The Limited Impact of *Lucas v. South Carolina Coastal Council* on Massachusetts Regulatory Takings Jurisprudence

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The United States Supreme Court has a long history of reviewing landowners' allegations that restrictive land use regulations amount to uncompensated takings of their property in violation of the Fifth and Fourteenth Amendments.1 Many of these “regulatory takings” decisions hinged on the Court's willingness to allow states to control land use without the fear of compensation or invalidation, while others focused on due process concerns in cases where landowners alleged severely diminished property values.2 This long line of Supreme Court takings decisions, however, had not resulted in any categorical takings rules other than general pronouncements and balancing tests.3 Rather, the Court preferred to make ad hoc, factual inquiries that often balanced private property rights against state regulatory powers that, for the most part, were bolstered by the Court's deference to the states' police power.4

Many hoped that the 1992 case of Lucas v. South Carolina Coastal Council would finally settle this uncertain takings jurisprudence.5

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1 See U.S. CONST. amend. V, XIV. The Takings Clause of the Fifth Amendment, which guarantees that no private property shall be taken for public use without just compensation, is made applicable to the states through the Fourteenth Amendment. See Chicago B. & Q.R. Co. v. Chicago, 166 U.S. 226, 239 (1897).
2 See Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413 (1922); see also Hadacheck v. Sebastian, 239 U.S. 394, 411 (1915); Reinman v. Little Rock, 237 U.S. 171, 176 (1887); Mugler v. Kansas, 123 U.S. 623, 669 (1887); Florida Rock Indus. v. United States, 18 F.3d 1560, 1571 (Fed. Cir. 1994).
3 See Loveladies Harbor, Inc. v. United States, 28 F.3d 1171, 1179 (Fed. Cir. 1994).
4 See id.
Takings advocates expected *Lucas* to clarify some long-standing ambiguities in the Supreme Court's takings law in the context of a growing sensitivity on the part of localities to environmental preservation. Instead, however, many agree that *Lucas* has simply recast and not reformed the takings issue. In so doing, *Lucas* may have raised more questions than it has answered for state courts and regulators.

*Lucas* was unprecedented in pronouncing as a "categorical rule" that a regulatory taking will occur when a challenged land use regulation that is not otherwise grounded in background principles of nuisance law denies a landowner all "economically viable use of his land." Some state practitioners expected this rule to have a noticeable impact on state takings litigation. Indeed, the *Lucas* dissent feared the decision's possible chilling effect on legislators and land use planners due to its highly interventionist tone. Such fears, according to the dissent, were only compounded by the fact that environmental regulators often face the need to insulate limited state coffers from takings liability while shouldering the immense responsibility of preserving local ecologies.

Massachusetts courts have decided a long line of regulatory takings cases since the mid-1800s. The development of this takings law through *Lopes v. City of Peabody*, one of the first state cases interpreting *Lucas*, presents an interesting case study of the impact of *Lucas* and its precedent on state takings jurisprudence. This Comment will demonstrate that the *Lucas* decision should have no sig-

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7 See Loveladies, 28 F.3d at 1178–79 ("[When the Supreme Court took the Lucas case], it was understood to confront the Court with a much-heralded opportunity to clarify how courts were to balance public interest claims against liberty claims of private property owners, and to do it in a case in which the issue was sharply focused on fundamental ecological and environmental values. Instead, the court recast the issue."); Richard C. Ausness, *Regulatory Takings and Wetland Protection in the Post-Lucas Era*, 30 LAND & WATER L. REV. 365, 413–14 (1995).

8 See *Lucas*, 505 U.S. at 1063 (Stevens, J., dissenting).


10 See *Lucas*, 505 U.S. at 1068–69, 1070 (Stevens, J., dissenting); see also Philip B. Herr, *Planning Amid the Shifting Sands*, in REGULATORY TAKINGS, supra note 6, at 143.

11 See *Lucas*, 505 U.S. at 1069–70 (Stevens, J. dissenting).


13 See *Lopes v. City of Peabody*, 629 N.E.2d 1312 (Mass. 1994); see also Ausness, supra note 7, at 390.
nificant impact on Massachusetts law. First, a line of Massachusetts takings cases, in a prophetic foreshadowing of Lucas, in many ways followed what is now commonly termed the Lucas categorical takings rule.\textsuperscript{14} Secondly, the Massachusetts courts are not unfamiliar with applying a Lucas-type nuisance exception to takings claims.\textsuperscript{15} Moreover, an examination of Massachusetts case law leading up to Lopes can in fact answer some questions for Massachusetts that Lucas deliberately did not address, such as the breadth of the nuisance exception and a more substantive meaning of the deprivation of all practical use of land.\textsuperscript{16}

In Section I, this Comment examines the important Supreme Court cases leading up to the Lucas decision. Section II examines the Lucas case itself and dissenting opinions. Section III analyzes Massachusetts takings case law and the Massachusetts courts' interpretation of Supreme Court takings principles. Section IV demonstrates how Massachusetts case law may provide answers to some of Lucas' open questions, and moreover how Lucas' pronouncements should have a limited impact on future Massachusetts regulatory takings jurisprudence.

I. Supreme Court Takings History: The Muddy Road to Lucas

\textit{Mugler v. Kansas} was one of the earliest United States Supreme Court cases to address a land use regulation challenge based on the resulting economic injury to the landowner.\textsuperscript{17} In Mugler, the Court reviewed the economic impact on a local brewer of a Kansas statute outlawing the sale and manufacture of intoxicating liquors.\textsuperscript{18} The brewer alleged that the statute conflicted with the Due Process


\textsuperscript{16} See Yankee, 526 N.E.2d at 1250 n.8; MacGibbon, 340 N.E.2d at 491; Turnpike Realty Co. v. Town of Dedham, 284 N.E.2d 891, 899–900 (Mass. 1972).

\textsuperscript{17} See Mugler v. Kansas, 123 U.S. 623 (1887).

\textsuperscript{18} See \textit{id.} at 657. The Kansas statute declared all places where intoxicating liquors were manufactured or sold as “common nuisance[s],” \textit{Id.} at 655.
Clause of the Fourteenth Amendment because the value of his brewery was “very materially diminished” by its enforcement.\textsuperscript{19}

In refusing to find that the statute’s enforcement amounted to a taking of the brewer’s property, Justice Harlan posited that the police power should not be restrained by the Fourteenth Amendment’s requirement of due process.\textsuperscript{20} Rather, he believed that a state’s regulatory authority under the police power should extend beyond the mere suppression of nuisances, and is bounded only by a regulation’s substantial relation to the public morals, health, and safety.\textsuperscript{21} The police power, Justice Harlan held, should not be “burdened with the condition that the State must compensate . . . individual owners for pecuniary losses they may sustain.”\textsuperscript{22} Then, by distinguishing a state’s decision to regulate noxious uses of property from those instances where states physically appropriate property for the public benefit, Justice Harlan refused to consider the statute’s enforcement an exercise of eminent domain.\textsuperscript{23} The Mugler rule, therefore, not only stipulated that states can legitimately regulate beyond the abatement of per se nuisances, but also suggested that no legitimate exercise of the

\textsuperscript{19} See id. at 657. The Court explicitly recognized that the buildings and machinery constituting Mugler’s breweries were of little value if not used for the purposes of manufacturing beer, and that the statute, if enforced against Mugler, would “materially diminish[]” the value of his property. See id. at 657. The brewer did not dispute that Kansas possessed the police power authority to legislate against the manufacture and sale of intoxicating liquors, but rather contested the uncompensated enforcement of the statute against owners of property whose value derived mainly from the liquor business. See Mugler, 123 U.S. at 664.

\textsuperscript{20} See id. at 663 (holding that “neither the [Fourteenth] amendment—broad and comprehensive as it is—nor any other amendment, was designed to interfere with the power of the state, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education, and good order of the people, and to legislate so as to increase the industries of the state, develop its resources, and add to its wealth and prosperity”) (quoting Barbier v. Connolly, 113 U.S. 27, 31 (1885)). Justice Harlan feared that such an interpretation might lead to the prejudice of the “public health” and the “public morals,” as “all property in this country is held under the implied obligation that the owner’s use of it shall not be injurious to the community.” See id. at 665.

\textsuperscript{21} See id. at 663; see also Catherine R. Connors, Back to the Future: The “Nuisance Exception” to the Compensation Clause, 19 CAP. U. L. REV. 139, 161 (1990).

\textsuperscript{22} See Mugler, 123 U.S. at 669. Justice Harlan considered this to be the case especially when a statute prohibited the noxious uses of property that are injurious to the community. See id.

\textsuperscript{23} See id. at 668–69. Justice Harlan posited that states should not be burdened by a duty to compensate landowners for resisting noxious uses of property: “The 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.” Id. at 669.
police power can result in a compensable taking, even in cases of the destruction of property values.  

The *Mugler* rule prevailed in Supreme Court takings jurisprudence for over the next forty years. Numerous takings challenges involving regulations that purportedly controlled non-nuisance activities were thwarted based on *Mugler*’s broad police power notions. In each of these cases, the Court went so far as to propose that although regulated activities were not actually nuisances *per se*, they were nevertheless nuisances “in fact and law.” As such, they were properly regulated under the police power, regardless of the economic impact to property owners. Under *Mugler* and its progeny, the Court often denied that compensation was guaranteed by constitutional due process considerations, even when regulations virtually eliminated the value of private property: “[W]here the public interest is involved[,] preferment of that interest over the property interest of the individual, to the extent even of its destruction, is one of the distinguishing characteristics of every exercise of the police power which affects property.” Although this broad reading of the police power dominated post-*Mugler* takings law for some time, the *Hadacheck v. Sebastian* decision revealed early stages of the Court’s uncertainty in those cases where landowners alleged total destruction of property values. In *Hadacheck*, the Supreme Court denied a brick kiln owner’s due process challenge to a Los Angeles ordinance that prohibited brick yards within designated areas of the city. Although upholding the ordinance as a valid exercise of California’s police power, the Court explicitly noted that, while completely prohibiting

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24 See Connors, supra note 21, at 161. Such a sweeping view of the police power was perhaps crucial to Justice Harlan’s analysis in *Mugler*, as the sale of liquor was not uniformly considered a nuisance. See id.

25 See *Hadacheck v. Sebastian*, 239 U.S. 394, 411 (1915) (regulation depriving brick kiln operator of his business was nuisance in fact and therefore properly regulated); *Reinman v. Little Rock*, 237 U.S. 171, 176 (1915) (livery stables, although not nuisances *per se*, were properly prohibited by regulation without compensation as nuisances “in fact and in law” based on the state’s police power); see also *Miller v. Schoene*, 276 U.S. 272, 280 (1928) (whether a regulation requiring the cutting of trees infected with “cedar rust” controlled a nuisance was irrelevant so long as the regulation was grounded in reasonable “considerations of social policy”).

26 See *Hadacheck*, 239 U.S. at 411; *Reinman*, 237 U.S. at 176; see also *Miller*, 276 U.S. at 280.

27 See *Hadacheck*, 239 U.S. at 410; *Reinman*, 237 U.S. at 176; see also *Miller*, 276 U.S. at 280.

28 See *Miller*, 276 U.S. at 279–80; see also *Hadacheck*, 239 U.S. at 408–09 (regulation was not invalid even though value of investments made in the brick kiln business prior to legislative action was greatly diminished).

29 See *Hadacheck*, 239 U.S. at 412.

30 See id. at 404.
the manufacture of bricks, the law did not prohibit other uses of the land such as the removal of subsurface brick clay. The Court then explicitly passed on whether it would have ruled differently had the ordinance worked a broader prohibition on the use of the land.

The Court drew on Mugler's broad police power notions until Justice Holmes' landmark decision in Pennsylvania Coal Company v. Mahon. Pennsylvania Coal was the first case in which the Supreme Court invalidated a land-use regulation as applied to a landowner due in part to a substantial diminution in property values. In Pennsylvania Coal, the Mahons, who had purchased property to which Pennsylvania Coal had retained subsurface mining rights, filed suit under the Kohler Act requesting injunctive relief from Pennsylvania Coal's further mining activities. Pennsylvania Coal countered by arguing that the Kohler Act was an invalid exercise of the police power that essentially worked a taking of their "support estate," or the portion of subsurface coal the statute required miners to leave in place for preventing subsidence.

In finding for Pennsylvania Coal, Justice Holmes admitted that the police power was a necessary incident to the government's continued existence. He proposed, however, that the contracts and due process clauses of the Constitution should nevertheless work limits on a state's regulatory powers. A challenged regulation's resulting effect on property values set these limits: "When [diminution] reaches a certain magnitude, in most if not in all cases there must be an exercise of eminent domain and compensation to sustain the act."

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31 See id. at 412.
32 See id. Justice McKenna thus distinguished the basis of his holding in Hadacheck from a California Supreme Court decision that invalidated a regulation because its effect was to "absolutely deprive the owners of real property within such limits of a valuable right incident to their ownership." See id. at 411–12 (citing Ex Parte Kelso, 82 P. 241 (Cal. 1905)).
33 See Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922).
34 See Petitioner's Brief on the Merits at 14, Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992) (No. 91-453); see also Connors, supra note 21, at 177.
35 See Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 412–13 (1922). The Kohler Act prohibited coal mining where subsidence would have adverse effects on dwellings. See id. at 413. Although the Mahons' deed had included an express provision allowing Pennsylvania Coal to mine under their land, they were assigned all the risks associated with the mining operations. See id. at 412.
37 See Pennsylvania Coal, 260 U.S. at 413. Justice Holmes explicitly recognized that "government could hardly go on if to some extent values incident to property could not be diminished without paying for some change in the general law. As long recognized, some values are enjoyed under an implied limitation and must yield to the police power." Id.
38 See id.
39 Id. This has come to be known as the "diminution in value" test, where the court essentially
Having established that diminution of property values worked a limit on the government's authority to regulate, Justice Holmes proceeded to balance the public interests protected by the Kohler Act with the private losses it exacted on Pennsylvania Coal.\textsuperscript{40} In weighing the concerns of public safety purportedly furthered by the statute, he concluded that the Mahons' property interests were not sufficiently common or public enough to designate Pennsylvania Coal's mining activity a nuisance.\textsuperscript{41} The statute's ultimate effect on Pennsylvania Coal, however, was to "abolish" a "very valuable" mining estate by making a portion of its coal commercially impractical to mine.\textsuperscript{42} This loss, which seemed more severe when balanced against what he considered to be the relatively weak public benefit of the statute, led Justice Holmes to conclude that the Kohler Act could not be sustained as a legitimate exercise of the police power in so far as it affected coal mining in places where the right to mine coal was reserved.\textsuperscript{43}

In his dissent, Justice Brandeis criticized the majority's application of the diminution in value test.\textsuperscript{44} In determining the extent of diminution, Justice Brandeis argued, the value of Pennsylvania Coal's support estate should not be assessed separately.\textsuperscript{45} Rather, it should be compared "with the value of all other parts of the land."\textsuperscript{46} Justice Brandeis observed that the value of the coal kept in place by the

\begin{itemize}
  \item Calculates the value of the land in question before and after the regulation is applied. See Donald W. Large, The Supreme Court and the Taking Clause: The Search for a Better Rule, 18 ENVTL. L. J. 3, 19–20 (1987). The court then calculates the percentage of decline in value to decide if the loss is severe enough to justify compensation. See id.
  \item See Pennsylvania Coal, 260 U.S. at 413–14.
  \item See id. at 413. In essence, Justice Holmes refused to apply the nuisance exception to the Kohler Act, reasoning that the source of damage to the Mahons' home was a private one and not "common or public." See id. He further posited that the Kohler Act was not justified as protecting public safety, since notice that subsidence would occur was sufficient to protect the public. See id.
  \item See id. at 414.
  \item See Pennsylvania Coal, 260 U.S. at 414. Justice Holmes refused in his analysis to recognize a distinction between the impact of physical appropriations of property, and property rendered valueless by governmental regulation. See id. at 415. Although he pronounced as a "general rule" that "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking," Justice Holmes provide no meaningful framework for deciding what is too far. See id. Rather, he simply posited that determining the point where enforcement of a regulation has the effect of a physical appropriation is a question of degree and "therefore cannot be disposed of by general propositions." See id. at 416. Exactly where a governmental action will fall on that spectrum will "depend[] on the particular facts." See id. at 413, 416.
  \item See Pennsylvania Coal, 260 U.S. at 419 (Brandeis, J., dissenting).
  \item See id.
  \item See id.
\end{itemize}
Kohler Act was “negligible” when compared to the value of the whole property. The resulting diminution, therefore, was hardly the undue hardship that Pennsylvania Coal had alleged.47 These criticisms attempted to expose the majority’s lack of guidance in applying the “diminution” test, and the Pennsylvania Coal dissent would initiate a marked level of uncertainty in future takings jurisprudence.48

In the 1962 decision of Goldblatt v. Town of Hempstead, the Court retreated from Pennsylvania Coal’s pro-takings pronouncements, but provided no concrete standards in their place.49 In an effort to regulate mining, Hempstead had enacted an ordinance prohibiting mining below the water table of a neighboring lake, and mandating that any excavations below that table be refilled.50 The petitioners argued that the ordinance worked an uncompensated taking of their property because it restricted mining on eighteen acres of their land.51

In writing for the majority, Justice Clark refused to recognize that a taking had occurred. He agreed that the ultimate effect of the regulation was to render any further mining impossible, thereby “completely prohibit[ing] a beneficial use to which the [petitioners’] property ha[d] previously been devoted.”52 However, despite Pennsylvania Coal’s holding that the degree of economic injury should factor into the Court’s takings analysis, Justice Clark, drawing heavily from Mugler, chose to focus mainly on the extent to which the town’s ordinance was a reasonable exercise of the police power.53 Although an assessment of property value diminution was relevant under Pennsylvania Coal, Justice Clark posited it was “by no means

47 See id.
48 See id. at 416; Carol M. Rose, Mahon Reconstructed: Why the Takings Test Is Still a Muddle, 57 S. CAL. L. REV. 561, 566 (1984). Professor Rose postulates that Justice Holmes’ diminution in value test fails to provide guidance in answering how much diminution is too much, or exactly what loss of property within an estate is relevant to the takings discussion. See id. Although Holmes’ analysis was unclear, the critical factor in his decision may indeed have been the extensiveness of the economic harm imposed by the regulation. See Joseph L. Sax, Takings and the Police Power, 74 YALE L.J. 36, 41 (1964). For other courts that have held similarly, see Hudson County Water Co. v. McCarter, 209 U.S. 349, 355 (1908) (if the exercise of the police power makes a property “wholly useless, the right of property would prevail over the other public interest, and the police power would fail”); Interstate Consol. St. Ry. v. Massachusetts, 207 U.S. 79, 87 (1907) (“the question [of whether a tax is too burdensome] narrows itself to the magnitude of the burden imposed”).
50 See id. at 592.
51 See id.
52 See id., at 592, 596–97.
53 See id. at 592, 598.
conclusive” as to the constitutional question of whether a taking had occurred.\footnote{54 See Goldblatt, 369 U.S. at 594.} Justice Clark did, however, attempt to reconcile the apparent inconsistencies of the \textit{Mugler} and \textit{Pennsylvania Coal} decisions by concluding that the reasonableness of Hempstead’s ordinance could be determined by the nature of the harm prevented, the availability of other less drastic alternatives, and the loss suffered by the property owners due to its enforcement.\footnote{55 See \textit{Penn Cent. Transp. Co. v. New York City}, 438 U.S. 104 (1978).}

\textit{Penn Central Transportation Co. v. New York City} was the most important attempt after \textit{Goldblatt} to reconcile the \textit{Mugler} and \textit{Pennsylvania Coal} ambiguities.\footnote{56 See \textit{Penn Cent. Transp. Co. v. New York City}, 438 U.S. 104 (1978).} The \textit{Penn Central} dispute concerned New York City’s Landmarks Preservation Law, which empowered a city commission to designate certain buildings as landmarks, and to exercise veto power over any proposed architectural modifications.\footnote{57 See \textit{id.} at 110-11.} In 1967, the commission designated New York City’s Grand Central Terminal an historic landmark, and later refused to approve Penn Central’s request for permission to build a multi-story office building above it.\footnote{58 See \textit{id.} at 115, 116-17.} Penn Central responded by alleging that the city, in refusing to approve the addition, had taken its property without just compensation in violation of the Fifth and Fourteenth Amendments.\footnote{59 See \textit{id.} at 119.}

In upholding the validity of the Landmarks Law, Justice Brennan held that the Court must consider three factors in reviewing a regulatory takings case: the character of the government action involved;\footnote{60 See \textit{id.}, at 119.} the extent to which the regulation interferes with investment-backed expectations;\footnote{61 See Ausness, \textit{supra} note 7 at 371 n.181. The term “investment-backed expectations” ap-
property owner. Before applying this formula to Penn Central's case, however, Justice Brennan acknowledged outright the Supreme Court's long history of upholding land use regulations that were reasonably related to the health, safety, morals, or general welfare, even in cases where real property interests were "destroyed or adversely affected." Justice Brennan then dismissed Penn Central's claim that the city's restriction could constitute a taking of one discreet property interest, or, in Penn Central's case, the air rights necessary for the proposed expansion: "‘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."

After recognizing the constitutionality of the Landmarks Law, Justice Brennan examined its interference with Penn Central's investment-backed expectations. He noted that Penn Central's initial expectations in purchasing the property were based on its use as a railroad terminal, and that this interest was not affected by the statute. The statute's economic impact was therefore not severe enough to exceed constitutional boundaries. Justice Brennan further noted


62 See Penn Central, 438 U.S. at 124.
63 See id. at 125 (citing Nectow v. Cambridge, 277 U.S. 183, 188 (1928)). Justice Brennan reasoned similarly the following year in Andrus v. Allard: "Suffice it to say that government regulation—by definition—involves the adjustment of rights for the public good. Often this adjustment curtails some potential for the use or economic exploitation of private property. To require compensation in all such circumstances would effectively compel the government to regulate by purchase." Id. (emphasis in original). See Andrus v. Allard, 444 U.S. 51, 65 (1979).
64 See Penn Central, 438 U.S. at 130. Justice Brennan noted that the Court should focus on the regulation's interference with rights in the parcel as a whole. See id. at 130–31; Andrus, 444 U.S. at 65–66 (holding that "where an owner possesses a full ‘bundle’ of property rights, the destruction of one ‘strand’ of the bundle is not a taking, because the aggregate must be viewed in its entirety").
65 See Penn Central, 438 U.S. at 125. Justice Brennan acknowledged that zoning laws such as the one at issue in Penn Central could be reasonably related to the public health, safety, morals or general welfare. See id.
66 See id. at 136. Although Justice Brennan employed the term "investment-backed expectations" in a conclusory fashion, he avoided any specific explanation of its meaning. See Large, supra note 39, at 26.
67 See Penn Central, 438 U.S. at 136.
68 See id. Professor Large writes of the inherent difficulty in determining investment-backed expectations, a phrase commonly used in a conclusory fashion after Penn Central. See Large, supra note 39, at 26. Large notes that Penn Central's proposed project may have indeed been within its investment-backed expectations, as the original Grand Central Station was erected with pillars that were of sufficient strength to sustain an office building above the station. See
that the Landmarks Law did not affect the present uses of the terminal, and moreover that the commission's denial of Penn Central's application did not restrict all construction above it. 69

The next important Supreme Court takings decision was the 1980 case of *Agins v. Tiburon*, in which landowners alleged that zoning ordinances restricting development of their parcels to a limited number of residential units effected an unconstitutional taking of their property. 70 The landowners in *Agins* argued that the ordinance's density restrictions had "completely destroyed the value of [their] property for any purpose or use whatsoever." 71

In rejecting the landowners' challenge, Justice Powell posited that a regulatory taking can only occur either when a regulation does not "substantially advance legitimate state interests, or denies the owner economically viable use of his land." 72 Applying this two-part analysis, Justice Powell first upheld the Tiburon ordinance as a legitimate exercise of the city's police power to protect its residents from "the premature and unnecessary conversion of open-space land to urban uses." 73 He then applied the "economically viable use" analysis to conclude that the landowners were still free under the ordinance to fulfill their "reasonable investment expectations" by building up to five residences on their property. 74 Justice Powell thus rejected the landowners' claim that the value of their property was completely destroyed by the ordinance. 75

The Supreme Court applied the *Agins* two-part test nine years later in *Keystone Bituminous Coal Ass'n v. DeBenedictis*, a case with

*id.* Indeed, an office building may have in fact been planned for possible future development. See *id.*

69 See *Penn Central*, 438 U.S. at 136–37.


71 See *Agins*, 447 U.S. at 258.

72 See *id.* at 260 (emphasis supplied) (citing *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 138 n.36 (1978)). In other words, either prong of the *Agins* test, if proven, would be sufficient to establish a taking. See Ausness, *supra* note 7, at 373.

73 See *Agins*, 447 U.S. at 261 (quoting CAL. GOVT. CODE ANN. § 65661(b) (West. Supp. 1979)). Some scholars have since criticized Justice Powell for requiring the "substantially advancing state interests" test for takings, as this requirement was, until *Agins*, only associated with the Court's substantive due process analysis. See Norman Williams, Jr. et al., *The White River Junction Manifesto*, 9 VT. L. REV. 193, 213–14 n.64 (1984).

74 See *Agins*, 447 U.S. at 262.

75 See *id.* at 262.
facts strikingly similar to *Pennsylvania Coal.* In *Keystone,* a group of miners challenged the Subsidence Act, a statute that restricted mining in certain areas that were vulnerable to subsidence. The miners, asserting "no more than a straightforward application of the Court’s decision in *Pennsylvania Coal,“ asserted that the statute worked a taking of their support estate, or the twenty-seven million tons of coal that the statute required to be left in place.

Justice Stevens, after applying the *Agins* two-part test, refused to recognize a taking. Stating that the purpose of a regulation played a "critical" role in determining whether a taking had occurred, Justice Stevens noted that the Subsidence Act legitimately protected valid public interests. He further concluded that the statute fit the nuisance exception because of its health, safety, conservation, and fiscal integrity purposes.

Then, in applying the second prong of the *Agins* test, Justice Stevens asked whether the petitioners had suffered "deprivation significant enough to satisfy the heavy burden on one alleging a regulatory taking." Did the statute serve to make the mining of certain coal "commercially impracticable," as was the case in *Pennsylvania Coal?" However, rather than view the petitioners’ twenty-seven mil-

77 See id. at 476, 478–79. The statute was entitled the Bituminous Mine Subsidence and Land Conservation Act, PA. STAT. ANN. tit. 52, § 1406.1 (Purdon 1986). See id. at 474.
78 See *Keystone Bituminous Coal Ass'n v. DeBenedictis,* 480 U.S. 470, 478–79, 481, 496 (1987). Pennsylvania law recognized three estates in mining land—the support estate, the surface estate, and the mineral estate—as separate property interests. See id. at 478–79. Petitioners argued that the coal supports they needed to leave in place as the "support estate" had been effectively appropriated, as coal served no useful purpose unless mined. See id. at 496–97.
79 See id. at 492.
80 See id.; see also Connors, *supra* note 21, at 144.
81 See *Keystone,* 480 U.S. at 488; Connors, *supra* note 21, at 145. Justice Stevens observed further that the statute at issue in *Keystone* was distinguishable from the statute in *Pennsylvania Coal,* which the Court had invalidated in part because of its private benefit to surface property owners. See *Keystone,* 480 U.S. at 486. He noted that the purpose of the statute in *Keystone* was the protection of public safety, the enhancement of land values for taxation, and the preservation of surface water drainage and public water supplies. See id. at 485–86. In fact, Justice Stevens may have overplayed this distinction from *Pennsylvania Coal,* as even the Kohler Act was intended to "cure existing evils and abuses" such as "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 . . . .” See *Large,* *supra* note 39, at 36 (quoting Mahon v. Pennsylvania Coal Co., 118 A. 491, 492 (Pa. 1922)). Indeed, key provisions of the Subsidence Act were identical to the Kohler Act. See Richard A. Epstein, *Takings: Descent and Resurrection,* 1987 SUP. CT. REV. 1, 12 (1987).
83 See *Keystone,* supra.
lion tons of coal as one appropriated property interest, Justice Stevens, following the Pennsylvania Coal dissent, noted that the Subsidence Act required that the petitioners leave only less than two per cent of their entire coal supply in place.\textsuperscript{84} He therefore was not convinced that the petitioners' "mining operations, or even any specific mines, were at all unprofitable since the Subsidence Act was passed."\textsuperscript{85} In so reasoning, Justice Stevens considered that the petitioners' "support estate," although deprived of profitability, was merely a part of the "entire bundle of rights" possessed by the owners of either the coal or the surface.\textsuperscript{86}

In his dissent, Chief Justice Rehnquist took issue with the majority's attempts to distinguish Keystone from Pennsylvania Coal by arguing that the statutes in both cases were aimed at similar economic goals.\textsuperscript{87} Although he agreed that the Subsidence Act was a legitimate exercise of the police power, Chief Justice Rehnquist criticized the majority's classification of subsidence as a nuisance.\textsuperscript{88} For the Court to invoke the nuisance exception to deny a takings claim, he argued, the challenged regulation must rest on the "discrete and narrow" purpose of preventing a nuisance.\textsuperscript{89} Because the Subsidence Act existed primarily for economic purposes, it could not be insulated from constitutional due process considerations.\textsuperscript{90} Chief Justice Rehnquist noted further that Keystone was unlike other "nuisance" cases such

\textsuperscript{84} See id. at 496.

\textsuperscript{85} See id. Justice Stevens also found that the Act had a negligible impact on petitioners' investment-backed expectations by noting that only 75% of the petitioners' coal could have been profitably mined in any event: "The question here is whether there has been any taking at all when no coal has been physically appropriated, and the regulatory program places a burden on the use of only a small fraction of the property that is subject to regulation." See id. at 499–500 n.27.

\textsuperscript{86} See Keystone, 480 U.S. at 501. In fact, Justice Stevens disputed even that the support estate itself was entirely deprived of profitability. See id. He noted that, in any event, the petitioners' record lacked any evidence of what percentage of the support estate, either in the aggregate or with respect to any individual estate, was actually affected by the Act. See id. He also cited Penn Central, which rejected the notion that the "air rights" above the petitioner's terminal constituted a separate segment of property for takings purposes. See id. at 500.

\textsuperscript{87} See Keystone, 480 U.S. at 510 (Rehnquist, C.J., dissenting).

\textsuperscript{88} See id. at 513 (Rehnquist, C.J., dissenting).

\textsuperscript{89} See id. (Rehnquist, C.J., dissenting). Chief Justice Rehnquist was not specific as to whether the regulation should prevent a nuisance as recognized \textit{a priori} by state law. See id. (Rehnquist, C.J., dissenting).

\textsuperscript{90} See id. (Rehnquist, C.J., dissenting). Indeed, although the majority did acknowledge that the nuisance exception was not coterminous with the police power itself, under Justice Stevens' reasoning in Keystone arguably all statutes which abate something similar to a public nuisance might ultimately fit the nuisance exception. See Connors, \textit{supra} note 21, at 145.
as *Mugler, Miller,* and *Goldblatt,* because in those cases the claimants did not suffer complete extinction of property values. After describing the unmined coal in *Keystone* as an "identifiable and separable property interest," he concluded that the Subsidence Act essentially appropriated this entire interest in violation of the Takings Clause.

II. **The Lucas Decision and Some Federal Interpretations**

A. **The Lucas Case**

In June of 1992, the Supreme Court decided *Lucas v. South Carolina Coastal Council.* In 1986, petitioner David Lucas purchased two residential lots on a South Carolina barrier island for $975,000. At the time of the purchase, neither lot was subject to regulation under the existing Coastal Management Act. A 1988 amendment to the Act, however, flatly prohibited any construction of "occupiable improvements" in an area extending between the ocean and a baseline that was landward of Lucas' lots. Lucas then filed suit in the South Carolina Court of Common Pleas, alleging that the regulation effected a taking of his property without just compensation. The court, agreeing that the amendment "deprived Lucas of any reasonable economic

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91 See *Keystone,* 480 U.S. at 513–14 (Rehnquist, C.J., dissenting). Chief Justice Rehnquist noted further that the Court had never applied the nuisance exception to allow complete extinction of property values. See id. at 513 (Rehnquist, C.J., dissenting). For later cases in which federal courts that have held likewise, see McDonal d v. County of Imperial, 942 F.2d 668 (9th Cir. 1991) ("We cannot agree that any legitimate purpose automatically trumps the deprivation of all economically viable use . . . ."); see also Whitney Benefits, Inc. v. United States, 926 F.2d 1169, 1176 (Fed. Cir. 1991); Yancey v. United States, 915 F.2d 1534, 1540 (Fed. Cir. 1990).

92 See *Keystone,* 480 U.S. at 517–18 (Rehnquist, C.J., dissenting). In a footnote, Chief Justice Rehnquist briefly reconciled the apparent contradiction of his reasoning with that of the majority in *Penn Central.* See id. at 517 n.5 (Rehnquist, C.J., dissenting). He noted that in *Penn Central,* unlike in *Keystone,* although the majority held that "Taking" jurisprudence does not divide a single parcel into discreet segments and attempt to determine whether rights in a particular segment have been entirely abrogated," the Court acknowledged that there were other uses for the air rights. See id. (Rehnquist, C.J., dissenting) (quoting *Penn Cent. Transp. Co. v. New York City,* 438 U.S. 105, 130–31 (1978)).


94 See id. at 1006–07.

95 See id.

96 See id. at 1008–09. The Act did allow some "nonhabitable" improvements, such as wooden walkways and wooden decks. See id. at 1009 n.2. The purpose of the amendment was to control the eroding shoreline, which had been changing significantly over the previous forty years. See Ausness, supra note 7, at 387.

97 See *Lucas,* 505 U.S. at 1009. Lucas did not contest the validity of the Act as a lawful exercise
use of his lots [by] render[ing] them valueless," awarded him more than $1.2 million in damages.\textsuperscript{98}

The South Carolina Supreme Court, relying mainly on Mugler's broad police power notions, reversed.\textsuperscript{99} The court perceived the Act's purpose to be the preservation of the shoreline and thus the prevention of serious public harm.\textsuperscript{100} It therefore held that the Takings Clause did not require compensation, regardless of the Act's effect on Lucas' property values.\textsuperscript{101} Moreover, because he never contested the validity of the Act itself, the court ruled that Lucas had implicitly conceded that the proposed use of his land would be harmful and thus within the noxious use exception to the Takings Clause.\textsuperscript{102}

The dissenters, on the other hand, read the Mugler line of cases as recognizing that states have the authority to regulate without compensation only when acting \textit{primarily} to prevent public nuisances and "noxious uses" of property.\textsuperscript{103} Reasoning that the primary purpose of the South Carolina Act was not the prevention of a public nuisance, the dissenters argued that, in Lucas' case, compensation was constitutionally required.\textsuperscript{104}

The United States Supreme Court granted certiorari, and Justice Scalia delivered the opinion for a bare majority in reversing the South Carolina Supreme Court.\textsuperscript{106} Justice Scalia commenced his analysis by describing the two scenarios in which the Supreme Court had applied the Takings Clause.\textsuperscript{106} The first scenario involved physical invasions of the police power, but rather claimed that, because the value of his property was completely extinguished, he was entitled to compensation regardless of the Act's objectives. See id.
or appropriations of private property.\footnote{See Lucas, 505 U.S. at 1015 (citing Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 435–40 (1982) (holding that law requiring landowners to allow television cable companies to place cable facilities in their apartments constituted a taking regardless of the minimal occupations of property)).} The second involved regulatory denials of "all economically beneficial or productive use of land."\footnote{See id. at 1011–12 (citing First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304 (1987) (holding that temporary deprivations of use may be compensable under the Takings Clause)).}

Justice Scalia concluded that in both cases compensation is necessary lest states use the excuse of preventing serious public harm to force a landowner into public service through regulation.\footnote{See id. at 1015. He continued: "[T]otal deprivation is, from the landowner's point of view, the equivalent of a physical appropriation." Id. Justice Scalia worried that regulations that leave land without "economically beneficial or productive options" for its use carry with them a "heightened risk that private property is being pressed into some form of public service under the guise of mitigating serious public harm." See id. at 1018.} He then accepted the South Carolina trial court's conclusion that Lucas' land was rendered valueless by the Act.\footnote{See Lucas, 505 U.S. at 1020 n.9. Justice Scalia noted that the respondents did not contest that Lucas' land was rendered valueless. Justice Scalia, however, did not hold as such. See id; Glenn P. Sugameli, Takings Issues in Light of Lucas v. South Carolina Coastal Council: A Decision Full of Sound and Fury Signifying Nothing, 12 VA. ENVTL. L.J. 439, 455 (1993). In fact, not a single justice aside from Justice Scalia appeared to accept Lucas's claim of total deprivation. See Steven J. Eagle, Regulatory Takings 265 (1996).}

Next, Justice Scalia asserted that the Court's past deference to the states' police power in denying takings claims provided no meaningful framework in which to decide when compensation is due a burdened landowner.\footnote{See id. at 1026.} Moreover, he reasoned, denying a total takings claim based solely on broad police power notions would be an entire departure from the Court's past adherence to the "categorical rule that total regulatory takings must be compensated."\footnote{See id. Justice Scalia reasoned that, under the noxious rule test, "departure [from the categorical rule] would always be allowed" and would thus "nullify Mahon's affirmation of limits to the noncompensable exercise of the police power." See id.} Past decisions such as \textit{Mugler, Hadacheck} and \textit{Goldblatt}, where police power justifications were used to justify burdensome regulations, were entirely consistent with the rule because none of the landowners in those cases alleged \textit{complete} elimination of property values.\footnote{See id. at 1027.}

Justice Scalia thus concluded that states could justify the non-compensable, complete devaluation of property only where the prohibited use was "not part of [the owner's] title to begin with."\footnote{See id.} In other
words, the total devaluation of property will not require compensation when the regulated activity would violate background principles of a state's property or nuisance law already in existence.\textsuperscript{115} In order to survive a takings claim, therefore, a regulation must "do no more than duplicate the result that could have been achieved in the courts [or] by adjacent landowners ... 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."\textsuperscript{116} Justice Scalia then remanded \textit{Lucas} to the South Carolina courts to determine whether any such background nuisance principles justified the strict regulation of Lucas' property.\textsuperscript{117}

Justice Kennedy, although concurring in the judgment, expressed reservations about the trial court's assumption that Lucas' land was rendered totally valueless by the Act.\textsuperscript{118} Moreover, he stressed that precedent required an analysis of the Act's impact on Lucas' investment-backed expectations in the context of a greater deference to the state's police power than Justice Scalia was willing to recognize:

I do not believe [that nuisance law] can be the sole source of state authority to impose severe restrictions. Coastal property may present such unique concerns for a fragile land system that the State can go further in regulating its development and use than the common law of nuisance might otherwise permit.\textsuperscript{119}

Justice Blackmun's dissent took issue with the majority's willingness to restrict a state's authority to promulgate regulations that protect life and property.\textsuperscript{120} Citing \textit{Mugler}, \textit{Hadacheck}, \textit{Miller}, \textit{Goldblatt} and \textit{Penn Central}, Justice Blackmun argued that the Court's

\textsuperscript{115} See \textit{Lucas}, 505 U.S. at 1029. As examples of such laws, Justice Scalia described the prohibition on building nuclear plants and restrictions on a landfilling operations that would have the effect of flooding neighboring property. \textit{See id.}

\textsuperscript{116} See \textit{id.} Justice Scalia implied that common law principles will rarely prohibit the "essential" uses of land. \textit{See id.} at 1031 (quoting Curtis v. Benson, 222 U.S. 78, 86 (1911)). Moreover, he cautioned that legislatures must do more than merely allude to general common law principles in order to avoid takings. \textit{See id.} at 1031. Rather, a state must employ the same common-law nuisance principles as it would have used had it decided to bring a nuisance action against the owner. \textit{See Lucas}, 505 U.S. at 1031; see also Ausness, supra note 7, at 39.

\textsuperscript{117} \textit{Lucas}, 505 U.S. at 1031–32. On remand, the South Carolina Supreme Court was not able to find any "background principle" for the regulation of Lucas' land. \textit{See Lucas} v. South Carolina Coastal Council, 424 S.E.2d 484 (S.C. 1992).

\textsuperscript{118} See \textit{Lucas}, 505 U.S. at 1033–34 (Kennedy, J., concurring).

\textsuperscript{119} See \textit{id.} at 1035 (Kennedy, J., concurring). Indeed, Justice Scalia did acknowledge that nuisance law was of an evolving nature: "[C]hanged circumstances or new knowledge may make what was previously permissible no longer so." \textit{See id.} at 1031.

\textsuperscript{120} See \textit{id.} at 1039–40 (Blackmun, J., dissenting) (quoting Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 491–92 (1987)).
rejections of earlier takings claims were appropriately premised on its deference to the states’ police power.\textsuperscript{121} Furthermore, he argued, total devaluation alone had never emerged in the Court’s analysis as a sufficient basis for recognizing a regulatory taking.\textsuperscript{122} Rather, the Supreme Court had consistently shunned categorical takings rules in favor of \textit{ad hoc} determinations that balanced the government’s interest in prohibiting activities against the private costs imposed on the landowner.\textsuperscript{123} Justice Blackmun further noted the extent to which the majority’s categorical “deprivation of all economically viable use” rule could yield subjective results depending on the Court’s definition of property.\textsuperscript{124} Finally, Justice Blackmun took issue with the majority’s emphasis on the importance of background, judge-made nuisance principles in forming a “value-free” takings jurisprudence.\textsuperscript{125} Reasoning that judges form common-law nuisance principles using the same rational thought processes and balancing tests as legislators, Justice Blackmun considered the majority’s quest for a “value-free” takings jurisprudence to be tenuous at best.\textsuperscript{126}

Justice Stevens, in a separate dissent, stressed that the majority’s desire for a categorical takings rule was inconsistent with Justice Holmes’ pronouncement in \textit{Pennsylvania Coal} that absolute rules “ill fit” the regulatory takings inquiry.\textsuperscript{127} In \textit{Pennsylvania Coal}, Justice


\textsuperscript{122} See \textit{Lucas}, 505 U.S. at 1047 (Blackmun, J., dissenting). Justice Blackmun discredited the majority’s reliance on \textit{Agins}’ dicta for its “total deprivation” categorical rule by observing that neither \textit{Agins} nor its progeny ever suggested that the public interest was irrelevant upon the taking of total value. See \textit{Lucas}, 505 U.S. at 1049–50 n.11 (Blackmun, J., dissenting).

\textsuperscript{123} See \textit{id.} at 1047 (Blackmun, J., dissenting).

\textsuperscript{124} See \textit{id.} at 1054 (Blackmun, J., dissenting). Citing \textit{Keystone}, Justice Blackmun described inconsistencies in the Court’s past decisions concerning the extent to which the “denominator” in the takings fraction should represent the property as a whole or merely the burdened portion. See \textit{id.} (Blackmun, J., dissenting).

\textsuperscript{125} See \textit{Lucas}, 505 U.S. at 1054 (Blackmun, J., dissenting).

\textsuperscript{126} See \textit{id.} (Blackmun, J., dissenting). He further stated: “There is nothing magical in the reasoning of judges long dead. They determined a harm in the same way as state judges and legislatures do today.” \textit{Id.} at 1055 (Blackmun, J., dissenting). Indeed, while at the heart of Justice Scalia’s analysis is a criticism of the subjective inquiries which underlie a state’s determination of harm, the fact that he supported the same subjective inquiry to define a nuisance (i.e. the degree of harm to public lands and resources, or adjacent private property, posed by the claimant’s activities) has been criticized as a glaring analytical flaw which undercuts the value of his opinion. See Sugameli, \textit{supra} note 110, at 459–60; see also William W. Fisher III, \textit{The Trouble with Lucas}, 45 STAN. L. REV. 1393, 1406–07 (1993).

\textsuperscript{127} See \textit{Lucas}, 505 U.S. at 1063 (Stevens, J., dissenting).
Stevens claimed, economic injury was only "[o]ne fact for consideration in determining [the] limits" of a regulation. Furthermore, he argued, Justice Scalia's "total deprivation" test was only undermined by its potentially arbitrary impact on landowners. Under that test, some landowners would be compensated for the total deprivation of their property, while others would receive nothing for slightly less severe devaluations. Finally, Justice Stevens stressed that an assessment of the "character of the regulatory action" was important to the takings inquiry. He reasoned that the Just Compensation Clause was designed to prevent those inequities arising when certain individuals are singled out to bear "public burdens which should, in all fairness and justice, be borne by the public as a whole." Justice Stevens concluded that Lucas should not be compensated because the purpose of the South Carolina act was not to single him out, but rather to conform with a federally-initiated national effort to protect the coastline.

B. Recent Federal Court Interpretations of Some Lucas Ambiguities

Florida Rock Industries, Inc. v. United States, and Loveladies Harbor, Inc. v. United States are two Federal Circuit decisions that have attempted to clarify certain Lucas ambiguities. In Florida Rock, the United States Court of Appeals for the Federal Circuit

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128 See id. at 1063 (Stevens, J., dissenting) (quoting Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413 (1922)).
129 See id. at 1064 (Stevens, J., dissenting).
130 See id. (Stevens, J., dissenting).
131 See id. at 1071 (Stevens, J., dissenting).
132 See Lucas, 505 U.S. at 1071 (Stevens, J., dissenting) (quoting Armstrong v. United States, 364 U.S. 40, 49 (1960)). Stevens considered physical appropriations to be entirely consistent with this principle. See id. at 1073 (Stevens, J., dissenting).
133 See id. at 1074–75 (Stevens, J., dissenting). Justice Stevens observed as well that the Coastal Management Act, because it imposed substantial burdens on many landowners, was thus more like the Subsidence Act in Keystone than the Kohler Act in Pennsylvania Coal. See id. at 1075 n.12 (Stevens, J., dissenting). He also noted that Justice Scalia's test had an inequitable impact on owners of developed land as compared to owners of undeveloped land. See id. at 1075 (Stevens, J., dissenting). Justice Stevens reasoned that Lucas provided no possible remedies for owners of developed land who, because of the restrictive nature of the Act, were not allowed either to rebuild damage to their properties or maintain existing barriers of protection to keep those properties from deteriorating. See Lucas, 505 U.S. at 1075 (Stevens, J., dissenting).
134 See Loveladies Harbor, Inc. v. United States, 28 F.3d 1171 (Fed. Cir. 1994); Florida Rock Indus., Inc. v. United States, 18 F.3d 1560 (Fed. Cir. 1994).
addressed the "partial taking" conundrum that Justice Stevens recognized as a glaring inequity in Lucas' "total deprivation" categorical takings rule: How can courts distinguish those instances where a state can legitimately diminish the value of property from those where compensation for less than full diminution may be constitutionally required?\(^\text{135}\)

In *Florida Rock*, the Federal Circuit Court of Appeals reviewed a property owner's successful allegation in the Court of Federal Claims that the Army Corps of Engineers' denial of a permit to mine under his wetlands amounted to a compensable taking.\(^\text{136}\) The Appeals Court disagreed that the landowner was denied all economically beneficial uses of his land, and remanded back to the Claims Court to determine whether the denial of only "a certain proportion" of the economic uses of land could in fact effect a partial regulatory taking.\(^\text{137}\) In so doing, the *Florida Rock* court noted that the Fifth Amendment did not narrow compensation only to those cases where claimants allege a *total* deprivation of value.\(^\text{138}\) Indeed, the court explained, a regulatory taking can result in "less than a taking of the property owner's entire fee estate," as by eminent domain the government is free to take any kind of estate or fee interest in property.\(^\text{139}\)

Then the *Florida Rock* court suggested that, to determine whether less than full devaluations amount to partial takings, courts should examine whether legislatures were "responsible" and "reasonable" in regulating the use of property.\(^\text{140}\) Courts should then reject partial takings claims when regulations result in "shared economic impacts"...
and landowners derive benefits from the very regulations that inhibit
the use of their land.\textsuperscript{141} However, the mere fact that a regulation
legitimately promotes the public interest will not automatically re-
lieve the government from takings liability, as “the takings clause
already assumes the government is acting in the public interest.”\textsuperscript{142}
In sum, argued the court, the proper inquiry is whether the regulation
reasonably benefits the plaintiff without unduly singling him out for
the benefit of the community.\textsuperscript{143}
Shortly after deciding \textit{Florida Rock}, the Federal Circuit attempted
to resolve the “denominator” issue reopened by \textit{Lucas}.\textsuperscript{144} In \textit{Love-
ladies}, the court addressed the question of whether the entire parcel
or the burdened parcel of land should be relevant to the “diminution
of value” equation in the court’s regulatory takings analysis.\textsuperscript{145} The
petitioner in that case owned a 250 acre lot, and sought state and
federal permits under the Clean Water Act to build residences on
fifty-one undeveloped acres of that lot.\textsuperscript{146} As part of a compromise with
the New Jersey Department of Environmental Protection (NJDEP),
the landowner agreed to donate almost thirty-nine acres of the fifty-
one acre lot to the state of New Jersey in exchange for a permit to
develop the remaining twelve and one-half acres.\textsuperscript{147} The Army Corps
of Engineers, however, later denied the permit after the NJDEP
decided it was not in compliance with state requirements.\textsuperscript{148} The land-
owner alleged that the denial effected a regulatory taking.\textsuperscript{149}
In upholding the landowner’s claim, the \textit{Loveladies} court inter-
preted \textit{Lucas} and its precedent to require courts, when reviewing a

\textsuperscript{141} See id. at 1570.
\textsuperscript{142} See id. at 1571 n.28 (citing \textit{Lucas}’ proposition that South Carolina’s simple assertions that
its regulations were in the public interest could not excuse it from takings liability). See id.; Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1031 (1992).
\textsuperscript{143} See \textit{Florida Rock}, 18 F.3d. at 1571 (“In short, has the Government acted in a responsible
way, limiting the constraints on property ownership to those necessary to achieve the public
purpose, and not allocating to some number of individuals, less than all, a burden that should
be borne by all?”). Indeed, the \textit{Florida Rock} court admitted that its decision did not provide a
bright line test, but rather continued the tradition of \textit{ad hoc} takings decision making. See id.
But it also predicted that “[o]ver time, enough cases will be decided with sufficient care and
clarity that the line will more clearly emerge.” See id. at 1571.
\textsuperscript{144} See \textit{Loveladies Harbor, Inc. v. United States}, 28 F.3d 1171, 1179 (Fed. Cir. 1994); \textit{Lucas},
505 U.S. at 1016–17 n. 7.
\textsuperscript{145} See \textit{Loveladies}, 28 F.3d at 1179–81.
\textsuperscript{146} See \textit{id.} at 1173–74. Nearly 200 acres of the landowner's original parcel had already been
developed prior to the Clean Water Act's restrictions. See \textit{id}.
\textsuperscript{147} See \textit{id}.
\textsuperscript{148} See \textit{id.} at 1174.
\textsuperscript{149} See \textit{Loveladies}, 28 F.3d at 1174.
takings claim, to undertake an analysis both of the extent of denial of economically viable use inflicted by the regulation, and the regulation's basis in state nuisance law. A crucial question bearing on the devaluation assessment in Loveladies, therefore, was whether the twelve and one-half acre parcel or the landowner's entire parcel should serve as the denominator in the value-lost equation.

In its analysis, the court first concluded that the landowner's 250 acre parcel could not reasonably serve as the denominator since New Jersey had made no effort to impose any land use restrictions on the property until after the first 200 acres were developed. The court then reasoned that the remaining fifty-one acres should also not serve as the denominator, since thirty-eight and one-half acres of that parcel were deeded to the State of New Jersey pursuant to a prior agreement: "It would seem ungrateful in the extreme to require Loveladies to convey to the public the rights in the 38.5 acres in exchange for the right to develop 12.5 acres, and then to include the value of the grant as a charge against the givers." The court thus reached the conclusion that the permit denial amounted to a total taking because the "relevant parcel" had been deprived of "all economically feasible use." The court also determined that because New Jersey had entitled the landowner to fill his wetlands under the original regulatory scheme, it could not now claim takings immunity under parallel nuisance law.

III. REGULATORY TAKINGS LAW IN MASSACHUSETTS

A. Early Nuisance Exception and Broad Police Power Notions

The Massachusetts Supreme Judicial Court has reviewed regulatory takings allegations since the 1846 case of Commonwealth v.

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150 See id. at 1179.
151 See id. at 1180. For an in-depth discussion of the denominator issue in determining compensability see Michelman, supra note 51, at 1192, 1193.
152 See Loveladies, 28 F.3d at 1181.
153 See id.
154 See id. at 1182–83. The trial court had found that the 12.5 acre parcel had a value of $2,658,000 without the regulation and $12,500 with it—a diminution in value of 99%. See id. at 1178.
155 See id. at 1183. Thus, by issuing the permit, the NJDEP had essentially established that the project was not a nuisance under state law. See Loveladies, 28 F.3d. at 1183. Furthermore, the court found no evidence showing that the state could have invoked existing nuisance law to prevent the filling. See id.
Tewksbury and the 1851 case of Commonwealth v. Alger. In both cases, the court’s analysis turned both on the validity of challenged regulations under the police power and a state’s inherent authority to regulate nuisances without compensation.

In Tewksbury, a Chelsea landowner challenged a statute that prohibited the removal of sand and gravel from town beaches. As an owner of property within the regulated areas, the landowner claimed that the statute was unconstitutional and void because it effected an uncompensated taking of his private resources for a public benefit.

In upholding the statute, Chief Justice Shaw argued that it was a legitimate exercise of the legislature to “regulate and restrain such particular use of property as would be inconsistent with, or injurious to, the rights of the public.” Chief Justice Shaw then explicitly addressed the government’s power to impose just restraints without compensation on activities that were “nuisance[s] at common law.” He posited that the protection of the beaches for navigation, either by preventing a landowner from “cut[ting] away the embankment on his own land” and “divert[ing] the watercourse so as to render it too shallow for navigation,” or from “removing the soil composing a natural embankment to a valuable, navigable stream, port or harbor,” represented the types of regulation for which no compensation was required. Chief Justice Shaw did not discuss the significance of residual use, if any, left to the landowner’s property by such regulations.

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157 See Alger, 61 Mass. at 86; Tewksbury, 52 Mass. at 57.
158 See Tewksbury, 52 Mass. at 55.
159 See id. at 55. The object of the statute was to protect Boston Harbor by preserving both its natural embankments and the integrity of surrounding beaches. See id. at 56. The landowner brought the action under the Massachusetts Declaration of Rights Pt. 1 Art. 10: “[N]o part of the property of any individual can, with justice, be taken from him, or applied to public uses, without his consent, or that of the representative body of the people. . . . And whenever the public exigencies require that the property of any individual should be appropriated to public uses, he shall receive a reasonable compensation therefor.” See id.; MASS. CONST. Pt. 1 Art. 10.
160 See Tewksbury, 52 Mass. at 57.
161 See id. at 57.
162 See id. at 57, 59. Chief Justice Shaw also implied that these inquiries are fact specific, and noted that “there are many cases where the things done in particular places, or under a particular state of facts, would be injurious, when, under a change of circumstances, the same would be quite harmless.” See id. at 57.
163 See generally id. at 55–59.
Five years later in *Commonwealth v. Alger*, the Supreme Judicial Court reviewed a claim by a Boston Harbor oceanfront resident who was prohibited from building a wharf beyond statutorily established limits.\(^{164}\) The statute, enacted to facilitate navigation, explicitly declared any construction beyond the boundary a public nuisance.\(^{165}\)

In arguing that the statute was unconstitutional as applied, Alger claimed that, although the government’s authority to prevent nuisances without threat of compensation was well-established at common law, the statute at issue was not enacted for the purpose of preventing a nuisance.\(^{166}\) Rather, he argued, the statute simply established and enforced the channel line and prevented encroachments thereon.\(^{167}\) Alger further considered it relevant that the 1641 colonial grant under which his land had been acquired contained no explicit restrictions on construction.\(^{168}\) There necessarily followed, he argued, a vested private right of use that could not be infringed by a public action without compensation.\(^{169}\)

In upholding the statute, Chief Justice Shaw first noted that any rights vested through colonial grants were subject to the general right of the public to navigate without impediment.\(^{170}\) He then determined that the statute’s purpose was the free navigation of Massachusetts’ coastal waters, a benefit in which Alger and other owners of riparian rights had a reciprocating “deep and abiding interest.”\(^{171}\) Suggesting that Alger’s buildout of the wharf beyond the statutory boundary worked a “noxious use of property,” Chief Justice Shaw held that while in some cases land use regulations can result in decreased profits, compensation for preventing such uses had never been required at common law.\(^{172}\)


\(^{165}\) See id. at 54, 98.

\(^{166}\) See id. at 62.

\(^{167}\) See id.

\(^{168}\) See id. at 59.

\(^{169}\) See *Alger*, 61 Mass. at 59.

\(^{170}\) See id. at 79.

\(^{171}\) See id. at 84.

\(^{172}\) See id. at 86. Although the statute at issue declared any wharf extending beyond the Commissioner’s line a public nuisance, Chief Justice Shaw admitted that there may have been instances prior to the statute where such wharves were not nuisances. See id. at 103. Alger’s downfall was particularly inevitable because he chose to build after the statute was in effect. See *Alger*, 61 Mass. at 103.
B. Modern Massachusetts Takings Law: Elements of the Categorical Takings Rule

In the early 1960s, the Supreme Judicial Court began to incorporate modern United States Supreme Court takings jurisprudence into state takings law. In so doing, the court often balanced the public benefits derived from restrictive land use regulations with the extent of economic burdens placed on the owners of regulated parcels. Whether or not a landowner was left with any residual practical use of a regulated parcel usually formed the turning point in the court's analysis. The court commonly studied the content of residual use to determine whether a challenged regulation caused such a deprivation of value that compensation or invalidation of the regulation was the only constitutional remedy.

In the 1960 case of Jenckes v. Building Commissioners of Brookline, the Supreme Judicial Court established the residual use inquiry as a crucial element of its takings analysis. In Jenckes, a landowner was refused a construction permit because of his parcel's non-conformity with a zoning by-law. The parcel was unbuildable without the permit, and the landowner sought a declaration that the by-law was therefore inapplicable to his property.

Chief Justice Wilkins, in holding for the landowner, explicitly observed that under the existing by-law, the parcel was deprived of any use other than perhaps a "playground, a park, or ornamental grounds or, perhaps, for uses accessory to the use of the [adjacent] lot . . .," and that "[e]ven ordinary agricultural use [did] not seem to be permitted." Therefore Chief Justice Wilkins noted, "[t]he effect of the

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175 See Aronson, 195 N.E.2d at 345; Mile Rd. Corp., 187 N.E.2d at 829-30; Jenckes, 167 N.E.2d at 759-60.
177 See Jenckes, 167 N.E.2d at 759.
178 See id. at 758.
179 See id. at 758-59. The landowner's lot did not conform to a Brookline zoning by-law that required all lots to abut a public or private way of not less than 40 feet. See id. at 757.
180 See id. at 759; but see Turnpike Realty Co. v. Town of Dedham, 284 N.E.2d 891, 899-90 (Mass. 1972) (agricultural use sufficient residual use to overcome landowner's claim of total deprivation).
amendment as applied to the locus is to deprive it of all practical value to its owner or anyone acquiring it. The owner can merely look at it and pay taxes on it."181 The Chief Justice then assessed the public purpose of the bylaw and found that, as applied, it had no substantial relation to the public safety, health or welfare.182 After balancing the "harsh" injury to the claimant with the limited public purposes of the by-law, Chief Justice Wilkins held that the by-law was too confiscatory as applied to the claimant to be justified under the police power.183 The court therefore invalidated the by-law as applied to the plaintiff's property.184

In 1965 the court decided Mile Road Corp. v. City of Boston and Commissioner of National Resources v. S. Volpe & Co., Inc.185 In those cases, Chief Justice Wilkins established a number of inquiries for Massachusetts courts to address in reviewing regulatory takings claims, including a categorical takings rule that later became the controversial basis for the Lucas opinion.186 In so doing, Chief Justice Wilkins incorporated important contemporary Supreme Court decisions into his analysis while assigning careful attention to the issue of residual use.187

In Mile Road Corp., Chief Justice Wilkins considered it crucial to the takings analysis whether a land owner suffered "complete deprivation of property," through regulation.188 In that case, a 1962 statute prohibited the owner of a parcel that was commonly used as a dumping ground from continuing its use as such.189 The owner alleged that

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181 Jenckes, 167 N.E.2d at 759. Chief Justice Wilkins' consideration of "practical" value appears to be a term of art not derived from previous caselaw. See id. Indeed, he cites no precedent for this term, and employs it again in Commissioner of Natural Resources v. S. Volpe & Co., Inc., 206 N.E.2d 666, 671 (Mass. 1965).

182 See id. at 760. Chief Justice Wilkins reasoned that the by-law was unreasonably applied to the claimant's isolated, undeveloped lot. See id. He noted that the claimant's parcel was surrounded by older, more valuable lots that contained nonconforming single residents. See id. Chief Justice Wilkins concluded that allowing another residence would not pose any additional hazard to public safety that did not already exist. See Jenckes, 167 N.E.2d at 760.

183 See id.

184 See id.


188 See Mile Rd. Corp., 187 N.E.2d at 830.

189 See id. at 828. The statute at issue was St. 1962, c. 583, "An Act Prohibiting the Dumping
the statute's enforcement was tantamount to a taking because it completely eliminated his "large and substantial investment" in the dump.\textsuperscript{190}

In ruling that the statute's enforcement did not amount to a taking, Chief Justice Wilkins noted that the landowner had no vested property right to operate a dump, and that his prior permit to do so was expressly revocable at either the health commissioner's request or by legislative act.\textsuperscript{191} Chief Justice Wilkins then reasoned explicitly that the requisite inquiry was not merely whether the statute itself had valid public purposes, but rather whether there remained any alternative uses for the property.\textsuperscript{192} Citing the Supreme Court cases of \textit{Reinman} and \textit{Miller}, the Chief Justice noted that, because the former dump site could be "put to other use[s]," the regulation did not amount to a taking without compensation.\textsuperscript{193}

Two years later in \textit{Volpe}, Chief Justice Wilkins again applied a "deprivation of practical use" inquiry in reviewing a landowner's claim that certain land use restrictions were the equivalent of a taking without compensation.\textsuperscript{194} In that case, the Commonwealth had successfully enjoined a landowner from filling his wetland property without the requisite permits.\textsuperscript{195} The trial court had granted the injunction on the grounds that the state and local denials of the filling permits pursuant to a state law furthered the valid public purpose of protecting marine fisheries.\textsuperscript{196}

In reversing the trial court's decision and remanding the case, Chief Justice Wilkins offered an analysis consistent with Justice Scalia's decision in \textit{Lucas} twenty-seven years later. Admitting that the public purpose of the contested legislation was relevant to the takings inquiry, the Chief Justice, citing \textit{Goldblatt}, stressed that nevertheless
the “crucial issue” was whether “there ha[d] been such a deprivation of the practical uses of a landowner’s property as to be the equivalent of a taking without compensation.” In so reasoning, he referred to Pennsylvania Coal as well other state cases that declared unconstitutional certain “confiscatory” land-use restrictions that were otherwise valid exercises of the police power. Moreover, casting doubt on the Commonwealth’s alleged authority to deny compensation to landowners while regulating for the mere purpose of conserving its natural resources, Chief Justice Wilkins concluded that “[a]n unrecognized taking in the guise of regulation is worse than confiscation.”

In subsequent cases where landowners contested zoning restrictions, the Supreme Judicial Court continued its close attention to residual “practical” use as a crucial element in determining the validity of allegedly confiscatory land-use regulations. Moreover, rather than take a more deferential view towards the authority of legislative bodies to restrict the use of land merely for environmental preservation without fear of compensation, the court in some cases also closely scrutinized regulations for improper objectives on the part of local municipalities.

The Mac Gibbon v. Board of Appeals of Duxbury cases, also known collectively as the “Mac Gibbon trilogy,” illustrate both approaches. In the series of Mac Gibbon cases, the Supreme Judicial Court reviewed the Duxbury Zoning Board of Appeals’ refusal to allow a landowner to excavate and fill a portion of his shoreland. The landowner alleged that the Board’s action was unauthorized under the Zoning Enabling Act because its enforcement denied his property of

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198 See id. at 670. In fact, Chief Justice Wilkins agreed to the validity of the regulation, but nevertheless ruled that the takings issue would hinge on “further findings as to what uses the marshland may still be put.” See Volpe, 206 N.E.2d at 671.
199 See id. For remand, Chief Justice Wilkins requested additional evidence relative to alternative uses for the parcel in its natural state, as well as figures pertaining to the original cost of the parcel and its market value with and without the limitations. See id. at 671–72.
201 See MacGibbon, 255 N.E.2d at 351.
203 See MacGibbon II, 255 N.E.2d at 348.
any practical use.\textsuperscript{204} Upon reviewing the case, the Supreme Judicial Court disapproved of the Board's zoning policy of prohibiting physical changes or improvements on coastal wetlands for the sole purpose of "preserv[ing] them in their natural state," and remanded the case back to the Board.\textsuperscript{206} Such a motive, the court declared, was legally untenable under the Zoning Enabling Act.\textsuperscript{206} If a municipality wished simply to preserve any remaining undeveloped coastal or inland wetlands in their "natural, unspoiled condition for the benefit of the public," the court concluded, it must invoke the power of eminent domain.\textsuperscript{207}

The Mac Gibbon case again reached the Supreme Judicial Court in 1976 when the Duxbury Zoning Board of Appeals again denied the landowner's permits by concluding that alternative practical uses for the property existed and, furthermore, because the proposed project would disturb the role of the coastal marsh in the ocean food chain.\textsuperscript{208} This time, the Supreme Judicial Court actually directed the Board to grant the permit based on the parcel's limited usefulness without it.\textsuperscript{209} The court reasoned that, under Volpe, the Board did not have the authority under the zoning by-law to regulate land in such a manner as to deprive landowners of all "practical value."\textsuperscript{210} The Board, concluded the court, had "misconceive[d] the applicable standard" of "practical" use by accepting testimony that:

\begin{quote}
the uses to which the property may be put include—and some of these may sound facetious, but they're not—bird watching, hiking—these are actual uses that people have, do make of such properties, similar properties—looking at the water; . . . just simple pride of ownership, just to say that they own a piece of the saltmarsh, flying model airplanes or kites, growing marsh hay, which at one time was a very strong use of marsh, very prevalent
\end{quote}

\textsuperscript{204} See id. at 348, 351. The court reviewed whether the denial of the permit was "unreasonable, whimsical, capricious or arbitrary" under the Zoning Enabling Act. See id. at 350.

\textsuperscript{206} See id. at 351.

\textsuperscript{206} See id.; see also MASS. GEN. LAWS ANN. ch. 40A, § 1 et seq. (West 1994).

\textsuperscript{207} See Mac Gibbon II, 255 N.E.2d at 352. The court decided not to review the takings claim, and chose to wait until the Board's further action on the plaintiff's special permit application. See id.

\textsuperscript{208} See Mac Gibbon v. Board of Appeals of Duxbury, 340 N.E.2d 487, 489 (Mass. 1976) (Mac Gibbon III). The Appeals Court had found that the plaintiff's marshland could be used for agricultural, recreational and other uses. See id. at 490. The plaintiff's property was worth $5,300 as regulated, but had a value of $44,000 with a single residence. See id.

\textsuperscript{209} See id. at 488.

\textsuperscript{210} See id. at 490 (citing Commissioner of Natural Resources v. S. Volpe & Co., 206 N.E.2d 666, 669 (Mass. 1965); Aronson v. Town of Sharon, 195 N.E.2d 341, 345 (Mass. 1964)).
use I should say, to protect the view, to provide a view. . . . Of course, one, obviously, is conservation . . . . 211

The case upon which the Board relied in the MacGibbon dispute was the 1972 decision, also cited by the dissent in Lucas, of Turnpike Realty Company v. Town of Dedham. 212 In that case, the Supreme Judicial Court reviewed a landowner’s as-applied challenge to a zoning by-law that included his property in a zoning flood plain. 213 The landowner alleged that the by-law, which restricted all uses in the flood plain except for “[a]ny woodland, grassland, wetland, agricultural, horticultural, or recreational use of land or water not requiring filling,” was unreasonably and unduly burdensome and therefore unconstitutional as applied to his land. 214

In upholding the by-law, Justice Spiegel first undertook careful scrutiny of its purposes by affording every presumption in favor of its validity, and preparing to defer to the judgment of local authorities if its reasonableness was fairly debatable. 215 Reasoning that the by-law was enacted to protect nearby residents from any exacerbation of existing flood conditions, he concluded that the town had not arbitrarily and unreasonably exercised the police power. 216 Justice Spiegel

211 See MacGibbon III, 340 N.E.2d at 491 (quoting the testimony of an expert witness for the Board). The court did not rule again on MacGibbon’s suit, but the MacGibbon case actually reached the Supreme Judicial Court for the fourth time on a petition for rehearing in 1976. See MacGibbon v. Board of Appeals of Duxbury, 344 N.E.2d 185, 186 (Mass. 1976). The Board’s main concern on rehearing was the possible impact of the MacGibbon decisions on the enforcement of a variety of state and federal conservation programs, such as the regulation of scenic and recreational rivers, acquisition of land by counties to preserve open space, and protection of coastal wetlands. See id. at 186 n.2. The Board also feared that the MacGibbon decisions questioned the legality and wisdom of certain statutes that governed the protection of coastal and inland wetlands. See id. at 187. In denying the rehearing, Justice Braucher refused to consider these arguments because they were neither discussed nor decided in the earlier cases. See id.


213 See Turnpike Realty, 284 N.E.2d at 894. The by-law, which went into effect sixteen years after the claimant purchased the parcel, prohibited the construction or use of any structure or building except for certain designated purposes. See id. at 894. The by-law also contained avenues for special permits which the petitioner had not pursued. See id.

214 See id. at 894, 897-98. Testimony revealed that, prior to the enactment of the by-law, the best use of petitioner’s land was for apartment buildings at a value of $431,000, and after the enactment the best use was for agriculture at a value of $53,000. See id. at 900. The by-law thus worked an 88% devaluation of the petitioner’s property. See Turnpike Realty, 284 N.E.2d at 900.

215 See id. at 898-99.

216 See id. at 896, 898, 899, 901 (citing Euclid v. Ambler Realty Co., 272 U.S. 365, 395 (1926)).
then discredited the petitioner's claim that the by-law deprived him of "all beneficial uses of his property." Although the uses allowed under the by-law may have "substantially restrict[ed]" the petitioner's use of his land, Justice Spiegel concluded that they were sufficient enough when balanced against the potential harm of flooding to the community.

Although concurring, Chief Justice Tauro stressed that the majority's discussion of "diminution in value" should not be construed as a critical meaning of Turnpike Realty, lest the decision be used "without justification" for "administrative denials of future petitions for building permits." Chief Justice Tauro interpreted the majority's ruling as establishing simply that the plaintiff's property did not suffer such a diminution in value as to render the by-law unconstitutional. Whether the petitioner was in fact an "uncompensated victim ... of a taking invalid [sic] without compensation" per Volpe, the Chief Justice cautioned, could only be decided upon the Board's denial of construction permits.

In Lovequist v. Conservation Commission of Town of Dennis, the Supreme Judicial Court continued to examine residual uses in assessing the validity of zoning laws and takings claims. In Lovequist, a developer challenged the Dennis Conservation Commission's denial of a permit to construct an access road across his cranberry bog and marshland as a regulatory taking. The developer wished to subdivide 26 of the 40 acres of

Judge Spiegel recognized that the by-law helped prevent the harmful effects of flooding. See id. at 899. He referred to expert testimony concluding that petitioner's project "could cause the water to rise higher at other points." See id. at n.5.

217 See Turnpike Realty, 284 N.E.2d at 899.

218 See id. at 899-900.

219 See id. at 901-02 (Tauro, C.J., concurring).

220 See id. at 901 (Tauro, C.J., concurring).


223 See id. at 861. The plaintiff had also alleged that the by-law was inconsistent with the Mass. Zoning Enabling Act, that the Dennis Conservation Commission was biased, and that the Commission lacked substantial evidence to justify disapproval of the proposed access road. See id.; see also MASS GEN. LAWS ANN. ch. 40A, § 1 (West 1994).

224 See Lovequist, 393 N.E.2d at 860. The developer wished to subdivide 26 of the 40 acres of
In denying the plaintiff's claim, Chief Justice Hennessey cited Alger's holding that property in Massachusetts is subject to reasonable restraints and regulation in the public interest.\(^\text{225}\) Referring to Penn Central, Chief Justice Hennessey posited that regulations can deprive landowner of even the "most beneficial" use of property without effecting a taking.\(^\text{226}\) Nevertheless, following MacGibbon, he agreed that government actions that strip private property owners "of all practical value to them or to anyone acquiring it, leaving them only with the burden of paying taxes on it" may be "forbidden takings."\(^\text{227}\) Chief Justice Hennessey then identified several alternative uses for the plaintiff's property, such as a single family house, a camp, or commercial cranberry production.\(^\text{228}\) These alternatives, including the property's current appraisal of $122,000, led him to conclude that the Commission's denial of the construction permit did not constitute an unlawful taking.\(^\text{229}\)

By 1980, the Massachusetts courts were interpreting both MacGibbon and Turnpike Realty as important cases for regulatory takings claims and for challenges to allegedly confiscatory zoning laws.\(^\text{230}\) Even when faced with substantially diminished property values, courts sometimes denied takings claims by citing Turnpike Realty to

woodland, marshland, and cranberry bog. See id. Under the Wetlands Protection Act and a Dennis by-law, the developer needed permits to construct on wetlands. See id. at 860–61 n.3–4. \(^\text{225}\) See id. at 866; Commonwealth v. Alger, 61 Mass. 53, 59 (1851). Chief Justice Hennessey agreed with the Commission's finding that the plaintiff's proposed construction might disturb the town's water supply. See Lovequist, 393 N.E.2d at 865. He cited Turnpike Realty's holding that the protection of groundwater is a valid public interest. See id. (citing Turnpike Realty Co. v. Town of Dedham, 284 N.E.2d 891 (Mass. 1972)). \(^\text{226}\) See id. at 866 (citing Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 123–28 (1978)). \(^\text{227}\) See id. (citing MacGibbon v. Board of Appeals of Duxbury, 340 N.E.2d 487, 490 (Mass. 1976) (MacGibbon III)). \(^\text{228}\) See id. The Commission had expressly indicated its willingness to consider proposals relating to the upgrading of the existing access road in order to assist the development of these uses. See Loveladies, 393 N.E.2d at 886, n.13. \(^\text{229}\) See id. at 866 (citing Turnpike Realty, 362 Mass. at 236).

See MacNeil v. Town of Avon, 435 N.E.2d 1043, 1046 (Mass. 1982) (citing Turnpike Realty to support upholding a by-law where the value of regulated land is substantially diminished); Lovequist, 393 N.E.2d at 866 (under Turnpike Realty, the denial of a road construction permit not a taking merely because of resulting decrease in profits); S. Kemble Fischer Realty Trust v. Board of Appeals of Concord, 402 N.E.2d 100, 103 (Mass. App. Ct. 1980) (Turnpike Realty "foreclose[d] the argument that the exceedingly limited use which a flood plain zoning by-law may leave to the owner of land constitutes a de facto taking."); Turner v. Town of Walpole, 409 N.E.2d 807, 808 (Mass. App. Ct. 1980) (the allegation that that a flood control regulation was confiscatory "controlled by Turnpike Realty").
identify practical residual uses of regulated land.\textsuperscript{231} \textit{Turnpike Realty} was particularly valuable for bolstering decisions upholding land use restrictions in flood plains.\textsuperscript{232} For example, in \textit{S. Kemble Fisher Realty Trust v. Board of Appeals of Concord}, a landowner appealed to the Massachusetts Appeals Court the denial of a permit to fill the portion of his land that was located in a floodplain district.\textsuperscript{233} The landowner asserted, in part, that the flood plain zoning was unconstitutional as applied because it left him "without any practical use" of a thirty-foot strip of his property.\textsuperscript{234} The Appeals Court, in denying the landowner's claim, read \textit{Turnpike Realty} to require that flood plain use restrictions must, in the context of takings claims, "be balanced against the potential harm to the community."\textsuperscript{235} The court concluded that the plaintiff's proposed filling project ultimately might inflict considerable flood damage to the surrounding area.\textsuperscript{236} The court further found that the plaintiff maintained sufficient value in the regulated portion of his property because it could be used to "enhance that portion of [his] land which is outside the flood plain."\textsuperscript{237}

One of the last important pre-\textit{Lucas} Massachusetts regulatory takings cases was the 1988 decision of \textit{Yankee Atomic Electric Co. v. Secretary of the Commonwealth}.\textsuperscript{238} It was an appropriate moment for the case, as the \textit{Yankee} decision and its dissent well reflected the discord that colored United States Supreme Court's regulatory takings debates before \textit{Lucas}. In that case, Yankee Atomic challenged the Attorney General's certification of an initiative petition that, once passed, would have prohibited the generation of electricity by nuclear power plants in Massachusetts.\textsuperscript{239} Yankee Atomic alleged that the petition, if enacted, would constitute a taking of its property, and was therefore unconstitutional and void.\textsuperscript{240}

\begin{footnotesize}
\begin{itemize}
\item[231] See MacNeil 435 N.E.2d at 1046; Lovequist, 393 N.E.2d at 858, 866; S. Kemble Fischer, 402 N.E.2d at 103; Turner, 409 N.E.2d at 808.
\item[232] See S. Kemble Fischer, 402 N.E.2d at 103; Turner, 409 N.E.2d at 808.
\item[233] See S. Kemble Fischer, 402 N.E.2d at 101.
\item[234] See \textit{id.} at 103. In the lower court, the judge had found that the plaintiff could not use the land "for access, general recreation or other uses permitted within the Flood Plain Conservancy District," although the judge also found that the land was not "worthless." \textit{See id.}
\item[235] \textit{See id.}
\item[236] \textit{See id.}
\item[237] See S. Kemble Fischer, 402 N.E.2d at 103.
\item[239] \textit{See id.} at 1247. Yankee Atomic sought to prevent the Secretary of State from including the initiative on the ballot in the upcoming state election. \textit{See id.}
\item[240] \textit{See id.} The plaintiffs referred to Article 48 of the Massachusetts Constitution, which
\end{itemize}
\end{footnotesize}
In refusing to recognize a taking, the Supreme Judicial Court, citing *Penn Central* and *Turnpike Realty*, undertook a "peculiarly fact dependent" analysis involving "essentially ad hoc, factual inquiries." In so doing, the court considered relevant both "residual use" and a "determination of the diminution in value of the regulated property." This analysis led the majority to conclude that the petition, if enacted, would not constitute a taking of Yankee Atomic's property because nothing in the petition restricted alternative uses of the land. The majority further considered Yankee Atomic's argument, which focused on the petition's impact on the value of its nuclear reactor rather than on its property as a whole, to be inconsistent with *Keystone*'s language regarding the parceling of property interests.

Citing *Pennsylvania Coal*, *MacGibbon* and *Volpe*, the *Yankee* dissent considered the petition, once enacted, to effect a taking of Yankee Atomic's property because of its "catastrophic" economic impact. Arguing that *Pennsylvania Coal* espoused the "bedrock principles of regulatory takings law," Justice Lynch, joined by Justice Liacos, understood *Pennsylvania Coal* and its progeny to have established three significant factors in the regulatory takings analysis: (1) the economic impact of the regulation, (2) its interference with reasonable investment-based expectations, and (3) the character of the government action. In examining each of these factors, the dissent noted first that the enacted petition would render Yankee

excludes referendums that are inconsistent with an individual's "right to receive compensation for private property appropriated to public use ..." See *Mass. Const.* Art. 48, The Initiative, II, § 3.


242 See id. at 1250 (citing *Penn Central*, 438 U.S. at 131; *MacNeil v. Town of Avon*, 435 N.E.2d 1043, 1045 (Mass. 1982); *Lovequist v. Conservation Comm'n of the Town of Dennis*, 393 N.E.2d 858, 866 (Mass. 1979)).


244 See id. at 1250 n.7. The majority's opinion affirmed an opinion of the Attorney General holding likewise. See id. The Attorney General had approved the petition's certification. See *Yankee*, 526 N.E.2d at 1250, n.7.

245 See id. at n.8.

246 See id. at 1253 (Lynch, J., dissenting).

247 See id. at 1251 (Lynch, J., dissenting).

Atomic's only reason for being in business "commercially impractica-
ble." Yankee Atomic's parcel, argued Justice Lynch, was "irre-
versibly committed to a nuclear facility," as "much of the plant equip-
ment [would] be made radioactive and because the site itself [would] be-
come (de-facto) a long-term radioactive waste storage facility . . .." All of Yankee Atomic's investment-backed expectations, therefo-

Citing MacGibbon, the dissent concluded that "this [was] a classic case of a regulation leaving a landowner with only the burdens of ownership and none of the benefits."

Citing Mugler, Hadacheck, and Goldblatt, the dissent then scruti-
nized the nature of the petition for its conformance with the state's police power to regulate the "noxious use of property" in the interest of public health and safety. Regulations enacted for such purposes, argued Justice Lynch, are distinguished from state actions which serve only private interests. Justice Lynch noted that in this case, the petition was offered not for public health and safety purposes, but rather because it was:

uneconomical and unwise to continue to generate electric power in the Commonwealth by means which result in the production of nuclear waste when there is no method for disposal of nuclear waste. The purpose of this Act is to protect the people of Massa-

249 See Yankee, 526 N.E.2d at 1253 (Lynch, J., dissenting). Lynch thereby distinguished Yan-
kee Atomic' case from the miners' situation in Keystone, where the challenged regulation did not render the mining of coal "commercially impractica-

250 See id. (Lynch, J., dissenting) (citing Attorney General's certification of the initiative petition).

251 See id. at 1254 (Lynch, J., dissenting). Yankee had expected, based on its federal license, to operate its nuclear power plant until 1997. See id. (Lynch, J., dissenting). The dissent further argued that Yankee would be forced by federal law to shoulder the burden of commissioning the plant upon cessation of nuclear power production. See Yankee, 526 N.E.2d at 1253 (Lynch, J., dissenting).


signers see as an economically unwise method of producing electricity.\textsuperscript{255}

Justice Lynch therefore concluded that the nature of the petition did not conform to the public purpose goals which the Supreme Court had considered as forming exceptions to the Takings Clause.

C. The “Denominator” Issue in Massachusetts

Yankee also addressed, although briefly, the “denominator” question which also surfaced in Penn Central and Keystone.\textsuperscript{256} The majority in Yankee asserted that Yankee Atomic's takings argument improperly focused on the petition's destructive economic impact on the nuclear reactor rather than on the property as a whole.\textsuperscript{257} The dissent, on the other hand, referred to Article Ten of the Massachusetts Declaration of Rights, which states that “no part of the property of any individual can, with justice, be taken from him, or applied to public uses, without his consent, or that of the representative body of the people . . . .”\textsuperscript{258} The dissent posited that, although Keystone's interpretation of the Fifth Amendment disapproved the “segmenting” of property for the purposes of a takings claim, it did not necessarily preempt the additional protections afforded by the language of Article 10.\textsuperscript{259}

Despite the conflicting opinions in Yankee regarding the segmenting issues addressed by Keystone and Penn Central, the Massachusetts Supreme Judicial Court has consistently followed Keystone and Penn Central when addressing the “denominator” question.\textsuperscript{260} For example, in Flynn v. City of Cambridge, landlords contested the authority of the Cambridge City Council to regulate evictions from rent control apartments and the conversions of housing subject to rent control.\textsuperscript{261} They argued that the ordinance amounted to a taking of their units by restricting the uses for which they could be utilized.\textsuperscript{262}

\textsuperscript{255} See id. (Lynch, J., dissenting).
\textsuperscript{256} See Yankee, 526 N.E.2d at 1250 n.8.
\textsuperscript{257} See id.
\textsuperscript{258} See id. at 1253–54 n.2 (Lynch, J., dissenting) (emphasis in the original) (quoting MASS. CONST. Art. X).
\textsuperscript{259} See id. at 1253 n.2.
\textsuperscript{261} See Flynn, 418 N.E.2d at 335–36.
\textsuperscript{262} See id. at 336. In response to a serious housing shortage, the ordinance required that any
Citing *Penn Central*, the *Flynn* majority held that the court's focus in a takings case should be on both the character of the government's action, and on the nature and extent of that action's interference with rights *in the parcel as a whole*.263 The majority then concluded that, since the expectations of owners using their units for rental housing on the effective date of the ordinance were not frustrated by its restrictions, the *Flynn* ordinance did not interfere with the landowners' "primary expectations" concerning the use of their property.264 The court further held that while use restrictions may "undeniably diminish the value of the property, this alone does not establish a taking."265

Similarly, in *Moskow v. Commissioner of Department of Environmental Management*, the Supreme Judicial Court denied the takings challenge of an owner of a parcel consisting of fifty-five percent inland wetlands.266 In that case, the Department of Environmental Management's order pursuant to the Inlands Wetlands Act barred the plaintiff from dredging, filling, or altering this wetland area.267 The Superior Court held that the Act's effect on the wetland portion of the plaintiff's property amounted to a taking because "the owner [was] denied the use of more than half his parcel" without "reciprocal benefit."268 However, upon direct appellate review, the Supreme Judicial Court reversed by noting that in *Penn Central*, the Court had focused both on "the character of the action and on the nature and extent of the interference with rights in the parcel as a whole . . . ."269

**D. Nuisance Controls Immune to Takings Claims**

The Supreme Judicial Court has thwarted takings claims in cases where the regulation of nuisances worked to deny landowners all use

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265 See id.
267 See id. at 752.
268 See id.
of their land. For example, in *Nassr v. Commonwealth*, landowners claimed that state officials had effected a taking of their property when it was seized for the purpose of removing hazardous waste. Plaintiffs alleged that the Commonwealth's eighteen month cleanup operation constituted a temporary taking for which they were entitled to payments equal to the property's reasonable rental value during the cleanup period.

Upon applying *Penn Central*'s two-part test, the Supreme Judicial Court concluded that the Commonwealth's clean-up efforts "maintain[ed] the public health" and "prevent[ed] the risks of groundwater contamination, fires and explosions, and life threatening disease." As such, they were "classic exercises of the police power" that could not be transformed into an exercise of eminent domain. The court also noted that that the Commonwealth had statutory authority to undertake cleanup procedures upon the spillage or seepage of any contaminants that could result in "damage to the waters, shores or natural resources utilized or enjoyed by [its] citizens ...." Noting as well that the lower court judge had declared the plaintiffs' storage and disposal of contaminated waste a "public nuisance," the *Nassr* court summarily dismissed the plaintiffs' compensation claims by concluding that they "sound[ed] a particularly hollow ring in light of the [Superior Court] judge's findings that both the warehouse and the liquid lagoon presented serious health risks ...."

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271 See *Nassr*, 477 N.E.2d at 990. Occupants of the property had negligently stored and dumped certain flammable and carcinogenic chemicals on the premises that created risk of damage to the central nervous system, liver, and kidneys if ingested through the groundwater supply. See id. at 989. Upon discovery of this condition, state and local officials locked the premises and maintained a security guard during cleanup operations. See id. at 990.

272 See id.

273 See id.

274 See id. at 990–91. The majority also quoted *Miller*: "Where the public interest is involved preferment of that interest over the property interest of the individual, to the extent even of its destruction, is one of the distinguishing characteristics of every exercise of the police power which affects property." *See Nassr*, 977 N.E.2d at 991 (quoting *Miller v. Schoene*, 276 U.S. 272, 279–80 (1928)).

275 See id. at 990 n.2 (quoting *Mass. Gen. Laws Ann.* ch. 21, § 27 (West 1994)).

276 See id. at 990.

277 See id. at 991.
E. Lopes v. City of Peabody

In March of 1994, the Supreme Judicial Court decided *Lopes v. City of Peabody*, one of the first state court cases interpreting *Lucas*.

*Lopes* commenced in 1989 when a landowner asserted in the Massachusetts Land Court that a wetlands conservancy zoning district was invalid as applied to a large portion of his parcel. The ordinance forbade construction within thirty feet of a nearby pond and in areas below an elevation of eighty-eight and one-half feet above sea level. The elevation of all but a small portion of Lopes’ lot was below this level, and he allegedly was “unable to use his land as a result” of the ordinance. The Land Court nevertheless ruled that the city’s establishment of the conservancy district and the minimum permitted elevation was a “valid exercise of legislative discretion” and that therefore no taking had occurred.

On appeal, the Massachusetts Appeals Court, although agreeing that Lopes had “no practical or beneficial use of his land,” affirmed the Land Court’s decision. The court found it sufficient that the ordinance was rationally related to conservation objectives and the prevention of flood damage to nearby homes. The court also considered it significant that Lopes had purchased his property in “full knowledge” of the ordinance.

The Massachusetts Supreme Judicial Court then refused further appellate review in September of 1992, but the United States Su-
preme Court later allowed Lopes' petition for certiorari. The Supreme Court subsequently vacated the Land Court's judgment, and remanded the case back to the Massachusetts Appeals Court for further consideration in light of Lucas. The Supreme Judicial Court then granted Lopes' request for direct review.

Writing for the majority, Justice Wilkins applied an interpretation of Lucas to determine whether the ordinance was constitutionally permissible as applied to Lopes' parcel. Under Lucas, stated Justice Wilkins, if the ordinance deprived Lopes of "all economically beneficial use and no justification exist[ed] for that restriction," the ordinance should be invalidated to "the extent necessary ... to permit economically beneficial use of the land." In other words, in order to be constitutional under Lucas, a challenged ordinance must "substantially advance state interests" while not "prohibit[ing] in advance any use of the land that state law would bar in any event." If, however, the ordinance did not deny Lopes' property of all economically beneficial use, Justice Wilkins posited that pre-Lucas takings principles would apply. In any event, he concluded that:

The Lucas opinion appears to have changed, or at least re-focused, the applicable standards for determining whether . . . there has been a regulatory taking of property. An essential fact question is whether application of the ordinance has caused the Lopes land to have no economically beneficial use . . . a term that the Supreme Court has not yet defined.

Justice Wilkins then suggested that, on remand, the Land Court could either first examine whether the challenged ordinance did not substantially advance legitimate state interests as applied to Lopes'

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286 See id.
287 See id. at 1313 n.2.
288 See id. In his petition to the Supreme Court, Lopes had focused on the takings question, and specifically whether the Fifth Amendment entitled him to compensation when an ordinance left his land "valueless and without any beneficial use." See id. at 1314 n.6. However, on remand, the Supreme Judicial Court reviewed only whether the ordinance was valid as applied to Lopes, and left for a separate lawsuit the actual takings claim. See Lopes, 629 N.E.2d at n.7.
289 See id. at 1315. Justice Wilkins first resolved that the Appeals Court had improperly denied Lopes the opportunity to challenge the ordinance merely because it was in effect at the time of purchase. See id. at 1314–15.
290 See id. In so stating, Justice Wilkins acknowledged Peabody's interest in enforcing the ordinance "to the extent that it [was] constitutionally permissible to do so." See id.
292 See id.
293 See id.
lot.\textsuperscript{294} Such an examination, the court concluded, should be made on a "case by case basis as to the particular land involved" without assigning any weight to "political judgments concerning the desirability" of the ordinance.\textsuperscript{295} Or, offered Justice Wilkins, the Land Court could first decide whether the ordinance deprived Lopes' land of all economically beneficial use and did not prohibit the use of his land that state law would have barred to begin with: "In other words, Lopes would have to show that his land, free of the regulation, has some economically beneficial use and that it has none when subject to the zoning regulation."\textsuperscript{296}

On remand, the Land Court allowed Lopes to amend his complaint to allege that a regulatory taking of his property entitled him to compensation under Article 10 of the Declaration of Rights of the Massachusetts Constitution.\textsuperscript{297} In his decision, Judge Cauchon first examined whether the Peabody ordinance deprived Lopes of all beneficial use.\textsuperscript{298} Concluding that Lopes' property had been deprived of "most, if not all economically beneficial use," Judge Cauchon invoked the \textit{Florida Rock} and \textit{Loveladies} balancing tests to measure "whether or not the government ha[d] acted in a responsible way" when it deprived Lopes a "substantial part of the economic use or value of property" through regulation.\textsuperscript{299} Even when the government seeks by regulation to advance public interests, noted Judge Cauchon, a compensable taking may still occur where:

The result is a denial of economically viable use of property . . . [and] the property owners had distinct investment backed expectations and the interest taken was one vested in the owners as a

\textsuperscript{294} See id. at 1316 (citing Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1016 (1992); Agins, 447 U.S. at 260)).

\textsuperscript{295} See id. at 1316. Justice Wilkins suggested that Lopes might prove that a lower contour could serve the same legitimate state interests. See Lopes, 629 N.E.2d at 1316.

\textsuperscript{296} See id. Justice Wilkins refused, however, to examine the specific application of Massachusetts nuisance law to Lopes' case. See id. at 1316–17.

\textsuperscript{297} See Lopes v. City of Peabody, 3 Ld.Ct.Rptr. 78, 79 (1995)

\textsuperscript{298} See id.

\textsuperscript{299} See id. at 80 (citing Florida Rock Indus., Inc. v. United States, 18 F.3d 1560, 1562 (Fed. Cir. 1994)). Judge Cauchon noted that the value of the parcel did not have to be "zero" for the regulation to constitute a compensable taking. See id. at 79. The \textit{Florida Rock} "partial taking" test, discussed supra, note 140 and accompanying text, entailed examining whether the government "limit[ed] constraints on property ownership to things necessary to achieve public purpose," while ensuring that the regulation "has not allocated to some number of individuals, less than all, burdens that should be born by all." See id.; \textit{Florida Rock}, 18 F.3d at 1571.
matter of state property law and not within the power of the state to regulate under common-law nuisance doctrine.\textsuperscript{300}

Judge Cauchon then examined the validity of the eighty-eight and one-half foot elevation requirement, and determined that, as applied to Lopes' property, the elevation served no legitimate state interest while unnecessarily burdening Lopes' land.\textsuperscript{301} Judge Cauchon then ordered that, as to Lopes' property, the conservancy district was to be amended to an elevation of slightly over eighty-six feet in order to "permit an economically beneficial use" of his property.\textsuperscript{302} He concluded by suggesting that, although Lopes could not make a claim for a permanent physical taking, he might have a temporary taking claim under \textit{First English}.\textsuperscript{303}

IV. FILLING IN THE GAPS: WHAT \textit{LUCAS} MEANS FOR MASSACHUSETTS

A. Lucas' \textit{Open Questions for State Courts}

The impact of \textit{Lucas} on future regulatory takings law in Massachusetts is difficult to predict, as the decision arguably suggests much more than it legally pronounces.\textsuperscript{304} For several reasons, state courts are subsequently left with some leeway in filling the gaps left by Justice Scalia's analysis, especially in determining the breadth of the nuisance exception and the meaning of the denial of all economically beneficial use of land.\textsuperscript{305} First, Justice Scalia assumed as fact the so-called "fiction" that Lucas' property was left with no economic use.\textsuperscript{306} He could therefore avoid providing state courts with any guidance as to the types of remaining uses that may be sufficient to refute a claim of total deprivation.\textsuperscript{307} Another related issue is the

\textsuperscript{300} See \textit{Lopes}, 3 Ld.Ct.Rptr. at 80 (citing Loveladies Harbor, Inc. v. United States, 28 F.3d 1171, 1179 (Fed. Cir. 1994)).
\textsuperscript{301} See id. at 80–81. Judge Cauchon noted that the trial judge had determined that the 88.5 foot contour requirement "seem[ed] to be a peculiarly political decision." See id. at 81.
\textsuperscript{302} See id. at 81.
\textsuperscript{303} See id. (citing \textit{First English Evangelical Church of Glendale v. County of Los Angeles}, 482 U.S. 304 (1987)).
\textsuperscript{305} See Ausness, supra note 7, at 466; \textit{Lucas v. South Carolina Coastal Council}, 505 U.S. 1003, 1015 (1992).
\textsuperscript{306} See \textit{Lazarus}, 505 U.S. at 1020 n.9; \textit{Lazarus}, supra note 304, at 1431.
\textsuperscript{307} See \textit{Lopes v. City of Peabody}, 629 N.E.2d 1312, 1315 (Mass. 1994) ("no economically beneficial use [is] a term that the Supreme Court has not yet defined . . . .").
partial takings question that Justice Scalia acknowledged but left unanswered: Is the Lucas categorical rule inapplicable to those landowners who allege a taking of only a large portion but not all of the use of their property? A third unanswered issue concerns the “denominator” in a court’s devaluation analysis: in a diminution calculation, should courts focus on the regulated segment as the relevant parcel, or should they examine the property as a whole? Finally, of what consequence is Lucas’ “nuisance exception” to Massachusetts’ takings analysis? Will it narrow the breadth of police power defenses to takings claims? Or might it allow the uncompensated, total diminution of property values so long as regulators adhere to some undefined standards of background nuisance law?

Massachusetts’ rich regulatory takings jurisprudence has historically tracked developments in Supreme Court regulatory takings law, and thus can illustrate how state courts might consider the questions left open by Lucas and its precedent. The following section will demonstrate how Lucas should not shift the course of Massachusetts takings law, and moreover how Massachusetts courts have addressed some of Lucas’ unanswered questions.

B. The Categorical Rule in Massachusetts

Lucas’ pronouncement that a zoning law will be unconstitutional if it “does not substantially advance state interests or denies an owner economically viable use of his land” has been a consistent tenet of Massachusetts regulatory takings law since 1965. The Supreme
Judicial Court’s application of this rule is most articulately illustrated by the Volpe and MacGibbon decisions, in addition to the Yankee dissent.\footnote{814 See MacGibbon II, 255 N.E.2d at 352; Volpe, 206 N.E.2d at 670; see also Yankee, 526 N.E.2d at 1251–55 (Lynch, J., dissenting).} In Volpe, the majority recognized that the relevant takings inquiry is not merely whether the regulation furthers a proper public purpose, but also whether “there has been such a deprivation of the practical uses of a landowner’s property as to be the equivalent of a taking without compensation.”\footnote{815 Similarly, in the MacGibbon cases, the court implied that a restrictive zoning regulation might be tantamount to a taking if it “deprives the plaintiff’s land of all practical value to them or to anyone acquiring it, leaving them only with the burden of paying taxes on it.”\footnote{816 Perhaps the Supreme Judicial Court’s most explicit pronouncements regarding what would later be termed the “Lucas categorical rule” emerged in the dissent’s opinion in Yankee.\footnote{817 The Yankee dissent recognized as a “bedrock principle[]” of regulatory takings law Justice Holmes’ pronouncement in Pennsylvania Coal that a regulation will require an exercise in eminent domain when deprivation reaches a certain magnitude.\footnote{818 In most if not all cases there must be an exercise in eminent domain and compensation” set the “bedrock principles of regulatory takings law”).} The Massachusetts courts are therefore not new to the categorical rule for determining the validity of land use ordinances and the merits of regulatory takings claims.\footnote{819 Thus, even in cases where landowners allege complete deprivation, the introduction of Lucas’ categorical rule should not cause a noticeable shift in Massachusetts regulatory takings law.\footnote{820 However, although the Supreme Judicial Court has reviewed land use restrictions with close attention to their confiscatory effects,\footnote{821 in reality Massachusetts courts have not been overly}
anxious to find total deprivations even under that seemingly strict standard. This trend has not changed since *Lucas*.\(^{322}\) *Lopes* confirmed that, in those cases where regulations do not deny landowners all economically beneficial use, courts should apply pre-*Lucas* takings principles.\(^{323}\) Given the rarity of total deprivations, therefore, Massachusetts courts will in the vast majority of cases continue to apply *Penn Central*’s "essentially ad hoc, factual inquiries" to determine the validity of land use regulations and related regulatory takings claims.\(^{324}\)

C. Massachusetts Gives Some Content to "Residual Use"

In *Lucas*, Justice Scalia assumed but did not hold that Lucas’ land was deprived of all economically beneficial use.\(^{325}\) The question is therefore still open for states as to what residual uses may be sufficient to render an alleged "total deprivation" less than total. Since *Jenckes*, Massachusetts courts have paid close attention to the content of residual use in reviewing takings claims.\(^{326}\) In *Jenckes*, Justice Wilkins posited that a regulation, in order to avoid a taking, must leave a property with some "practical value."\(^{327}\) He considered that a zoning regulation that deprives property of any use, including "ordinary agricultural" use, will leave the owner with only the ability to "look at it and pay taxes on it."\(^{328}\) Specifically, Justice Wilkins suggested that the potential for playgrounds, parks, or accessory uses to adjacent parcels were not "practical" enough to uphold the enforcement of a challenged by-law.\(^{329}\)

After *Jenckes*, the court's attention to certain practical uses became a necessary component of its takings analysis, even in the face of otherwise legitimate exercises of the police power.\(^{330}\) In *Volpe*, the


\(^{323}\) See Lopes v. City of Peabody, 629 N.E.2d 1312, 1315 (Mass. 1994).


\(^{327}\) See id.

\(^{328}\) See id.

\(^{329}\) See id.

\(^{330}\) See Commissioner of Natural Resources v. S. Volpe & Co., 206 N.E.2d 666, 671 (Mass. 1965);
Supreme Judicial Court considered an examination of "practical uses" so critical to its takings analysis that it remanded the case for a determination, in part, of "[t]he uses which [could have been] made of the locus in its natural state." In so ruling, the Volpe court held that: "A crucial issue is whether, notwithstanding the meritorious character of the regulation, there has been such a deprivation of the practical uses of a landowner's property as to be the equivalent of a taking without compensation."

Like in Volpe, the MacGibbon court also considered the lack of residual practical uses a crucial factor in determining the validity of zoning regulations. There the Supreme Judicial Court gave hints as to what residual uses might not be "practical" enough to avoid a takings claim. According to MacGibbon, recreational uses that are merely incidental to the enjoyment of land in its undeveloped state will not comply with the "applicable standard" of "practical" use. After MacGibbon, Massachusetts regulators may therefore have difficulty asserting that such psychological notions as "pride of ownership" and simple enjoyment of waterfront views—uses that are merely incidental to enjoying land in its natural state—are sufficient residual uses to indicate less than full deprivation. The notion that regulators may not, without compensating the landowner, utilize zoning laws for the sole purpose of conservation has in fact been considered an underlying motive for the Lucas decision.

Turnpike Realty illustrates one scenario where the uses considered impractical by the MacGibbon court may nonetheless suffice to repel an attack on a land use regulation in Massachusetts, at least where

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331 See Volpe, 206 N.E.2d at 671.

332 See id. at 669 (citing Goldblatt v. Town of Hempstead, 369 U.S. 590, 592–94 (1962); Mile Rd. Corp. v. City of Boston, 187 N.E.2d 826, 830 (Mass. 1963)).

333 See MacGibbon III, 340 N.E.2d at 490.

334 See id. at 491; MacGibbon II, 255 N.E.2d at 352.

335 See MacGibbon III, 340 N.E.2d at 91; MacGibbon II, 255 N.E.2d at 351; see also Aronson v. Town of Sharon, 195 N.E.2d 341, 345 (Mass. 1964) (holding that such purposes are not authorized under the Massachusetts Zoning Enabling Act).

336 See MacGibbon III, 340 N.E.2d at 491.

337 See Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1018 (1992) ("[R]egulations that leave the owner without economically beneficial or productive options for its use—typically, as here, by requiring land to be left substantially in its natural state—carry with them a heightened risk that private property is being pressed into some form of public service under the guise of mitigating serious public harm") (emphasis supplied); Sax, supra note 304, at 1440–41.
the risk of inland flooding is involved. In that case, the Supreme Judicial Court considered the potential for any "woodland, grassland, wetland, agricultural, horticultural or recreational use of land not requiring filling" as sufficient enough to uphold the validity of a bylaw in the face of an otherwise substantial restriction in the use of land. However, that Turnpike Realty considered these uses significant enough to deny the plaintiff's claim was not the main thrust of its decision. Rather, the court relied primarily on the Mugler rule by intimating that regulations preventing a serious public harm are immune from invalidation regardless of substantial devaluations in property values: "Although it is clear that the petitioner is substantially restricted in its [sic] use of the land, such restrictions must be balanced against the potential harm to the community from overdevelopment of a flood plain area." In so reasoning, the Turnpike Realty court noted that "[a]lthough there was a substantial diminution in the value of the locus, the mere decrease in the value of a particular piece of land is not conclusive evidence of an unconstitutional deprivation of property.

D. Turnpike Realty: Limited Significance After Lucas, Lopes, and Florida Rock?

Although Turnpike Realty seems to conflict with MacGibbon in its somewhat generous approach to residual uses, its holding is not necessarily inconsistent with MacGibbon, Volpe, and even Lucas and Lopes. First, the landowner in Turnpike Realty did not plead a takings case, but posed an as applied challenge to the validity of the bylaw amendment. The issue of whether a taking had occurred

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339 See id. at 900-01. The regulation diminished the value of the plaintiff's land from $431,000 to $53,000. See id. at 900.
340 See id.
341 See id. Although the Turnpike Realty court cited Hadacheck in concluding that "although a comparison of values before and after is relevant ... it is by no means conclusive," it chose not to reference Justice Holmes' conclusion in Pennsylvania Coal that, "while property may be regulated to a certain extent, if the regulation goes too far it will be recognized as a taking." See Turnpike Realty, 284 N.E.2d at 900; Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).
343 See Turnpike Realty, 284 N.E.2d at 894.
was not yet ripe for review, as, unlike in Volpe and MacGibbon, the Turnpike Realty plaintiff had not yet been denied any permits to build under the ordinance.\textsuperscript{344} Second, unlike in MacGibbon, Volpe, and Lopes, where the plaintiffs' properties arguably suffered more severe devaluations, the plaintiff's property in Turnpike Realty held a value of $53,000 even after the enactment of the ordinance.\textsuperscript{345} Third, the flood zoning by-law in Turnpike Realty might have conformed with Massachusetts' common-law nuisance principles according to Lucas, as "[t]he general necessity of flood plain zoning to reduce the damage to life and property caused by flooding" was considered "unquestionable" by the Turnpike Realty court.\textsuperscript{346} Indeed, for all its ambiguities concerning the content of the "nuisance exception," even Lucas explicitly suggested that the denial of a "requisite permit to engage in a landfilling operation that would have the effect of flooding the others' land" prohibits a use that is "always unlawful."\textsuperscript{347} As such, under Lucas, flood plain restrictions in Massachusetts may be examples of noncompensable government action, even in the face of complete deprivation of value.\textsuperscript{348} Therefore, Turnpike Realty may still be viable even under Lucas due to Justice Scalia's ambiguous conception of the nuisance exception.\textsuperscript{349} Moreover, even if Turnpike Realty implies a tendency on the part of the Supreme Judicial Court to thwart takings challenges by recognizing a generously broad conception of practical residual use, the fact that Turnpike Realty's holding has been invoked primarily in cases of flood plain regulation challenges may illustrate its particularly narrow scope.\textsuperscript{350} Indeed, the MacGibbon court even managed to distinguish

\textsuperscript{344} See id. at 901 (Tauro, C.J., concurring). In fact, Chief Justice Tauro stressed in his concur-
rence that although the court was unable to conclude that the plaintiff suffered sufficient diminution in value to render the by-law unconstitutional, the court should have emphasized that it did not rule whether the plaintiff was an uncompensated victim of a taking. See id. at 902 (Tauro, C.J., concurring). Such a ruling would have to depend on the Board's denial of a special permit. See id.

\textsuperscript{345} See id. at 900.

\textsuperscript{346} See Turnpike Realty, 284 N.E.2d at 899.


\textsuperscript{348} See id. at 1029-30.

\textsuperscript{349} See id. at 1025; see also Lazarus, supra note 304, at 1418-19.

\textsuperscript{350} See Turner v. Town of Walpole, 409 N.E.2d 807, 808-09 (Mass. App. Ct. 1980); S. Kemble Fischer Realty Trust v. Board of Appeals of Concord, 402 N.E.2d 100, 103 (Mass. App. Ct. 1980). Indeed, even in Lopes, where the Supreme Court reviewed the validity of floodplain regulations, Turnpike Realty was merely part of a string cite for its potential value in determining the restrictions imposed on the use of land subject to periodic flooding by "nuisance and the law of
Turnpike Realty when considering the validity of the wetlands regulations that prohibited MacGibbon’s filling project.\textsuperscript{351} In so doing, the MacGibbon court simply dismissed Turnpike Realty on the grounds that “obstruction of a coastal tidewater at or above mean high water is very different from obstruction of a river.”\textsuperscript{352}

The Land Court’s invocation in Lopes of the Florida Rock “partial takings” analysis may also signal Turnpike Realty’s diminished significance in Massachusetts as an anti-takings case.\textsuperscript{353} By invoking Florida Rock, the Land Court in Lopes may have set the stage for the development of partial takings jurisprudence in Massachusetts, and in so doing may have clarified for Massachusetts what Justice Stevens recognized as a glaring ambiguity of the Lucas decision.\textsuperscript{354} In Florida Rock, the court considered regulatory takings to be possible not only in the absence of complete deprivation, but in cases of partial deprivation as well.\textsuperscript{355} In so reasoning, it held that whether a regulation amounts to a partial taking depends on a balance of competing private and governmental interests.\textsuperscript{356} The Land Court in Lopes applied this principle on remand to Lopes’ lot, which had limited residual uses under the ordinance similar to those allowed by the Turnpike Realty by-law: conservation of water, plants and wildlife, recreation, grazing, farming, forestry and nurseries.\textsuperscript{357} However, although Lopes’ land was not fully devalued by the Peabody ordinance, the Land Court nevertheless rendered the ordinance inapplicable to Lopes’ regulated parcel.\textsuperscript{358} For this reason, even in cases where the uses recognized by Turnpike Realty may actually exist, courts may none-
Nevertheless invoke the partial takings principle to either invalidate restrictive land use regulations, or to find partial takings.

E. The "Denominator" Issue in Massachusetts

Justice Scalia arguably reawakened in *Lucas* the question of whether a claimant's entire parcel or a burdened portion thereof should function as the denominator in the devaluation analysis of a takings claim.\(^{359}\) Before *Lucas* and *Loveladies*, this issue was considered settled by the *Penn Central* and *Keystone* decisions, which considered the value of the entire parcel as relevant to the takings analysis.\(^{360}\) In *Lucas*, however, Justice Scalia implied without deciding that such a calculation was "extreme" and "unsupportable."\(^{361}\) Rather, he offered that the answer to the denominator issue "may lie in how the owner's reasonable expectations have been shaped by the State's law of property . . . ."\(^{362}\) Similarly, the *Loveladies* court later found that the burdened portion of the claimant's land in that case could function as the denominator in the diminution analysis.\(^{363}\) However, Massachusetts courts have, both before and after *Lucas*, consistently viewed whole property interests as relevant to the takings devaluation analysis, and thus have ample precedent to sustain challenges based on Justice Scalia's footnoted criticism of *Penn Central*'s rule.\(^{364}\)

This interpretation might in the future be reshaped by a successful application of Article 10 of the Massachusetts Declaration of Rights, which states that "no part of the property of any individual can, with justice, be taken from him, or applied to public uses, without his consent, or that of the representative body of the people . . . ."\(^{365}\)

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\(^{361}\) See *Lucas*, 505 U.S. at 1017 n.7. For a discussion of the possible repercussions of Justice Scalia's suggestion, see Fisher, *supra* note 126, at 1402-05.

\(^{362}\) See *Lucas*, 505 U.S. at 1017 n.7.


\(^{365}\) See MASS. CONST. Art. X (emphasis supplied); Lopes v. City of Peabody, 629 N.E.2d 1312,
potential impact of the Massachusetts constitution to the takings issue is as of yet undetermined, although some Massachusetts practitioners hope that Article 10's application to takings law will encourage courts to be more cautious in enforcing land-use laws. Indeed, the Supreme Judicial Court has recently appeared to invite plaintiffs to argue that Article 10's language provides even more protection than the Fifth Amendment in takings challenges. No such claim has yet been successfully advanced, and future courts will need to decide in what way the Massachusetts Takings Clause will impact the current interpretation of partial takings claims.

F. Nuisance Law in Massachusetts: Lucas as an Anti-Takings Tool?

The nuisance exception to the Takings Clause has been a persistent feature of Massachusetts regulatory takings law. According to Lucas, the nuisance exception will essentially thwart a landowner's claim of complete deprivation in cases where states regulate to "forestall grave threats to the lives and property of others." Lucas suggested that, in reviewing "total taking[s]" claims, courts should consider "the degree of harm to public lands and resources, or adjacent private property posed by the claimant's activities..." to help determine whether the prevention of public harm outweighs a landowner's entitlement to compensation.

The Massachusetts courts are not unfamiliar with the nuisance exception as a tool for upholding restrictive land use regulations and denying takings claims. As early as in 1851, the Alger court upheld

1313 n.2 (Mass. 1994); see also Steinbergh v. City of Cambridge, 604 N.E.2d 1269, 1272 (Mass. 1992); Yankee, 526 N.E.2d at 1253 n.2 (Lynch, J., dissenting).


367 See Yankee, 526 N.E.2d at 1253 n.2 (Lynch, J., dissenting); see also Daddario, 681 N.E.2d at 836 n.3 (court noted that plaintiff had not argued that Massachusetts Constitution provided greater protections than the United States Constitution); Steinbergh, 604 N.E.2d at 1272 ("Although a similarity in standards under the 'takings' clauses of the two constitutions has not been as clearly established, the plaintiffs have advanced no reason why we should create takings principles more favorable to them than those developed under the Federal Constitution.").


370 See id. at 1030–31.

371 See Nassr, 477 N.E.2d at 990; Turnpike Realty, 284 N.E.2d at 899–90; Alger, 61 Mass. at 54; see also Yankee, 526 N.E.2d at 1254.
a coastline construction regulation by concluding that it prevented noxious uses of property: "Nor does the prohibition of such noxious use of property, a prohibition imposed because such use would be injurious to the public, although it may diminish the profits of the owner, make it an appropriation to a public use, so as to entitle the owner to compensation."372 In fact, besides noting that the statute specifically designated construction beyond an established boundary as a "public nuisance," the Alger court asserted that "all real estate inland or on the sea shore, derived immediately or remotely from the state is taken and held under the tacit understanding that the owner shall deal with it so as not to cause injury to others."373 Although the landowner's property title in Alger was conveyed by a king's grant that vested "the right of soil" to the recipient, the court reasoned that nevertheless such a grant "will not justify the grantee in erecting such permanent structures thereon, as to disturb the common rights of navigation; and such obstruction ... is held to be a public or private nuisance, as the case may be."374

The Nassr decision also provides an example where government regulation of nuisance-type activities will withstand a takings claim, even in the face of a temporary deprivation of all use of a landowner's property.375 In Nassr, the court denied the landowners' claim that the Commonwealth's action in seizing their property for eighteen months in order to remove hazardous waste amounted to a temporary taking.376 In so deciding, the court explicitly noted that the landowners had created a public nuisance by storing and disposing hazardous waste, and that the Commonwealth's decision to seize the property was a "classic exercise of the State's police power to maintain the public health."377 Although the landowners' profits were completely destroyed for over a year's period, the Nassr court held that the Commonwealth's actions to prevent nuisances "hardly transform[ed] this exercise of the police power into an exercise of eminent domain."378

372 See Alger, 61 Mass. at 86.
373 See id. at 86–90.
374 See id. at 90.
375 See Nassr, 477 N.E.2d at 990–91.
376 See id. at 990.
377 See id. The Nassr court cited Penn Central in focusing on "the character of the action and on the nature and extent of the interference with rights in the parcel as a whole." See id. at 990 (quoting Penn Cent. Transp. Co. v. New York City, 438 U.S. 194, 130–31 (1978)).
378 See id. at 991. The court further noted that the lower court had declared the plaintiff's activities a public nuisance. See Nassr, 477 N.E.2d at 991.
Similarly, the Yankee dissent also applied a Lucas-type “nuisance exception” analysis in examining the purpose of the petition that threatened to destroy Yankee Atomic’s property interests in its nuclear plant. The Yankee dissent argued that the requisite question in the takings analysis was whether the regulation sought to abate a nuisance, or, alternatively, was it merely promoting the state’s notions of economic efficiency. Drawing distinctions between Pennsylvania Coal and Keystone, the Yankee dissent considered it crucial to the takings analysis, especially in cases of total deprivation, whether the state’s petition was grounded in background nuisance principles. Finding that the petition’s purpose of discontinuing an “unwise” economic choice was not within the nuisance exception, the Yankee dissent essentially foreshadowed Justice Scalia’s later pronouncement in Lucas that regulators must find existing nuisance principles to support regulations that deny all beneficial use of land.

Massachusetts courts are therefore not new to “nuisance exception” applications to regulatory takings allegations. However, after Lucas, the lengths to which states must go to prove background nuisance principles are unclear. Indeed, Justice Scalia cautioned in Lucas that, in order to defend against total takings challenges, states “must do more than to proffer the legislature’s declaration that the uses [a plaintiff] desires are inconsistent with the public interest, or the conclusory assertion that they violate a common law maxim such as sic utere tuo ut alienum non laedas.” The Lopes court understood this suggestion to mean that “[a]fter the Lucas opinion, generally expressed political judgments concerning the desirability of a zoning regulation will do little to resolve the question whether a regulation substantially advances state interests.” Lucas may have, at the very least, increased a state’s burden for a successful application of the nuisance exception.

In Massachusetts, Lucas’ seemingly more stringent “nuisance exception” may not necessarily undermine regulators’ attempts to con-

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380 See id. (Lynch, J., dissenting).
381 See id. at 1252–54 (Lynch, J., dissenting) (citing generally Keystone Bituminous Coal Ass’n v. DeBenedictis, 480 U.S. 470 (1987); Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922)).
383 See Lucas, 505 U.S. at 1030. The Latin phrase denotes a common law maxim which translates as: “one should use his own property in such a manner as not to injure that of another.” See BLACK’S LAW DICTIONARY 1380 (6th ed. 1990).
trol land use without the threat of takings claims, especially where coastland and inland flooding regulations are at issue. From Alger’s pronouncement that coastal landowners cannot alter coastal lands to the detriment of the surrounding landscape, to Turnpike Realty’s assertion that flood plain laws are necessary to reduce damage to life and property, Massachusetts’ rich common law may contain the very background nuisance doctrines required by Lucas as a necessary element of the nuisance exception. Lucas essentially invites land use regulators to ground land use regulations in these principles as a defense against takings challenges.

V. CONCLUSION

Lucas arguably provides many more questions than it answers for land use regulators. However, Lucas should not have a significant impact on Massachusetts takings jurisprudence. Lopes made clear that in cases of less than complete deprivation, courts should continue to apply ad hoc, factual inquiries and pre-Lucas balancing tests. Based on the court’s past reluctance to find total deprivation, Lucas and its categorical rule should therefore be applicable only in a limited number of instances. In cases where the court’s “practical” use standard reveals complete deprivation, however, the introduction of Lucas’ categorical rule will not present Massachusetts with a principle that is not already well-established in its own takings jurisprudence. Moreover, Massachusetts courts have often invoked nuisance principles to withstand takings challenges, even in cases of complete deprivation. If nuisance law drives land use regulation in Massachusetts, Lucas’ seemingly pro-takings pronouncements should continue to have even less of an impact as a pro-takings tool. Rather, in the context of Massachusetts’ common law nuisance principles, Lucas may in fact provide a useful avenue for land-use regulators to better shield themselves from regulatory takings liability.