Reexamining 100 Years of Supreme Court Regulatory Taking Doctrine: The Principles of “Noxious Use”, “Average Reciprocity of Advantage”, and “Bundle of Rights” from Mugler to Keystone Bituminous Coal

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REEXAMINING 100 YEARS OF SUPREME COURT REGULATORY TAKING DOCTRINE: THE PRINCIPLES OF "NOXIOUS USE," "AVERAGE RECIPROCITY OF ADVANTAGE," AND "BUNDLE OF RIGHTS" FROM MUGLER TO KEYSTONE BITUMINOUS COAL

Thomas A. Hippler*

The relationship between the takings clause1 of the United States Constitution's fifth amendment and states' police power2 to legislate to provide for the public health, safety and welfare has been the source of much confusion among courts and scholars.3 Confusion centers around the questions of when the government can regulate

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2 The police power has no specific meaning, but at least incorporates those powers possessed by the states and not granted to the federal government in the Constitution. See U.S. CONST. AMEND. X. The scope of the police power has expanded greatly in twentieth century jurisprudence. See generally L. Tribe, AMERICAN CONSTITUTIONAL LAW (1977).

land use without compensation under the police power and when the regulation amounts to an exercise of the power of eminent domain which must be accompanied by just compensation to the owner. The Supreme Court's treatment of this issue, generally called the "regulatory taking" issue, has led to confusing and inconsistent decisions. Lower courts and scholars have proceeded under alternative theoretical approaches, resulting in much uncertainty for land use planners attempting to accommodate private and public interests.

The rather mystifying nature of regulatory takings jurisprudence is in part a result of the Supreme Court's failure to hear almost any takings challenges of police power regulation of land use for a period of fifty years. An attorney litigating a land use regulatory takings claim based on the federal constitution is faced with the problem of constructing an argument based in substantial part on cases decided before 1930. An examination of these cases is particularly important because in the leading case in contemporary regulatory takings jurisprudence, Penn Central Transportation v. New York City, from which the Court is developing a modern "bundle of rights" approach to regulatory takings claims, the justices did not agree on the meaning of this precedent. Justice Brennan's majority opinion upholding New York City's police power regulation was unable to answer satisfactorily questions raised by Justice Rehnquist's dissent, which interpreted regulatory takings analysis to revolve around turn-of-the-century principles of "noxious use" and "average reciprocity of advantage."

In its most recent term, the Supreme Court was again unable to agree on the application of these principles in rejecting a regulatory takings challenge in Keystone Bituminous Coal Assn. v. DeBenedictis. In Keystone Bituminous Coal, Justice Stevens' majority opinion contained a major shift in the Court's modern regulatory

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4 The history of the takings clause indicates that this clause was intended to prevent arbitrary and tyrannical treatment of property owners by the federal government. Scholars agree that the founding fathers did not intend the takings clause to apply to state police power regulation, or to any non-physical or non-title interference with private property. Such interpretations of this clause resulted from the passage of the fourteenth amendment and the rapid expansion of government action and regulation of private property in the second half of the nineteenth century. See Bosseman, supra note 3, at 51-138; Sax I, supra note 3, at 57-60. See also infra Section I.

5 Bosseman, supra note 3, at 322–24.
7 See infra notes 233–45 and accompanying text.
8 See infra notes 231–41 and accompanying text.
takings analysis in that it recognized the "noxious use exception" to the takings clause which had been advocated by Justice Rehnquist in his *Penn Central* dissent.\textsuperscript{10} Yet now-Chief Justice Rehnquist again dissented, arguing that based upon the Court's turn of the century precedent, the Court should find that this exception was inapplicable to the case and that the police power interference with private property constituted a taking requiring just compensation for the burdened owners.\textsuperscript{11} Consequently, cases from the 1870-1930 time period not only form the foundation of the Court's modern analysis, they are still central to it.

The increasing intensity of land use and corresponding rise in the value of real property in the United States indicate that new and existing types of police power regulation of land use aimed at protecting the environment and controlling the rate and form of development will give rise to more and more regulatory takings claims.\textsuperscript{12} Based upon the interests they represent, attorneys will continue to raise the principles of noxious use (or "public nuisance exception")\textsuperscript{13} and average reciprocity of advantage because of the divergent results these principles encourage. It is also likely that proponents of regulation will continue to argue that the substantive due process test is the proper mode of examining the constitutionality of police power regulation of land use.\textsuperscript{14} Unfortunately, while most commentators agree that the inconsistencies of 1870-1930 cases continue to be the central problem in regulatory takings analysis, there is a dearth of scholarship analyzing in depth cases other than *Pennsylvania Coal v. Mahon*\textsuperscript{15} decided during this period.

This comment examines the Supreme Court's regulatory takings cases of the 1870-1930 time period, focusing on their analytical inconsistencies and their relationship with each other and with the Burger Court's regulatory takings test which was recently modified in *Keystone Bituminous Coal*. With an eye toward the Rehnquist Court's future treatment of regulatory takings claims, this comment also argues that, in terms of precedent and principle, the Court

\textsuperscript{10} See infra notes 301-06 and accompanying text.
\textsuperscript{11} See infra notes 311--39 and accompanying text.
\textsuperscript{12} See generally Boselman, supra note 3, at 3--50.
\textsuperscript{13} The *Penn Central* dissent referred to the "noxious use exception" to the takings clause. 438 U.S. at 145--47. In *Keystone Bituminous Coal*, both the majority and dissent termed this exception the "public nuisance exception." 107 S.Ct. at 1243--46. Both phrases refer to the same regulatory takings principle.
\textsuperscript{14} See Note, Testing the Constitutional Validity of Land Use Regulations: Substantive Due Process as a Superior Alternative to Takings Analysis, 57 Wash. L. Rev. 715 (1982).
\textsuperscript{15} 260 U.S. 393 (1922).
should alter its current bundle of rights regulatory takings analysis and adopt an approach which focuses on the nature and necessity of legislative action. Section I discusses the Supreme Court's doctrine before the landmark case of Pennsylvania Coal v. Mahon. This section traces the genesis and development of the principles of noxious use, average reciprocity of advantage, and of "reasonableness" or bundle of rights balancing. Section II examines the Pennsylvania Coal decision, focusing on its relationship to precedent and the nature of the debate between Justice Holmes' majority opinion and Justice Brandeis' dissent. Section III discusses the seminal zoning case of Euclid v. Ambler Realty Co., again concentrating on its relationship with precedent and its implications for later takings jurisprudence. Section IV examines the Burger Court's development of its bundle of rights takings analysis and focuses in depth on Keystone Bituminous Coal, the first major regulatory takings case decided by the Rehnquist Court. Lastly, section V argues that in terms of precedent the Supreme Court's regulatory takings analysis is on the wrong track because it fails to balance the public interest against the private harm, and suggests the Court modify its approach, drawing from its current contract clause analysis.

I. REGULATORY TAKINGS THEORY BEFORE PENNSYLVANIA COAL

The police power, as it was understood in the first half of the nineteenth century, was limited in scope and thus thought not to conflict with the power of eminent domain, the exercise of which required compensation to the property owner. The police power

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16 See infra notes 22-142 and accompanying text.
17 See infra notes 143-80 and accompanying text.
18 272 U.S. 365 (1926).
19 See infra notes 181-214 and accompanying text.
20 See infra notes 215-343 and accompanying text.
21 See infra notes 344-405 and accompanying text.
22 The police power was seen as a "protective power" preventing injury to the community, while eminent domain involved taking for the public benefit. Appropriate regulation of property under the police power was not compensable. See Railroad Co. v. Richmond, 96 U.S. 521 (1877); Barbier v. Connolly, 113 U.S. 27, 31 (1885); Mugler v. Kansas, 123 U.S. 623, 699 (1887); Abbott, The Police Power and the Right to Compensation, 3 HARV. L. REV. 188 (1889); Freund, POLICE POWER 546-47 (1904). See also BOSEL eman, supra note 3, at 105-23.

During this time period the legal community believed that any individual burden caused by a legitimate exercise of the police power was offset by the benefits the individual gained from other uses of that power. Thus, with a proper use of the police power courts required no compensation and recognized no injury to the individual owner. See Commonwealth v. Alger, 61 Mass. (7 Cush.) 53, 102 (1851), Vanderbilt v. Adams, 7 Cow. 349 (N.Y. Sup. Ct. 1827); Baker v. Boston, 29 Mass. 183, 193, 12 Pick. 184, 194 (1831); Rose, Mahon Reconstructed:
was thought to encompass only the right of government to interfere with private property in two situations: police regulation of property which was implicitly limited to preventing common law public nuisances; and in cases of extreme necessity, such as preventing the spread of conflagration, in which the general welfare of the public was thought to be imperiled and thus thought to override all private interests. The distinction between the two aspects of the police power is important to an understanding of the development of regulatory takings doctrine because it ultimately produced the split in regulatory takings analysis which has plagued modern courts and scholars.

The economic expansion, population growth, and urbanization which occurred in the second half of the nineteenth century created social conditions which demanded expansion of government's power to interfere with private property. These demands were accommodated within the police power by expanding both attributes of the power. The state's power to prohibit injurious or nuisance uses of property was increasingly broadened to allow government to regulate use which was not a common law nuisance. Additionally, during the 1870-1930 period, the requirement that an extreme or overriding necessity must exist in order to provide a proper public purpose for non-nuisance police power regulation was continually deflated to the point where Justice Holmes could argue that the fact that legislative action had occurred should be deemed proof that such action was necessary for the general welfare and had a proper public purpose. The deflation of the requirement of overriding necessity was accomplished through legal fictions such as certain in-

Why the Takings Test is Still in a Muddle, 57 S. Cal. L. Rev. 561, 581-82 (1984), and cases cited therein. The principle that general reciprocal benefits offset any burdens made sense, however, only where the use of the police power was limited to prohibiting noxious property uses, or to appropriation of substantial noninjurious private property interests only during war, conflagration, plague, or spreading crop blight, where all property owners are imperiled and where private property becomes worthless. See infra note 23 and accompanying text. Given the more intrusive restrictions on private property attempted under the police power and upheld by courts in the late nineteenth and early twentieth centuries, it became clear that the idea of general reciprocal benefits could not justify all uses of the police power when challenged as regulatory takings. See infra note 84 and accompanying text.


Comment, Land Use Regulation and the Concept of Takings in Nineteenth Century America, supra note 22, at 894.

See infra notes 31–75 and accompanying text.

dustries that were so large or important that they became "clothed" or "affected" with the public interest and certain property possessed such "peculiar conditions" that it also "affected" the public interest, and thus was the proper subject of police power regulation. A broad examination of the development of these legal fictions is beyond the scope of this Comment, but it is important to recognize the dramatic change in the scope and nature of the police power in order to understand the development of Supreme Court regulatory takings doctrine in the 1870-1930 period. The development of this doctrine is usefully viewed as a reaction to the radically new and broadened uses of the police power of the late nineteenth and early twentieth century rather than simply as a shift in judicial interpretation of the takings clause. The important themes of the development of the Court's regulatory takings doctrine in response to increased police power action limiting property rights can be traced through three lines of cases which were to later clash in Pennsylvania Coal. The cases show that the Supreme Court actually developed three similar, but independent, regulatory takings analyses.

A. The Police Power To Prevent Noxious Uses of Property

One line of cases is that which involved regulatory takings challenges to government regulation of public nuisance or noxious uses of private property. State and local governments' police power to prohibit public nuisances predates the United States Constitution. The history of the takings clause indicates that it was not a limit on

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29 In other words, there was a proper public purpose for the regulation.

30 This Comment generally ignores regulatory takings claims in the context of utility rate-making or regulation of railroads. Although important, these cases involve courts applying various legal fictions which significantly alter their takings analysis. Perhaps the most important of these cases is Chicago, B. & Q. Ry. v. Drainage Comm'rs., 200 U.S. 561 (1906). Also important to a complete analysis of regulatory takings is an examination of the change in the notion of what "property" is which took place in the 1875–1925 period. See generally Cormack, Legal Concepts in Cases of Eminent Domain, 41 Yale L.J. 221 (1931); Kratovil & Harrison, Eminent Domain—Policy and Concept, 42 Cal. L. Rev. 596 (1964).

the government's common law public nuisance police power.\textsuperscript{32} Early on, legislatures used this power to abate property uses which were recognized as common law nuisances. As exercises of the police power interfering with private property broadened in the latter half of the nineteenth century, the extent of this power came increasingly into question in the context of fourteenth amendment due process clause challenges.\textsuperscript{33} In the last quarter of the nineteenth century the Court gradually accepted the argument that the fourteenth amendment's guarantee that "no person shall be deprived of life, liberty or property without due process of law" mandated that the police power must not arbitrarily or discriminatorily interfere with private property.\textsuperscript{34} Thus, the test for this aspect of the due process guarantee,

\begin{flushleft}
\textsuperscript{32} See supra note 4; infra note 33.

All persons born or naturalized in the United States, subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. Amend. XIV.
\end{flushleft}

It is undisputed that, at the time of its adoption, the United States Constitution's takings clause and other provision in the Bill of Rights were intended to restrict only the powers of the federal government. See Warren, The New "Liberty" Under the Fourteenth Amendment, 39 Harv. L. Rev. 431, 433--35 (1926) (an interesting account of how James Madison sought to bind the states with the Bill of Rights, yet the 1789 Congress explicitly declined this approach). In Barron v. Baltimore, 32 U.S. (7 Pet.) 243 (1833), the United States Supreme Court had specifically held that the Bill of Rights was not intended as a limitation on the powers of the states. Not surprisingly, with the passage of the fourteenth amendment following the Civil War, litigants began to argue that state legislation violated both the privileges and immunities clause and the due process clause of that amendment in order to gain federal protection of individual rights. Arguments for federal protection based on the privileges and immunities clause were unsuccessful. See Slaughter House Cases, 83 U.S. (16 Wall.) 36 (1873); Mugler v. Kansas, 123 U.S. 623, 657--59 (1887); McElvaine v. Brush, 142 U.S. 155 (1891); Maxwell v. Dow, 176 U.S. 587 (1900). Litigants met with more success in obtaining some protection for individual rights under the due process clause. See infra note 34 and accompanying text.

\textsuperscript{34} In other words, the Supreme Court accepted the argument that "due process of law" had a substantive element, it prohibited the states from depriving the individual of the fundamental rights of "life, liberty or property" other than in furtherance of a proper public purpose. This was very much a "natural law" argument based on courts' duty to protect the fundamental rights of man which the United States Constitution and the state constitutions were thought to embody. See Grant, The "Higher Law" Background of the Law of Eminent Domain, 6 Wis. L. Rev. 67 (1931). Various forms of this argument had been accepted by a few state courts before it found favor in the United States Supreme Court. See Corwin, The Doctrine of Due Process of Law Before the Civil War, 24 Harv. L. Rev. 366, 460--79 (1911). Barbier v. Connolly, 133 U.S. at 31, is one of the earliest Supreme Court opinions recognizing a sub-
which became known as substantive due process, developed principally in the context of police power regulation which prohibited what state and local governments deemed noxious uses of property.35

The 1887 case of Mugler v. Kansas36 is the Supreme Court’s first comprehensive analysis of the relationship between states’ police power and the due process and takings clauses. Mugler involved an act of the Kansas legislature which prohibited the manufacture or sale of intoxicating liquors within the state. The appellants, owners of breweries, argued that the act diminished the value of their property without compensation and thus deprived them of property in violation of the fourteenth amendment.37 In other words, the claim was that “due process” required that the fifth amendment’s takings clause apply to the states and required just compensation be paid when police power regulations substantially diminish the value of private property interests. The Court rejected this claim, reaffirming the absolute power of states to enact measures which they deem necessary and appropriate to protect the public from injurious uses of private property:

The power which the States have of prohibiting such use by individuals of their property as will be prejudicial to the health, the morals, or the safety of the public, is not . . . burdened with the condition that the State must compensate such individual owners for pecuniary losses they may sustain, by reason of their not being permitted, by a noxious use of their property, to inflict injury upon the community. 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

stantive element in the guarantee of “due process of law.” Before the adoption of the fourteenth amendment, the Court had reasoned that the phrase “due process of law” in the fifth amendment had its origins in the provision of the Magna Carta guaranteeing deprivation of rights only according to “law of the land.” Murray’s Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 276 (1855). Thus, the Court had previously held the “due process of law” guarantee to constitute only procedures according to pre-existing laws which were accepted by the people at the time of the ratification of the United States Constitution, all validly enacted laws thereafter, and according to English common law due process rights. Id. at 276–77.

35 Substantive due process also developed in the context of ratemaking cases for utilities and railroads, both of which were found to be “affected” or “clothed” with the public interest and thus subject to regulation. In these cases, the substantive due process analysis concentrated on whether rates had been merely arbitrarily set, or set so low as to amount to a confiscation of private property. See infra note 84.

36 123 U.S. 623 (1887). See Barbier, 113 U.S. at 31, for an earlier discussion of the relationship between the police power and the takings clause.

37 123 U.S. at 654, 657, 664.
public use, or from depriving a person of his property without due process of law. In the one case, a nuisance only is abated, in the other, unoffending property is taken away from the innocent owner. 38

Although Justice Harlan's majority opinion in *Mugler* does at times speak of the police power to protect or promote public well being, it is clear that the Court is addressing a legislature's ability to restrict injurious or nuisance uses of property. 39 Justice Harlan refers to the ability to prohibit "noxious use" in recognition of the fact that legislatures' power to declare certain uses to be public nuisances extends beyond prohibition of what courts have already held to be common law nuisances. 40 In Harlan's view, such a determination by a state legislature should be shown great deference and the extent of legislature's power to declare certain private property uses to be public nuisances is limited to review under the substantive due process and equal protection requirements of the fourteenth amendment. 41 The *Mugler* Court reasoned that the Kansas act satisfied the requirements of substantive due process because it had a "real and substantial relation" to the protection of the public health, moral, and safety and was not simply an invasion of constitutional rights. 42

Two subsequent non-land use cases, *Powell v. Pennsylvania* 43 and *Lawton v. Steele*, 44 represent the Supreme Court's commitment to, and development of, the substantive due process test of regulatory takings claims. 45 In *Powell*, the Court upheld a Pennsylvania act which prohibited the manufacture and sale of oleomargarine butter for the protection of the public health and to prevent adulteration and fraud in the sale of dairy products. 46 Under the act the appellant

38 Id. at 669.
39 See id. at 668–69; 657–74. See also infra note 55 and accompanying text.
41 Mugler, 123 U.S. at 660–63.
42 Id. at 661–62.
43 127 U.S. 678 (1888).
44 152 U.S. 133 (1894).
45 The Supreme Court has only recognized that "property," which includes both common law personal property and real property, must be taken. See United States v. Security Industrial Bank, 459 U.S. 70, 75–78 (1982). While it is impossible to simply separate the "property" inquiry from the overall regulatory takings analysis, this Comment will not examine in depth what is or is not a constitutional property interest. See generally Oakes, "Property Rights" in Constitutional Analysis Today, 56 WASH. L. REV. 583 (1981); B. ACKERMAN, PRIVATE PROPERTY AND THE CONSTITUTION (1977).
was fined one hundred dollars for selling oleomargarine butter and argued that the act deprives him of property without due process of law under the fourteenth amendment.\(^{47}\) The Supreme Court upheld the state court's holding that the appellant's offer to prove that his oleomargarine butter was wholesome was irrelevant to the issue of whether the Act violated the fourteenth amendment.\(^{48}\) The \textit{Powell} Court simply stated that the wholesomeness of the business of manufacturing oleomargarine was a legislative question.\(^{49}\) As such, the Court accorded the legislation the requisite presumption of validity, and found that it bore a "real and substantial relation" to its legitimate aim, the protection of public health.\(^{50}\) This relation was all that was required by the fourteenth amendment, and thus the plaintiff was not entitled to compensation for the loss of the right to use or sell his property validly manufactured before the enactment of the law.\(^{51}\)

\textit{Lawton} involved a New York fish preservation statute which declared all fishing equipment aside from hook and line or handrod to be a public nuisance which any person could destroy without compensation to the owner.\(^{52}\) In upholding the law as a valid police power exercise, the Supreme Court discussed the limits of the police power regulation of private property:

\begin{quote}
[the police power] is universally conceded to include everything essential to the public safety, health, and morals and to justify the destruction or abatement of whatever may be regarded as a public nuisance...the State may interfere wherever the public interests demand it, and in this particular [sic] a large discretion is necessarily vested in the legislature to determine, not only what the interests of the public require, but what measures are necessary for the protection of such interests.\(^{53}\)
\end{quote}

The \textit{Lawton} Court then set out the classic statement of the proper public ends-reasonable means-substantive due process test:

\begin{quote}
To justify the State in thus interposing its authority in behalf of the public it must appear, first, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and, second, that the means are reason-
\end{quote}

\(^{47}\) Id. at 682–83.  
\(^{48}\) Id. at 681–83; 684–86.  
\(^{49}\) Id. at 684–85.  
\(^{50}\) Id. at 684–87.  
\(^{51}\) Id. at 687. \textit{See also} id. at 698–99 (Field, J., dissenting).  
\(^{52}\) \textit{Lawton}, 152 U.S. at 135.  
\(^{53}\) Id. at 136.
ably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals.54

Although, like the Mugler opinion, Lawton can be read as encompassing an unfettered police power which extends beyond prohibiting only harmful private property use, the Court goes on to distinguish cases which involved invalid police power exercises, reasoning that they involved "a practical inhibition of occupations harmless in themselves which might be carried on without detriment to the public interests."55 The Lawton Court also reasoned that, although it must be given much discretion, "the legislature has no right to declare that to be a nuisance which is clearly not so."56 Lawton and Powell are best viewed as extensions of the Mugler doctrine which viewed substantive due process as a limit on a legislature's power to regulate, but ultimately allowed legislatures to prohibit nuisance or near-nuisance use of private property unfettered by the takings clause.57 The disenfranchised property interest in all three cases was judged by a state legislature to be injurious to the public, and the Supreme Court was willing to uphold the legislative judgment and means in all three cases as reasonable. All three Courts believed that the sole regulatory taking constitutional test of a state police power regulation is whether an individual has been deprived of property without substantive due process.

The case of Dobbins v. Los Angeles,58 in which the Supreme Court invalidated an exercise of the police power, is important to an analysis of regulatory takings because it indicates the limits of legislatures' police power. Dobbins involved two ordinances adopted by the city council of Los Angeles. The first ordinance set the boundaries of the district where gasworks could be constructed.59 Pursuant to the ordinance, the appellant had contracted to construct gasworks, purchased property, obtained a permit and constructed the foundations of the works.60 The city council then passed a second ordinance which limited the boundaries of the district and by doing so made it unlawful for the appellant to construct her gasworks.61 The Dobbins

54 Id. at 137. See Goldblatt v. Town of Hempstead, 369 U.S. 590, 594-95 (1962).
55 Lawton, 152 U.S. at 138.
56 Id. at 140.
57 See Mugler, 123 U.S. at 658-69; Powell, 127 U.S. at 684-87; Lawton, 152 U.S. at 138-39.
58 195 U.S. 223 (1904).
59 Id. at 224. Dobbins actually involved a rudimentary zoning ordinance.
60 Id. at 224, 238.
61 Id. at 225.
Court reasoned that despite the impairment of the appellant’s property rights, the police power ordinance would be valid if the gasworks’ operation or the changed character of the community made the prohibition necessary to protect the health and safety of the public. However, based on the demurrer to the facts, the Court assumed that the gasworks would be constructed so as to not interfere with the public health and safety, its operation was not incompatible with the surrounding land use, and community conditions had not changed. The Dobbins Court was not willing to allow the city council to declare a compatible use of property to be a public nuisance. Accordingly, it held that the ordinance was not necessary to protect the public and thus was an “arbitrary and discriminatory exercise of the police power which amounts to a taking of property without due process of law and an impairment of property rights protected by the Fourteenth Amendment to the Federal Constitution.” In other words, a regulatory taking was found using the Lawton ends-means substantive due process test.

Increasingly the theme of changed community conditions was relied upon by the Court to uphold noxious use police power restrictions of private property uses. The case of Reinman v. Little Rock involved a city ordinance that closed an established livery stable as a noxious or nuisance use. The Supreme Court upheld the ordinance as reasonable in light of the changed nature of surrounding uses. Although the livery stables were now practically worthless, no compensation was constitutionally required. Similarly, in Hadacheck v. Sebastian the Court upheld a city ordinance closing a brickyard, causing a decline in the value of the affected property from $800,000 to $60,000. Despite the fact that the property was originally located

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62 Id. at 238.
63 Id. at 238–40.
65 Provided that the government sought only to use the police power to prohibit a noxious use or abate a nuisance only, the Lawton ends-means substantive due process test had to be satisfied. However, under the guise of abating a public nuisance, property could not be “appropriated to public use” by the police power. Sweet v. Rechel, 159 U.S. 380, 396–400 (1895). In other words, just compensation was required if the police power was used not only to abate the public nuisance, but to take title and improve the property for resale by the state or for use as public property. See id.
68 Id. at 176–78.
69 239 U.S. 394 (1915).
outside city limits and had been operated as a brickyard for a number of years, the Court found that the prohibition of brickmaking as a nuisance or noxious use was not arbitrary or unjustly discriminatory and thus the Constitution did not require that just compensation be paid to the brickyard owner.\textsuperscript{70} Reinman and Hadacheck are important because they demonstrate the expansion in scope of the police power to prevent public nuisances.\textsuperscript{71} The cases rest on the idea that a certain land use with spillover effects can become a public nuisance when it is no longer compatible with the surrounding uses and that, if a legislature finds the land use to be noxious, the use can be abated despite the detrimental impact on the individual.\textsuperscript{72}

In sum, the noxious use line of cases demonstrates that the Supreme Court viewed the fourteenth amendment guarantee against the deprivation of property without due process of law as mandating a substantive due process test. The fifth amendment guarantee against the taking of property without just compensation was incorporated into this test in the sense that a police power regulation which failed the \textit{Lawton} ends-means substantive due process test constituted an unconstitutional taking of private property without compensation. Where the police power was being used to regulate private property interests or uses because they were injurious to the health, safety, and welfare of other individuals, the takings clause principle of protection of private property rights was effectuated only by requiring the government regulation be reasonably necessary to prevent a noxious use and not be an unnecessary interference with private property.\textsuperscript{73}

Proponents of property regulation used the label of noxious use regulation to justify increasingly restrictive regulation of property interests which were not common law nuisances. Yet, the Supreme

\textsuperscript{70} Id. at 410–11.
\textsuperscript{71} Along with Dobbins, Reinman and Hadacheck also demonstrate the inability of the public nuisance police power to accommodate the required land use management desires of local government and the Court attempting to fit what was obviously new and necessary land use control within its traditional concepts.
\textsuperscript{72} See Hadacheck, 239 U.S. at 410. Other cases which involved changing community conditions justifying the use of the police power to prevent public nuisances include: St. Louis Poster Advertising Co. v. St. Louis, 249 U.S. 269 (1919) (billboard prohibition upheld as reasonable because it discourages thieves, prostitutes, derelicts, etc.); Thomas Cusack Co. v. Chicago, 247 U.S. 528 (1917) (ordinance prohibiting billboards upheld as reasonable as a prohibition of negative impacts on neighborhood, including aesthetics); Murphy v. California, 225 U.S. 623 (1912) (ordinance prohibiting billiard hall as harmful to the public upheld).
\textsuperscript{73} The "not unduly oppressive" aspect of the \textit{Lawton} ends-means substantive due process test was not interpreted by the Court as mandating a least restrictive means analysis in any of these noxious use cases. See Hadacheck, 239 U.S. at 413–14.
Court was very reluctant to interfere with this traditional use of police power. Thus, in almost every case the Court gave much deference to any legislative judgment and upheld the regulation of uses which state and local governments found to be noxious. Yet, Dobbs and dicta from other cases indicate that some legislative or judicial finding of endangerment to the public or incompatibility with other uses had to support classification and abatement of a particular use as noxious or a public nuisance. The absolute nature of an exercise of the police power to prevent noxious uses of property was never questioned. If valid under the Court’s ends-means substantive due process test, the use of the police power did not take property in violation of the United States Constitution.

B. Police Power Interference with Private Property to Improve the Public Condition: The Roots of the Bundle of Rights Analysis

A review of Supreme Court regulatory takings jurisprudence reveals a second type of police power regulatory takings analysis developing out of the more intrusive uses of state police power in the 1870-1930 period. While the legislature’s ability to use its police

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75 In Northwestern Laundry v. Des Moines, 239 U.S. 486 (1916), a unanimous Supreme Court upheld an act which declared the emitting of smoke within certain city limits to be a public nuisance. Justice Day reasoned:

So far as the Federal Constitution is concerned, we have no doubt the State may by itself or through authorized municipalities declare the emission of dense smoke in cities or populous neighborhoods a nuisance and subject to restraint as such; and that the harshness of such legislation, or its effect upon business interests, short of a merely arbitrary enactment, are not valid constitutional objections. Nor is there any valid Federal constitutional objection in the fact that the regulation may require the discontinuance of the use of property or subject the occupant to large expense in complying with the terms of the law or ordinance.

Id. at 492. See also Mugler, 123 U.S. at 658 (“The acknowledged police power of a State extends often to the destruction of property. A nuisance may be abated. Everything prejudicial to the health or morals of a city may be removed.” (quoting Justice McLean’s opinion in the License Cases, 46 U.S. (5 How.) 513, 532 (1846))); California Reduction Co. v. Sanitation Reduction Workers, 199 U.S. 306, 324–25 (1905) (“the clause prohibiting the taking of private property without compensation is not intended as a limitation of those police powers which are necessary to the tranquillity of any well-ordered community, nor of that general power over private property which is necessary for the orderly exercise of all governments. It has always been held that the legislature may make police regulations, although they may interfere with the full enjoyment of private property, and though no compensation is made.”); Hadacheck, 239 U.S. at 410 (“It is to be remembered that we are dealing with one of the most essential powers of government, one that is the least limitable. It may indeed seem harsh in its exercise, usually is on some individuals, but the imperative necessity for its existence precludes any limitation upon it when not exercised arbitrarily. A vested interest cannot be asserted against it because of conditions once obtaining.”).
power to prohibit public nuisances was considered to be absolute, in the years following the enactment of the fourteenth amendment the Supreme Court became increasingly wary of, and sought to limit, uncompensated government interference with innocent, noninjurious uses of private property.\textsuperscript{76}

The Supreme Court first attacked this interference in the context of inverse condemnation claims resulting from government proprietary action. In \textit{Pumpelly v. Green Bay Co.},\textsuperscript{77} the Court held that the owner of land was entitled to just compensation when his property was flooded after the government-authorized construction of a dam caused a rise in the water level of a lake.\textsuperscript{78} The \textit{Pumpelly} Court reasoned that when private property is physically invaded to a substantial extent by government action, the government is required to use the power of eminent domain.\textsuperscript{79} For the next thirty years the Supreme Court's view continued to be that a physical invasion was required before a landowner would be entitled to just compensation, and that any consequential or incidental damages resulting from government action were strictly noncompensable.\textsuperscript{80}

The case of \textit{Richards v. Washington Terminal Company},\textsuperscript{81} which was decided forty years after \textit{Pumpelly}, shows how the just compensation requirement further expanded in a manner which brought it into conflict with police power regulations. \textit{Richards} involved a property owner whose land was located next to a railroad tunnel that was equipped with a fan that blew out smoke and fumes. The railroad was operated by a private company under congressional authorization. The Supreme Court held that Congress could legalize what would otherwise be a public nuisance, but it could not confer immunity from action for a private nuisance of such a character as to amount, in effect, to a taking of private property for public use.\textsuperscript{82}

\textsuperscript{76} While this section deals with the application of the takings clause to state police power exercises, the reader should note that the Supreme Court first held that the takings clause guarantee of just compensation for private property taken for public use applies to the states through the fourteenth amendment guarantee of due process of law in the context of an 1897 case reviewing a state exercise of eminent domain. See Chicago, B. & Q. Ry. v. Chicago, 166 U.S. 226, 235–36 (1897). In \textit{Chicago, B. & Q. Ry.}, the Supreme Court's holding is based on a natural law rationale rather than a historical incorporation argument. See id.

\textsuperscript{77} 80 U.S. 166 (1871).

\textsuperscript{78} Id. at 177.

\textsuperscript{79} Id. at 181.


\textsuperscript{81} 233 U.S. 546 (1914).

\textsuperscript{82} Id. at 553.
The operation of the railroad affected the plaintiff's property with such direct, peculiar and substantial damages as to diminish its value to an extent which required compensation.83 *Pumpelly* and *Richards* arose out of government agents' failure to use their delegated powers of eminent domain to condemn all property affected by their operations that furthered the public interest. These two cases represent the breakdown of the requirement that an appropriation of title is necessary to effect a taking. In addition, these cases stand for the broader principle that the takings clause requires compensation for innocent owners whose non-noxious property interests are actually or effectively appropriated by government action to increase the general welfare. A number of pre-*Pennsylvania Coal* police power regulation cases share this theme. 84 While a detailed examination of

83 *Id.* at 556–57.


Police power regulation of non-noxious property interest was allowed by the Court under two different rationales. On the one hand, the Court disregarded the implicit end of regulation as preventing nuisances or near nuisances and countenanced the increased regulation of non-noxious private property interests by reasoning that the police power encompassed the power to regulate to promote the "public convenience." *See* Bacon v. Walker, 204 U.S. 311 (1907) (the police power "is not confined to the suppression of what is offensive, disorderly or unsanitary. It extends to so dealing with the conditions which exist in the State as to bring out of them the greatest welfare of the people."). On the other hand, the Court allowed the transformation of the judicial requirement of "public necessity" as providing the proper public purpose for police power regulation. By finding geographical areas possessing "peculiar conditions affecting the public interest," and certain businesses providing such a public function or service that they were "affected" or "clothed" with the public interest, the Court found more and more regulation to be justified by "necessity" and thus within the scope of the police power. *See supra* notes 27–29 and accompanying text. In combination, these two trends produced a new judicial view of a broad police power which frequently appropriated non-noxious private property interests through regulation because the nature of the property usually was found to implicate the public interest. *But see* *Pennsylvania Coal*, 260 U.S. at 412–14 (no public interest in private deed reserving rights); Tyson Bros. v. Banta, 273 U.S. 418 (1927) (no public interest in the price of theater tickets).

However, as the requirement of extreme public necessity as the justification for depriving the individual of non-noxious private property broke down and new and greater restrictions on private property were attempted under the police power, the Court began to view the takings clause as a limitation on the use of the police power in lieu of the power of eminent domain. In the context of utility ratemaking cases, the Court added the requirement that police power regulation of property which was not a public nuisance could not amount to a "practical destruction" or "confiscation" of that property. *See* Reagan v. Farmers' Loan & Trust Co., 154 U.S. 362, 397 (1894); Smyth v. Ames, 169 U.S. 466, 525–26 (1898); Knoxville v. Knoxville Water Co., 212 U.S. 1, 16–19 (1909) and cases cited therein.
dicta would not be meaningful, at least three land use cases which focus on the development of the conflict of the proper role of eminent domain and of the police power deserve mention.

The case of *Curtin v. Benson*\(^{85}\) concerned regulations promulgated by the Secretary of the Interior that addressed the problem of herds of cattle roaming around the park. The regulations attempted to solve this problem by prohibiting the grazing of cattle on private lands within Yosemite Park. Apparently, at this time such grazing was regarded as the primary, if not only, practical use of these lands. The issue before the Supreme Court was whether the federal government had the power to regulate private lands. The unanimous Court did not explicitly decide this question because it held that, assuming the United States had power over these private lands either as sovereign or proprietor, the regulations were nevertheless ultra vires because they destroyed the essential use of private property.\(^{86}\) Justice McKenna reasoned:

> [the] order is not . . . a regulation of the use of the land, as an order to fence the lands might be, but is an absolute prohibition of use. It is not a prevention of a misuse or illegal use but the prevention of a legal and essential use, an attribute of its ownership, one which goes to make up its essence and value. To take it away is practically to take his property away, and to do that is beyond the power of sovereignty, except by proper proceedings to that end.\(^{87}\)

Thus, the *Curtin* Court held that the end sought to be accomplished by the regulations, prohibition of a significant non-noxious use of the land, could be obtained only through the exercise of the power of eminent domain.

Similarly, in *Los Angeles v. Los Angeles Gas Corp.*,\(^{88}\) the Court struck down a city ordinance which required a franchised utility to remove its poles and wires as necessary in order to aid the construction of a new municipal system. The Court rejected any noxious use justification for the regulation, reasoning that the company's facilities posed no threat to the public.\(^{89}\) Similarly, the Court rejected the argument that extreme or overriding necessity might justify uncompensated interference with private property under the police power, reasoning that there was "no real public necessity" for constructing

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\(^{85}\) 222 U.S. 78 (1911).

\(^{86}\) Id. at 86–87.

\(^{87}\) Id. at 86. See *infra* note 322 and accompanying text.

\(^{88}\) 251 U.S. 32 (1919).

\(^{89}\) Id. at 38.
a new city-owned system. Although the city had the right to erect a system of its own, it could not violate the company's franchise rights, nor compel it to aid in the endeavor, without compensating the utility:

[we are not concerned with the duty of the corporation operating a public utility to yield uncompensated obedience to a police measure adopted for the protection of the public, but with a proposed uncompensated taking or disturbance of what belongs to one lighting system in order to make way for another. And this the Fourteenth Amendment forbids.]

Like the Curtin Court, the Los Angeles Gas Corp. Court invalidated a police power regulation which substantially interfered with private uses that did not constitute public nuisances. Although their reasoning is not entirely consistent, both Courts held that due process of law would not permit the prohibition of property uses not conflicting with the public interest. Such interference was a taking of private property without due process of law.

However, in Block v. Hirsh the Supreme Court upheld a federal rent control statute which substantially interfered with a noninjurious use of private property. Block concerned an act of Congress which addressed the rental housing shortage in the District of Columbia resulting from the World War I effort. The act "cut down" the landowner's property and contract rights by allowing tenants to remain in their apartments at the rent they had been paying, unless modified by a rent board. The Act was challenged under the fifth amendment by a landowner who desired to use a previously rented room for his own residential purposes rather than renew his tenant's expired lease.

90 Id. at 40. Thus, apparently by 1919 the Supreme Court believed that the takings clause did impose some substantive limits on states' police powers because the clause was held to be part of "due process." But see supra note 75.
91 The Los Angeles Gas Corp. Court's analysis has much in common with the enterprise-arbiter theory later advanced by Professor Joseph Sax. Compare 251 U.S. at 38-40; Sax I, supra note 3, at 61-70.
92 256 U.S. 135 (1921). In Marcus Brown Holding Co. v. Feldman, 256 U.S. 170, 198 (1921), the Supreme Court also reasoned that the Block analysis applied to state rent control laws. See also Levy Leasing Co. v. Siegel, 258 U.S. 242, 246-50 (1922).
93 Id., 256 U.S. at 153-54.
94 Id. at 157.
95 Id. at 154. Under the Act, the owner did have the right to possession "for actual and bona fide occupancy by himself, or his wife, children, or dependents . . . upon giving thirty days' notice in writing." Apparently, Hirsh did want the premises for his own use, but did not provide thirty days notice because he denied the validity of the Act. Id.
Writing for the majority, Justice Holmes reasoned that the public interest was implicated because housing is a necessity of life, space in Washington was monopolized in comparatively few hands, and the existing condition caused by the federal government's war effort was dangerous to public health. In other words, this interference with a noninjurious use of private property did have a public purpose because the extreme situation affected the public interest. As with the old conflagration or wartime cases, "public necessity" was found to permit regulation which significantly burdened owners of nonnoxious private property.

Yet, Justice Holmes further reasoned that such a police power regulation could go "too far" and amount to a taking without due process of law. In the case at issue, the statute did not go "too far" because it was only a temporary measure and provided the landlord a reasonable rent. The Block Court, in effect, held that police power regulation of noninjurious use of private property is constitutionally permissable if the regulation is reasonable and addresses a public exigency. Factors which go to establishing the reasonableness of the regulation are the diminution in value and whether the regulation provides an economic use to the owner, and the duration and extent of the redefinition of legal property rights.

Contrary to the suggestion of some modern commentators, prior to Pennsylvania Coal v. Mahon the Supreme Court struggled with and accepted the principle that the takings clause limits police power regulation of private property. The Court realized that where the police power is being used to solve a public problem, or to increase the public welfare, by redistributing to the public private property interests that are compatible with surrounding uses to the public, a clear conflict with the takings clause can develop. The Court was not willing to allow the use of the police power for the purpose of significantly redistributing noninjurious private property rights to the public. However, under its reasonableness balancing approach, the Court would uphold reasonable regulations addressed to public exigencies despite the fact that regulation did take some private property uses or interests for public use. Thus, where the police

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97 Id. at 156.
98 Id. at 155–56.
99 See supra notes 22, 84.
100 Block, 256 U.S. at 156.
101 Id. at 156–57.
102 Id. at 157–58.
103 See id. at 156.
power was being used to regulate land use which could not be prohibited as a public nuisance, the Supreme Court effectuated the takings clause guarantee of individual property rights with a reasonableness analysis, rather than strictly a Lawton ends-means substantive due process approach. The reasonableness balancing test examines the magnitude of the burden to the property owner's interest, and therefore parallels the approach to inverse condemnation cases such as Pumpelly and Richards. The Court was not willing to find a taking unless a substantial degree of invasion or diminution in value was shown. In addition, the Block reasonableness balancing test weighs the magnitude of the burden to the individual against the benefit to the public interest. Although the reasonableness balancing test applied only to non-noxious use cases, it is the forerunner of the Court's modern "bundle of rights" approach to all regulatory takings claims.

C. The Principle of Average Reciprocity of Advantage As a Validator of Police Power Impairment of Private Property Rights to Improve Public Welfare.

The Supreme Court's pre-Pennsylvania Coal regulatory takings decisions also recognized another category of cases in which the police power was exercised to appropriate non-noxious private property rights. These cases involved the use of the police power to actively promote private economic expansion. The cases rested on

104 This "reasonableness" test is not the Lawton ends-means substantive due process reasonable means analysis. See supra note 106; Humbuck, A Unifying Theory for the Just Compensation Cases: Takings, Regulation and Public Use, 34 Rutgers L. Rev. 243, 274-75 (1982). But see Stoebuck, supra note 3, at 1065.

105 In the public welfare regulation cases, the regulatory interference caused by the police power could be analyzed in a manner similar to inverse condemnation cases, such as Pumpelly and Richards, where the interference is caused by government enterprises. In both these types of cases, the government is burdening private property interests or uses thought to be compatible with surrounding uses and noninjurious in themselves. On the other hand, police power regulation of noxious uses for private property demanded an alternative analysis because the regulated use of the private property was the direct cause of the public problem.

106 See Block, 256 U.S. at 156-57; Pennsylvania Coal v. Mahon, 260 U.S. 393, 413, 415-16 (1922). This second element of the Block reasonableness test makes the test very similar to the Lawton ends-means substantive due process test used for police power regulations of noxious uses. However, at least theoretically, the Block reasonableness test is more restrictive than the ends-means substantive due process test because while the latter test presupposes an absolute police power to achieve proper ends, under the reasonableness test the magnitude of the burden to the individual owner alone could constitute a taking even if the burden is necessary to achieve the government ends.

107 See infra notes 223-27 and accompanying text.
the idea that the regulation provides an average reciprocity of advantage – the reciprocal benefits flowing to the burdened party as a result of the regulation make it fair under the circumstances for a few individuals to bear the entire burden of the regulation. Like the Block reasonableness test, this principle was developed by the Supreme Court in order to uphold police power regulation without compensation because the regulations were thought to be reasonable.

Justice Holmes appears to have originated the phrase “average reciprocity of advantage” in *Jackman v. Rosenbaum Co.*,\(^{108}\) and he explicitly recognized this principle as part of the constitutional regulatory takings test in that case and in *Pennsylvania Coal v. Mahon*.\(^{109}\) Unfortunately, his presentation of the theory in both cases was brief and rather nebulous.\(^{110}\) Justice Holmes defined average reciprocity of advantage in these two cases by using precedent. We must therefore look to the earlier caselaw in order to define the role of this principle in the constitutional regulatory takings test.

*Wurts v. Hoagland*,\(^{111}\) which is cited in *Jackman*, is an early reciprocity of advantage case. In *Wurts*, the Supreme Court held

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\(^{108}\) 260 U.S. 22 (1922).

\(^{109}\) 260 U.S. 393 (1922).

\(^{110}\) As a result of Justice Holmes' nebulous presentation of the principle of average reciprocity of advantage, and the fact that the principle seemed to disappear from the Supreme Court’s regulatory takings analysis until raised by the *Penn Central Transportation* dissent, modern commentators have not agreed on the precise meaning of Holmes' phrase. Compare Heyman & Gilhool, *The Constitutionality of Imposing Increased Community Costs on New Suburban Residents Through Subdivision Exactions*, 73 Yale L.J. 1119, 1129 n.47 (1964) (the phrase means correlative benefit, and to Justice Holmes, but not Justice Brandeis, it meant some special kind of return not enjoyed by the community at large); Oakes, “Property Rights” *In Constitutional Analysis Today*, 56 Wash. L. Rev. 583, 604 (1981) (the phrase was Holmes' way of saying that a public interest existed); D. Mandelker, *Land Use Law* 21 (1982) (“A zoning ordinance illustrates a land use ordinance conferring an average reciprocity of advantage. All the land within a residential district is burdened by the residential land use restriction, but all the land is also benefitted. All property owners within the district suffer the burden but gain from the benefit because all of the land is equally restricted. Benefits cancel burdens. There is no taking.”); Rose, *Mahon Reconstructed: Why the Takings Test is Still in a Muddle*, 57 S. Cal. L. Rev. 561, 581–82 (1984) (Holmes was referring to the traditional principle that justified police power regulation always produces reciprocal benefits which implicitly compensate all owners); Van Alstyne, *Taking or Damaging by Police Power: The Search for Inverse Condemnation Criteria*, 44 S. Cal. L. Rev. 1, 5–6 (1971) (as coined by Justice Brandeis, the phrase assumes a system of reciprocal duties and benefits between individual property owners and implicitly regards the constitutional mandate for just compensation as satisfied in non-monetary form—the owner is compensated for losses sustained in regulation by sharing in the general benefits which regulations secure). See also Van Alstyne, *Modernizing Inverse Condemnation: A Legislative Prospectus*, 8 Santa Clara Lawyer 1, 18 (1967).

\(^{111}\) 114 U.S. 606 (1885).
that a New Jersey law providing for the common drainage of any tract of marsh land upon application of at least five owners of separate lots in the tract did not deprive any of the owners of their property without due process of law. The Court reasoned:

[i]t is the power of the government to prescribe public regulations for the better and more economical management of property of persons whose property adjoins, or which . . . can be better managed and improved by some joint operation. The principle . . . is, to make an improvement common to all concerned, at the common expense of all.112

Thus, Wurts stands for the principle that the police power can be used to force unwilling owners to surrender property interests and join in a mutual development scheme because the owners themselves will share equally in the benefits of any development.113 The peculiar nature of the marsh lands was thought to necessitate government involvement, or in other words, to implicate the public interest. Commenting that this principle has long been maintained by the courts of New Jersey, the Supreme Court explicitly noted that this proper (and uncompensated) exercise of police power did not derive from the power of taking private property for the public use under the right of eminent domain or the (police) power to suppress a nuisance dangerous to the public health.114 Rather, it derived from the police power to regulate when necessary to further the general welfare.115

Fallbrook Irrigation District v. Bradley,116 a second reciprocity of advantage case cited by Justice Holmes in Jackman, concerned a California Act which assessed property owners, but not non-owners, within a district for the cost of an irrigation system to improve arid lands within that district. Using essentially the same rationale as Wurts, the Supreme Court held that the act was a valid police power regulation with a legitimate public use and did not unconstitutionally deprive land owners of their property.117 The Court noted that, "[s]tatutes authorizing drainage of swamp lands have frequently been upheld independently of any effect upon the public health, as reasonable regulations for the general advantage of those who are

112 Id. at 615.
113 Id. at 611-12. See also Head v. Amoskeag, 113 U.S. 9, 22 (1884).
114 Id. at 614.
115 Wurts, 114 U.S. at 114.
116 164 U.S. 112 (1896).
117 Id. at 160-64.
treated for this purpose as owners of a common property.” The Court reasoned that this principle applied to regulations setting up irrigation districts for arid lands. Again the principle is that the police power can be used to force economic development of a private property interest where such development is required for the benefit of the surrounding property interests and where such development in turn increases the value of the owner’s property.

Thus, the line of cases Justice Holmes later characterized as resting on average reciprocity of advantage developed in the context of land use regulation of certain extreme lands. In certain areas property rights were thought so interdependent that all private property use affected the public interest. There the criteria of necessity was held to be satisfied, thus there was a public purpose, and the police power could be used to compel owners to surrender noninjurious property interests and participate in common development. Owners were usually paid compensation for the land actually used for irrigation or drainage ditches. Compensation was not constitutionally required because the improvements to private property provided by the exercise of the police power offset the appropriation of a forced share contribution and the loss of property rights. However, if an owner in an appropriation district showed that he or she did not share in the common improvements, the exercise of the police power was invalid as depriving the owner of property without due process of law.

Justice Holmes himself applied the reciprocal benefits principle in an appropriation scheme outside of land use regulation in Noble State Bank v. Haskell. In Noble State Bank the Supreme Court upheld as valid an Oklahoma act which created a state Depositors’ Guaranty Fund, which was funded by an assessment of one percent of banks’ average daily deposits. The plaintiff bank asserted that because it

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118 Id. at 163. The Supreme Court further reasoned: “In such a case the absolute right of each individual owner of land must yield to a certain extent or be modified by corresponding rights on the part of other owners for what is declared upon the whole to be for the public benefit.” Id.

119 Id. at 163–64. The Court also reasoned that, as in drainage cases, irrespective of the fact that some parcels may receive greater benefits from the scheme, all parcels situated so as to be benefitted by the project could be assessed. Id. at 163–64.

120 See generally Clark v. Nash, 198 U.S. 361 (1905); Schofield, Power of Illinois, Under the Fourteenth Amendment, to Aid Owners of Wet Lands to Drain Them for Agricultural Purposes, 1 Ill. L. Rev. 116 (1906).


122 219 U.S. 104 (1911).
was solvent and did not want the help of the Guaranty Fund, the assessment took private property for private use and thus deprived it of property without due process of law. Writing for a unanimous court, Justice Holmes rejected this argument, reasoning that a public purpose existed because an ulterior public advantage may justify a comparatively insignificant taking of private property for a private use. Justice Holmes reasoned further that the share of each party in the benefit of a scheme of mutual protection may be sufficient compensation for the correlative burden that it is compelled to assume. Holmes found that the fund was a reasonable use of police power both because the fund had a public purpose in that it ultimately promoted the public welfare by safeguards for the banking public and because it had a mutual compulsory benefit for the banks themselves.

A 1916 case, *Plymouth Coal v. Pennsylvania*, is the one average reciprocity of advantage precedent cited by Justice Holmes in *Pennsylvania Coal v. Mahon*. Pennsylvania's Barrier Pillar Act required that the owners of adjoining coal mines were each required to leave a pillar (or wall) of sufficient width to prevent floods which were produced when mines were abandoned and allowed to fill with water. The defendant Plymouth Coal Company refused to leave any pillar barrier between its workings and those of the adjacent coal mine. The defendant argued that such a pillar was unnecessary and that the act was unconstitutional because it took property without just compensation in violation of the Pennsylvania Constitution and the due process clause of the fourteenth amendment. The Pennsylvania court held that although the act did work an appropriation of property rights it was nevertheless a valid exercise of police power because it was intended to prevent mineowners from using their

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123 Noble State Bank, 219 U.S. at 110. Here Justice Holmes was addressing the appellant's claim that no proper public purpose existed. Subsequent Supreme Court decisions have so expanded permissible public purposes that this type of argument is unlikely to be successful. See generally Berman v. Parker, 348 U.S. 26 (1954); Hawaii Housing Authority v. Midkiff, 467 U.S. 229, 240 (1984).

124 Noble State Bank, 219 U.S. at 111. See also Ohio v. Indiana, 177 U.S. 190 (1900).

125 Noble State Bank, 219 U.S. at 111–12.


129 In *Plymouth Coal Company*, the United States Supreme Court considered only procedural due process and equal protection clause issues. Justice Holmes' use of *Plymouth Coal Company* in his *Pennsylvania Coal* opinion refers to the Pennsylvania Supreme Court's two alternative holdings in Commonwealth v. Plymouth Coal Company, 232 Pa. 141 (1911) (the Pennsylvania Supreme Court affirmed on the grounds of the opinion below by Judge Ferris).
property to injure the rights of others and to protect miners from the dangers of flooding, and because protection of such a large class of individuals constituted protection of public safety.130 Alternatively, the court reasoned an exercise of police power may burden a specified class, if in achieving the public interest, the regulation protects alike the interests of, or generates specific benefits for, the burdened class.131 Here:

the rib of solid coal not to be mined into by either of the adjoining owners was to be contributed by each in equal parts for the mutual benefit of each....This regulation works no hardship on one for the benefit of another, but is impartial, just and reasonable, imposing a common burden for the benefit of all such owners.132

Again we see that the principle of average reciprocity of advantage involves a narrow, specific group burdened with an appropriation scheme police power regulation and receiving particular direct benefits from the regulation while the public indirectly benefits. The motivation of the lower court in Plymouth Coal, and, it can be inferred, of Justice Holmes, is that the Barrier Pillar Act, although substantially diminishing certain property interests, does not operate simply to redistribute property rights because at least on its face, the regulation acts to reciprocally benefit burdened mineowners.133

Lastly, in Jackman v. Rosenbaum Co. itself, the Supreme Court was unwilling to allow a claim that a Pennsylvania common wall law took property without just compensation.134 The Supreme Court reasoned that custom was enough to uphold the law, but it expressly approved of the state court’s alternate holding justifying the law with what Holmes labelled average reciprocity of advantage.135 The common wall statute, like the police power regulations in the cases

130 Id. at 147–48, 149–51.
131 Id. at 148–50. In other words, even if the protection of miners did not constitute protecting the public safety, and thus the Barrier Pillar Act was not a public nuisance regulation, the public interest or welfare was forwarded by the regulation. No taking occurred because in forwarding the public interest the regulation generated specific benefits for the mineowners.
132 Id. at 149.
133 For the relationship and importance of redistributive effects in takings analysis, see Rose, supra note 110, at 583–97; Michelman, supra note 3, at 1203–45; L. TRIBE, CONSTITUTIONAL CHOICES ch. 10 (1985).
134 260 U.S. at 31. A common wall law requires a single wall between buildings of adjoining owners to be built partly on each owner’s property. Each owner is given dominion over the wall and is able to repair or alter it without consent. See also Smoot v. Heyl, 227 U.S. 518 (1913) (common wall statute held invalid as applied).
previously discussed, allowed an actual appropriation of the owner's property rights, but conferred the same right on the owner and also specifically benefitted the owner and generally benefitted the public by decreasing fire hazards associated with urban development of the period. In _Jackman_, average reciprocity of advantage was held to validate a police power regulation which had the immediate effect of allowing one private property owner to physically appropriate the adjacent owner's private property interests.

As it was developed in the late nineteenth and early twentieth centuries, the principle of average reciprocity of advantage is largely based on the underlying philosophy that economic development should be encouraged to benefit the overall quality of life. Average reciprocity of advantage concerned police power regulations which forced economic development of non-injurious property interests rather than regulating noxious uses of property. The owner's use, or perhaps more correctly, choice of use, of certain property interests were appropriated to achieve the societal goal of economic development to improve the general welfare. The idea that this development made the owner's overall property interests monetarily more valuable was seen as at least a sufficient offset for the owner's forced contribution of property or a monetary share of the costs. Although the owner had lost his or her freedom of choice as to how best use his or her property, society had made an efficient choice for the owner, and thus due process of law did not mandate that the regulation be accompanied by compensation. The later use of the principle in _Noble State Bank_ and _Plymouth Coal_ rested not only on encouraging development but on improving the welfare of certain private individuals and thereby indirectly advancing the public interest in safety. However, _Noble State Bank_ and _Plymouth Coal_ also rest on the idea that the police power regulation is valid because it reciprocallly benefits the affected parties by increasing the efficiency, and thus the exploitation, of their private property interests. _Noble State Bank_ and _Plymouth Coal_ can be said to rest on the idea that a risk-free business was more valuable than a dangerous one.

In sum, Justice Holmes' phrase "average reciprocity of advantage" referred to the principle that certain uncompensated police power

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136 Id.

137 _Plymouth Coal Company, Jackman, Noble State Bank, Wurts, Fallbrook Irrigation District_ are all physical appropriations or physical interferences with property interests.


139 Noble State Bank, 219 U.S. at 111–113, Commonwealth v. Plymouth Coal Company, 232 Pa. at 149. In practice the two coal companies would contract at some point to remove the wall after each has exhausted its mine.
exercises were constitutional because of the specific reciprocal benefits they generated which compensated any burdened owners. It was merely the principle of "special benefit" taxing districts extended to analogous police power exercises. The principle of these districts was that even though the public may benefit generally from an improvement project, specific individual property owners could be forced to bear the cost, in the form of betterment assessments or set-offs against eminent domain damages, as long as these owners were not forced to contribute more than the "special" local benefits to their parcels of land.

Property regulation which provided average reciprocity of advantage was viewed as a valid use of the police power because it was

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140 See generally Misczynski, Special Assessments in WINDFALLS FOR WIPEOUTS: LAND VALUE CAPTURE AND COMPENSATION 311-35 (Hagman and Misczynski eds. 1978).

141 In the context of a special benefit district tax assessment case, then-Chief Justice Holmes of the Massachusetts Supreme Judicial Court expressed this principle in the following manner:

It would be a matter for regret if the law as worked out by the courts with regard to the constitutional powers of the Legislature should be found to have taken so scholastic a form that an actual effect upon a well defined and limited part of a city which might be so distinct as to change the character of its use and to double its market value could not be recognized as a benefit when it came to the imposition of a tax . . . .

Upon a question of set-off against the payment for property taken for public uses, the line might be drawn strictly in order to give full effect to the constitutional requirement that what is taken shall be paid for. But it has been recognized that benefits which could not be set off might justify an assessment. And even by way of set-off in a proceeding for damages caused by the taking of land for a railroad it has been held that any peculiar increase of value in the market could be allowed.

It is plain that the fact that the rise in value is common to all or many of the estates upon a street would not prevent the benefit being sufficiently peculiar for a betterment tax. No doubt it might be hard to draw the line between some cases when the benefit might be held special and a general advance of real estate in the vicinity which often has been said not to be sufficient for set-off, although it is to be noticed that Mr. Chief Justice Gray, in speaking of benefits that cannot be assessed for, describes them as those which extend to all estates in the same town or city . . . . Again the fact that the improvement is for a public purpose of course is no objection to the tax. To invalidate the betterment assessment, the general public benefit must be the only result of the improvement. Such a change may have a double aspect of general public benefit and also of peculiar local advantage. It is suggested, to be sure, that the special benefits cannot be made the basis of a tax when they are only incidental and not the object to which the improvement was directed. But we see nothing in the Constitution to prevent it, or to make the power of the Legislature depend upon which of two resultant advantages is especially before its mind when it makes a change in the streets. In this case plainly it contemplated improving the petitioners' land as it provided for making them pay their share of the cost of the improvement.

As to the remoteness or speculative character of the advantage, we do not see what trouble there is on the former ground if the Legislature says that the advantage is near enough . . . .

reasonable. More specifically, the principle operated only to validate police power regulations which were challenged as redistributions of property rights among definable private individuals. It should be noted that all these average reciprocity of advantage cases involve the police power being used to promote a mutual development scheme and all the cases contain some identifiable “burdened” and “benefitted” parties. It is also significant that in these cases the Court was not using the Lawton ends-means substantive due process test which it had applied to constitutional challenges to police power prevention of public nuisances. Instead, these cases used an analysis which focused only on proper public purpose and mutuality of benefit.

II. PENNSYLVANIA COAL

Pennsylvania Coal v. Mahon is the central case in regulatory takings in the sense that it has shaped all modern discussion of the issue. After examining the aforementioned three lines of cases, one is in a position to understand the majority opinion of Justice Holmes and the dissenting opinion of Justice Brandeis in this seminal case. Pennsylvania Coal involved a Pennsylvania statute called the Kohler Act which attempted to prohibit the mining of anthracite coal located beneath property if that mining would cause subsidence of various surface uses. The Mahons were homeowners whose predecessor in interest had acquired the surface estate from the coal company but had not acquired the subsurface rights. Under the act, the Mahons were granted an injunction which prohibited the coal company from mining beneath their surface property. The coal company then brought suit under the Pennsylvania and U.S. Constitutions claiming that the Kohler Act impaired the obligation of con-
tracts and took property without just compensation in violation of the fourteenth amendment.\textsuperscript{145}

Writing for the eight justice majority, Justice Holmes began his \textit{Pennsylvania Coal} opinion with the traditional determination of whether the police power regulation advanced a general public purpose.\textsuperscript{146} He reasoned that the case only involved a private homeowner and that the parties' risks and rights had been contractually reserved by deed.\textsuperscript{147} While subadjacent mining had caused some degree of safety risk and fear in the region,\textsuperscript{148} Holmes noted that safety could be provided for by notice, and thus he rejected public safety as justifying this restriction on property use.\textsuperscript{149} Instead, Holmes believed that the statute interfered with private property and contractual rights in order to confer benefits to a small number of private individuals such as the Mahons — a narrow objective which did not amount to a public purpose.\textsuperscript{150}

However, stating that the case "had been argued in a manner which required the statute be treated generally," Holmes conceded that enough of a public interest existed to use the power of eminent domain.\textsuperscript{151} In other words, despite his belief that the Kohler Act was invalid if only enacted to prohibit an alleged noxious use of property by the coal company, Holmes conceded that public necessity might justify interference with noninjurious use of private property in order to benefit the public.\textsuperscript{152} The latter part of his \textit{Pennsylvania Coal} opinion

\textsuperscript{145} \textit{Pennsylvania Coal}, 260 U.S. at 412.
\textsuperscript{146} Id. at 412–14.
\textsuperscript{147} Id. at 413.
\textsuperscript{148} See Rose, supra note 110, at 563.
\textsuperscript{149} \textit{Pennsylvania Coal}, 260 U.S. at 414.
\textsuperscript{150} Id.
\textsuperscript{151} Id. at 414. By treating the statute generally, Justice Holmes appears only to have been recognizing that a significant number of persons, and the city of Scranton itself were in the position of the Mahons. Thus, Holmes was conceding that the Kohler Act did confer benefits which were public in nature rather than private—in other words, that public necessity could justify the use of the police power or the power of eminent domain. Holmes believed that if only the Mahon's residence was concerned, the state could not even use eminent domain to transfer the company's property interest. See Note, 11 Cal. L. Rev. 188 (1923). The narrow holding in \textit{Pennsylvania Coal} is that the Kohler Act is invalid as a taking for the private benefit of a homeowner. In \textit{Keystone Bituminous Coal}, 107 S.Ct. at 1241, a majority of the Court surprisingly reached this conclusion. The remainder of the \textit{Pennsylvania Coal} opinion is properly classified as dictum or an "advisory opinion." See id.
\textsuperscript{152} This author does not believe that Justice Holmes conceded that the Kohler Act was required for public safety, in other words to prevent a public harm. Justice Holmes believed that the state could not prohibit the subsidence of property as a public nuisance because damage to a private house is not a "common or public" harm and, as to the public property, the state had accepted the risk of the danger when it transacted with the coal company to
Coal takings analysis focused on whether the police power could be used in lieu of eminent domain to accomplish this goal.

First, Holmes used the average reciprocity of advantage test to examine whether the police power could be used to transfer the support estate \(^{153}\) from the coal company to other private parties, like the Mahons, in order to increase public welfare. Holmes distinguished the case of *Plymouth Coal v. Pennsylvania*, in which the Court eight years earlier had upheld Pennsylvania's Barrier Pillar Act. \(^{154}\) In Holmes' view, that law was unlike the one before the Court because the Barrier Pillar Act "was for the safety of employees invited into the mine and secured an average reciprocity of advantage that has been recognized as a justification of various laws." \(^{155}\) Thus, it can clearly be inferred that, even though they rejected the Kohler Act as a public safety regulation, Holmes and the majority would have ruled differently if the Kohler Act contained specific reciprocal benefits that were generated for all burdened owners by the Barrier Pillar Act. \(^{156}\) Without this average reciprocity of advan-

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\(^{153}\) The "support estate" is a separate property estate under Pennsylvania common law. See *Charnetski v. Miners Mills Coal Mining Co.*, 270 Pa. 459, 113 A. 683 (1921). Thus, Pennsylvania state law recognized three estates in the parcel of land owned by the Mahons and the Pennsylvania Coal Company. The Mahons owned the surface rights, while the coal company owned both the subsurface mineral rights and the right to support or not to support the surface estate. The city of Scranton was in the same position as the Mahons with respect to the portions of the city which had been purchased from the coal company. See *Pennsylvania Coal*, 260 U.S. at 415.

\(^{154}\) See supra notes 126–33 and accompanying text.

\(^{155}\) *Pennsylvania Coal*, 260 U.S. at 415. In other words, Justice Holmes believed that *Plymouth Coal* was distinguishable on the basis of both its alternative holdings. See supra notes 130–32 and accompanying text. The principle of average reciprocity of advantage was clearly inapplicable to *Pennsylvania Coal*. See supra Section IC.

\(^{156}\) However, Justice Holmes would still have found a taking as far as the city of Scranton was concerned. In a letter to Sir Fredrick Pollock, Holmes wrote:

I enclose one of my last decisions [Pennsylvania Coal v. Mahon] that you may judge whether there is any falling off. It was unpopular in Pennsylvania of course. Brandeis' dissent speaks as if what I call average reciprocity of advantage were made the general ground by me. Not so I use that only to explain a particular case. My ground is that the public only got to this land by paying for it and that if they saw fit to pay only for a surface right they can't enlarge it because they need it now any more than
tage, the Kohler Act was not as reasonable as the earlier law, and as a significant impairment of private property, it could not escape the explicit language of the takings clause.

Using the reasonableness test set out in *Block*, Holmes next considered whether the Kohler Act could be justified as a police power redistribution of private property rights to the city of Scranton. He noted that the public chose only to acquire the surface rights to the property on which it constructed its streets. He also reasoned that whether a police power regulation is permissible is a question of degree with one factor being the diminution in value of the property. In Holmes' and the majority's view, the extent of the regulation of the Kohler Act did go "too far" because it rendered the subsurface mineral rights in coal worthless and abolished an estate in land. Again, Holmes and the majority reasoned that the use of the police power was not as reasonable as previously upheld police power actions. Holmes distinguished the rent control law cases of *Block v. Hirsh* and *Marcus Brown Leasing Co. v. Feldman* as reasonable impairments of private property interests because they involved situations of more pressing public necessity and allowed the property owner to charge what was upheld as reasonable rent. In addition, Holmes characterized *Bowditch v. Boston*, an 1879 "overriding necessity" case in which the Supreme Court upheld the use of the police power to destroy a private home without compensation in order to stop the spread of a fire, as "resting more upon tradition than reason."

An exact interpretation of Justice Holmes' opinions characterizing the conflict between the police power and the power of eminent

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they could have taken the right of being there in the first place. Perhaps it would have been well if I had emphasized more the distinction between the rights of the public in places where they only get any locus standi by a transaction that renounced what they now claim.

M. Howe, Holmes-Pollock Letters–The Correspondence of Mr. Justice Holmes and Sir Fredrick Pollock, 1874–1932 v.2, 109 (1941). Discussing the same opinion in a letter to Harold J. Laski, Justice Holmes wrote: “If you read the document you will see that I do not as [Brandeis] suggests, rely on average reciprocity of advantage as a general ground, but only to explain a certain class of cases.” M. Howe, Holmes–Laski Letters, The Correspondence of Justice Holmes and Harold J. Laski, 1916–25, 462 (1953).

157 See *supra* notes 93–107 and accompanying text.

158 *Pennsylvania Coal*, 260 U.S. at 415.

159 *Id.* at 413.

160 *Id.* at 414.

161 *Id.* at 416. See *supra* notes 93–107 and accompanying text. Justice Holmes indicated that these cases went to “the verge of the law, but fell far short of the present act.” *Pennsylvania Coal*, 260 U.S. at 416.

162 *Id.* at 415–16.
domain as a “difference in degree” is difficult. Yet his majority opinion in *Pennsylvania Coal* must be read in light of his earlier opinions in which he used nearly identical reasoning. Along with many of his contemporaries, Holmes viewed the police power as encompassing the power to prevent common law nuisances and to take de minimus property interests in order to further the general welfare. He apparently believed that regulations addressing an injurious use of property or a common law nuisance (or near nuisance) never went “too far” in the sense that the burden to the individual alone could constitute a taking — although these regulations may overregulate or arbitrarily regulate and thereby constitute takings. However, Holmes believed any other police power regulation for the general welfare is a redistribution of private property to the public which could go too far in terms of the magnitude of the burden to the individual. The point of Holmes’ “too far” reasonableness test is that redistributions of private property solely to promote the public welfare must be limited or there can be no truly private property.

This view of Holmes’ majority opinion finds support in the dissenting opinion of Justice Brandeis in *Pennsylvania Coal*. The dissent argued that if the government regulation addressed a harm to the public (that is, a nuisance or noxious use), then the police power was absolute and could be used regardless of the extent of diminution to the private interest. Brandeis adamently argued that neither the State nor private individuals could contractually abrogate the police power to provide for the public health and safety, and that

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165 See Miller, 152 Mass. at 546–48, 26 N.E. at 102; See also Pierce Oil Corp. v. City of Hope, 248 U.S. 498 (1918); Erie R.R. Co. v. Public Utility Commsrs., 254 U.S. 394, 410–11 (1921). Justice Holmes’ majority opinion in *Pennsylvania Coal* cites no public nuisance/noxious use cases. Holmes also voted with the majority in *Reinman*, 237 U.S. 171 (1915), *Hadacheck*, 239 U.S. 394 (1915), and Miller v. Schoene, 276 U.S. 272 (1928), all involving substantial burdens to private property owners and containing no “difference in degree” reasoning. Thus, one can infer that Justice Holmes recognized what the modern Supreme Court is now calling the “public nuisance exception” to the takings clause. See *Keystone Bituminous Coal Assn.*, 107 S.Ct. at 1243–46.

166 In other words, any police power regulation which could not be said to be restricting a public nuisance could go “too far.” In a letter to Harold J. Laski, Justice Holmes referred to the “petty larceny of the police power.” M. Howe, *HOLMES–LASKI LETTERS* 457 (1958).

167 *Pennsylvania Coal*, 260 U.S. at 416 (Brandeis, J., dissenting).

168 Id. at 417, 418, 420–22.
the legislative determination that the Kohler Act was necessary for public safety was correct and the Court should defer to it. Brandeis reasoned that the Supreme Court decisions had upheld the absolute police power to prevent noxious uses in many different contexts. Thus, Justice Brandeis' main argument was that the Court should have upheld the Kohler Act as a noxious use regulation under the deferential Lawton ends-means substantive due process analysis which it had previously applied in similar cases.

As to the use of the police power to interfere with non-noxious uses of private property to confer benefits, Justice Brandeis agreed that the takings clause did limit the magnitude of the burden which could be placed on the individual to achieve a proper public purpose. Brandeis argued under the Block reasonableness test that here the diminution in value was not as severe as the majority believed, because he disagreed with the majority on the divisibility of an owner's property interests in a parcel of land. Brandeis argued that the parcel must be viewed as a whole in order to assess any economic loss from regulation. Average reciprocity of advantage, in Brandeis' view, was necessary to validate the use of police power in lieu of the power of eminent domain, only where direct transfers of property interests in "neighborhood" type regulations resulted in the generation of public benefit. The principle had "no place" in this case, where the police power was being used to prohibit a noxious use. Alternatively, he argued that the prohibition of a noxious use always provides an average reciprocity of advantage in

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169 Id. at 416-22.
170 Id. The Supreme Court used the Lawton ends-means substantive due process test in all of these cases.
171 See id. at 419, 422. Bosselman, Callais and Banta argue that Justice Brandeis believed there was a difference in kind between an exercise of the police power and an exercise of eminent domain requiring just compensation. Bosselman, supra note 3, at 247. This is correct as to noxious uses, but Brandeis did not argue that a police power regulation to confer benefits could never be a taking in the sense that the burden to the individual alone violates the takings clause. Brandeis did join the Court's opinion in Block and The Rent Law cases. See supra notes 93-107 and accompanying text. See also Delaware, Lackawanna and Western Ry. Co. v. Morristown, 276 U.S. 182 (1928); Nashville, C. & St. L. Ry. v. Walters, 294 U.S. 404, 429-30 (1935).
172 260 U.S. at 419. Justice Holmes and the majority were willing to look at the economic diminution to the coal required to provide subadjacent support caused by the regulation. Id. at 415-16. Holmes, in effect, argued that diminution in value should be measured on the separate "support" or "third" estate recognized by Pennsylvania common law, while Justice Brandeis believed that a court should look at the economic loss measured against the combined value of the three estates.
173 Pennsylvania Coal, 260 U.S. at 422.
174 Id.
the sense that it makes civilized communities possible. In other words, Brandeis referred to the older belief that proper uses of the police power (which clearly includes the prohibition of public nuisances) always confer reciprocal benefits.

Thus, Justice Brandeis' dissent is consistent with the Pennsylvania Coal majority's holding. Brandeis shared the majority's view that the takings clause mandated that the police power could not be used to redistribute private property. His exceptions which allow the use of police power where regulation amounts to confiscation rest on the basis that no redistributions in property rights occur. The public harm exceptions seek only to restrict private usurpation of surrounding private property interest, while the average reciprocity of advantage exceptions are cases in which mutual advantages accrue to the affected party and the recipient one. Justice Brandeis certainly did not advocate a different regulatory takings analysis than the one espoused by the majority in Pennsylvania Coal. Rather, he simply disagreed with the majority because he believed that the Kohler Act should be upheld as a noxious use regulation, and thus the magnitude of the burden to the coal company could not go "too far" as long as the Act was reasonably related to the abatement of the noxious use.

Pennsylvania Coal represents a logical development in Supreme Court regulatory takings doctrine, rather than a substantial departure from it. The case is remarkable because of the unique factual situation which allowed Justice Holmes to uncharacteristically fail to exercise deference to a legislative determination and to find no room for the police power to prevent noxious use despite the obvious damage and loss of life which was occurring. The opinion addresses

\[175\] Id.

\[176\] See supra note 22. Justice Brandeis' broader view of reciprocal benefits is very different than the principle of average reciprocity of advantage that Justice Holmes and the majority use to distinguish Pennsylvania Coal from Plymouth Coal. See supra notes 141-42, 154-56 and accompanying text. Justice Brandeis' remark is best viewed as a quip, rather than a genuine elaboration of the principle of average reciprocity of advantage. Brandeis clearly understood that the principle of average reciprocity of advantage involves only special benefits to burdened owners in mutual cooperation schemes. Brandeis' comment that noxious use regulations always provide an average reciprocity of advantage may have been the result of an erroneous belief that average reciprocity of advantage was central to the majority's holding. See supra note 156.

\[177\] See id. at 417, 422.

\[178\] Contemporaneous law review notes share the belief that the disagreement between Justice Holmes and Justice Brandeis in Pennsylvania Coal was based on their different beliefs concerning the state legislative determination that the statute was necessary for public safety, and not on different views of the regulatory takings test as some modern commentators have suggested. See Note, 11 CAL. L. REV. 188 (1923); Note, 71 U. PA. L. REV. 277, 277-78 (1923),
a takings clause limitation on the police power where the government purpose is to solve a public problem or increase the general welfare by redistributing non-noxious private property to other private property owners or to the public as a proprietor. Holmes' analysis does not address any takings clause limitation to the police power to regulate a public nuisance or noxious use of property. Thus, it is incorrect to conclude that in Pennsylvania Coal Justice Holmes introduced a new takings test which overrides the substantive due process test of police power regulation of public nuisances. His test addresses the situation in which public necessity provided a proper public purpose for a regulation which redistributed noninjurious private property interests. Because the Pennsylvania Coal Court is answering this limited question, it does not use the Lawton ends-means substantive due process test. Rather, the Court looks to the Kohler Act's reasonableness under the principle of the average reciprocity of advantage line of cases and under the Block reasonableness test. Distinguishing these latter cases, the majority held that the Kohler Act was not reasonable in that it substantially and permanently usurped private property interests and redistributed them to the city of Scranton, and to private individuals with no reciprocal benefit to the coal company.

III. Euclid and the Redefinition of the Police Power's Ability to Arbitrate Among Private Land Uses

When the cases are properly understood, Euclid v. Ambler Realty Co. is at least as important as Pennsylvania Coal in terms of the

Note, 21 Mich. L. Rev. 581 (1923); Note, 36 Harv. L. Rev. 753 (1923); Note, 32 Yale L.J. 511 (1923); Powell, The Supreme Court and State Police Power 1922-1930, 18 Va. L. Rev. 1, 10–12 (1931).

179 It is for this reason that the Pennsylvania Coal analysis was not applied in subsequent regulatory takings cases involving public nuisance or zoning regulations. See infra text at Section III. The one case in the next decade which does vaguely apply the "too far" principle of Pennsylvania Coal is a case involving regulation of the noninjurious property of a common carrier whose business is subject to regulation in the public interest, not a public nuisance police power case. See Delaware, Lackawanna and Western Ry. Co. v. Morristown, 276 U.S. 182, 193 (1928).

180 Block and Pennsylvania Coal should be compared to the contemporaneous contract clause cases such as Home Bldg. & Loan Assn. v. Blaisdell, 290 U.S. 398, 428, 436–38 (1933). As the uses of the police power expanded to the point where the Court could no longer deny that the purpose of regulation was to deal with a public necessity by explicitly taking property for public use or impairing the obligation of contracts, the Court adopted a "reasonableness" constitutional balancing test to uphold regulations which were not extremely redistributive, and did not strictly construe the express constitutional provisions prohibiting such government action.

development of the Supreme Court’s analysis of the police power regulation of private property. *Euclid* involved the facial constitutionality of a comprehensive zoning plan which divided the village into different districts, allowing certain land uses in each district. Zoning had rapidly developed as a tool for municipalities to restrict and control urban growth.\(^{182}\) It was clear that the power to zone was desirable, if not necessary, to regulate the interrelationship of property interests in urban communities. As an exercise of police power, however, zoning had little justification in terms of judicial precedent.\(^{183}\) Specifically, zoning went well beyond previously sanctioned police power prohibitions of nuisances. Indeed, its function was to prevent situations which could result in future nuisances.\(^{184}\) In addition, zoning often involved significant diminution in value of private property when it allowed only a residential or other use of limited profitability. State courts were split on the issue of whether zoning ordinances constituted regulatory takings, with a majority upholding zoning.\(^{185}\)

The United States District Court held the *Euclid* zoning law to be an unconstitutional taking without just compensation.\(^{186}\) This court had followed an analysis one would expect if the above interpretation of *Pennsylvania Coal* is correct.\(^{187}\) First, the court recited the finding of a referee that the plaintiff had been deprived of “the normal and reasonably to be expected use” of its property rights to an unconstitutional extent.\(^{188}\) In addition, like Holmes in *Pennsylvania Coal*, the court struggled with the issue of whether a public use existed at all, eventually deferring to the legislative judgment.\(^{189}\)

\(^{182}\) Contemporaneous zoning articles include: Bettman, *Constitutionality of Zoning*, 37 Harv. L. Rev. 885 (1924); Young, *City Planning and Restrictions on the Use of Property*, 9 Minn. L. Rev. 593 (1925); Byrne, *The Constitutionality of a General Zoning Ordinance*, 11 Marq. L. Rev. 189 (1927); Freund, *Some Inadequately Discussed Problems of the Law of City Planning and Zoning*, 24 U.Ill. L. Rev. 135 (1929). For a list of all contemporaneous scholarship on the issue of zoning, see Powell, supra note 178, at 18–21 nn.37, 38, 39, 40.

\(^{183}\) See generally Bettman, supra note 182; Young, supra note 182.

\(^{184}\) See Bettman, supra note 182, at 836–37.


\(^{187}\) See the district court’s discussion of the relationship of the police power used to promote the public welfare, the police power to prohibit public nuisances, and police power exercises which confer an average reciprocity of advantage. Id. at 314–15.

\(^{188}\) Id. at 308–09.

\(^{189}\) Id. at 312.
a substantial deprivation of property under the use of police power. The court reasoned that the zoning ordinance could not be justified as an exercise of the police power to abate or prevent nuisances, nor did it provide an average reciprocity of advantage.

The United States Supreme Court was largely willing to defer to the legislative judgment that the zoning ordinance was necessary for protection and welfare of the public. The Court sought to justify the zoning ordinance in terms of precedent but recognized that the old concepts of property and police power were increasingly inapplicable to modern urban society. The Euclid Court took a very practical view of property, reasoning that land use is a public nuisance because of the context in which it is conducted:

[T]he question whether a particular thing is a nuisance, is to be determined, not by an abstract consideration of the building or of the thing considered apart, but by considering it in connection with the circumstances and the locality. A nuisance may be

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190 See id. at 310, 315.

191 Id. at 315–16. The lower court specifically held that average reciprocity of advantage did not operate to validate this general zoning ordinance. Scholars had suggested that the general principles of the average reciprocity of advantage cases might be used to allow zoning to withstand a regulatory taking challenge because, as in those cases, neighboring property owners are being given rights in each other's property in the public interest. See Byrne, supra note 182, at 206–07; Young, supra note 182, at 602–04. As in the earlier appropriation cases, unwilling owners are being forced to participate in a development plan which confers comparable benefits to all owners—here, a more orderly and efficient community and the opportunity to enjoy property interests free from incompatible surrounding land use. Freund, supra note 182, at 146–47; Bettman, supra note 182, at 844–45. However, it appears that few courts or scholars believed that the principles of the average reciprocity of advantage cases could be used to validate zoning ordinances which significantly burdened property interests. For example, Alfred Bettman (who argued Euclid before the Supreme Court) in his leading article mentioned these cases only "in passing." See Bettman, supra note 182, at 844.

Upon closer scrutiny, one realizes that the principles of the average reciprocity of advantage cases do not apply to a general zoning ordinance. A comprehensive zoning ordinance does not place roughly equal use restrictions on all burdened owners. Rather, such an ordinance aims to place different use restrictions (i.e. different burdens) on different districts. Similarly, a comprehensive zoning ordinance generates general benefits shared by all, not comparable special economic benefits inuring to burdened owners. See supra note 141 and accompanying text; Euclid, 297 F. Supp. at 316. Even if a zoning ordinance could be said to generate specific economic benefits to all burdened owners, one should note that, particularly in the 1920's, owners burdened with fewer use restrictions received greater economic benefits from the ordinance than those with greater use restrictions. In contrast, the police power exercises in the average reciprocity of advantage cases were non-discriminatory on their face. Any disparity in owners' benefits and burdens in the average reciprocity of advantage cases was due to the particular conditions of each parcel (presumably unknown to legislators), and not to a legislative policy decision which in effect allocated special benefits and burdens.

192 Id. at 388–90, 395.

193 Id. at 387. See Bettman, supra note 181, at 188.
merely a right thing in the wrong place – like a pig in the parlor instead of the barnyard.\textsuperscript{194}

Thus, in contrast to the lower court, the Supreme Court was willing to view the police power regulation as a valid extension of the regulation of nuisances.\textsuperscript{195} However, the Court refrained from treating the scope of the police power as coterminous with the power to suppress or prevent nuisances.\textsuperscript{196} Rather it argued that zoning was part of the police power because it was justified by the same reasons as, and thus analogous to, the public nuisance police power.\textsuperscript{197} Thus, the \textit{Euclid} Court both affirmed and expanded state and municipal police powers by redefining the police power to arbitrate between property uses. The Supreme Court accepted planned private property restrictions in order to prevent incompatible neighboring uses as a legitimate police power goal.\textsuperscript{198}

In line with precedent involving police power regulations of noxious property use, Justice Sutherland’s opinion effectuated the takings clause guarantee using the \textit{Lawton} ends-means substantive due process test, and did not apply the \textit{Block/Pennsylvania Coal} reasonableness test.\textsuperscript{199} \textit{Euclid} and the few subsequent zoning cases decided by the Court established that the Court would only use the

\textsuperscript{194} \textit{Euclid}, 272 U.S. at 388. See also this Court’s general discussion of zoning cases, \textit{id.} at 390–95.

\textsuperscript{195} \textit{Euclid}, 272 U.S. at 387–99. The \textit{Euclid} Court also referred to reciprocal benefits, noting that a zoning plan applied throughout the village and benefits all owners. \textit{id.} at 391–93. However, the Court’s discussion appears in the form of a proper public purpose policy argument supporting zoning as desirable, and it is clear that the \textit{Euclid} Court did not rely on average reciprocity of advantage to justify the zoning ordinance. \textit{Euclid} was not a typical average reciprocity of advantage case because it involved no direct transfer of property interests and only very indirect, and not necessarily comparable benefits among owners. See \textit{Euclid}, 297 F. Supp. at 315–16. See also \textit{supra} note 191.

\textsuperscript{196} \textit{Id.} at 387–88. Bettman, \textit{supra} note 181, at 188.

\textsuperscript{197} \textit{Euclid}, 272 U.S. at 387–95. See Bettman, \textit{supra} note 181, at 188–89. It was argued by at least one commentator that the police power to prohibit nuisances or noxious uses allowed greater government interference with private property than the police power to zone. See Comment, \textit{Retroactive Zoning Ordinances}, 39 YALE L.J. 735, 739 (1930). Such a distinction makes sense from the standpoint of the public purposes which justify these two different uses of the police power and from an approach which balances the private harm with the public harm being prevented by regulation.

\textsuperscript{198} \textit{Euclid}, 272 U.S. at 391, 394–95.

\textsuperscript{199} \textit{Id.} at 386, 395. One should note that the lower court had relied on \textit{Pennsylvania Coal} in finding the ordinance an unconstitutional taking. \textit{Euclid}, 297 F. Supp. at 311–15. Yet the United States Supreme Court did not even mention the case because it viewed zoning as a proper exercise of the police power similar to public nuisance regulation. In the one subsequent zoning case where the Court found a regulatory taking it did so using the \textit{Lawton} ends-means substantive due process test, not the \textit{Block/Pennsylvania Coal} reasonableness test. See \textit{Nectow v. Cambridge}, 277 U.S. 183, 188–89 (1928).
Lawton ends-means substantive due process test to examine whether the land use dictated by a zoning ordinance was reasonably related to the goals of zoning: to further the public health, safety, and welfare by preventing incompatible neighboring uses. The important factor in judging the constitutionality of a zoning restriction was the reasonableness of the use in light of surrounding uses.

Two years after Euclid, a unanimous Supreme Court reaffirmed a broad police power to prevent and abate public nuisances in Miller v. Schoene. Miller concerned a Virginia statute designed to protect the state’s apple orchards from cedar rust which threatened to destroy them. The Court upheld the statute which declared red cedar trees to be a public nuisance and required the owners of these red cedar trees to cut them down without compensation. The Supreme Court rejected the cedar tree owners argument that their private property was being destroyed in order to protect other private property and not because it was a public nuisance. The Court reasoned that the choice between noncompatible private property interests was the essence of the nuisance power. It held that the size and importance of the state’s apple industry implicated the public interest. Thus, the Miller Court held that serious public economic effects, and not simply direct human health and safety effects, are sufficient to justify an application of the police power to prevent public nuisances. Using the Lawton ends-means substantive due process test it had previously employed in regulatory takings challenges of public nuisance police power regulation, the Su-

201 Id. at 277–78.
203 Id. at 279–80. Professor Stoebuck argues that Miller was based on the emergency or overriding necessity doctrine. Stoebuck, supra note 3, at 1067. However, the Court’s discussion indicates that Miller was based on a public nuisance rationale, and the cases cited in Miller are public nuisance cases. See id. Furthermore, the Supreme Court had already overruled the necessity doctrine by implication in Pennsylvania Coal. See 260 U.S. at 415–16; supra notes 151–66 and accompanying text. But see U.S. v. Caltex, Inc., 344 U.S. 149 (1952).
204 Miller, 276 U.S. at 279.
205 To a large extent Miller rests on the same rationale as the “changing condition” public nuisance cases. See supra notes 66–72 and accompanying text.
preme Court held that Virginia's police power regulation was not unreasonable and thus was valid without compensation.209

In effect, *Euclid* and *Miller* collectively establish that where the police power is being used to arbitrate among noncompatible private property interests, the Supreme Court's regulatory takings test was solely the *Lawton* ends-means substantive due process test. Furthermore, reasoning that such a use of the police power was traditionally and appropriately a matter of state and local concern, the Court exercised much deference to local government decisions in its substantive due process approach.210 Thus, it is clear that the nature of the police power regulation was of utmost importance in the regulatory takings test as it stood in 1930.

This deferential review of police power arbitration of land use, combined with the continued deterioration of public purpose scrutiny, opened the floodgates for regulation which significantly restricted private property. The wide array of police power land use regulation which had now been sanctioned by the Court's substantive due process approach left little need for the "reasonableness test" of *Pennsylvania Coal* or for the average reciprocity of advantage test, because only in a few cases were such arguments necessary. The Great Depression of the 1930's and the Court's determination to limit its review of economic and social legislation211 further increased the Supreme Court's reluctance to strike down regulation of private property in the relatively few regulatory takings claims it did decide.

Although the Supreme Court altered its regulatory takings analysis significantly in the 1919–1929 decade, it is clear that in the subsequent years, state courts were unable to derive a regulatory takings test based on the cases decided in that period. This development is significant because, for the next half century, regulatory takings doctrine in general became less and less clear as it evolved in different directions at the state court level.212 The Supreme Court itself must accept the responsibility for this development because the Court declined to hear land use regulatory taking claims without ever comprehensively explaining its constitutional takings test.213

209 *Miller*, 276 U.S. at 280.

210 *But see Nectow*, 277 U.S. 183, 188–89 (1927) (residential use classification struck down as unreasonable).


212 *See generally Bosselman et al., supra note 3, at 141–94.

213 Perhaps the Court's best attempt to sum up its takings rationale was that of Justice
addition, *Euclid* and *Miller* made impossible any distinction between noxious use police power regulations and regulations of non-noxious property justified by public necessity. Yet, it is on this ultimately unsupportable distinction that *Pennsylvania Coal* and all of the Court's pre-1930 precedent are based. Finally, in cases involving the "liberty to contract," the Supreme Court proceeded to bury the substantive due process test of economic and social legislation without relating this to the substantive due process test of regulation of economic uses of real property as it was left by *Euclid* and *Miller*.

Such explanations were crucial given the dynamic changes in constitutional law forged by the Supreme Court in the Great Depression and following decades.

**IV. THE SUPREME COURT'S MODERN "BUNDLE OF RIGHTS" TAKINGS CLAUSE ANALYSIS**

**A. Regulatory Takings and the Burger Court**

The Supreme Court's conclusion that land use regulation was a matter for local government meant that the Court would not hear takings claims resulting from land use regulation. As a result, before the 1978 case of *Penn Central Transportation v. New York City*, the Supreme Court's regulatory takings doctrine did not advance from that used by the *Pennsylvania Coal* and *Euclid* Courts. For this reason an analysis of the Court's doctrine will not be fatally

Brandeis in Nashville, C. & St. L. Ry. v. Walters, 294 U.S. 404 (1935). In holding that an assessment of a railroad company requiring it to pay one-half of the expense of eliminating a railroad crossing deprives the company of its property without due process of law, Justice Brandeis reasoned: "... when particular individuals are singled out to bear the cost of advancing the public convenience, that imposition must bear some reasonable relation to the evils to be eradicated or the advantages to be secured." *Id.* at 429. While this test does draw general principles from the Court's different precedents, Brandeis' approach, in effect, suggests a *Lawton* ends-means analysis of all police power regulation challenged as a regulatory taking. *See supra* text accompanying note 54. Of course, since Walters was an assessment case the Court did not have to consider the question of whether the magnitude of a use restriction rises to the level of an exercise of eminent domain.

214 *See supra* note 211. Commenting on the dual standard of deferential Supreme Court review of legislation affecting "economic rights" and that affecting "personal rights" which Justice Stone set down in *Carolene Products*, 304 U.S. at 152 n.4, Learned Hand said: "Just why property itself was not a 'personal right' nobody took the time to explain." *L. Hand, The Spirit of Liberty*, 206 (1960).


216 *See Oakes, "Property Rights" in Constitutional Analysis Today, 56 Wash. L. Rev. 583, 607, 611, 613 (1981); Stoebuck, *supra* note 3, at 1069 (1980); Boselman et al., *supra* note 3, at 134-38; *See also* B. Ackerman, *Private Property and the Constitution*, 8 (1977); Sax II, *supra* note 3, at 149.
flawed by moving directly to an examination of the decisions of the Burger Court.217 The Supreme Court apparently regards all the cases discussed so far as good law. Therefore recent decisions should be examined in the light of their supporting precedent.

In *Penn Central*, the Supreme Court allowed one of the broadest applications of the police power in the area of land use.218 *Penn Central* is particularly significant because in their attempt to formulate a framework in which to decide a regulatory takings claim based on a new type of land use regulation, the justices were unable to agree on the principles guiding their regulatory takings doctrine. The case concerned the application of New York City's landmark law to Grand Central Station terminal. As owners of a designated historical landmark, the company was placed under an affirmative obligation to maintain the structure and was required to obtain approval from the Landmarks Preservation Commission before mak-

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217 See Dunham, *supra* note 3, for a complete discussion of cases decided in the 1932–1962 period. Consistent with Sections I, II, and III of this Comment, Professor Dunham's conclusion was that the "crazy-quilt pattern" of Supreme Court takings decisions could best be explained as relying on a harm-benefit rationale. Dunham, *supra* note 3, at 73–80. Dunham concluded that if the purpose of the government regulation was to provide a public benefit it was likely to be found a taking if private property interests were substantially impaired, while regulations attempting to prohibit private interests from being used to harm the public were likely to be found constitutional without the payment of just compensation. *Id.* at 80.

At least two regulatory takings decisions in this period, *United States v. Central Eureka Mining Co.*, 357 U.S. 155 (1958), and *Goldblatt v. Hempstead*, 369 U.S. 590 (1962), deserve mention. *Central Eureka Mining Co.* involved a 1942 order of the War Production Board which required the mining company's non-essential gold mines to cease operations. The order was motivated by the shortage of experienced miners and equipment necessary to operate essential, war related mines. 357 U.S. at 166–67. The Supreme Court essentially applied the *Block/Pennsylvania Coal* reasonableness test and found that under the exigencies of war the order was a reasonable regulation and not a compensable taking. *Id.* at 168–69. The facts that the order was a temporary, non-physical invasion of the company's property interests, and did not result in a loss of all value of the mining equipment also influenced the outcome of the Court's balancing test. *See id.* at 166–69. Justice Harlan dissented reasoning that the regulation was not restricting an injurious use of property and went "too far" in burdening the mine owners to obtain a public benefit. *Id.* at 181–84.

*Goldblatt* involved a gravel company challenging a town ordinance which prohibited dredging and pit excavation below the water table within town limits. Writing for the unanimous Court, Justice Clark reasoned that regulation (apparently including noxious use regulation) could be so onerous as to constitute a compensable taking. 369 U.S. at 594. However, given the lack of evidence on the record showing a diminution in value, Justice Clark reasoned that in this case the Court need not decide how far a regulation must go before it constitutes a taking. *Id.* Turning to the traditional *Lawton* ends-means substantive due process noxious use regulation analysis, the Court found the ordinance constitutional. *Id.* at 594–96. *Goldblatt* also indicates that the "reasonableness" of the ordinance depends on a comparison of the burden on the individual and the benefit to the public interest. *Id.* at 596–96.

ing any alteration. Penn Central contracted with a developer to build a 55-story tower above the terminal. The city denied approval for the alteration on the grounds that it would destroy the aesthetic qualities of the structure. The company then brought suit claiming the application took its property without just compensation and without due process of law.

Justice Brennan’s majority opinion used a framework which linked the Pennsylvania Coal reasonableness test with the takings clause analysis which the Supreme Court had developed in the context of eminent domain and inverse condemnation claims. This latter analysis determines whether property has been “taken” by focusing on the government’s interference with the property owner’s “bundle of rights,” that is the owner’s various possessory and use interests. The majority apparently believed that all regulatory takings claims should be decided by the “bundle of rights” takings clause analysis applied to other inverse condemnation claims. Thus, the Court characterized the takings clause as mandating a balancing inquiry designed to ensure “justice and fairness” in any government interference with private property. First, the government activity must have a proper public purpose. The Court also identified several factors as particularly significant in its takings clause analysis balancing inquiry: the character of the action; the economic impact of the regulation on the claimant; and the interference with distinct investment-backed expectations.

Applying this analysis, the Penn Central majority upheld the New York landmark law. The majority reasoned that the preservation of historic landmarks did serve a public purpose by preserving structures and areas with special historic, architectural, or cultural significance. Furthermore, the burden on Penn Central was not unique but was part of a comprehensive plan. The majority held

219 Penn Central Transportation, 438 U.S. at 111-14.
220 Id. at 116.
221 Id. at 117-18.
222 Id. at 119.
223 See id. at 124–38.
225 Penn Central Transportation, 438 U.S. at 124.
226 See id. at 129.
227 Id. at 124.
228 Penn Central Transportation, 438 U.S. at 129.
229 Id. at 133–35.
that the application of New York's landmark regulation to Grand
Central Station did not deprive Penn Central of its property inter­
ests to an unconstitutional extent because it did not deprive the
owners of all reasonable use, or completely frustrate reasonable
Investment-backed expectations.230

Justice Rehnquist, joined by Chief Justice Burger and Justice
Stevens, dissented from the majority's view of takings law and the
decision. The dissent reasoned that a significant interference with,
or destruction of, private property interests had only been permitted
as an exercise of police power, instead of the power of eminent
domain, when the action suppressed noxious uses or when it pro­
vided an average reciprocity of advantage.231 In the dissent's view
these two types of police power regulation operated as exceptions
to the requirement of just compensation.232 Rehnquist believed it
was clear that the application of the landmark law affected a signif­
icant diminution in value and that it did not attempt to abate an
injurious use.233 Thus, the use of the police power could only be
validated if it provided an average reciprocity of advantage.234 The
dissent broadly defined average reciprocity of advantage in the con­
text of typical zoning ordinances where restrictions create similar
burdens which are approximately offset by the benefits they gen­
erate.235 Although no Supreme Court zoning opinion had ever re­
ferred to average reciprocity of advantage, the Penn Central dis­
senters believed that the principle operated to validate zoning
regulation.236

230 Id. at 136--38.
231 Id. at 144--47. The dissent did not characterize police power zoning regulations separately,
rather it incorrectly lumped zoning cases in with police power regulations justified by average
reciprocity of advantage. See id. at 147; supra notes 191, 195 and accompanying text.
232 Penn Central Transportation, 438 U.S. at 144.
233 Id. at 145--46.
234 Id. at 147. This author does not read the dissent as suggesting lack of average reciprocity
of advantage can be used to invalidate all police power ordinances. The Supreme Court has
never held that a lack of average reciprocity of advantage alone invalidates a police power
regulation concerning either noxious or non-noxious use of private property. See supra sections
IC and II. Clearly, a police power regulation must be found to amount to an exercise of
eminent domain before the principle of average reciprocity of advantage is necessary to
validate it as constitutional without compensation. See Jackman, 263 Pa. at 174 (1919), aff'd,
260 U.S. 22 (1922).
235 Penn Central Transportation, 438 U.S. at 139--40, 147.
236 Id. at 147. Supreme Court precedent does not support the use of average reciprocity of
advantage to validate zoning ordinances. The idea that the principles of average reciprocity
of advantage cases could justify police power zoning regulation was advanced by several
commentators attempting to find some constitutional law precedent by which courts could
uphold zoning ordinances challenged as regulatory takings. See supra note 191. However, in
Justice Rehnquist recognized that the principle of average reciprocity of advantage applies when the police power is used to force specific owners to transfer their property to other owners for the public welfare. In Rehnquist's view the landmark law burdened the owner of a historical landmark and not his neighbors with no comparable reciprocal benefit. The dissent saw the regulation as an unconstitutional exercise of police power to redistribute property interests from a small group of owners to their neighbors and the public at large.

It is not clear whether the majority simply rejected the dissent's statement of takings law. It is clear that they were unwilling or unable to adequately answer the dissent. The reason was that the Penn Central Court sought to fit all of the Court's inverse condemnation and regulatory takings cases into one rubric. In order to do this, the Court focused only on the burden to the individual property owner's bundle of rights caused by the police power regulation. The Court attempted to interpret the meaning of average reciprocity of advantage and of the noxious use cases in a manner which fit into its bundle of rights approach. The Penn Central majority apparently viewed average reciprocity of advantage as part of its overall calculation of individual burden in that the benefits a police power regulation generates should generally offset the burdens it creates on the affected owner.

The Penn Central Court also did not accept the idea of a public nuisance or noxious use exception to the takings clause. The majority attempted to fit the noxious use and zoning cases into its

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238 *Id.*
239 *Id.* at 147–48, 152–53.
240 At points the majority seems to reject Justice Rehnquist's analysis. *Id.* at 133–34 n.30. At other points the majority apparently views the landmark law as generating reciprocal burdens and benefits which provide an average reciprocity of advantage. *See id.* at 134–35, 137. Lastly, the Court did not explicitly reach the issues of a noxious use or average reciprocity of advantage exception to the takings clause because it held that the extent of diminution in economic value to property interests caused by the landmark law does not amount to an exercise of eminent domain. *Id.* at 137–38.
241 Sax, supra note 218, at 483.
242 *Penn Central Transportation*, 438 U.S. at 134–135, 137.
243 *Id.* at 133–34 n.30.
analysis by reasoning that these cases established that uses of the police power can significantly diminish property values, and that broad based community plans lacked the character of a taking.\textsuperscript{244} As a result, the \textit{Penn Central} Court justified New York's landmark law using noxious use and zoning precedent which did not support this type of police power exercise or the Court's regulatory takings analysis.\textsuperscript{245}

Despite its focus on the bundle of rights takings clause analysis and its rather tenuous use of pre-1930 precedent, the \textit{Penn Central} Court's holding in a sense is largely consistent with the ends-means substantive due process analysis of \textit{Lawton}, \textit{Euclid}, and \textit{Miller}.\textsuperscript{246} One could simply say that the \textit{Penn Central} Court accepted historic preservation as a proper public purpose for police power regulation and then found that the landmark law was reasonably related to that goal in that it left Grand Central Station with a reasonable economic use in its unaltered historic state.\textsuperscript{247} Yet, in subsequent cases the Burger Court did not adopt this substantive due process view of \textit{Penn Central}; instead the Court chose to develop a bundle of rights balancing approach to all regulatory takings claims.

In \textit{Andrus v. Allard},\textsuperscript{248} the Court upheld regulations of the Secretary of the Interior prohibiting the sale of feathers or parts of

\textsuperscript{244} \textit{Id.}; \textit{id.} at 126–28, 130–31.

\textsuperscript{245} These cases rested on the idea that it was within the nature of the police power to arbitrate among potential or actual competing economic uses of land, and thus these police power actions were not limited by the takings clause except as it was incorporated into the \textit{Lawton} ends-means substantive due process test.

\textit{Penn Central} involved a new use of the police power, one which denied property interests to certain owners despite granting the same interests to their neighbors. New York City had not prohibited what was judged by the legislature to be a non-compatible economic use, it had prohibited a compatible use in order to benefit the public. \textit{Cf.} Sax, \textit{supra} note 218, at 482–83 (however, Professor Sax argues that what is occurring is a change in social values not an attempt by society to obtain free benefits). Despite the fact that all of Penn Central's neighbors had torn down and modernized existing structures, the company was prohibited from doing so and was required to maintain the historic structure intact. \textit{Id.} In addition, New York City conceded that the proposed addition to Grand Central Station did not violate any of the city's elaborate zoning requirements. \textit{Penn Central Transportation}, 438 U.S. at 146.

\textsuperscript{246} \textit{See Penn Central Transportation}, 438 U.S. at 127, 129, 138; Stoebuck, \textit{supra} note 3, at 1068 (Professor Stoebuck reasons that the \textit{Penn Central} Court's approach used substantive due process and bundle of rights takings clause analysis as alternate approaches to the takings claim).

\textsuperscript{247} Under the \textit{Lawton} ends-means substantive due process test a reasonable economic use for the Grand Central Station is important because only by leaving structures with a reasonable economic use will a historic preservation police power regulation achieve its objectives. Lack of a reasonable economic use, in itself, would not indicate that a police power ordinance constitutes a taking.

\textsuperscript{248} 444 U.S. 51 (1979).
protected birds obtained prior to the enactment of the Migratory Bird Treaty and Eagle Protection Acts. Writing for a unanimous Court, Justice Brennan again reasoned that government regulation involves the adjustment of rights for the public good, and that the takings clause preserves the government power to regulate subject only to the dictates of justice and fairness. Focusing on the bundle of rights held by the property owner, Brennan also reasoned that diminution of the plaintiff’s property value and loss of future profits factor into the balancing test, but unaccompanied by any physical property restriction, are not dispositive of the issue. The Court also compared the prohibition of trading of eagle feathers with earlier prohibitions of the sale of intoxicating liquors. Quoting the portion of Justice Brandeis’ Pennsylvania Coal dissent which commented on average reciprocity of advantage, the Court held that the burden of the regulation was offset by the reciprocal advantages of living in a civilized community and thus was a reasonable burden which does not effect a taking in violation of the fifth amendment.

Again in Andrus, the Burger Court’s approach was problematical in terms of precedent. The purpose of the regulation apparently was important to the Court, yet the focus of Andrus is clearly on the impact, not the purpose, of the regulation as in early cases. The Court does not use the intoxicating liquors cases to develop what Justice Rehnquist had termed the noxious use exception to the takings clause. Instead, Justice Brennan’s reasoning appears to be that these cases show that prohibition of the right to sell property, if it has a proper public purpose, does not take enough interests so as to amount to an exercise of eminent domain because it is an interference with only one “strand” of the owner’s bundle of property rights. If the prohibition of the sale of bird artifacts is permissible as regulation of a noxious use, precedent such as Mugler, Lawton, Hadacheck, and Miller indicate that the Court should not have considered the impact on property interests unless it did so as part of its analysis of the reasonableness of the means of abating the noxious use under the ends-means substantive due process test. Additionally, the

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249 Id. at 65.
250 Id. at 65–66. The Court reasoned that the owners retained a right to profit from the bird artifacts, and lost only their right to sell the artifacts. Id. at 66.
251 Id. at 67.
252 Id. at 67–68.
253 See id. at 65–67.
254 See supra Sections IA and III. The Supreme Court may have analyzed the Secretary of the Interior’s regulation differently than the noxious use cases because Andrus involved the
Andrus Court’s use of Justice Brandeis’ Pennsylvania Coal dissent apparently represents the Court continuing to struggle to fit the principle of average reciprocity of advantage into its modern regulatory takings test. Here, the Court is so vague that it is difficult to give the principle any workable application in the Court’s modern balancing inquiry.

In Kaiser Aetna v. U.S.\textsuperscript{255} and Pruneyard Shopping Center v. Robbins\textsuperscript{256} one sees the Supreme Court further developing its bundle of rights analysis. In Kaiser Aetna, the Court found that the congressional creation of a free public right of access to a privately developed marina violated the takings clause. Employing its bundle of rights takings clause balancing, the Court reasoned that the right of access amounted to a physical appropriation of property, and goes so far beyond ordinary regulation or improvement for navigation that it amounts to a taking.\textsuperscript{257} It held that the “right to exclude” is such a fundamental element of “property” that it falls within the category of property interests which government cannot take without just compensation.\textsuperscript{258}

In Pruneyard Shopping Center, owners of a mall claimed that allowing individuals’ rights of free speech beyond those guaranteed by the United States Constitution’s first amendment constituted a taking of property.\textsuperscript{259} Although, like Kaiser Aetna, this case apparently involved the government abrogating “the right to exclude” and granting a right of access to the mall owner’s property, the Court rejected the owner’s claim reasoning that the owners had failed to demonstrate “that the ‘right to exclude others’ is so essential to the use or economic value of their property that the state-authorized limitation of it amounted to a taking.”\textsuperscript{260} Thus, the Court held, in effect, that the state’s interference with private property in promoting free expression did not go too far in interfering with the

exercise of a federal power, rather than a state police power regulation. However, no reasoning in Andrus or any subsequent opinion explicitly indicates that this was the case.

\textsuperscript{255} 444 U.S. 164 (1979).
\textsuperscript{256} 447 U.S. 74 (1980).
\textsuperscript{257} Kaiser Aetna, 444 U.S. at 174–80.
\textsuperscript{258} Id. at 179–80. Judge Oakes has noted that it is interesting that the Court did not even raise the idea that the marina owners had already received reciprocal benefits from the project. Oakes, supra note 216, at 606 n.209.
\textsuperscript{259} Pruneyard Shopping Center, 447 U.S. at 83. In Pruneyard Shopping Center, the California Supreme Court had held that article 1, sec. 2 and 3 of the California Constitution guaranteed individual’s free speech rights in the shopping center even if the United States Constitution’s first amendment did not. Id. at 79.
\textsuperscript{260} Id. at 84.
owner's bundle of property rights, because by opening their property to the public, the mall owners did not have a reasonable expectation of complete dominion over it. 261 The Pruneyard Shopping Center Court then, independently, found that the owners were not deprived of their property without (substantive) due process of law. 262 Unfortunately, the Court does not explain why the regulation was subject to both a bundle of rights analysis and an independent substantive due process analysis.

In Agins v. City of Tiburon, 263 the Supreme Court applied its bundle of rights takings balancing approach to a regulatory takings claim involving a zoning ordinance. In Agins, the Court held that a zoning ordinance which allowed the appellants to develop only one-family dwellings and open space uses did not on its face take property without just compensation in violation of the fifth and fourteenth amendments. 264 Writing for the the unanimous Court, Justice Powell began his analysis in a manner which appears to be ends-means substantive due process oriented, reasoning that the regulations are exercises of the city's police power to protect its residents from the ill effects of urbanization and thus substantially advance legitimate government goals. 265 The Court then reasoned that, although it might substantially diminish market value, the ordinance did not constitute a taking because it did not frustrate reasonable investment expectations, prevent all economic use of the appellant's land, nor extinguish a fundamental attribute of ownership. 266 The Court further reasoned that "the zoning ordinances benefit the appellants as well as the public" and the ordinances affect all property, and "(a)pPELLANTS THEREFORE WILL SHARE WITH OTHER OWNERS THE BENEFITS AND BURDENS OF THE CITY'S EXERCISE OF ITS POLICE POWER." 267 This latter reasoning is apparently a reference to the principle of average reciprocity of advantage. 268 Although it is not clear, the Agins Court

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261 Id. at 82–84.
262 Id. at 84–85.
264 Id. at 260–63. The Court held that the owners lacked standing to claim that the zoning ordinance constituted a taking as applied to their property. Id. at 260.
265 Id. at 261.
266 Id. at 262.
267 Id.
268 Justice Powell did not explicitly refer to average reciprocity of advantage. However, his reference to a general sharing of burdens and offsetting benefits is consistent with Justice Rehnquist's Penn Central dissent which characterized zoning ordinances as restrictions which apply over a broad cross section of land and create similar burdens which are approximately offset by the benefits they generate and thus secure an average reciprocity of advantage. See 438 U.S. at 139–40, 147. Justice Rehnquist's definition of average reciprocity of advantage
implicitly reasoned that regulation which affects generalized sharing of benefits and burdens provides an average reciprocity of advantage which validates the uncompensated use of the police power.

Like Andrus, the police power regulation in Agins was analogous to those upheld in precedent and the Court could have decided the case in line with substantive due process precedent. However, the Burger Court again undertook an independent bundle of rights balancing analysis which required only that the government purpose be proper, and then looked to the extent of the owner's burden. Thus, the purpose of the regulation does not shape this side of the Agins Court's regulatory taking inquiry. The Court simply held that the magnitude of the burden to the Agins' private property interests was constitutionally permissible. In contrast to the Euclid Court's analysis, the Supreme Court's Agins regulatory takings test of whether a zoning ordinance affects a taking contains two tiers: a zoning ordinance now must not only satisfy the takings clause guarantee incorporated into the ends-means substantive due process test, but it must also satisfy an independent bundle of rights takings clause analysis.

The Burger Court continued to develop the bundle of rights takings clause analysis as the sole constitutional test for regulatory takings claims in Loretto v. Teleprompter Manhattan CATV Corp. Loretto concerned a New York City police power regulation which required all landlords to allow the installation of CATV cables in their buildings in exchange for a "reasonable fee" which was set at one dollar. Landlords could set reasonable conditions to protect the aesthetics and safety of their property and the CATV company would indemnify landlords for any damage resulting from the installation, operation, or removal of the cable television equipment.

The difference could be crucial in the context of a zoning ordinance which provides for an across the board building moratorium. Such an ordinance prohibiting all development, permanently or temporarily, could withstand an ends-means substantive due process analysis if it is substantially related to a proper public purpose. However, because it would deny all economic use of land, it would likely constitute a regulatory taking under the bundle of rights analysis. See id. at 260.
The *Loretto* Court held that the law amounted to a taking requiring compensation, adopting a per se rule that a permanent physical occupation authorized by the government so intrudes on the basic attributes of ownership that it constitutes a taking without regard to the public interests it forwards.\(^{274}\)

Professor Laurence Tribe has suggested that *Loretto* seems to rest on the Supreme Court's obsession with "permanent physical invasions of even the most de minimis variety."\(^{275}\) Indeed, the *Loretto* Court virtually conceded that the regulation would be constitutional if it had left the title of ownership in the landlord's possession.\(^{276}\)

The majority answered the dissent's argument that this was a regulation of the rental of property, like an ordinance requiring the installation of fire safety equipment,\(^{277}\) by reasoning that a rental ordinance is different because it would allow the owner to initiate repairs and alterations in the cable equipment herself rather than having to call the cable company.\(^{278}\)

Rather than the gravity of the purpose of the police power regulation having something to do with its constitutionality, in *Loretto* it is only the characterization of the particulars of the mode of regulating the bundle of rights that determines a taking. The *Loretto* opinion shows the Burger Court preoccupied with its bundle of rights takings clause analysis, having lost sight of the overall issue to be decided—whether the police power regulation is reasonable or fundamentally unfair.\(^{279}\)

In sum, the Burger Court developed a bundle of rights test of police power regulation of real property that focused almost exclusively on the burden the regulation places on the affected owner. This regulatory takings analysis was essentially the *Block/Pennsylvania Coal* "reasonableness" test, but it differed from that test in that it did not weigh the necessity for regulation against the private burden.\(^{280}\)

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\(^{274}\) Id. at 434–35.

\(^{275}\) L. Tribe, Constitutional Choices 177 (1985).


\(^{277}\) Id. at 449.

\(^{278}\) Id. at 440–41 n.19.

\(^{279}\) See L. Tribe, supra note 275, at 174–79. Read literally as mandating no balancing in cases of permanent physical appropriation of property, the *Loretto* Court's broad per se holding is at odds with a number of takings cases discussed in this Comment. See *Lawton*, 152 U.S. 133 (1894) (allowing the appropriation and destruction of certain fishing equipment as a nuisance); *Noble State Bank*, 219 U.S. 104 (1911) (bank protection scheme which appropriates one percent of daily deposits); *Plymouth Coal*, 232 U.S. 531 (1914) (granting negative easement in neighboring mine owner's coal barrier wall); and *Jackman*, 260 U.S. 22 (1922) (authorizing third party appropriation of party wall).

\(^{280}\) See supra note 106 and accompanying text.
sonableness test because it was applied to all police power regulations whether they are enacted for the purpose of preventing noxious uses or for that of promoting the public welfare. The Burger Court interpreted most of the Court's earlier noxious use and average reciprocity of advantage precedent in a manner which would make this precedent consistent with a bundle of rights approach.

Under the bundle of rights analysis, the police power regulation must have a proper public purpose. In *Agins* the Court also reasoned that zoning ordinances must also satisfy an ends-means substantive due process analysis. The Burger Court then examined the character of the invasion, that is whether it is regulatory or physical; the breadth of the class of burdened owners; and also the types of property interests taken by the regulation. *Loretto* established that a regulation authorizing a permanent physical occupation of property constitutes a per se taking requiring just compensation for the owner. In weighing the extent of the economic burden on the individual owner, the Burger Court focused on the extent of the regulation's interference with reasonable, distinct investment-backed expectations of the owner, and on the extent of diminution of property value and the property's remaining uses. Although it did not hold that complete economic frustration is a per se regulatory taking, the Burger Court suggested that police power regulation must leave property with a reasonable remaining economic use.281 Finally, the concept of average reciprocity of advantage had some undefined weight in the Court's overall ad hoc fairness analysis in that greater benefits to burdened owners, or a general sharing of benefits and burdens, act to validate uses of the police power which impose significant burdens without just compensation.

**B. Keystone Bituminous Coal Assn. v. DeBenedictis**

*Keystone Bituminous Coal Assn. v. DeBenedictis*282, the Rehnquist Court's first examination of a regulatory takings claim, presented a takings challenge very similar to the claim successfully advanced by the coal companies sixty-five years earlier in *Pennsylvania Coal*.283 In *Keystone Bituminous Coal*, the coal companies claimed that Pennsylvania's Bituminous Mine Subsidence and Land Conservation Act, and regulations promulgated pursuant to it, which

281 See *Agins*, 447 U.S. at 260.
283 See supra text at Section II.
required that fifty per cent of the coal beneath certain structures be kept in place to provide surface support, took private property without compensation in violation of the fifth and fourteenth amendments. 284 Careful to distinguish the cases as involving different sets of "particular facts", a divided Supreme Court reached a different result than the Pennsylvania Coal Court, upholding Pennsylvania's police power mine subsidence legislation against the coal companies' regulatory takings claim. 285 The majority and dissent opinions both undertook detailed examinations of Pennsylvania Coal and the earlier noxious use cases, and are the Supreme Court's most complete exposition of its regulatory takings doctrine.

In Keystone Bituminous Coal, Justice Stevens, writing for the five justice majority, reached the holding essentially advocated in Justice Brandeis' Pennsylvania Coal dissent. 286 Like Brandeis, the majority of the justices were willing to defer to a legislative determination that police power regulation was justified and necessary to protect public interest. 287 The majority held that the genuine, substantial, and legitimate public purposes of the Subsidence Act were the prevention of the negative health, environmental, and fiscal integrity effects of damage caused by surface subsidence coal mining. 288 Proceeding with its bundle of rights regulatory takings test, the majority rejected the coal companies' taking challenge based on two apparently independent conclusions: First, that the government action does not have the "character" of a taking; and second, that there was no record in the case to support a finding that the Act makes it impossible to profitably engage in coal mining, or that there has been undue interference with investment backed expectations. 289

The principal holding of the Court, focusing on the magnitude of the economic burden to the individual owner's bundle of property rights, was reached using the analysis one would expect based on Penn Central and its progeny. 290 Justice Stevens began this analysis by noting that the case involved a facial challenge to the constitutionality of the act in which the coal companies presented their

285 107 S. Ct. at 1236. The Supreme Court also held that the legislation did not violate the contracts clause of the United States Constitution. Id. at 1251-53.
286 See supra notes 167-77 and accompanying text.
287 See 107 S. Ct. at 1242-44.
288 Id. at 1242-43.
289 Id. at 1242. See also 107 S. Ct. at 1256 (Rehnquist, C.J., dissenting) ("The Court today indicates that this 'nuisance exception' alone might support its conclusion that no taking has occurred.").
290 Compare 107 S. Ct. at 1246-50; supra text accompanying notes 280-81.
takings claim by narrowly defining certain segments of their property and arguing that the Subsidence Act takes this “property” by denying the coal company owners any economically viable use.\(^{291}\) He reasoned that one of the critical questions in the analysis of the magnitude of the burden to the individual owner is that of “determining how to define the unit of property ‘whose value is to furnish the denominator of the fraction.’”\(^{292}\) The majority opinion then set out two recent Supreme Court verbal formulizations of the definitional issue:

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\text{In } \text{Penn Central} \text{ the Court explained: ‘Takings’ jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, the Court focuses rather both on the character of the action and on the nature of the interference with rights in the parcel as a whole—here the city tax block designated as the landmark site. . . . Similarly, in } \text{Andrus v. Allard} \ldots \text{ we held 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.}\(^{293}\)
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With these formulizations providing “sufficient guidance,” Justice Stevens then rejected the two alternative theories by which the coal companies asserted their claim.

First, the majority opinion rejected the coal companies’ argument that the Act had taken property because it required that approximately 27 million tons of coal be left in place.\(^{294}\) Looking to the above quoted portions of the \textit{Penn Central} and \textit{Andrus} opinions, Justice Stevens reasoned that “27 million tons of coal do not constitute a separate segment of property for takings law purposes.”\(^{295}\) Likening the Subsidence Act to zoning and set back ordinances which limit an owner’s right to make profitable use of some segments of his property, Justice Stevens added: “There is no basis for treating less than 2% of petitioners’ coal as a separate parcel of property.”\(^{296}\) He then reasoned “that in the context of any reasonable unit of coal-making

\(^{291}\) 107 S. Ct. at 1246–48. Justice Stevens noted that the coal companies did not claim that bituminous coal mining is now commercially impractical, or unprofitable. Also, there was no evidence as to how much coal was actually left in the ground solely due to the Act. \textit{Id.} at 1247–48.

\(^{292}\) \textit{Id.} at 1248.


\(^{294}\) 107 S. Ct. at 1249.

\(^{295}\) \textit{Id.}

\(^{296}\) \textit{Id.}
operations and investment backed expectations," the coal companies had not sustained their burden of showing that they had been denied economically viable use of that property, or that investment backed expectations had been materially affected.297

The majority had a little more difficulty with the coal companies’ alternative claim that the Act took their “support estate,” a separate interest in land under Pennsylvania law.298 On the one hand, the majority apparently held that state law does not define “property” for purposes of federal constitution takings clause analysis, and that Pennsylvania’s support estate was not a cognizable property right under the takings clause.299 However, Justice Stevens alternatively reasoned that “even if we were to accept petitioners’ invitation to view the support estate as a distinct segment of property for ‘takings’ purposes, they have not satisfied their heavy burden of sustaining a facial challenge to the Act.”300

Although the Keystone Bituminous Coal Court’s bundle of rights analysis raises certain questions which will be crucial to future regulatory takings analysis, the most significant aspect of the majority opinion is the Court’s finding that the Subsidence Act fits within a “public nuisance exception” to the takings clause.301 Justice Stevens, reached this holding by reasoning that in Pennsylvania Coal, and cases decided both before and after it, the Supreme Court has recognized that the “nature” of the state’s interest in the regulation is a critical factor in takings analysis.302 He further reasoned that the nature of the state’s interest is a factor which is to be weighed along with the “type of taking,” that is whether it is a physical invasion or a regulatory program, and the magnitude of harm to the individual.303 After focusing specifically on Mugler and Miller, Justice Stevens reasoned that courts are hesitant to find a taking when the state “merely restrains uses of property that are tantamount to public nuisances.”304 The majority believed that because the Subsidence Act furthers a substantial public interest in “preventing activ-

297 Id.
298 Id. at 1250–51. See supra note 153.
299 Id. at 1250.
300 Id. Apparently, the Supreme Court has left open the possibility of an “as applied” regulatory takings challenge based on support estate property rights. But see supra note 289 and accompanying text.
301 107 S. Ct. at 1243–46.
302 Id. at 1243–45. Justice Stevens explicitly reasoned: “We reject petitioner’s implicit assertion that Pennsylvania Coal overruled [the noxious use] cases which focused so heavily on the nature of the state’s interest in regulation.” Id. at 1244.
303 Id. at 1244, 1244 n.18.
304 Id. at 1245.
Ities similar to public nuisances” it fits within the “public nuisance exception” to the takings clause.306 As a result of falling within this classification, the Subsidence Act was found to lack the “character” of a taking and the coal companies may be burdened by this police power regulation with no claim for just compensation.306 The majority did not elaborate on whether anti-nuisance regulations are never a taking, or whether these regulations only require heavier burdens on the individual to constitute a taking.

The majority also reasoned that the special status of public nuisance police power regulations is consistent with Justice Holmes’ principle of average reciprocity of advantage.307 Justice Stevens reasoned that, with public nuisance restrictions, “[w]hile each of us is burdened somewhat by such restrictions, we in turn, benefit greatly from the restrictions that are placed on others.”308 In a footnote, Justice Stevens added that the takings clause does not require that states or the courts calculate whether a specific individual has suffered burdens under this generic rule in excess of benefits received.309 Thus, the Keystone Bituminous Coal majority apparently interpreted the principle of average reciprocity of advantage to require that the nature of a police power regulation be such that, though its use may burden an individual on one occasion, other similar regulations will generate benefits which outweigh this burden. However, the majority also believed that the principle does not require that the benefits outweigh the individual’s burden on each and every occasion.310

Chief Justice Rehnquist and the dissenters appear to have agreed with the structure of the takings analysis laid out by the majority, but differed as to the particulars of each arm of the inquiry and as to the application of these arms to the coal companies regulatory

305 See id. at 1242, 1246, 1245 n.20.
306 Id. at 1246.
307 In a footnote Justice Stevens also reasoned that the special status was also justified on the basis that the state has not “taken” anything when it enjoins a nuisance-like activity because no private individual has the right to use his property so as to create a nuisance or otherwise harm others. Id. at 1245 n.20.
308 Id. at 1245.
309 Id. at 1245 n.21.
310 This Comment has argued that Justice Holmes’ principle of average reciprocity of advantage did require weighing on each and every occasion, but that it applied only to certain police power regulations where such weighing made sense. See supra notes 141-42 and accompanying text. The Keystone Bituminous Coal Court, like the Andrus and Agins Courts, appears to be attempting to construe average reciprocity of advantage based on Justice Brandeis’ “quip” on the final page of his Pennsylvania Coal dissent. See supra note 176 and accompanying text.
takings claim. It is clear the dissenters believed that the Court's analysis of the Subsidence Act must follow the Pennsylvania Coal Court's analysis of the Kohler Act.\textsuperscript{311} The dissent rejected the majority's characterization of much of the Pennsylvania Coal majority opinion as "advisory," and they found a regulatory taking for largely the same reasons as Justice Holmes and the majority in the earlier case.

After concluding that the public purposes of the Subsidence Act were indistinguishable from those of the Kohler Act, Chief Justice Rehnquist reasoned that the existence of a public purpose does not resolve the question of whether a taking has occurred.\textsuperscript{312} He agreed with the majority that the nature of the public purpose is relevant to the analysis of a regulatory takings claim.\textsuperscript{313} Expounding upon the analysis of his Penn Central dissent, which argued that any police power regulation that significantly burdened private property was a taking unless it fit within the noxious use exception or generated an average reciprocity of advantage, Chief Justice Rehnquist reasoned that a narrow "nuisance exception" to takings analysis has been established by the Court's precedent.\textsuperscript{314} In the view of the Chief Justice, the narrow nature of the nuisance exception is compelled by the principles underlying the takings clause.\textsuperscript{315} Rehnquist further reasoned that the takings clause does not prohibit regulations which secure a reciprocity of advantage.\textsuperscript{316} Rather, he reasoned that it does prohibit the public from unjustly placing public burdens on an individual and mandates full and equivalent compensation when one surrenders to the public something more and different than surrendered by other members of the public.\textsuperscript{317} Apparently, the dissenters believed that average reciprocity of advantage was not needed to, and did not operate to, validate public nuisance regulations.

The dissent reasoned that a broad public nuisance exception to the takings clause based on multi-faceted regulations advancing the

\textsuperscript{311} 107 S. Ct. at 1253 (Rehnquist, C.J., dissenting). The dissenting justices rejecting the majority's characterization of much of the Pennsylvania Coal majority opinion as "advisory," the dissenting Justices' analysis is in large part an updated version of the reasonableness test of Justice Holmes and the Pennsylvania Coal majority. See id. at 1253–59. But see supra notes 146–66, 178–80 and accompanying text.

\textsuperscript{312} 107 S. Ct. at 1256.

\textsuperscript{313} Id.

\textsuperscript{314} Id.

\textsuperscript{315} Id.

\textsuperscript{316} Id.

\textsuperscript{317} Id.
public purposes of health, welfare and safety would allow the government “much greater authority” to place societal burdens on individual landowners than the Court has recognized, and thereby erode the takings clause guarantee. 318 Thus, the Chief Justice was unable to agree with the Court’s conclusion that this nuisance exception encompassed the Subsidence Act. 319 Instead, he argued that the majority opinion’s assertion that the activity here regulated is akin to a public nuisance suggests an exception far wider than recognized in the Court’s previous regulatory takings cases. 320

Chief Justice Rehnquist then proceeded with an analysis of the nature and scope of the nuisance exception in regulatory takings analysis. He reasoned that the exception is not coterminous with the police power itself. 321 Quoting Curtin v. Benson, the Chief Justice, further reasoned that it is a narrow exception which allows the government to prevent “a misuse or illegal use” of property, but does not allow “the prevention of a legal and essential use, an attribute of the property’s ownership.” 322 In the dissenters’ view, the Supreme Court has applied two narrowing principles to the nuisance exception. 323 First, the public nuisance regulations exempted from the takings clause have rested on discrete and narrow purposes. 324 Second, the Chief Justice believed it was even more significant that the Supreme Court had “never applied the nuisance exception to

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318 Id. at 1256–57.
319 Id. at 1256.
320 Id.
321 Id. at 1256 (citing Penn Central Transportation, 438 U.S. at 145 (Rehnquist J., dissenting)). See supra note 196. See also Euclid v. Ambler Realty, 272 U.S. 365, 387–88 (1926).
322 Id. at 1256 (quoting Curtin v. Benson, 222 U.S. 78, 86 (1911)). For a discussion of Curtin see supra notes 85–87 and accompanying text. The Keystone Bituminous Coal dissent’s use of Curtin in articulating principles applicable to the “public nuisance exception” to the takings clause is problematic. The principle issue in Curtin was whether or not the federal government had the power to regulate private property adjacent to federal lands at all, not whether the specific proposed regulations fell within a public nuisance exception to the takings clause. Justice McKenna’s opinion indicates that the justices deciding that case did not believe that the regulations considered there could be considered to be only regulations of uses of property injurious to others. See 222 U.S. at 86. The Curtin opinion does not say that regulations solely prohibiting injurious or noxious uses of property cannot destroy all use of property. Nor does Curtin say that a use of property found to be noxious can constitute an “essential use of private property, an attribute of its ownership . . . .” Consequently, Curtin does not reflect the reality of the broad public nuisance police power recognized in Supreme Court jurisprudence. See supra Sections IA, & III.
323 107 S. Ct. at 1257.
324 Id. The cases cited by the Chief Justice as precedent exhibiting this principle are: Mugler v. Kansas, 123 U.S. 623 (1887), Hadacheck v. Sebastian, 239 U.S. 394 (1915), and Goldblatt v. Hempstead, 369 U.S. 590 (1962).
allow complete extinction of the value of a parcel of property.” He further reasoned that although the Court has upheld public nuisance regulations which substantially reduce the value of an owner’s property, “we have not accepted the proposition that the State may completely extinguish a property interest or prohibit all use without providing compensation.”

The dissenters found that the Subsidence Act violated both of these narrowing principles and thus did not fall within the takings clause public nuisance exception. First, the Act was much more than a nuisance statute because its central purposes, although including public safety, reflect a concern for the preservation of buildings, economic development, and the maintenance of property values to sustain the state’s tax base. The Chief Justice reasoned that the Court “should hesitate to allow a regulation based on essentially economic concerns to be insulated from the dictates of the Fifth Amendment by labeling it a nuisance regulation.” Under the second principle, he reasoned that the Subsidence Act falls outside the nuisance exception because it requires seams of coal to remain in the ground, and thus it does not merely forbid a particular use of the property with many uses but extinguishes all beneficial use of the coal companies’ property.

The final section of the Chief Justice’s dissent took issue with the majority’s holding that the Subsidence Act’s impact on the coal companies’ bundle of rights was constitutionally permissible. In the dissenters’ view the majority’s conclusion that the Act does not

325 107 S. Ct. at 1257. As far as regulatory takings precedent involving personal property is concerned, the dissent’s assertion does not completely reflect precedent. See Powell v. Pennsylvania, 127 U.S. 678, 687, 698–99 (1888) (public nuisance police power regulation under which the use and sale of plaintiff’s validly manufactured oleomargarine without compensation upheld); Lawton v. Steele, 152 U.S. 133, 139 (1894) (regulation allowing the uncompensated appropriation and destruction of certain fishing equipment as a nuisance upheld). See also Mugler, 123 U.S. at 664 (the Mugler Court rejected the defendants’ argument that their “[brewing] establishments will become of no value as property, or, at least, will be materially diminished in value ... ”). See infra note 375 for a further discussion of the Keystone Bituminous Coal dissent’s assertion.

326 107 S. Ct. at 1257. The dissent discussed Mugler, Goldblatt, and Miller v. Schoene, 276 U.S. 272 (1928) as precedent resting on a rejection of this proposition. Again, contrary to the dissent’s assertion, much of the Supreme Court’s jurisprudence does accept the proposition. See supra notes 75, 325; infra note 375.

327 107 S. Ct. at 1257.

328 Id. But see supra note 208 and accompanying text (characterizing Miller v. Schoene as reasoning that public nuisance regulation could be used to protect public interest economic concerns).

329 107 S. Ct. at 1257.

330 Id. at 1258–61.
impermissibly impair the coal companies' investment backed expectations or ability to profitably operate their businesses was primarily a result of its view that 27 million tons of coal in the ground do not constitute a separate segment of property for takings law purposes. The dissenters argued that the majority only reached this conclusion by basing its consideration of the impact on private property rights on the fact that the alleged taking was regulatory rather than a physical intrusion. The dissenters believed that the characterization of the government action as a regulatory or physical invasion was, in itself, irrelevant to measuring the burden on private property. The Chief Justice reasoned that the Court's precedent accorded the two types of government action different treatment only because it is clear that physical appropriations, unlike regulations, deprive the owner of the full bundle of property rights in land.

In the dissenters' view the Subsidence Act destroyed the entire bundle of interests in a segment of property, the 27 million tons of coal, and thus works a taking of property. Apparently, at least in these circumstances, the dissenters believed that the Court should not look at the impact of regulation on the regulated owner's entire related business property interests. Rather, they would hold that the specific unusable segment of property was taken.

Similarly, the Chief Justice rejected the majority's refusal to consider the impact on the support estate as the relevant segment of property. He reasoned that the Court has evaluated takings claims by reference to units of property defined by state law, and that Pennsylvania has clearly defined the support estate as a separate estate in property. Thus, the Chief Justice and the dissenters believed that it is appropriate to consider the effect of regulation on only the bundle of rights inuring to the support estate, rather than to treat this estate as merely part of the bundle of rights possessed

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331 Id. at 1258.
332 Id.
333 Id. at 1258–59. The Chief Justice specifically reasoned that the Court's decision in Andrus v. Allard, 444 U.S. 51 (1979), would have been different if the government confiscated the avian artifacts, rather than prohibiting only their sale and thereby destroying only one strand of the owner's bundle of property rights. 107 S. Ct. at 1259. See supra notes 248–54 and accompanying text.
335 Id.
336 See id.
337 Id. at 1259–61.
by either the coal owner or the surface owner. So considered, the dissenters believed the Act must be accompanied by just compensation because it completely interferes with a property right and extinguishes its value, making worthless the separate right the coal company purchased under Pennsylvania law.

Thus, Keystone Bituminous Coal contains several potentially important developments for the Supreme Court's regulatory takings analysis. Generally, the Rehnquist Court continued to embrace the Burger Court's regulatory takings test which first examines whether a regulation advances a public purpose, then weights the magnitude of the burden to the owner's bundle of property rights. However, in Keystone Bituminous Coal, a majority of the justices have now indicated that state property law does not define the size of the "bundle" considered in the Court's regulatory takings analysis, and that an assessment of a regulation's economic interference must take into account the owner's overall business interests. The four Keystone Bituminous Coal dissenters believed that the Pennsylvania Coal Court had held otherwise.

The Keystone Bituminous Coal opinion's most significant aspect is its refinement of the prong of the Court's regulatory takings analysis which measures the burden to the individual in terms of "the character of the taking." The Court held that "the character of the taking" is determined by the "type of taking" and "the nature of the State's action." The "type of taking" primarily refers to whether the government interference with private property is in the form of a physical invasion, or police power regulation. However, it also apparently includes the breadth of the class of burdened owners, and the types of property interests taken by the invasion. The "nature of the State's action" aspect of this prong focuses on whether the state is prohibiting a noxious use, and thus acting within the public nuisance exception to the takings clause. Unfortunately, the Keystone Bituminous Coal majority did not develop the nature and meaning of the exception, although the dissent argued that it is a very limited one.

338 See id.
339 Id. at 1260–61.
340 See supra notes 295–300 and accompanying text.
341 See supra notes 301–06 and accompanying text.
342 See supra note 303 and accompanying text.
343 See supra note 305 and accompanying text.
V. Why the Supreme Court's Regulatory Takings Test Is on the Wrong Track, and A Suggested Modification

A. Why the Regulatory Takings Test Has Been on the Wrong Track After Penn Central: The Need to Balance Harm to the Individual Against Harm to the Public Interest.

The Supreme Court and commentators agree that the takings clause should be construed as a principle mandating fairness in government interference with private property. This "fairness" mandates that no government action, either taxation, eminent domain, or police power is constitutional if its sole purpose is to redistribute to individuals the private benefits of the government action. As applied to police power regulations, the fairness required by the takings clause is principally a requirement that the purpose or effect of the regulation must not be to redistribute unreasonably an individual's private property rights to society at large. Thus, the Court has sought generally to prohibit the use of the police power to avoid the just compensation requirement of the fifth amendment. While the Supreme Court's modern regulatory takings test may be adequate to accomplish this goal, the Court's evolving test has yet to produce reasoning and results which convey an underlying consistency, or the "fairness" which is the purported goal of regulatory takings analysis.

Much of the continuing inconsistency is a result of the Supreme Court's failure to comprehend, or at least articulate, the meaning and importance of the principles of "noxious use" and "average reciprocity of advantage" within the precedent on which the Court continues to base its regulatory takings analysis. Pennsylvania Coal did not establish that every police power regulation must provide an average reciprocity of advantage. The Rehnquist Court must limit its use of this principle to the manner in which Justice Holmes used it. Average reciprocity of advantage is appropriate in a narrow type of regulatory takings case involving mutual development schemes with direct transfers of private property interests among

344 See Penn Central Transportation, 438 U.S. at 124; Michelman, supra note 3.
346 See id. at 166; Michelman, supra note 3, at 1203-45. Aside from Loretto, the Court only has struck down police power regulations with the takings clause when it perceived the regulation to be a spot redistribution of wealth. See L. TRIBE, supra note 345, at 167-69. See also Note, Governmental Seizure of a Business To Prevent Strike Caused Work Stoppages—Regulation or Taking?, 49 GEO. WASH. L. REV. 184, 192-93 (1950).
347 See supra notes 153-56 and accompanying text.
private individuals, but is completely irrelevant to the vast majority of takings challenges to police power regulations. 348

Similarly, the regulatory takings analysis developed by the Burger Court has been on the wrong track because it incorrectly ignored the principles of the noxious use cases, and tested the constitutionality of police power regulations solely by analyzing the magnitude of the burden to the owner's bundle of property rights. 349 The Court has used its bundle of rights analysis as if it was the entire regulatory takings test, when it is properly viewed as merely a part of the analysis used by the Court in precedent. 350 As a result, the Court has manipulated the bundle of rights analysis to achieve the correct results at the expense of the logic and consistency of the analysis. 351 It is difficult to understand why, in Penn Central, New York's landmark law forbidding the owner's multimillion dollar development of property in the manner of his neighbors and, in Andrus, the Secretary of the Interior's regulations forbidding the owner's right to sell his rare bird artifacts take a constitutionally permissible amount of property interests out of the owner's bundle when, in Loretto, the New York cable-television regulation forcing owners who choose to rent their property to accept, for "a reasonable fee," a few cables and a one and one-half foot by one foot rooftop box on their building, takes too many. 352 The reasoning of the Keystone Bituminous Coal majority that federal law and the owner's overall business operations control the determination of the relevant segment of property in which an owner can claim a bundle of rights is

348 See supra Section IC.
349 See supra Section IVA.
350 See supra notes 98–107, 143–80 and accompanying text.
351 As the Keystone Bituminous Coal dissent points out, it is inconsistent to measure the individual burden in the context of the individual's overall business interests where the alleged taking is by regulation, but to measure the individual burden against the specific property interest where the government action is, or authorizes, a physical invasion. See 107 S. Ct. at 1258. Additionally, if there is a qualitative difference between regulation of public nuisance activities and other uses of the police power (as the Keystone Bituminous Coal Court suggested), why has the Court used the significant burdens allowed in public nuisance regulation cases to establish limits (or lack thereof) on non-public nuisance related government interference with private property? See Penn Central Transportation, 438 U.S. at 127–29, 130–31, 133–35.
352 See L. Tribe, supra note 345, at 177–79. On the other hand, it is easier to understand that the use of the police power regulation in Loretto was struck down because it did violate certain traditional, compatible, and noninjurious property interests only to speed up the already occurring cable television installation process, while the Penn Central Transportation and Andrus regulations were necessary to prevent property uses which would result in significant and permanent losses to the environment. For an analysis attempting to capture this totality of the circumstances type balancing see infra Section VB.
also troubling. This reasoning suggests that federal courts must disregard state law property interests and determine the regulated parcel on which the harm to the owner's bundle of rights is to be measured. Such an approach necessarily implies that the larger the regulated owner's overall property interest the less likely a taking will be found. This approach contradicts the recognized anti-redistributive principle represented by the takings clause.

Legitimate exercises of the police power operate to define what private property rights are, rather than to take them for public use in the sense which the takings clause contemplated. The power to determine the legal uses of private property, more particularly to prevent uses which threaten the public health and safety, has been considered an essential attribute of sovereignty for a period dating back beyond the date of enactment of the United States and state constitutions. However, at least until *Keystone Bituminous Coal*, the Court's modern approach presupposed that the takings clause, through its incorporation into the Fourteenth Amendment due process clause, constituted a substantive limitation on any and all uses of the police power. The Burger Court seemed to be interpreting the takings clause as carving out an autonomous area of private property in which government cannot regulate without compensation. In so doing, the Court had departed from the noxious use cases which upheld states' absolute police power to prohibit public nuisances. Thus, under the Burger Court, the takings clause was not only a principle mandating fairness, but rather a bar to state police power.

The recognition of an important role for states' police power to arbitrate among land uses is integral to the vitality of a regulatory takings analysis which contains a bundle of rights component. Most modern redefinitions of private property rights are based on new interdependencies of neighboring uses and changing public perceptions of what constitutes "private property," rather than on any desire to tyrannize or redistribute property. The Burger Court's approach protecting an eighteenth or nineteenth century bundle of rights of property owners ignored the realities of property rights.

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354 See supra note 133.
355 See supra note 4. See also Sax, *supra* note 218, at 484–96.
357 See supra Section 1A.
Property is a dynamic concept not a static bundle of rights. The recognition that property is a dynamic concept underlay the Supreme Court's acceptance of zoning as a constitutional use of the police power in the context of a regulatory takings claim sixty years ago.\(^{359}\)

Once the dynamic nature of property rights is realized, it becomes evident that the constitutionality of a property use regulation demands a flexible test which examines the necessity and reasonableness of the regulation in its social environment. Regulatory takings claims must be decided by balancing the harm to the individual against the purpose and necessity of the regulation.\(^{360}\) Supreme Court precedent recognizes that such a decision is best made by localized experts whose judgment should be deferred to unless the use of the police power is clearly unreasonable or intentionally redistributive.\(^{361}\) The Court's modern bundle of rights balancing test necessarily, and incorrectly, focuses the constitutional analysis of police power redefinitions of property rights on one factor—the harm to the burdened owner's traditional property interests. It does not weigh the purpose of the regulation against the burden it creates. All the justices appear to have realized this in *Keystone Bituminous Coal*, but the Court has not yet explicitly related the nature and necessity of the police power action to the burden it creates. This Comment has argued that all of the Court's earlier precedent undertook this weighing.\(^{362}\)

\(^{359}\) See *Euclid*, 272 U.S. at 387-88. See also *Bettman*, supra note 182, at 187.

\(^{360}\) Justice Stevens expressly recognizes this in his *Keystone Bituminous Coal Assn.* opinion. 107 S. Ct. at 1246. However, this Comment suggests that, at least until *Keystone Bituminous Coal Assn.*, such balancing did not fit within the framework of the Supreme Court's modern regulatory taking analysis. See supra Section IVA. Several commentators have reached the conclusion that the regulatory takings test should balance public necessity against private harm. See *Plater*, *The Takings Issue in a Natural Setting: Floodlines and the Police Power*, 52 TEXAS L. REV. 201, 228-36, 243-53 (1974); Comment, *Testing the Constitutional Validity of Land Use Regulations: Substantive Due Process as a Superior Alternative To Takings Analysis*, 57 U. WASH. L. REV. 715 (1982). See also Comment, *Balancing Private Loss Against Public Gain to Test For a Violation of Due Process or a Taking Without Just Compensation*, 54 WASH. L. REV. 315 (1979). Justice Black argued that such balancing was not consistent with the takings clause. See *Black*, *The Bill of Rights*, 35 N.Y.U. L. REV. 865, 877-79 (1960).

\(^{361}\) See, e.g., *Miller*, 276 U.S. at 279-80; *Euclid*, 272 U.S. at 388-89, 395; *Pennsylvania Coal*, 260 U.S. at 420 (Brandeis J., dissenting); *Block*, 256 U.S. at 158.

\(^{362}\) See supra Section I. However, this Comment does not argue that the relaxed requirement of a "real and substantial relation" to a proper public purpose of public nuisance abatement or zoning constitutes the proper balancing standard for modern regulatory takings analyses. Given the greater constitutional protection given to many individual rights by the modern Supreme Court, a least restrictive means analysis may be more appropriate where police power regulations substantially burden private property.
The *Keystone Bituminous Coal* Court’s recognition of a takings clause exception encompassing a state’s police power to prevent noxious uses is a step toward getting the regulatory takings analysis back on track. The Court’s precedents do establish that the “nature” of the police power regulation is important for takings clause purposes. Yet the *Keystone Bituminous Coal* Court failed to appreciate, or at least articulate, the scope or meaning of the public nuisance exception. Justice Stevens’ limited articulation of state’s right to prohibit uses similar to nuisances has destined the Court’s regulatory takings litigation to a new battleground—that of the scope of the “public nuisance exception.” His implicit reasoning that this exception may be absolute\(^{363}\) will further exacerbate the conflict. How will courts distinguish between public nuisance regulations and amendments to zoning regulations designed to protect the integrity of the zoned community? Similarly, are not environmental protection statutes which protect public and private property interests from spillover effects of economic uses of property public nuisance regulations?\(^{364}\) A predictable response by pro-environment lawmakers will be to characterize environmental protection statutes as public nuisance statutes.

Contrary to the *Keystone Bituminous Coal* dissent, this Comment has argued that the Court’s precedent does not establish a narrow “public nuisance exception.”\(^{365}\) One key to understanding the scope of what the Rehnquist Court is now characterizing as the “public nuisance exception” to the takings clause is to relate the public

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\(^{363}\) See *Keystone Bituminous Coal Assn.*, 107 S. Ct. at 1243 n.17 (“In his [*Pennsylvania Coal*] dissent, Justice Brandeis argued that the State has an absolute right to prohibit land use that amounts to a public nuisance . . . Justice Holmes’ opinion for the Court did not contest that proposition, but instead took issue with Justice Brandeis’ conclusion that the Kohler Act represented such a prohibition.”). This Comment has argued that the “public nuisance exception” was absolute. See *supra* notes 73–75, 165 and accompanying text.

\(^{364}\) In connection with this latter question it should be noted that the principal difference between the Kohler Act, which the *Pennsylvania Coal* Court rejected as a public nuisance regulation, and the Subsidence Act, which the *Keystone Bituminous Coal* Court accepted as one, is that the “main goal” of the Subsidence Act was deterring coal operators from causing damage to surface land areas. *Keystone Bituminous Coal Assn.*, 107 S. Ct. at 1243. Thus, the Subsidence Act is largely a “conservation” or environmental protection statute, unlike the Kohler Act. See *id.* at 1242–43. Professor Joseph Sax has argued that the government should be able to prevent all “spillover effects,” that is, economic uses which affect other public or private property, unfettered by the takings clause. See Sax II, *supra* note 3, at 161–63. But see *Florida Rock Industries v. United States*, 8 Cl. Ct. 160, 170–77 (1985), *aff’d in part, vac’d in part, remanded*, 791 F.2d 893 (Fed. Cir. 1986) *Cert. denied*, 199 L. Ed. 2d 971 (1987) (U.S. Court of Claims Chief Judge Kozinski distinguished between public nuisance and environmental protection statutes, reasoning that the former can burden individuals to a greater extent than the latter). See also *supra* note 197.

\(^{365}\) See *supra* Sections IA & III.
nuisance (i.e. noxious use) cases to the Court's decisions in *Pennsylvania Coal* and *Euclid*. The modern Supreme Court has not completely understood the relationship of these earlier precedents because it has failed to understand the role of average reciprocity of advantage in these two cases. In the dissent in *Penn Central*, both the current Chief Justice and Justice Stevens viewed the principle of average reciprocity of advantage as underlying the Supreme Court's acceptance of zoning as a 'constitutional exercise of police power in *Euclid*. Examining the reasoning of *Pennsylvania Coal, Jackman v. Rosenbaum Co.*, and those cases which Justice Holmes characterized as resting on the principle, this Comment has argued that the principle of average reciprocity of advantage operated in Supreme Court doctrine only as a validator of uncompensated police power regulations in a narrow context—where in mutual development schemes direct transfers of property interests occurred between identifiable owners. These types of police power exercises generated both general benefits shared by the public as well as the burdened owners, and special benefits shared only by the burdened owners. It is not average reciprocity of advantage which justified the police power to zone in *Euclid*, rather the constitutionality of zoning rests on the *Euclid* Court's recognition that the police power to prevent public nuisances is "not coterminous with the police power itself," and that zoning was akin to, or justified for, the same reasons as, the police power to prevent public nuisances. In other words, just as earlier Courts had found that the the police power to prevent use which amounts to common law public nuisances properly extended to preventing near-nuisances, the *Euclid* Court found that prohibiting public nuisances from developing by means of zoning also

366 See supra Sections II & III. Chief Justice Rehnquist and Justice Stevens, despite their divergent opinions in *Keystone Bituminous Coal*, are apparently the only two Justices sitting on both the *Penn Central* and *Keystone Bituminous Coal* Courts who have espoused a regulatory taking analysis which includes a "noxious use" or "public nuisance" exception in both cases. See *Penn Central Transportation*, 438 U.S. 104, 133–34 n.30 (1978) (in the Opinion of the Court, Justice Brennan reasons: "[Hadacheck, Miller, and Goldblatt] are better understood as resting not on any supposed "noxious" quality of the prohibited uses but rather on the ground that the restrictions were reasonably related to the implementation of a policy, not unlike historic preservation, expected to produce a widespread public benefit and applicable to all similarly situated property."). Yet, *Keystone Bituminous Coal* indicates that all the Supreme Court justices are now embracing the view of regulatory takings doctrine articulated by the *Penn Central* dissent. See supra notes 231–32 and accompanying text.

367 438 U.S. at 139–40, 147 (J. Rehnquist dissenting).

368 See supra note 142 and accompanying text.

369 See supra note 141 and accompanying text.

370 See supra notes 194–98 and accompanying text.
fell within the proper use of the police power that the Rehnquist Court is now characterizing as "the public nuisance exception" to the takings clause. Further, *Miller v. Schoene* additionally upheld a "public nuisance exception" to the takings clause which recognized that if a proper public purpose exists, the state may directly arbitrate among competing property uses using the police power to prevent nuisances. 371

In addition, this Comment has argued that the Supreme Court's reasoning in the pre-1930 noxious use or public nuisance cases does not support the limiting principles to the exception advanced by the *Keystone Bituminous Coal* dissent. 372 Contrary to the *Keystone Bituminous Coal* dissent's suggestion, at least by the second two decades of the twentieth century the Supreme Court did not reason that police power regulation must rest on discrete and narrow health and safety purposes, and not essentially economic concerns, to fall within the public nuisance exception. 373 *Miller v. Schoene* clearly establishes that prohibition of adverse economic effects on private property which indirectly affect the public welfare can be the purpose of public nuisance regulation. 374 Nor has the Court reasoned that the public nuisance exception cannot be applied to allow complete extinction of the value of a parcel of property. 375 Correctly

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371 See supra notes 205-09 and accompanying text.
372 107 S. Ct. at 1257 (C.J. Rehnquist dissenting). See supra notes 320–26 and accompanying text. Chief Justice Rehnquist's dissent does not state that the Supreme Court's reasoning has ever explicitly recognized these principles. Rather, he finds them to be "involved" in the "nuisance rationale" and the results of the regulatory taking cases upholding public nuisance regulation of private property.
373 The *Keystone Bituminous Coal* dissent implicitly suggests that the discrete and narrow purposes of public nuisance statutes are the protection of public health and safety. See *Keystone Bituminous Coal Assn.*, 107 S. Ct. at 1257 (C.J. Rehnquist dissenting).
374 See supra note 208 and accompanying text.
375 The Supreme Court has applied this exception to completely extinguish the value of personal property. See supra note 325. In addition, the Supreme Court has never reasoned that real and personal property should be treated differently under the takings clause. See supra note 45.

As precedent for its proposition that the Supreme Court has not accepted the proposition that the state may completely extinguish a property interest without compensation under public nuisance regulations, the *Keystone Bituminous Coal* dissent first cites *Mugler v. Kansas*, 123 U.S. 623 (1887) (reasoning "in *Mugler v. Kansas* . . . the prohibition of manufacture and sale of intoxicating liquors made the distiller's brewery 'of little value' but did not completely extinguish the value of the building." 107 S. Ct. at 1257). But, in *Mugler*, the Court rejected the defendants' argument that their "... [brewing] establishments will become of no value as property, or, at least, will be materially diminished in value . . . ." 123 U.S. at 664. The fact that the brewery may have retained some value does not appear to have been addressed in the Court's reasoning. It certainly was not determinative. What was important was the fact that the building may have some non-noxious use and thus could not be completely
viewed, the Supreme Court's public nuisance and noxious use decisions, as well as *Euclid* and the zoning decisions, establish the converse proposition that state governments have the absolute power to prevent private property exploitation which is injurious to community interest as long as it does not do so arbitrarily or unnecessarily.376

Rather than a narrow "public nuisance exception" to the takings clause, the Court's precedent establishes what could be termed a broad state police power "use arbitration exception" resting on the principle of federalism embodied in the tenth amendment of the United States Constitution.377 Recognizing this broad exception, the Supreme Court in zoning and public nuisance cases effectuated the takings clause guarantee using only the *Lawton* ends-means substantive due process test which required only that the ordinance be reasonably related to a proper public purpose.378 The "public nuisance exception" quite simply does not fit within the modern Supreme Court's bundle of rights analysis which determines a taking by looking only at the burden to the individual. The fact that, when properly

destroyed unless specifically found to be a noxious use after passage of the statutes. See id. at 670–72, 676–78. In addition, the regulation probably completely destroyed the value of at least some of the defendants' brewing equipment since the brewery could no longer be profitably operated. See id. at 664. The *Keystone Bituminous Coal* dissent next cites Miller v. Schoene, 276 U.S. 272 (1928) (reasoning, "Similarly, in Miller v. Schoene . . . the individual forced to cut down his cedar trees nevertheless was able 'to use the felled trees.'" 107 S. Ct. at 1257). However, again this fact was important only because it established that the Virginia statute did not go beyond eliminating a public nuisance (since the felled trees were no longer public nuisances), and thus it was a bona fide police power public nuisance regulation. See *supra* notes 202–09 and accompanying text; and *supra* note 65. Other than for this purpose, the *Miller* Court's reference to the use of the felled trees does not appear to be integral to, or representative of, its reasoning upholding Virginia's statute as a valid public nuisance police power statute. See 276 U.S. at 277, 278–80. Finally, the *Keystone Bituminous Coal* dissent cites Goldblatt v. Hempstead, 369 U.S. 590 (1962) (reasoning that "[t]he restriction on surface mining in Goldblatt v. Hempstead . . . may have prohibited 'a beneficial use' of the property, but did not reduce the value of the lot in question." 107 S. Ct. at 1257). Rather than establishing that the nuisance exception cannot completely extinguish the value of property, *Goldblatt* rests on the fact the plaintiffs presented no evidence as to the diminution in value of the property and the Court's finding that the local public nuisance regulation was reasonable in order to protect public safety. See 369 U.S. at 594.

376 See *supra* notes 73–75, 210 and accompanying text. See also *Mugler*, 123 U.S. at 678 (Field J., dissenting) ("It has heretofore been supposed to be an established principle, that where there is a power to abate a nuisance, the abatement must be limited by its necessity, and no wanton or unnecessary injury can be committed to the property or rights of the individual.").

377 The tenth amendment provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X.

378 See *supra* notes 73–75, 199–201 and accompanying text.
viewed, this exception encompasses zoning and most government police power arbitration between competing land uses suggests that the Court's current "bundle of rights" takings analysis is unsatisfactory.

**B. A Suggested Modification—Use of the Modern Contract Clause Balancing Test.**

The Supreme Court's regulatory takings test must reflect the weighing of principles which underlies a takings clause challenge to a police power regulation. The United States Constitution clearly recognizes that both the federal and state governments have certain powers of sovereignty. However, as the Court has held the anti-redistributive principle embodied in the takings clause must limit states' police powers and the federal government's delegated powers or "private property disappears." See Pennsylvania Coal, 260 U.S. at 415. These principles mandate a balancing test which will take into account not only the burden placed upon the individual by the regulation, but also the harm to the public interest legitimately addressed by the police power. If the Supreme Court is to apply one analysis for all types of regulatory takings claims, that analysis should be more akin to the *Lawton* ends-means substantive due process regulatory takings analysis than the bundle of rights approach used in eminent domain cases. See Oakes, supra note 216, at 625–26. Rather than focusing on detailed analyses of legal fictions such as "noxious use," "average reciprocity of advantage," and property owner's "bundle of rights," the analysis should recognize the principles consistently underlying Supreme Court precedent: Necessary police power regulations or regulations which impose reasonable burdens on owners are not prohibited by the takings clause. Like the Supreme Court's tests of the police power when it conflicts with most other explicit and fundamental substantive constitutional rights, the Court's regulatory takings analysis should be a hybrid substantive due process analysis which explicitly balances the public interest in regulation against the harm to the individual.

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379 *Pennsylvania Coal*, 260 U.S. at 415.
The Supreme Court's modern formulation of the constitutional contract clause analysis offers a workable balancing approach from which the Court should draw. During the formative years of its modern approaches, the Supreme Court's treatment of claims involving conflicts between the police power and the contract clause to a great extent paralleled its treatment of regulatory takings.\textsuperscript{382} Both types of constitutional inquiry center around the private autonomy and the "rule-of-law" underpinnings of the United States Constitution.\textsuperscript{383} The contract clause, which was originally intended by the framers to apply to states, should not mandate a balancing test which allows greater state police power interference with individual rights than the takings clause analysis.

The Burger Court is perceived as having rejuvenated the contract clause as a source of constitutionally guaranteed substantive individual rights which may not be abridged by state police power.\textsuperscript{384} However, the Burger Court did not strictly construe the contract clause as barring any police power interference with private contracts.\textsuperscript{385} Instead, it attempted to insure that police power regulation in this area be reasonable, necessary and consistent with the principle embodied in the clause.\textsuperscript{386} Although both courts and commentators have seen the Burger Court's contract clause analysis as a modification of Supreme Court jurisprudence in this area, for the most part the

\textsuperscript{382} See generally L. Tribe, supra note 345, at 165–87. Compare the analysis of the two cases on which the Court's modern takings clause and contract clause approaches are based, Pennsylvania Coal v. Mahon, 260 U.S. 393 (1922); Home Bldg. & Loan Assn. v. Blaisedell, 290 U.S. 398, 428, 436–48 (1934). In Pennsylvania Coal Justice Holmes used one analysis to address both the takings clause and the contract clause claims. See Frankfurter, Twenty Years of Mr. Justice Holmes' Constitutional Opinions, 36 Harv. L. Rev. 909, 937 (1923) (classifying Pennsylvania Coal as a contract clause case).

\textsuperscript{383} See Note, Rediscovering the Contract Clause, 97 Harv. L. Rev. 1414, 1423–31 (1984) and cases cited therein. As to the takings clause see L. Tribe, supra note 345, at 165–76. Fredrich Hayek set out the rule-of-law ideal of government acting through "rules fixed and announced beforehand–rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances and to plan one's individual affairs on the basis of this knowledge." F. Hayek, The Road To Serfdom 72 (rev. ed. 1976). Under an approach based on the rule of law, substantive limitations are not placed on legislatures, but legislatures may only impair substantive contract or property rights through generally applicable laws prescribing rules of conduct that operate prospectively. See Note, Rediscovering the Contract Clause, 97 Harv. L. Rev. at 1426–27. See also Note, Regulation Without Just Compensation: A Political Process-Based Taking Analysis of the Surface Mining Act, 69 Geo. L.J. 1083 (1981), for an argument that a "political process approach," under which courts first look to the breadth of the regulation, and then to the degree of interference with private property, should be used for takings analysis.


\textsuperscript{385} See id. at 1418–19.

\textsuperscript{386} Id. at 1427–31.
Court's new contract clause decisions are favorably viewed in terms of constitutional principles.\textsuperscript{387}

Much like its recent takings clause jurisprudence, the Supreme Court's recent decisions involving the contract clause reveal a fact oriented, multi-factor balancing test.\textsuperscript{388} In order to determine whether a contract has been "impaired" within the meaning of the clause, the Court has looked at the legislation's frustration of reasonable contract-based expectations.\textsuperscript{389} The degree of investment-backed interests, and extent of prior legislative regulation in the area are two important factors in this inquiry.\textsuperscript{390} Once an impairment of a contract is found, the Court has applied a balancing test which draws heavily from ends-means substantive due process analysis.\textsuperscript{391}

In its recent contract clause jurisprudence, the Court's level of scrutiny of a challenged police power regulation varies inversely with the severity of impairment.\textsuperscript{392} A police power regulation whose sole effect is an impairment of a valid public contract receives strict scrutiny and will be upheld only if "reasonable and necessary" to serve an "important public purpose."\textsuperscript{393} The Supreme Court has also suggested that in this situation contractual impairment is "reasonable" only when it is prompted by some unforeseen changed circumstances, and "necessary" only when it is the least drastic means to a given end.\textsuperscript{394} Where the sole effect of the police power regulation is a sudden and permanent impairment of a private contractual

\textsuperscript{387} Id. at 1426-27, 1429-31. But see L. Tribe, supra note 345, at 179-87 (Professor Tribe argues that the Burger Court's contract clause analysis has been too rigid in its protection of existing capital distributions and has failed to protect the vast majority of Americans unable to secure economic and emotional security in the marketplace); Epstein, Toward a Revitalization of the Contract Clause, 51 U. CHI. L. REV. 703, 750 (1984) (Professor Epstein argues for a stricter contracts clause guarantee and not simply a hybrid substantive due process approach).


\textsuperscript{389} See Energy Reserves Group Inc., 459 U.S. at 411, 416.

\textsuperscript{390} See id. at 411, 413-16.

\textsuperscript{391} See Epstein, supra note 387, at 750 (concluding his argument for a revitalization of the contract clause as a source of substantive rights against legislative interference, Professor Epstein writes: "The interpretation of the Contract Clause prevailing in the Supreme Court reduces the Clause to yet another emaciated form of substantive due process.").

\textsuperscript{392} Energy Reserves Group, Inc., 459 U.S. at 411; Allied Structural Steel Co. v. Spannaus, 438 U.S. at 245.

\textsuperscript{393} Allied Structural Steel Co., 438 U.S. at 245; United States Trust Co., 431 U.S. at 25 (1977).

\textsuperscript{394} Note, Rediscovering the Contract Clause, supra note 383, at 1429. See United States Trust Co., 431 U.S. at 29-32.
obligation, the Court has also applied a strict scrutiny approach which compares the degree of disruption of the private contract-based expectations to the importance of the public ends furthered by the challenged police power regulation.\textsuperscript{395} Such a balance necessarily accents the narrowness of the classes benefitted and burdened by the regulation.\textsuperscript{396} Finally, the Court has indicated that a deferential minimum rationality standard of review will apply where the police power regulation imposes a "generally applicable rule of conduct designed to advance a broad societal interest and only incidentally disrupts existing contractual obligations."\textsuperscript{397}

The balancing test which the Court undertakes under the contract clause can be used for regulatory takings claims to alternatively stress substantive individual rights and a rule of law approach\textsuperscript{398}—the two theoretical bases underlying both the \textit{Lawton} ends-means substantive due process and the \textit{Block/Pennsylvania Coal} "reasonableness" or "bundle of rights" balancing tests. Under such a balancing test the Court's initial inquiry would concentrate on the magnitude of the harm to the private individual owner. Weighing the "type" of the invasion (authorized physical invasion or restriction of use), the diminution in value, and the interference with distinct and reasonable investment-backed expectations, the Court would decide whether private property has been "taken."\textsuperscript{399} If the Court so finds, then it will require justification on the part of the state for regulating without just compensation.

State justification would be reviewed with a sliding scale of scrutiny. Following the modern contract clause analysis, the Supreme Court should link the level of scrutiny to the magnitude of the burden to the owner.\textsuperscript{400} Precedent indicates that the Court should undertake strict scrutiny of any regulation which involves the direct transfer of property interests to the local, state, or federal government.\textsuperscript{401}

\textsuperscript{395} Note, \textit{Rediscovering the Contract Clause}, supra note 383, at 1417.
\textsuperscript{397} Id. at 191 (quoting \textit{Allied Structural Steel Co.}, 438 U.S. at 249).
\textsuperscript{399} In other words, the Supreme Court should first undertake the Burger Court's bundle of rights analysis to determine whether the burden to the property owner rises to the level of a "taking." See supra text accompanying notes 280–81.
\textsuperscript{400} In \textit{Goldblatt}, 369 U.S. at 395–96 the Court reasoned that its analysis of the reasonableness of a regulation would depend on the burden to the individual. But see supra note 73.
\textsuperscript{401} In his 1960 article, Professor Joseph Sax concluded that the proper regulatory taking test (and not only the level of scrutiny), based on Supreme Court precedent and the policy underlying the takings clause was an enterprise-arbiter test which looked to whether or not the state was acting to acquire private property interests rather than merely refereeing among private property disputes. See Sax I, supra note 2 at 61–76.
Such a regulation should be upheld only if it is "reasonable and necessary" to advance an important government interest. The average reciprocity of advantage line of cases indicates that mutual cooperation schemes mandating direct transfers of substantial private property interests among private owners will be upheld as reasonable only if they convey roughly reciprocal benefits on the burdened owners.\footnote{See supra note 141 and accompanying text.} \textit{Loretto} indicates that a police power regulation allowing permanent physical occupation of private property is unreasonable.\footnote{See supra note 274 and accompanying text.} Of course, the bulk of regulatory takings claims arise in the context of government arbitration of private property interests. Regulatory takings precedent readily indicates that use arbitration regulation, such as zoning and noxious use ordinances, which advance broad societal interests with generally applicable rules of conduct will receive more deferential scrutiny even if they substantially burden individual interests.\footnote{See supra Sections IA & III. See also \textit{Keystone Bituminous Coal Assn.}, 107 S. Ct. 1243 n.16.} \textit{Keystone Bituminous Coal}, as well as the older noxious use cases, indicate that legitimate regulation of spillover uses of private property which will harm bona fide public interests is reasonable and necessary. In other words, as long as the state does not arbitrarily or unreasonably regulate private property, the state interest in regulation will outweigh any private property interests.\footnote{See supra notes 73-75 and accompanying text.} 

Clearly, this proposed analysis will not immediately provide bright guidelines for land use regulators and private property owners, but it should provide the predictability and guidance as to the constitutional protection of private property that all desire. This test expressly lays out all the factors which go into the ad hoc factual inquiry and relates them in a meaningful way. It balances the harm to the individual against the public interest by requiring stricter scrutiny of regulations which substantially burden private property interests. The analysis also makes clear that both the nature and the necessity of the ends of the regulation do affect the Court's analysis of the means, that is of the burden placed on the individual. It links the modern Court's regulatory takings analysis to its older substantive due process analysis, and allows the Court to expand upon its precedent in the context of new types of land use regulation. Most importantly, by stressing the necessity of police power action in
addition to impact on the owner’s bundle of property rights, this analysis upholds the core substantive guarantee of the takings clause while preserving the state governments’ power to undertake reasonable and necessary police power action.

VI. CONCLUSION

In a regulatory takings analysis the fifth amendment takings clause must be construed as a principle to be balanced against the sovereign powers reserved to the states by the tenth amendment. This Comment has argued that in the 1870–1930 period the Supreme Court undertook this balancing using three different analyses. Up until Keystone Bituminous Coal, the modern Supreme Court had relied on a bundle of rights regulatory takings analysis which essentially treats regulatory takings claims in the same manner as non-regulatory inverse condemnation claims. Although Keystone Bituminous Coal indicates that the Court does now recognize a “public nuisance exception” to the takings clause, this Comment has argued that both in terms of policy and precedent the modern Supreme Court analysis is unsatisfactory because it does not balance the purpose of the regulation or its necessity against the magnitude of the harm to the individual. Finally, this Comment has suggested that a regulatory takings analysis based on the Court’s modern approach to contract clause cases would contain this requisite balancing element and could be used to reconcile precedent and uphold the underlying goals of the takings clause while preserving states’ sovereign powers.