." *Id.* (citing Pennsylvania Coal v. Mahon, 260 U.S. 393, 418 (1922) (Brandeis, J., dissenting)).

182 *Id.* at 2912-14 (Blackmun, J., dissenting).

183 *Id.* at 2912-13 (Blackmun, J., dissenting). Justice Blackmun opined that the brewery shut down in *Mugler* could not be classified as a nuisance at common law. *Id.* at 2913 (Blackmun, J., dissenting) (citing Mugler v. Kansas, 123 U.S. 623, 661 (1887)). The Justice further noted that the Court had already explicitly rejected reliance on common law nuisance principles. *Id.* (citing *Goldblatt*, 369 U.S. at 593; *Miller*, 276 U.S. at 280). The *Goldblatt* Court posited that it was not of "controlling significance . . . that the use prohibited is arguably not a common-law nuisance." *Goldblatt*, 369 U.S. at 593. The *Miller* Court asserted that it was unnecessary to "weigh with nicety the question whether the infected cedars constitute a nuisance according to common law." *Miller*, 276 U.S. at 280.

184 *Lucas*, 112 S. Ct. at 2912-13 (Blackmun, J., dissenting). In rejecting the majority's reliance on common law nuisance principles, Justice Blackmun questioned how such an approach was connected to the majority's goal of formulating a more "value free" and "objective" approach to takings claims. *Id.* at 2913-14 (Blackmun, J., dissenting). The dissenting Justice opined that determining whether a total economic diminution in value had occurred in a particular case could not be determined objectively, therefore thwarting the majority's test from the outset. *Id.*

185 *Id.* at 2914, 2917 (Blackmun, J., dissenting).

186 *Id.* at 2914 (Blackmun, J., dissenting) (citations omitted). Justice Scalia countered this assertion by stating that takings theories prior to the Fifth Amendment's adoption were irrelevant, and that *Pennsylvania Coal's* recognition of regulatory tak-

dismissed the case on ripeness grounds[187] and rejected the majority's new takings framework.[188] The dissenting Justice began by attacking the Court's "categorical rule" necessitating compensation for total regulatory takings.[189] Positing that the Court's precedents had disfavored categorical rules for regulatory takings, Justice Stevens stated that a regulation's economic impact on private interests was only one factor to consider in a takings analysis.[190] Justice Stevens further attacked the *per se* rule on a practical level, stating that the rule would unfairly reward property owners who had lost all value while providing nothing to property owners who had lost practically all of their property value.[191] The Justice also stated that the rule was theoretically unsound and criticized the majority's various rationales for crafting the rule.[192]

Justice Stevens attacked the majority's nuisance exception

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ings had contradicted the restrictive takings views cited by Justice Blackmun. *Id.* at 2900 n.15.

187 *Id.* at 2917 (Stevens, J., dissenting). The Justice called the permanent taking claim unripe because of the Act's newly passed administrative remedy. *Id.* Justice Stevens also rejected the temporary takings claim, submitting that Lucas had never attempted to obtain a building permit either before or after the Act's enactment, therefore bringing into question whether Lucas was planning to build during the time when his construction rights were denied. *Id.* at 2917 n.1.

188 *Id.* at 2918 (Stevens, J., dissenting).

189 *Id.*

190 *Id.* (citation omitted). Justice Stevens noted that in *Pennsylvania Coal* Justice Holmes had warned against categorical rules and had explicitly asserted that diminution in a property's value was just one factor to consider in a takings analysis. *Id.* (quoting Pennsylvania Coal v. Mahon, 260 U.S. 393, 413, 416 (1922)). Justice Stevens further reasoned that while a few previous decisions had opined that a total economic taking deserved full compensation, such language was merely dictum. *Id.* (quoting Agins v. Tiburon, 447 U.S. 255, 260 (1980)). In practice, the dissenting Justice continued, the Court had a long history of upholding regulations despite the fact that they rendered property valueless. *Id.* at 2819 (Stevens, J., dissenting) (citations omitted).

191 *Id.* The Justice also expressed concern that property owners would find ways to create "specialized estates" within larger estates in order to enhance the possibility of regulatory action effectuating a compensable total taking of that property segment. *Id.*

192 *Id.* at 2920 (Stevens, J., dissenting). First, Justice Stevens rejected the Court's assertion that a total economic deprivation was tantamount to a physical taking. *Id.* The Justice rationalized that partial and total economic takings were equally similar to physical takings. *Id.* Second, the dissenting Justice criticized the majority's statement that a total economic taking would arise in rare instances, stating that such a rationale did not decide whether the decision was constitutional. *Id.* Finally, Justice Stevens rejected the majority's suggestion that total economic takings carried a heightened risk that the property owner was being singled out for a public benefit, stating there was no nexus between a takings result and its purpose. *Id.*

with equal vigor.[193] The Justice flatly asserted that the Court's decision limiting governmental power to common law nuisance and property principles, in effect, overruled *Mugler v. Kansas*.[194] Justice Stevens further suggested that the nuisance exception would freeze state common law, thereby preventing legislatures from updating their laws to guard against newly identified evils.[195]

The dissenting Justice concluded by chastising the Court for ignoring the governmental action's character.[196] Justice Stevens stated that a regulation's character could, in fact, be the most important inquiry in identifying whether particular property owners were being targeted.[197] In Lucas's case, Justice Stevens found determinative the fact that the regulation did not single out Lucas but applied to adjacent developed and undeveloped lots.[198]

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193 *Id.* at 2920-22 (Stevens, J., dissenting).

194 *Id.* at 2921 (Stevens, J., dissenting). For support, Justice Stevens noted the holding of the *Mugler* Court, which reasoned that:

> [T]he supervision of the public health and the public morals is a governmental power, "continuing in its nature," and "to be dealt with as the special exigencies of the moment may require;" . . . "for this purpose, the largest legislative discretion is allowed, and the discretion cannot be parted with any more than the power itself."

Mugler v. Kansas, 123 U.S. 623, 669 (1887) (citations omitted). Justice Stevens opined that the majority's nuisance exception would effectively gut the legislature's discretionary power to protect the general public from dangers not protected by the common law. *Lucas*, 112 S. Ct. at 2921 (Stevens, J., dissenting).

195 *Id.* The Justice explained that legislatures had traditionally redefined property interests to comport with new revelations such as the "appreciation of the significance of endangered species, . . . the importance of wetlands, . . . and the vulnerability of coastal lands." *Id.* at 2921-22 (Stevens, J., dissenting) (citations omitted).

196 *Id.* at 2922 (Stevens, J., dissenting). Justice Stevens posited that, "[i]t is well established that a takings case 'entails inquiry into [several factors:] the character of the governmental action, its economic impact, and its interference with reasonable investment-backed expectations.' " *Id.* at (quoting Prune Yard Shopping Center v. Robins, 447 U.S. 74, 83 (1980)). The Justice asserted that the categorical rule addressed only the economic impact factor while the nuisance exception attempted only to address an owner's reasonable expectations. *Id.*

197 *Id.* at 2922-23 (Stevens, J., dissenting). For example, the Justice pointed out that a regulation having general applicability would be less suspect than a specific taking targeting certain individuals. *Id.* at 2924 (Stevens, J., dissenting). Justice Stevens continued, "[i]n analyzing takings claims, courts have long recognized the difference between a regulation that targets one or two parcels of land and a regulation that enforces state-wide policy." *Id.* (citations omitted).

198 *Id.* Justice Stevens was also impressed by the legislature's asserted goal of protecting South Carolina's beaches and citizens. *Id.* at 2925 (Stevens, J., dissenting). The Justice opined that such goals were "a traditional and important exercise of the States's police power, as demonstrated by Hurricane Hugo, which in 1989, caused 29 deaths and more than $6 billion in property damage in South Carolina alone." *Id.*

Finally, Justice Souter entered a statement declaring that the case was unripe for review.[199] Deeming the trial court's conclusion that a total taking had occurred to be "questionable" and based on superficial treatment, the Justice posited that the Court improvidently assumed that a total economic taking was present in this case.[200]

Commentators' interpretations of the *Lucas v. South Carolina Coastal Council* decision have ranged from the view that the case will have little impact on takings jurisprudence to the belief that the opinion will have long-lasting effects.[201] As is usually the case when such diametrically opposed viewpoints are expressed, the truth most likely falls somewhere in the middle. While the majority's categorical rule and nuisance exception will narrow government flexibility in restricting property uses, the case's long lasting effects may be felt in what the opinion portends regarding the proper inquiry for determining when a regulation results in a total diminution of value.

One of the decision's largest failings is the number of assumptions Justice Scalia was forced to make in deciding the case on its merits. As Justice Kennedy aptly noted, Lucas had never proven that he was planning to build on the lot during the time period of his temporary taking and, therefore, may not have suffered any economic injury.[202] More importantly, Justice Scalia relied on the trial court's dubious finding that Lucas's lot had been rendered valueless.[203] These assumptions proved to be ample fodder for the dissenting Justices to attack the majority's opinion as a zealous attempt at promulgating the Court's takings agenda despite an incongruous factual scenario.[204]

Nevertheless, the dissenters' fears regarding the majority's categorical compensation rule for total regulatory takings, and its attendant nuisance exception, are unfounded. Both Justice Blackmun and Justice Stevens have written or joined in past opinions espousing, albeit in dictum, the proposition that a total dim-

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199 *Id.*

200 *Id.*

201 Michael M. Berger, *Recent Takings and Eminent Domain Cases, in* ALI-ABA LAND USE INSTITUTE: PLANNING, REGULATION, LITIGATION, EMINENT DOMAIN, AND COMPENSATION 77, 79 (1992) (noting that "[c]ommentators are purporting to see all sorts of things either contained in, or missing from, *Lucas* in order to justify a conclusion that either nothing happened or something momentous happened").

202 *Lucas*, 112 S. Ct. at 2902-03 (Kennedy, J., concurring).

203 *Id.* at 2896 & n.9.

204 *Id.* at 2904 (Blackmun, J., dissenting); *id.* at 2917 (Stevens, J., dissenting).

inution in value of property will generally effect a taking.[205] This past ambivalence towards the categorical rule that Justice Scalia adopts in *Lucas* betrays the dissenting Justices' indignation now set forth in the *Lucas* case.

Furthermore, the dissenting Justices' contention that the nuisance exception will "freeze" the common law and, therefore, stop legislatures from adjusting state law to comport with changing times is equally disingenuous. While Justice Scalia's common law nuisance inquiry does restrict government power, it neither prevents regulation of new technologies nor ignores new understandings of certain uses. This assertion is supported by Justice Scalia's recognition that a nuclear power plant could be regulated according to common law principles, despite the fact that such plants are relatively new to the American landscape.[206]

Justice Scalia's reasoning can better be attacked by noting the Justice's strict adherence to language in past decisions in crafting the categorical regulatory takings rule, while ignoring cases with explicit language in direct contradiction to the newly-formulated nuisance exception. Rather than providing a clear rationale for the categorical rule, Justice Scalia instead provides only possible theories in its support.[207] Such a stance could have been justified under the guise of *stare decisis* if not for the Justice's trampling of precedent in devising the common law nuisance exception. While this exception has the laudable goal of bringing more certainty to the takings area, a goal which the exception may or may not accomplish, it flies in the face of pronouncements in two major takings cases.[208] By taking two divergent paths to arrive at a final conclusion, the majority leaves itself open to criticism that the court is more interested in reaching certain ends than in the means at arriving at those ends.

Finally, Justice Scalia has planted the seed for a new framework to be utilized in determining whether a total economic diminution in value of property has occurred.[209] The Justice's test,

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205 Berger, *supra* note 201, at 80.

206 *Lucas*, 112 S. Ct. at 2900-01.

207 *Id.* at 2893-95, 2899-2900.

208 *See* Goldblatt v. Hempstead, 369 U.S. 590, 593 (1962) (positing that it was of "controlling significance . . . that the use prohibited is arguably not a common-law nuisance"); Miller v. Schoene, 276 U.S. 272, 280 (1928) (asserting that it was unnecessary to "weigh with nicety the question whether the infected cedars constitute a nuisance according to common law").

209 *Lucas*, 112 S. Ct. at 2894 n.7 (suggesting that "how the owner's reasonable expectations have been shaped by the State's law of property" could resolve the inconsistency in the Court's resolution of the takings problem).

based on property owners' "reasonable expectations" as formed by state property law, would be a welcome alternative to the muddled state of Supreme Court holdings on this question. While not the type of bright line test that would end the confusion in this area, Justice Scalia's framework would at the very least allow for some recognition of the conceptual severance doctrine and protect property owners from overreaching governmental regulations resulting in deprivations just short of total takings. An adoption of conceptual severance would be more consistent with the traditional conception of property and mark a sound retreat from the overly deferential approach to government applied in past cases.

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