This Land Is My Land: The Clash Between Private Property and the Public Interest in Lucas v. South Carolina Coastal Council

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THIS LAND IS MY LAND: THE CLASH BETWEEN PRIVATE PROPERTY AND THE PUBLIC INTEREST IN LUCAS V. SOUTH CAROLINA COASTAL COUNCIL

No person shall . . . be deprived of . . . property, without due process of law; nor shall private property be taken for public use, without just compensation.2

These words seem so simple, yet they lie at the heart of some of our country’s most confusing constitutional doctrine. Implicit in the governmental limitations that the Fifth Amendment imposes is the understanding that, in some circumstances, the government does have the power, with due process of law, to deprive a person of property or, upon payment of just compensation, to take private property for public use.4 The first of these powers is generally referred to as the police power and the second as the power of eminent domain.5 The confusion about where to draw the line between these two powers makes it difficult to determine when an

2 U.S. Const. amend. V. This requirement is applicable to the states as well as the federal government. See Chicago, B. & Q. R.R. v. Chicago, 166 U.S. 226, 235–41 (1897).
3 See, e.g., Donald W. Large, The Supreme Court and the Takings Clause: The Search For a Better Rule, 18 Envtr. L. 3, 4 (1987) (“Few issues . . . have proven to be as unsolvable . . . .”); Joseph L. Sax, Takings, Private Property and Public Rights, 81 Yale L.J. 149, 149 (1971) (“Few legal problems have proved as resistant to analytical efforts . . . .”). Two of Professor Sax’s articles on takings were recently listed in an article compiling the most cited articles from The Yale Law Journal, which may indicate the number of writings this topic generates. See Fred R. Shapiro, The Most-Cited Articles from The Yale Law Journal, 100 Yale L.J. 1449, 1462 (1991).
5 See id. It is the power of eminent domain that is implicated, for example, when the government physically takes one’s land in order to build a new highway or a community redevelopment project. See, e.g., Poletown Neighborhood Council v. City of Detroit, 304 N.W.2d 455, 459 (Mich. 1981) (city condemned housing area for construction project designed to revitalize the community). For a discussion of some of the issues that arise with such physical invasions, see generally Lawrence Berger, The Public Use Requirement in Eminent Domain, 57 Or. L. Rev. 203, 203 (1978); William Epstein, The Public Purpose Limitation on the Power of Eminent Domain: A Constitutional Liberty Under Attack, 4 Pace L. Rev. 231, 236 (1984); William B. Stoebeck, A General Theory of Eminent Domain, 47 Wash. L. Rev. 553, 553 (1972).
exercise of governmental power goes so far as to constitute a taking of private property for which compensation is required. 6

Currently a record number of Fifth Amendment cases are pending in the courts that pit private property owners against the government. 7 Many of these cases involve challenges to environmental regulations. 8 As we, as a society, become more aware of our environment and the ways in which our actions in one area affect the economic and environmental well-being of other areas, 9 we find ourselves being forced to sacrifice some of our personal property rights. 10 The property owners in the pending suits generally claim, however, that they should not be forced to bear the cost of the environmental restrictions. 11 Unfortunately, the question that then arises is whether government, especially given the current fiscal state of our nation, can afford to compensate each landowner affected by an environmental regulation. 12

This is just the issue presented by Lucas v. South Carolina Coastal Council. 13 In February 1991, the South Carolina Supreme Court, in

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6 Wiseman, supra note 4, at 438-39; see also Nathaniel S. Lawrence, Regulatory Takings: Beyond the Balancing Test, 20 Urb. Law. 389, 389 (1988); Sax, supra note 3, at 149.

7 David Kaplan & Bob Cohn, Pay Me, or Get Off My Land, Newsweek, Mar. 9, 1992, at 70. These authors cite the current conservative judiciary as part of the incentive behind these suits. Id.

8 Id.


10 See id. Mr. Linden quotes Erik Meyers of the Environmental Law Institute, who says "[t]he freedom to swing your arms stops at your neighbor's nose, and what has happened is that noses have got [sic] a lot closer together." Id.

11 See Kaplan, supra note 7, at 70. Mr. Kaplan notes that if you want to love a tree, it would be best to buy one. Id.

12 See id. Kaplan notes that forcing governments to compensate landowners for regulated land would cost billions of dollars. Id. Almost any land regulation would conceivably be affected by such a requirement, including laws protecting wetlands, endangered wildlife, nature habitats and historic districts. Id.

13 Id.; see also Lucas v. South Carolina Coastal Council, 404 S.E.2d 895 (S.C.), cert. granted, 112 S. Ct. 436 (1991). The Court has decided at least one other case this term that involved a takings issue. See Yee v. City of Escondido, 112 S. Ct. 1522, 1526 (1992). In Yee v. City of Escondido, owners of mobile home parks challenged the constitutionality of a mobile home rent control ordinance. Id. Except in certain circumstances, the ordinance compelled a park owner to accept as a new tenant a person who purchased a mobile home from an existing tenant. Id. In the lower court, the park owners argued that the ordinance caused the price of used mobile homes to increase dramatically because the existing tenants were able to monetize the value of living in a rent controlled area. See id. at 1528. Thus, they argued, the ordinance constituted a taking because it transferred the monetary interest from the park owners, who would normally capture the value through increased rents, to the tenants and gave the tenants a right of physical occupation on the land. See id. In its opinion, the California Court of Appeal refused to accept the plaintiff's argument that they were required to acquiesce to the occupation of their property by a third party designated by the government. Id. at 1527. Thus, the court found that no taking had occurred. See id.
Lucas, held that the South Carolina Beachfront Management Act, which prohibits building along South Carolina beaches, did not constitute a compensable taking of the plaintiff's private property.\textsuperscript{14} The Lucas court reasoned that because the statute sought to prevent a use of the land that would seriously harm the public, the government need not compensate the landowner affected by the regulation.\textsuperscript{15} The court held that the government regulation was valid without compensation despite the fact that the plaintiff contended that he had no remaining economic use for his land.\textsuperscript{16} In November 1991, the United States Supreme Court granted Mr. Lucas's petition for certiorari.\textsuperscript{17}

In determining whether a taking has occurred in a case like Lucas, a court must undertake a two-step analysis.\textsuperscript{18} First, a court determines if there is a property interest that is protected by the Fifth Amendment.\textsuperscript{19} The United States Supreme Court has adopted no single definition of property for the purposes of the Takings Clause, but instead has interpreted property to mean a number of different things.\textsuperscript{20} For example, in one case, the Court held that the property involved was a physical parcel of land that included all parts of the property, including the airspace above the building.\textsuperscript{21} In another case, the Court considered discrete portions of a building not effect a per se physical taking. \textit{Id.} at 1534. While the Court recognized that the mobile home law limited the bases upon which a park owner could terminate a tenant's lease, the Court agreed with the state court that nothing compelled the park owners to rent their land to mobile home owners. \textit{Id.} at 1528. Instead, the Court viewed the ordinance as merely regulating the relationship between a landlord and a tenant. \textit{Id.} at 1529. Such regulations, the Court continued, cannot be a per se taking based on a physical invasion, but must be analyzed by engaging in an "ad hoc, factual" inquiry. \textit{Id.}

The plaintiffs in Yee also argued that the ordinance effected a regulatory taking, and not just a per se physical taking. \textit{See id.} at 1531. The Court, however, held that this question was not properly presented in the petition for certiorari. \textit{Id.} Therefore, the Court declined to decide the question of whether the ordinance effected a taking under a factual inquiry. \textit{See id.} at 1534.

A second takings case was also scheduled to come before the Court this term. The petition for certiorari was dismissed, however, on the grounds that it had been improvidently granted. \textit{See PFZ Properties, Inc. v. Rodriguez, 928 F.2d 28, 29 (1st Cir. 1991), cert. dismissed, 112 S. Ct. 1151 (1992).}


\textsuperscript{15} \textit{Id.} at 899–901.

\textsuperscript{16} \textit{See id.} at 896.


\textsuperscript{19} \textit{See id.} at 1302, 1304.

\textsuperscript{20} \textit{See id.} at 1304.

where cable equipment had been installed to be property that had been taken. 22 In addition, the Court has found valid property interests in property other than parcels of land, such as economic rights. 23 Thus, the Court has provided no single definition of property for purposes of the Takings Clause. 24

In the second step of the takings analysis, a court must determine whether compensation is required in a particular instance. 25 Here too, the Supreme Court has been unable to develop a "set formula" to determine when compensation is required. 26 Instead, the Court has approached the compensation analysis in a number of different ways. 27 For example, in one case the Court applied a multi-factor balancing test. 28 In other cases, the Court has looked for a bright-line rule to apply. 29 Thus, the United States Supreme Court has not provided clear guidelines for either the property interest or the compensation prong of the takings analysis. 30

This note argues that although the facts of Lucas present a very sympathetic case for the landowner's claim for compensation, the facts also present an opportunity for the United States Supreme Court to refine its takings analysis in a way that explicitly addresses the interest the public has in a government regulation. Section I discusses what constitutes a property interest that can be taken. 31 Section II discusses the history of the Court's approach to compensation under the Takings Clause. 32 Section III presents the decision

24 Peterson, supra note 18, at 1304.
25 Id.
27 See Peterson, supra note 18, at 1333; see also Penn Central, 438 U.S. at 128–35.
28 See Peterson, supra note 18, at 1317; see also Cherokee Nation, 480 U.S. at 703–04 (no balancing required where interference with riverbed resulted from congressional control over the waters); Agins, 447 U.S. at 260 (zoning law affects a taking if ordinance does not substantially advance state interests or denies owner economically viable use of land); Hadacheck, 239 U.S. at 411 (ordinance prohibiting brickyard not a taking because the use of the property was a nuisance); Mugler, 123 U.S. at 668–69 (ordinance prohibiting manufacture of liquor not a taking because use of property is injurious to others).
29 Peterson, supra note 18, at 1305.
30 See infra notes 37–95 and accompanying text.
31 See infra notes 96–224 and accompanying text.
of the South Carolina Supreme Court in *Lucas.* Section IV argues that, although the United States Supreme Court has been moving towards a more decisive and bright-line approach in determining when compensation is required, the Court should instead base its decisions on a multi-factor balancing test. Section V then proposes that the Court should explicitly include the public interest as a factor in this balancing test. Section VI applies the two-step analysis, utilizing this comprehensive balancing approach, to *Lucas* and concludes that the South Carolina Beachfront Management Act does not effect a taking of Mr. Lucas's oceanfront property.

I. THE FIRST PRONG OF THE TAKINGS TEST—FINDING A VALID PROPERTY INTEREST

*The first person who, having fenced off a plot of ground, took it into his head to say this is mine and found people simple enough to believe him, was the true founder of civil society.*

No matter what the context of a constitutional takings claim, the threshold question that courts must address is whether a legitimate property interest has been affected. Although the word "property" may seem familiar, the United States Supreme Court has defined the concept in various ways. The Court has found property interests in physical parcels of property and economic rights. In other cases, the Court has held that a legal right must be vested in order to be property within the meaning of the Takings Clause.

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53 See infra notes 225–47 and accompanying text.
54 See infra notes 248–75 and accompanying text.
55 See infra notes 276–303 and accompanying text.
56 See infra notes 304–75 and accompanying text.
58 John Martinez, Reconstructing the Takings Doctrine by Redefining Property and Sovereignty, 16 FORDHAM URB. L.J. 157, 161 (1988); Peterson, supra note 18, at 1308.
59 See infra note 18, at 1304.
A. Physical Parcels of Property

Although the United States Supreme Court sometimes defines property for Takings Clause purposes as a physical parcel of land, the boundaries of the parcel may differ from case to case. In 1978, the Court, in *Penn Central Transportation Co. v. New York City*, defined the relevant unit of property as a parcel of land that the city had designated as a historic landmark site. The landowner argued that the government had deprived it of the airspace above Grand Central Terminal because it denied the plaintiff permission to construct a fifty-three story office building on top of the terminal. The Court noted that the city had designated the parcel as a whole, encompassing the entire block, as a landmark site. Therefore, the Court reasoned that the plaintiff's takings claim must be analyzed with respect to the whole parcel, which included the airspace. Thus, according to the *Penn Central* Court, a single parcel could not be divided into discrete segments in order to determine if rights in a particular segment had been entirely extinguished.

On the other hand, in 1982, in *Loretto v. Teleprompter Manhattan CATV Corp.*, the Court held that a valid property interest existed in just a portion of a larger piece of property. In *Loretto*, the alleged taking was the permanent physical installation of a cable wire on

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45 Compare *Penn Central*, 438 U.S. at 130–31 (property is entire parcel of land) with *Loretto*, 458 U.S. at 438 (property taken can be small portion of larger tangible parcel).

44 438 U.S. at 130–31. The building in question was Grand Central Terminal, located in midtown Manhattan. *Id.* at 115. The *Penn Central* Court noted that the building was regarded as an “ingenious engineering solution” to the problems presented by urban railroad stations as well as a “magnificent example of the French beaux-arts style.” *Id.*

46 *Id.* at 130. The owner of the property had two plans for the building, one of which required that a portion of the terminal be torn down and some of the remaining features of the terminal’s facade be stripped. *Id.* at 116–17.

47 *Id.* at 130.

48 *Id.* at 130–31. The Court noted that allowing the landowner to establish a taking merely by showing that he had been deprived the right to develop was “untenable.” *Id.* at 130. The Court observed that this principle was applicable to air rights as well as to the development of subjacent and lateral land. *Id.; see also Goldblatt v. Hempstead*, 369 U.S. 590, 594, 596 (1962) (ordinance prohibiting excavation of land below water table of lake is valid); *Gorieb v. Fox*, 274 U.S. 509, 604, 610 (1927) (ordinance establishing mandatory set-back lines for homes is valid).

49 *Penn Central*, 438 U.S. at 130; *see also Hodel v. Indiana*, 452 U.S. 314, 355 (1981) (relevant unit of property is entire parcel not uses to which particular pieces may be put); *cf: Williamson County Regional Planning Comm’n v. Hamilton Bank*, 473 U.S. 172, 192 n.12 (1985) (Court considered land itself, not expectations in the land). *But see* *Keystone Bituminous Coal Ass’n v. DeBenedictis*, 480 U.S. 470, 499 (1987) (Court did not define property with precision).

50 458 U.S. 419, 421 (1982).
the roof and side of an apartment building the plaintiff owned. Although the cable wire intruded only onto a small portion of the landowner's total property, the Court nevertheless held that a taking had occurred. The Loretto Court did not attempt to explain how it could view the occupation of merely a portion of the landowner's building as a deprivation of property, when the Penn Central Court had held that the relevant property for takings purposes was the parcel as a whole. Therefore, even when the relevant property affected by an alleged taking is a tangible piece of land, it is not clear whether the land should be viewed in discrete segments or only as a complete parcel for purposes of the takings analysis.

B. Economic Rights

In other cases, the Court has not required a physical parcel of land to find a property interest, but has defined property as economically valuable rights created by law. In 1945, in United States v. General Motors Corp., the Court held that property for Takings Clause purposes consisted not of the tangible thing itself, but of certain rights recognized by law with respect to that thing. In General Motors, the government had exercised its eminent domain power to acquire a short-term lease from a tenant holding a longer-term lease. The Court reasoned that when the government exercised its power of eminent domain, it placed itself in the same place with regard to the property as the tenant from whom the land was taken. Therefore, the Court held that the government had to deal

50 Id. Originally the cable company installed the cable lines only above the building as part of the cable "highway" traveling around the city block. Id. at 422. Two years after the plaintiff bought the apartment building, however, the cable company installed a line that dropped, from these wires, down the side of the building. Id. This line provided cable service to the tenants in the plaintiff's building. Id.
51 Id. at 421.
52 Peterson, supra note 18, at 1310.
53 See id.
56 Id. at 374–75. The original tenant of the building had leased it in 1928 for a twenty-year term for the storage and distribution of automobile parts. Id. at 375. Then, in 1947, the United States government sublet a portion of the building from the original tenant. Id. Shortly thereafter the government condemned the remaining space in the building for military purposes for a term beginning immediately and ending in June of the following year. Id. A trial ensued to determine the amount of compensation the government owed the plaintiff. See id. at 376.
57 Id. at 376.
with the tenant's interest in the property, whether it was a fee simple or a tenancy.\textsuperscript{58} Thus, the \textit{General Motors} Court did not view the building as the relevant property, but instead looked to the legal rights of the original tenant to possess, use and dispose of the property.\textsuperscript{59}

Similarly, in 1980, in \textit{Webb's Fabulous Pharmacies, Inc. v. Beckwith}, the Court held that money deposited in an interpleader fund with a state court was property for Takings Clause purposes.\textsuperscript{60} At issue in \textit{Webb's} was whether the state or the depositors owned the interest earned on the money deposited in the fund.\textsuperscript{61} When directed to remove the money from the fund, the clerk of the court did so, but neglected to turn the interest over as well.\textsuperscript{62} Webb's, as the depositor, then brought a claim to require the clerk to release the interest money.\textsuperscript{63} The Supreme Court of Florida held that the money deposited in an interpleader fund was "public money" from the date of deposit until it left the account.\textsuperscript{64} Thus, the court held that there could be no taking because the interest earned during that time was not private property.\textsuperscript{65}

The United States Supreme Court disagreed, however, reasoning that the property was held in the fund not for the benefit of the court, but for the benefit of the parties, in this case a corporation's creditors.\textsuperscript{66} Therefore, the \textit{Webb's} Court held that the creditors had a property right in their respective portions of the fund.\textsuperscript{67} The Court thus concluded that the clerk's retention of the interest constituted a taking of private property.\textsuperscript{68}

\textsuperscript{58} \textit{Id.}
\textsuperscript{59} \textit{See id.}
\textsuperscript{60} 449 U.S. 155, 161 (1980).
\textsuperscript{61} \textit{Id.} at 158. The case involved an agreement between two Florida corporations whereby one agreed to purchase substantially all the assets of the other. \textit{Id.} at 156. At the closing of the deal, the debts of the corporation being purchased, Webb's Fabulous Pharmacies, Inc., appeared to be greater than its assets. \textit{Id.} To protect itself, the purchaser, pursuant to state law, filed a complaint of interpleader and interpleaded as defendants Webb's and its creditors. \textit{Id.} at 156–57. The purchaser then tendered the purchase price to the court thereby requiring creditors to seek relief in the court. \textit{Id.}
\textsuperscript{62} \textit{Id.} at 158. The court subsequently appointed a receiver for Webb's whose responsibilities included determining the number and amount of the claims filed against the interpleader fund. \textit{Id.} at 157–58. Thus, the receiver moved to have the fund turned over to him and the court granted the motion. \textit{Id.} at 158.
\textsuperscript{63} \textit{Id.}
\textsuperscript{64} \textit{Id.}
\textsuperscript{65} \textit{Id.} at 158–59.
\textsuperscript{66} \textit{Id.} at 161.
\textsuperscript{67} \textit{Id.}
\textsuperscript{68} \textit{Id.} at 164–65.
Then, in 1984, in *Ruckelshaus v. Monsanto Co.*, the Court found a property interest in a pesticide manufacturer's trade-secret rights in health and safety data. At issue in *Ruckelshaus* was a federal law that mandated that any company wishing to register for the manufacture of a pesticide must disclose its health and safety data to the Environmental Protection Agency. Monsanto claimed that the required disclosure of confidential commercial information constituted a taking of private property. The Court recognized that the extent of a property right in a trade secret was defined by the extent to which the owner of the secret could protect the secret from disclosure. The Court acknowledged that trade secrets do have some characteristics of tangible property interests, such as assignability, but the Court, citing to *General Motors*, also held that the intangible property rights in trade secrets were themselves protected by law. Thus, the Court affirmed that in addition to tangible parcels of land, valid property rights could be found in intangible economic rights.

C. Vested Legal Rights

Non-economic legal rights may also be property for takings purposes, but the Court has held that such rights must be vested before they are property protected by the Fifth Amendment. In 1986, in *Bowen v. Public Agencies Opposed to Social Security Entrapment*, the Court held that no taking had occurred because the legal rights that the plaintiffs claimed to have lost were not vested. The case involved a written agreement, pursuant to federal law, between the State of California and the United States Secretary of Health and

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70 Id. at 995-96.
71 Id. at 998-99.
72 Id. at 1002. The Court noted that information that is public knowledge or generally known within an industry cannot be a trade secret. Id. The Court also noted that if an individual discloses a trade secret to someone who is not under any obligation to protect the confidentiality of the information, then the information loses its status as a property interest. Id.
76 477 U.S. at 55.
Human Services in which the state agreed to participate in the Social Security system. A subsequent change in the federal law eliminated a termination provision in the agreement. The State of California and several public agencies claimed that the termination provision was a valuable property right that had been taken without just compensation. The Court reasoned in part, however, that the contractual right at issue was not one over which the State had any bargaining power. Rather, the Court viewed the provision in the contract as only part of a larger regulatory program. As such, the Court held that the claimants had no vested right in the provision and, thus, its elimination did not implicate the Fifth Amendment.

In 1987, in Bowen v. Gilliard, the Court again rejected a takings challenge by holding that the plaintiff had not been deprived of any vested rights. The case involved a federal law that required any custodial parent entitled to support payments from a noncustodial parent to assign the right to receive those payments to the state government if the state provided the family financial aid under the Aid to Families with Dependent Children program ("AFDC"). The plaintiff in Gilliard, who was receiving public assistance under the program, sued for the right to be able to collect her entire allotted AFDC benefit as well as the full amount of the child support she received for her youngest child. In reaching its decision, one factor the Court considered was whether the child receiving the support payments held a reasonable expectation that such payment would continue. After noting that a judicial decree or legislative act could modify the support payment, the Court concluded that the child did not have a vested expectation that payments would continue in the same manner. Thus, the Court held that the right

78 Id. at 48.
79 Id. Congress was concerned about a number of factors, including the recent number of withdrawals from the Social Security system. Id. at 47–48.
80 Id. at 49.
81 Id. at 55.
82 Id.
83 Id. The Court also indicated that the provision was not a vested property right because Congress had expressly reserved the power to amend or repeal any provision of the prior law. See id.
85 Id. at 591.
86 Id. The state had automatically deducted the amount of the support payment in excess of $50.00 from the plaintiff’s monthly allowance. Id. at 591, 607.
87 See id. at 607.
88 Id. at 607–08.
to the support payments was outside the scope of property protected by the Fifth Amendment. 89

Thus, the United States Supreme Court has not provided any single definition of property under the first prong of the Takings Clause analysis. 90 In some cases the Court has focused on tangible parcels of land, yet it has not made clear what boundaries apply. 91 In other cases, the Court has focused on intangible property. 92 In the category of intangible property, the Court has found valid property interests in economic rights 93 and has held that legal rights must be vested in order to be property for Takings Clause purposes. 94 The Court’s numerous definitions of property unfortunately make it difficult to predict what definition will apply in a future takings case. 95

II. THE SECOND PRONG OF THE TAKINGS ANALYSIS—DETERMINING WHEN COMPENSATION IS REQUIRED

[This Court, quite simply, has been unable to develop any “set formula” for determining when “justice and fairness” require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons.] 96

Commentators divide the United States Supreme Court cases that comprise the compensation analysis of the regulatory takings doctrine into three groups. 97 The first group are those historical cases decided before 1922, where the Court developed the public

89 See id. at 608.
90 Peterson, supra note 18, at 1304.
93 See Ruckelshaus, 467 U.S. at 1003–04 (trade secrets); Webb’s, 449 U.S. at 161 (interpleader fund); General Motors, 323 U.S. at 377–78 (tenancy).
95 Peterson, supra note 18, at 1308.
97 See generally Large, supra note 3, at 6; Lawrence, supra note 6, at 394.
nuisance exception to the compensation requirement. The second group includes the landmark 1922 case of Pennsylvania Coal Co. v. Mahon and the cases that followed until the 1986–87 Term, where the Court began to analyze takings cases under a number of different theories. The third group is comprised of the cases decided during the 1986–87 Term, where the Court attempted to clarify the takings doctrine.

A. Cases Prior to 1922

United States Supreme Court cases prior to 1922 indicated that, despite severe economic damage to private property, no taking occurred if the government had a valid public purpose for the challenged law and the government had not physically trespassed on the land. For example, in 1887, in Mugler v. Kansas, the Supreme Court held that no taking occurred when the government prevented a landowner from causing a detriment to the public. In that case, the people of Kansas approved an amendment to the state constitution that prohibited the manufacture and sale of intoxicating liquors in the state except for medical, scientific and mechanical purposes. The state legislature subsequently passed an act to give effect to that amendment, declaring, in part, that places that manufactured liquor were public nuisances. As a result of the legislation the plaintiff’s building, which he had specially

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98 See Large, supra note 3, at 6; see also Hadacheck v. Sebastian, 239 U.S. 394, 411 (1915); Mugler v. Kansas, 123 U.S. 623, 668–69 (1887).
99 See Large, supra note 3, at 10; see also Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 438 (1982) (physical invasion effects a taking); Penn Central, 438 U.S. at 124 (determining when a taking occurs is an ad hoc factual inquiry); Miller v. Schoene, 276 U.S. 272, 279–80 (1928) (no taking if the regulation protects a public interest greater than the private interest); Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413 (1922) (diminution in value of property must be considered).
101 Large, supra note 3, at 8–9.
102 123 U.S. 623, 668–69 (1887). See also the cases prior to Mugler, including U.S. v. Lynah, 188 U.S. 445, 474 (1903) (flooding of property by government dam constituted taking when land became a valueless bog); Pumpelly v. Green Bay Co., 80 U.S. (13 Wall.) 166, 181 (1871) (flooding of property was a taking where usefulness of land was destroyed or impaired); Commonwealth v. Tewksbury, 52 Mass. (11 Met.) 55, 57 (1846) (law prohibiting removal of beach sand not a taking as it was only restraint on injurious use of property).
103 Id. at 655.
104 Id.
constructed and operated as a brewery for a number of years, became worthless.\textsuperscript{105}

Although the \textit{Mugler} Court recognized that the plaintiff's property had little value, the Court reasoned that a community may prohibit uses that are deemed to be injurious to the health, morals or safety of its members without effecting a taking.\textsuperscript{106} Such legislation, the Court observed, did not deprive the owner of the use of the property for lawful purposes.\textsuperscript{107} The Court acknowledged that the public health, morals and safety could all be endangered by the use of intoxicating drink; it therefore refused to usurp the decision of the Kansas legislature.\textsuperscript{108} Reiterating the proposition that all property is held under the implied obligation that each owner's use shall not be injurious to the public,\textsuperscript{109} the Court held that the limitation on the plaintiff's use of his land did not constitute a taking.\textsuperscript{110}

Similarly, in 1915, in \textit{Hadacheck v. Sebastian}, the Court held that the prevention of a noxious use under the police power did not effect a taking.\textsuperscript{111} The City of Los Angeles annexed land on which the plaintiff had been operating a brickyard for a number of years.\textsuperscript{112} Once the land was part of the city, the city enforced an ordinance prohibiting brickyards within city limits.\textsuperscript{113} Although the \textit{Hadacheck} Court noted that the action of a landowner cannot be made a nuisance merely by an arbitrary or capricious legislative determination,\textsuperscript{114} it held, as it did in \textit{Mugler}, that a landowner has no property right in a nuisance.\textsuperscript{115} The Court noted that although the state cannot arbitrarily exercise its police power, prohibiting

\textsuperscript{105} \textit{Id.} at 657.
\textsuperscript{106} \textit{Id.} at 668–69.
\textsuperscript{107} \textit{Id.} at 669.
\textsuperscript{108} \textit{Id.} at 662.
\textsuperscript{110} \textit{See id.} at 655.
\textsuperscript{111} \textit{Mugler}, 123 U.S. at 675.
\textsuperscript{112} 239 U.S. 394, 411 (1915).
\textsuperscript{113} \textit{Id.} at 408.
\textsuperscript{114} \textit{See id.} at 404. A state court convicted the owner of the brickyard of a misdemeanor for violating the ordinance and the owner filed a petition in the state Supreme Court for a writ of habeas corpus. \textit{Id.} at 404–05. The court discharged the writ and remanded the prisoner to custody. \textit{Id.} at 405. A writ of error was subsequently granted by the United States Supreme Court. \textit{Id.}
\textsuperscript{115} \textit{Id.} at 410–11; see also \textit{Mugler v. Kansas}, 123 U.S. 623, 668–69 (1887).
brickyards within the limits of the city was clearly within the state's power. Thus, the Court held that there was no taking.  

B. Cases 1922–1987

Although the Supreme Court never explicitly rejected the nuisance exception to the Takings Clause established in Mugler, in 1922 the Court took regulatory takings jurisprudence in a new direction as it began to consider the effect of the regulation on the value of the land. In that year, in Pennsylvania Coal Co. v. Mahon, the Court held that a state act prohibiting subsidence mining of coal was a taking. The act required mining companies to leave pillars of coal behind to support the weight of the land above. Writing for the majority, Justice Holmes conceded that government did not have to pay compensation every time property value was affected, but he noted that at some point the decline in value would cross a line and become a taking of property. The Pennsylvania Coal Court reasoned that if the government required a landowner to leave some coal behind, it was as if the government had appropriated or destroyed the coal. The Court held that in this case the line had been crossed and the subsidence act was unconstitutional.

Justice Brandeis dissented in Pennsylvania Coal, arguing that the case involved the prevention of a nuisance. In his opinion, such a restriction, imposed to protect the public health, safety or morals from danger, did not constitute a taking. Thus, he believed that the case should have been analyzed according to the principle that there was no protectable property right in a public...

116 Hadacheck, 239 U.S. at 411.
117 Id. at 411, 414.
118 Lawrence, supra note 6, at 395. But see Penn Central, 438 U.S. at 134 n.30 (Brennan, J.) (expressing some skepticism about the theory).
119 See Large, supra note 3, at 10–11.
120 260 U.S. 393, 416 (1922).
121 See id. at 412–13.
122 Id. at 415. Commentators have labeled this the diminution in value theory. See Large, supra note 3, at 11; Sax, supra note 3, at 151.
123 Id. at 416. The Court noted that it was also concerned that only one house was affected by the statute, possibly indicating that the law was enacted to protect a private, rather than a public, interest. Id. at 413.
124 Id. at 417 (Brandeis, J., dissenting).
125 Id. (Brandeis, J., dissenting).
nuisance. Justice Brandeis would have held, under this theory, that the legislation did not appropriate the land, but only prevented the owner from using the land in a way that interfered with paramount rights of the public. Under this approach, he would have found no taking.

The Pennsylvania Coal Court thus established that one factor for consideration in a compensation analysis is the extent of diminution in the value of the property. In subsequent cases, however, the Court has not always adhered to this analysis. In 1928, in Miller v. Schoene, the Court held that a Virginia law that mandated that all diseased cedar trees be destroyed did not require compensation to the owners of the trees. The State had enacted the legislation to prevent the ultimate destruction of the State's nearby apple orchards by the spread of the disease, a purpose the Court held to be legitimate. Rather than decide the case based on the diminution in value of the plaintiff's property, the Court returned to a nuisance type of analysis. Finally, the Court held that for a legitimate public purpose, the State could destroy some property interests without paying for them.

Then in 1978, in Penn Central Transportation Co. v. New York City, the Court held that New York's landmark preservation legislation did not effectuate a taking. The Court reasoned that the building restrictions imposed by the law were substantially related to the promotion of the general welfare and in addition permitted the landowner to retain a reasonable beneficial use of the site.

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128 Id. at 417–18 (Brandeis, J., dissenting); see also Mugler v. Kansas, 123 U.S. 623, 668–69 (1887).
129 See Pennsylvania Coal, 260 U.S. at 417 (Brandeis, J., dissenting).
130 Id. at 419 (Brandeis, J., dissenting).
131 See id. at 413 (diminution in value must be considered); see also Large, supra note 3, at 16.
133 276 U.S. 272, 280 (1928).
134 Id. at 277.
135 See Large, supra note 3, at 16–17.
136 Miller, 274 U.S. at 277, 279.
138 Id. The Court noted that another factor influencing its decision was that the city had granted the landowner transfer development rights. Id. at 137. With these rights, the landowner would be able to develop at least one of eight other parcels of land located near the site in question. Id.
Thus, the landowner was denied compensation and the regulation was upheld. In reaching its decision, the majority of the Penn Central Court noted that it had been unable to develop a standard formula to determine when a compensable taking had occurred. In the case, however, the Court did identify several factors that had been addressed in the past, and stated that these factors carried particular significance in determining whether compensation is required. The first factor the Court noted was the economic impact of the regulation on the landowner. The second factor the Court identified was the extent to which the regulation interfered with investment-backed expectations. The third factor the Penn Central Court highlighted was the character of the government action.

The Court did not specify whether any one of these factors was determinative of whether a compensable taking had occurred, but rather indicated that the consideration of these factors was essentially an ad hoc, factual inquiry. The Court then applied these factors to the case before it. The Court accepted the landowner's argument that the landmark law burdened some property owners more than others. The Court refused, however, to accept the argument that this diminution in property value was alone sufficient to effect a taking. Instead, the Court held that legislation designed to promote the general welfare must commonly bur-

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139 See id. at 138.
140 See id. at 124.
141 Id.
142 Id. In identifying this factor, the Court cited Goldblatt v. Hempstead, 369 U.S. 590, 594 (1962), and recognized that there is no set formula to apply to determine how much of an economic impact will lead to a taking. Id.
143 Id. Although the Court again cited to Goldblatt for this factor, commentators have suggested that the Court drew the term not from a prior opinion but from an article written by Frank Michelman. See, e.g., Richard G. Wilkins, The Takings Clause: A Modern Plot for an Old Constitutional Tale, 64 NOTRE DAME L. REV. 1, 23 n.158 (1989). Michelman wrote in 1967 that the takings test established in Pennsylvania Coal was whether claimant was deprived of a "distinctly perceived, sharply crystallized, investment-backed expectation." Michelman, supra note 109, at 1233.
144 Penn Central, 438 U.S. at 124. The Court noted that this third factor means that a taking may be more readily found when the governmental interference is a physical encroachment on the land than when a public program is adjusting the benefits and burdens of economic life to promote the common good. Id.
145 Id.; see also United States v. Central Eureka Mining Co., 357 U.S. 155, 168 (1958) (presence of one factor is not necessarily a taking); United States v. Caltex, Inc., 344 U.S. 149, 156 (1952) (each case must be judged on its own facts).
146 See Penn Central, 438 U.S. at 124–38.
147 Id. at 133.
148 Id. at 131.
den some persons more than others and thus held that no taking occurred.\textsuperscript{149}

Justice Rehnquist dissented from the majority opinion in \textit{Penn Central}.\textsuperscript{150} While acknowledging that the government can prevent a property owner from using the property in a way that may injure others, he argued that the nuisance exception is not coterminous with the police power itself.\textsuperscript{151} Under the facts of \textit{Penn Central}, he asserted, no nuisance was being prohibited.\textsuperscript{152} Thus, according to Justice Rehnquist, the government should have compensated the landowner for its loss.\textsuperscript{153}

Since \textit{Penn Central}, the Court has seldom singled out any one of these factors to decide a case, but rather has continued to weigh the factors as a group.\textsuperscript{154} In 1980, however, in \textit{Agins v. City of Tiburon}, the United States Supreme Court applied a specific two-part test and held that a zoning law effects a taking only if the ordinance does not advance legitimate state interests or it denies an owner economically viable use of the land.\textsuperscript{155} In that case, the landowners had acquired five acres of unimproved land intending to develop the land for residential purposes.\textsuperscript{156} After the acquisition, the city adopted a zoning ordinance that limited residential development on the parcel to between one and five single-family homes.\textsuperscript{157} Without seeking administrative relief under the zoning ordinance, the landowner brought suit claiming that the land had been taken.\textsuperscript{158} The Court reasoned, however, that while development was limited, the landowner could still make use of the land and no fundamental attribute of ownership had been extinguished.\textsuperscript{159} Thus, the Court held that there was no taking.\textsuperscript{160}

\begin{itemize}
\item \textsuperscript{149} Id. at 133, 135.
\item \textsuperscript{150} See id. at 138–58 (Rehnquist, J., dissenting).
\item \textsuperscript{151} Id. at 144–45 (Rehnquist, J., dissenting).
\item \textsuperscript{152} Id. at 145 (Rehnquist, J., dissenting).
\item \textsuperscript{153} See id. at 152 (Rehnquist, J., dissenting). Justice Rehnquist would have remanded the case to the lower court to determine if the transfer development rights provided full compensation. \textit{Id.}
\item \textsuperscript{154} \textit{Lawrence}, supra note 6, at 399; see also \textit{PruneYard Shopping Center v. Robins}, 447 U.S. 74, 84 (1980); \textit{Kaiser Aetna v. United States}, 444 U.S. 164, 179–80 (1979).
\item \textsuperscript{155} 447 U.S. 255, 260 (1980). Although the language in the \textit{Agins} opinion is similar to that in \textit{Penn Central}, the \textit{Agins} Court used the word "or" to separate the factors. See \textit{id}. This would seem to indicate that an "either/or" test applied in \textit{Agins}, rather than the \textit{Penn Central} balancing test. \textit{Peterson}, supra note 18, at 1928.
\item \textsuperscript{156} \textit{Agins}, 447 U.S. at 257.
\item \textsuperscript{157} \textit{Id.}
\item \textsuperscript{158} \textit{Id.} at 257–58.
\item \textsuperscript{159} See \textit{id.} at 262.
\item \textsuperscript{160} \textit{Id.} at 262–63.
\end{itemize}
Although the Court did not indicate whether the two-part *Agins* test established a clear rule to be applied to takings cases, there is one area of takings law where the Court has explicitly attempted to provide a bright-line rule. The Court has frequently found a taking when the government physically invades property or expropriates it for the government's own use. In 1982, in *Loretto v. Teleprompter Manhattan CATV Corp.*, the Court held that when a public body causes a permanent physical occupation of private property, there is, per se, a taking. The case involved the installation of a cable wire and related equipment on an apartment building owned by the plaintiff. The Court concluded that because the government had taken the area actually occupied by the cable facilities, it was required to pay just compensation.

Thus, prior to the 1986-87 Term, the Court had approached takings cases in several different ways. The historical nuisance doctrine articulated in *Mugler* was never abandoned by the Court; instead, the Court added to takings jurisprudence with the diminution in value theory from *Pennsylvania Coal*, the multi-factor balancing test of *Penn Central*, and a rearticulation of the factors of the balancing test in *Agins*. Moreover, in *Loretto*, the Court indicated that regulations that cause a physical intrusion by the government are, per se, a taking.

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161 Peterson, supra note 18, at 1328.
162 Id. at 1333.
163 Id.; Michelman, supra note 109, at 1184 (physical invasion is the one incontestable case for compensation); see also United States v. Causby, 328 U.S. 256, 264–65 (1946) (low flying aircraft constitutes taking); United States v. Lynah, 188 U.S. 445, 474 (1903) (flooding constitutes taking); cf. United States v. Central Eureka Mining Co., 357 U.S. 155, 168–69 (1958) (no taking of gold mines when government did not take physical possession); United States v. Caltex, Inc., 344 U.S. 149, 155 (1952) (no taking when property was destroyed to prevent enemy capture and was not actually appropriated for subsequent use).
165 See id. at 421–22.
166 Id. at 438, 441.
167 See Large, supra note 3, at 35.
168 Lawrence, supra note 6, at 395.
169 See supra notes 119–31 and accompanying text.
170 See supra notes 137–54 and accompanying text.
171 See supra notes 155–60 and accompanying text.
172 See supra notes 161–66 and accompanying text.
C. Cases Decided During the 1986–87 Term

In the 1986–87 Term, the United States Supreme Court sought to redefine various aspects of takings jurisprudence. The first major consideration of the takings issue in the term was in *Keystone Bituminous Coal Association v. DeBenedictis*, where the Court held that a subsidence mining statute, similar to the one found to be unconstitutional in *Pennsylvania Coal*, did not effect a taking of private property for which compensation was required. The *Keystone* Court distinguished its case from *Pennsylvania Coal* on two grounds. First, although the *Pennsylvania Coal* Court held that its statute had a limited public purpose, the *Keystone* Court held that the subsidence mining act before it had a valid public purpose. Thus, the *Keystone* Court held the purpose of the act to be the valid prevention of a public nuisance.

The second distinguishing factor between *Pennsylvania Coal* and *Keystone* was the manner in which the Court measured the diminution in value of the property. Although the *Keystone* Court relied on the same basic test enunciated in *Pennsylvania Coal*, the *Keystone* Court measured the plaintiff’s percentage loss differently. Rather than focusing on what the mining company was required to leave behind, the *Keystone* Court looked at what percentage of coal the company retained. Because only two percent of the total amount of coal had to be left behind to prevent subsidence, and the owner

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178 See id. at 485, 493.

179 *Pennsylvania Coal*, 260 U.S. at 413–14 (the statute appeared to be aimed at the protection of only one home).

180 Id. at 485–86. The Court expressly held that *Mugler* and related decisions had survived *Pennsylvania Coal*. See id. at 488–90. One author has argued that by discussing the nuisance exception in a modern case, the Court extended the nuisance theory to cover areas of contemporaneous concern and regulation. Lawrence, supra note 6, at 408.


182 See id. at 493–502. In *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), the Court measured diminution in value by focusing on the coal that the statute required the landowner to leave in place. Id. at 414. Because the government required the landowner to leave some coal behind, the *Pennsylvania Coal* Court reasoned that it was as if the government had appropriated or destroyed the coal. Id.

could mine the rest, the *Keystone* Court noted that the landowner retained economic use of the land.\(^\text{186}\) Thus, the Court held that there was no taking.\(^\text{187}\)

In a dissenting opinion, Chief Justice Rehnquist advanced two theories of takings analysis not addressed by the majority in the five-four decision.\(^\text{188}\) First, he stated that the reliance on the nuisance exception in this case was misplaced.\(^\text{189}\) The Chief Justice argued that the previous nuisance cases served “discrete and narrow purposes.”\(^\text{190}\) He maintained, however, that the statute in *Keystone* was based essentially on an economic concern rather than on public safety.\(^\text{191}\) Moreover, he asserted that the nuisance exception should not be allowed to completely extinguish a property interest or prohibit all use of a property interest.\(^\text{192}\)

Second, the Chief Justice asserted that the coal left in the ground should be viewed as a separate parcel of property containing a “separable property interest.”\(^\text{193}\) The Chief Justice argued that because the statute stripped the plaintiff of a portion of its rights in the coal, the subsidence act should have been held to be a taking that required compensation.\(^\text{194}\) Thus, the question of what unit of property a takings inquiry should focus on was an issue debated by the *Keystone* Court.\(^\text{195}\)

In the second major takings case of the 1986-87 Term, *First English Evangelical Lutheran Church v. County of Los Angeles*, the United States Supreme Court held that the government must compensate landowners for temporary regulatory takings.\(^\text{196}\) The restriction at issue in the case was a county flood plain ordinance that

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\(^{184}\) Id. at 498–99.

\(^{186}\) Id.

\(^{187}\) See id. at 506–21 (Rehnquist, C.J., dissenting).

\(^{188}\) Id. at 512 (Rehnquist, C.J., dissenting).

\(^{189}\) Id. at 513 (Rehnquist, C.J., dissenting). Although Chief Justice Rehnquist did not explicitly define this phrase, he did cite to three particular cases. *Id.* The Chief Justice cited to *Goldblatt v. Hempstead*, 369 U.S. 590 (1962), in which the Court upheld an ordinance prohibiting, for safety reasons, excavation of a lake. *Id.* at 596. He also cited to *Hadacheck v. Sebastian*, 239 U.S. 394 (1915), where the Court held that the city of Los Angeles could prohibit the operation of brickyards within the city limits without compensating the landowners. *Id.* at 411. Finally, the Chief Justice cited to *Mugler v. Kansas*, 123 U.S. 623 (1887), where the Court upheld a state law that prohibited the manufacture of intoxicating beverages even though the plaintiff’s land was rendered worthless by the statute. *Id.* at 667–69, 675.

\(^{190}\) *Keystone*, 480 U.S. at 513 (Rehnquist, C.J., dissenting).

\(^{191}\) See *id.* (Rehnquist, C.J., dissenting).

\(^{192}\) Id. at 517 (Rehnquist, C.J., dissenting).

\(^{193}\) Id. at 520–21 (Rehnquist, C.J., dissenting).

\(^{194}\) Lawrence, *supra* note 6, at 415.

prohibited the redevelopment of areas devastated by previous storm runoff. The plaintiff, a church, owned a camp for handicapped children that was destroyed in the flood. Because the ordinance prevented the church from rebuilding, the church filed suit.

Although at least one commentator has noted that there was no federal constitutional issue properly before the Supreme Court in *First English*, the Court nevertheless took this opportunity to decide the issue of temporary takings. For the purposes of the opinion, the Court assumed that the ordinance had denied the plaintiff all use of its property for a considerable time period. Thus, the Court concluded that even if the county were to subsequently repeal the legislation, it had to pay the landowner fair market value for the time the regulation was in effect.

The next takings case before the Court during the 1986–87 Term was *Nollan v. California Coastal Commission*, where the Supreme Court held that the state’s attempt to acquire beach access through the use of an exaction was invalid. In *Nollan*, the landowners sought a development permit for their coastal property, but the Commission informed them that in order to acquire the permit they would have to allow the public a lateral easement along the beach. According to the Court, however, there was not a sufficient nexus between the condition imposed by the Commission, lateral beach access, and the request of the landowners, to build a larger home. The Court held that without this nexus, the Commission must compensate the Nollans for the easement.
Justice Brennan, joined by Justice Marshall, dissented from the holding in *Nollan*.205 Justice Brennan argued that the police power included the authority to impose conditions on private development.206 Thus, he asserted, the requirement of a “precise fit” between the burden on the developer and asserted needs of the Commission would hamper the ability of the Commission to fulfill its “public trust mandate.”207 Moreover, Justice Brennan argued, the public’s expectation of access existed before any expectation of private development evolved.208

Justices Stevens and Blackmun each dissented in a separate opinion.209 Neither of the Justices disagreed with Justice Brennan’s opinion that the restriction on the Nollan’s right to obtain the development permit was a valid use of the police power.210 Justice Blackmun characterized the majority’s interpretation of the nexus between the condition and the permit as “rigid.”211 Justice Stevens explicitly agreed with Justice Brennan’s opinion that state agencies must have flexibility to deal with the conflict between private property interests and the preservation of our natural resources.212

The other takings cases decided by the United States Supreme Court during the 1986–87 Term did not gain the widespread attention of the three cases above.213 In *United States v. Cherokee Nation of Oklahoma*, the Court held that Congress’s power over the im-

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205 See *Nollan*, 483 U.S. at 842–64 (Brennan, J., dissenting).
206 *Id.* at 843 (Brennan, J., dissenting).
207 *Id.* at 847 (Brennan, J., dissenting).
208 *Id.* (Brennan, J., dissenting).
209 *Id.* at 865–66 (Blackmun, J., dissenting), 866–67 (Stevens, J., dissenting).
210 *Id.* at 865–66 (Blackmun, J., dissenting), 867–68 (Stevens, J., dissenting).
211 *Id.* at 865 (Blackmun, J., dissenting).
212 *Id.* at 867 (Stevens, J., dissenting).
213 See, e.g., Large, *supra* note 3, at 35 (referring to *Keystone, First English* and *Nollan* as the three significant cases of the term); Lawrence, *supra* note 6, at 392 (referring to *Keystone, First English* and *Nollan* as the three most heralded takings cases of the term).
provement of navigable waters precluded a taking by the exercise of those powers.\textsuperscript{214} In that case, an Indian tribe claimed that a government waterways project that altered a channel in the Arkansas River had impermissibly damaged, and thus taken, gravel deposits in a portion of the bed to which the tribe held title.\textsuperscript{215} The Court reasoned, however, that ownership of riverbed property did not include the right to be free from congressional exercise of the navigational power.\textsuperscript{216} Thus, the Court created a categorical exception, like the \textit{Mugler} nuisance exception, to the compensation prong of the takings test.\textsuperscript{217}

In sum, rather than clarify existing takings jurisprudence during the 1986–87 Term, the Court added several new considerations to a takings analysis.\textsuperscript{218} The Court held that a governmental permit condition imposed on a landowner must be reasonably related to the action by the landowner who requires the permit.\textsuperscript{219} The Court also held that even a temporary taking must be compensated.\textsuperscript{220} In addition, the Court failed to overrule the \textit{Mugler} noxious use or nuisance exception\textsuperscript{221} and added a new categorical exception to the compensation requirement.\textsuperscript{222} Moreover, the Court decided some cases with language reminiscent of the \textit{Penn Central} balancing test.\textsuperscript{223} Therefore, it is arguable whether the takings doctrine was in fact clarified during the term.\textsuperscript{224}

\textsuperscript{214} 480 U.S. 700, 703–04 (1987).
\textsuperscript{215} Id. at 701.
\textsuperscript{216} See \textit{id.} at 706.
\textsuperscript{217} See \textit{id.} at 705 (indicating that no balancing test is required); see also \textit{Lawrence}, \textit{supra} note 6, at 433–34.
\textsuperscript{218} See \textit{Peterson}, \textit{supra} note 18, at 1304.
\textsuperscript{221} \textit{Lawrence}, \textit{supra} note 6, at 395; see also \textit{Penn Central Transp. Co. v. New York City}, 438 U.S. 104, 125 (1978) (recognizing that land use regulations enacted for public welfare may adversely affect property interest); \textit{Pennsylvania Coal Co. v. Mahon}, 260 U.S. 393, 413 (1922) (noting that damage was not a public nuisance). \textit{But see Penn Central}, 438 U.S. at 184 n.30 (Brennan, J.) (expressing some skepticism about the theory).
\textsuperscript{224} See \textit{Peterson}, \textit{supra} note 18, at 1304 ("difficult to imagine a body of case law in greater doctrinal and conceptual disarray").
III. The Current Controversy: Lucas v. South Carolina Coastal Council

Although the regulatory takings question is a complex one, and although regulations affecting coastal property are especially problematic, this appeal presents . . . a relatively straightforward issue.225

David Lucas purchased his two vacant oceanfront lots in late 1986.226 He intended to build a house on each piece of property, one for his family and one as an investment for resale.227 A year and a half later, in July of 1988, South Carolina passed its Beachfront Management Act ("Act").228 The Act authorized the South Carolina Coastal Council to establish a baseline along the shore of the beach in front of which no new construction would be permitted.229 The Council drew the lines behind Mr. Lucas's property, thereby prohibiting the construction of any permanent structure on the property with the exception of a small deck or walkway.230

Mr. Lucas brought suit against the South Carolina Coastal Council in the Court of Common Pleas claiming that the restrictions on the use of his property constituted a taking without just com-
The lower court agreed and awarded him $1,232,387.50 as just compensation for the regulatory taking. In an opinion by Justice Toal, the South Carolina Supreme Court reversed the lower court decision, holding that the regulation was a valid exercise of the state’s police power and did not go so far as to constitute a taking.

The South Carolina Supreme Court recognized that the United States Supreme Court has never articulated a set formula to determine when a taking has occurred and thus a court's determination of whether compensation is required must be a fact-specific one. The state court did acknowledge, however, that there are certain factors that courts generally consider. These factors include: (1) the economic impact of the regulation; (2) the regulation's interference with the landowner's investment-backed expectations; (3) the physical impact of the invasion; and (4) the nature of the state's interest in the regulation. Moreover, the Lucas court noted that in some situations certain factors may deserve more weight than others and in some cases may be determinative. One such situation, the court noted, is when the regulation exists to prevent serious public harm. The court then held that the Beachfront Management Act prevented a serious harm to the public. Thus, the Lucas court concluded that in this case, the purpose of the Act was determinative in the compensation analysis and the Act did not effect a taking of Mr. Lucas’s property.

Justice Harwell, joined by Justice Chandler, dissented from the Lucas decision. Justice Harwell argued that to allow such an in-

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231 Lucas, 404 S.E.2d at 896.
232 Id.
233 Id. at 899.
234 Id. at 898–99.
235 Id. at 899.
236 Id.
237 Id.
238 Id. Another example cited by the Lucas court is the fact that the United States Supreme Court has “invariably found a taking when the government regulation is characterized as a permanent physical invasion.” Id.
239 Id. The court, in fact, found that because Mr. Lucas had not challenged the public purpose of the act, he had in fact conceded that the Beachfront Management Act prevented a public harm. Id. at 900. Mr. Lucas, however, denied this concession and conceded only that land use regulations are a rightful exercise of the state’s police power. See Petitioner’s Brief on the Merits at 10, Lucas v. South Carolina Coastal Council, 404 S.E.2d 895 (S.C.), cert. granted, 112 S. Ct. 436 (1991) (No. 91–453).
240 See Lucas, 404 S.E.2d at 899.
241 See id. at 902–08 (Harwell, J., dissenting).
terpretation of the Mugler nuisance exception would grant "carte blanche" to government agencies to regulate private property.\textsuperscript{242} Moreover, he argued that none of the stated purposes of the Beachfront Management Act could be labeled the prevention of a nuisance.\textsuperscript{243} He asserted, therefore, that because Mr. Lucas's property had no fair market value, the state must compensate him.\textsuperscript{244}

Mr. Lucas subsequently filed a Petition for Rehearing with the South Carolina Supreme Court.\textsuperscript{245} The petition was denied on June 17, 1991.\textsuperscript{246} The United States Supreme Court granted Mr. Lucas's Petition for Certiorari on November 18, 1991.\textsuperscript{247}

IV. ANALYZING THE APPROACH OF THE COURT: BALANCING TEST VERSUS BRIGHT-LINE APPROACH

\textit{[B]alancing—or, better, the judicial practice of situated judgment or practical reason—is not law's antithesis but a part of law's essence.}\textsuperscript{248}

One commentator has referred to takings jurisprudence as a "gravitational center" with four planetary bodies of regulations circling it.\textsuperscript{249} The first type of regulation is one that involves an actual physical invasion, penetration or occupation by the government.\textsuperscript{250} The second is a government action designed to protect life or property from a noxious use or public nuisance.\textsuperscript{251} The third is comprised of government regulations for general zoning purposes.\textsuperscript{252} The final group consists of those actions tied to public

\textsuperscript{242} Id. at 906 (Harwell, J., dissenting).
\textsuperscript{243} Id. (Harwell, J., dissenting).
\textsuperscript{244} Id. at 907 (Harwell, J., dissenting).
\textsuperscript{246} Id.
\textsuperscript{248} Michelman, supra note 173, at 1629.
\textsuperscript{250} Id. at 81; see also Loreto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 426 (1982) (cable wire); U.S. v. Lynah, 188 U.S. 445, 474 (1903) (flooding of property).
sensibilities such as historic landmark preservation or aesthetic or cultural values.253

The tests used by the Court to determine if compensation is required in any of the above cases cannot be categorized quite so easily. In some cases the Court has used language reminiscent of the multi-factor balancing test introduced in Penn Central Transportation Co. v. New York City.254 Yet in other cases, the Court has looked for more of a bright-line exception to the compensation prong of the Takings Clause.255 In fact, some commentators argue that, more and more, the Court has been leaning away from a balancing test in favor of decisive, categorical answers.256 The Court’s previous attempts, however, at creating bright-line exceptions to the compensation requirement, such as the nuisance or noxious use exception, clearly show that an interest-balancing approach is preferable.257

One of the first problems in creating a bright-line test is defining the limits or parameters of that test. For example, in the 1887 decision of Mugler v. Kansas, the United States Supreme Court attempted to address the need for government regulatory action against an individual on behalf of the public by holding that property cannot be used in ways that are injurious to others.258 By finding the operation of a brewery to be a nuisance and therefore subject to governmental regulation,259 the Court may have believed that it was defining a discrete category of “noxious” land uses or “nuisances” that would be easily recognized by courts in the future. This has not, however, been the case.

255 See United States v. Cherokee Nation of Oklahoma, 480 U.S. 700, 703–04 (1987) (navigational right-of-way); Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 426 (1982) (physical invasion); Mugler v. Kansas, 123 U.S. 623, 668–69 (1887) (nuisance). In Agins v. Tiburon, 447 U.S. 255 (1980), the Court indicated that a regulation leaving no economic use for the land will constitute a taking. Id. at 260. Although this appears to be another bright-line test, the Court has held that when the purpose of the regulation is the prevention of a public nuisance, compensation is not always required. See Keystone, 480 U.S. at 492.
256 See, e.g., Lawrence, supra note 6, at 432; Michelman, supra note 173, at 1621–25.
257 See supra notes 101–17 and accompanying text for a discussion of the nuisance exception.
258 123 U.S. 623, 655 (1887).
259 Id. at 671.
After more than one hundred years, the Court has yet to define the term "nuisance." Without a clear definition, some lower courts have limited the application of the nuisance concept to those land uses that directly endanger the lives of human beings. Other courts have found that public harm must be more broadly defined and encompass the notion of public welfare or interest as well.

Another problem associated with any clear rule is the rule's failure to account for all conceivable situations. For example, the United States Supreme Court has held that a public nuisance exists in the operation of a brickyard, the existence of diseased cedar trees, and subsidence mining. Despite these decisions, it is not clear whether a government may prohibit subsidence mining where there are no homes or cemeteries or whether diseased trees may be destroyed without compensation if there is no apple orchard within hundreds of miles. Nor is it clear whether the cedar trees could be destroyed if only one apple tree was in danger. No definition of a nuisance can possibly account for all uses of land that might be harmful, or even just annoying, to the public.

The Court's inability to account for all possible scenarios leads to differing interpretations of the rule by lower courts. This weakens the persuasiveness of two arguments that are commonly made for a bright-line test: predictability and reduced litigation. Land-use planners and governments are only able to guess whether the activity they are prohibiting falls within the definitions of a 

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260 The term "nuisance" is grounded in tort law yet, even in that context, it is not a concept that is easily grasped. See W. PAGE KEETON ET AL., PROSSER & KEETON ON TORTS, § 86 at 616–17 (5th ed. 1984) (nuisance may be a catchword used as a substitute for any analysis of a problem).

261 See Empire Kosher Poultry, Inc. v. Hallowell, 816 F.2d 907, 914–16 (3rd Cir. 1987) (government may regulate to prevent harm from disease).


264 See Miller v. Schoene, 276 U.S. 272, 280 (1928).


266 See id. at 476 (subsidence act prohibited mining that would cause damage to public buildings, dwellings and cemeteries).

267 See Miller, 276 U.S. at 277 (order to cut down trees was to prevent spread of disease to apple orchards in vicinity).

268 See id.

nui
cane and any resulting dispute must then be resolved by the
courts.270

A third problem with a bright-line rule is particularly relevant
in the area of takings jurisprudence. Although takings claims are
raised in a number of situations,271 many are based on land regu-
lations. Land-use regulation has generally been a matter of local
concern.272 This is only natural, as the contours and the needs of
the land vary dramatically among regions. Even a state legislature
may not be in the best position to dictate how a local community
can best use its land.273 The creation of a number of bright-line
rules and exceptions to be applied in a takings case would effectively
strip some of this control from the local communities. A balancing
test, on the other hand, would allow the lower courts, those more
familiar with the circumstances of the particular case, to apply and
balance, with discretion, specific factors delineated by the United
States Supreme Court.

In evaluating a takings claim, a court must be willing to consider
explicitly the specific facts and interests involved in the case. A
bright-line approach, such as the nuisance exception to the com-
ensation requirement, ignores these interests.274 A balancing ap-

270 Guessing is much more dangerous considering the United States Supreme Court's
decision in First English Evangelical Lutheran Church v. County of Los Angeles. 482 U.S. 304, 307
(1986). In that case, the Court held that even a temporary taking must be compensated. Id.
Thus, if a local government guesses incorrectly and a court later finds the action to constitute
a taking, the appropriate remedy no longer is just the repeal of the government action. See
id. The government must now compensate the landowner for the time the regulation was in
effect. Id.

liability from pension fund); Ruckelshaus v. Monsanto, 467 U.S. 986, 1001-03 (1984) (dis-
losure of trade secrets).

272 See David L. Callies & Robert H. Freilich, Cases and Materials on Land Use 34
(1986).

273 The locating of group homes for the mentally disabled is one example of a land-use
regulation that may be more successful when some control is left to the local communities.
Some states have set forth broad policy statements regarding the siting of these homes and
the courts have allowed the local communities to retain some control over the exact placement
App. 1990) (town may deny home a special permit if certain factors are taken into account).
On the other hand, other states have preempted the possibility of the local communities
imposing their own zoning restrictions. See, e.g., Minn. Stat. Ann. § 462.357, subd. 7 (West
1991) ("A state licensed residential facility serving six or fewer persons ... shall be considered
a permitted single family residential use of property for the purposes of zoning."). Although
either type of approach may result in the opening of a group home, giving the community
some control may ease fears and allow the local residents to feel that they have participated
in the decisionmaking process.

274 At least one commentator has argued that the bright-line rules play an important role
proach, on the other hand, allows for each claim to be evaluated on its merits. A court may then follow the Supreme Court’s guiding principle that “justice and fairness” must determine whether compensation is required.\(^{275}\)

V. DEFINING THE BALANCING TEST TO REFLECT ALL INTERESTS

As a nation, the United States must come to an understanding of why natural areas are important to its future.\(^{276}\)

Even concluding that a balancing test is preferable to a brightline approach does not solve the issue of what factors the Court should consider in its balancing analysis. The public interest must be considered along with the impact of the regulation on the private interest. Although the Court has sketched an outline of a takings test that reflects these interests, it has yet to refine and illuminate the factors into a workable compensation analysis.\(^{277}\)

In *Penn Central Transportation Co. v. New York City*, the Court addressed three factors that should be considered in a compensation analysis.\(^{278}\) The first two, the economic impact of the regulation\(^{279}\) and the interference with investment-backed expectations,\(^{280}\) seem

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\(^{275}\) See *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124 (1977). One commentator has suggested that the benefits of a balancing approach have been recognized by the Court with regard to the Fourth Amendment. See Wilkins, supra note 143, at 25. The Fourth Amendment protects against unreasonable searches and seizures, a concept that was limited, for some time, to physical invasions. *Id*; see also *Clinton v. Virginia*, 377 U.S. 158, 158 (1964) (Clark, J., concurring) (actual physical intrusion required before search will be found). In 1967, the Court abandoned physical intrusion as a constitutional threshold and held instead that the Fourth Amendment applies whenever police investigatory activities infringe on an expectation of privacy that society recognizes as reasonable. Wilkins, supra note 143, at 25; see also *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring). Thus, the Court moved from a mechanical rule to an explicit, if more difficult, analysis of the core concerns underlying the constitutional amendment. Wilkins, supra note 143, at 25. Professor Wilkins and this note argue that the benefits of a balancing approach are appropriate for the Fifth Amendment takings cases as well. See *id*.


\(^{277}\) See Wilkins, supra note 143, at 23. Professor Wilkins proceeds from the same premise as this note. See *id*. He asserts that the Court, in *Penn Central*, has sketched a sufficient outline for a workable takings test. *Id*.

\(^{278}\) See *id*.

\(^{279}\) See *id*.

to account fully for the interests of the private party. The third factor, however, the character of the government invasion, seems to have been lost over the years. Generally, the Court’s inquiry on this prong of the test has been reduced to whether or not the government's action constitutes a physical invasion. To read the third factor in this manner fails, however, to account for the second interest described above, that of the public. Instead of focusing on the physical character of the government action, the third factor should include an explicit consideration of the public interest.

Much of the Court's reasoning in *Penn Central*, as well as in subsequent cases, supports this call for a strengthened public interest factor in a takings balancing test. For example, in addition to presenting the three factors for consideration in a takings case, the *Penn Central* Court also discussed the underlying rationale for determining when a government action constitutes a compensable taking. The Court, while recognizing that finding a set formula was difficult, noted that “justice and fairness” must determine when the private party should be compensated. Whether or not compensation in any given circumstance is just or fair, however, should not turn only on whether or not the government action involves a physical invasion. Instead, the analysis should include a consideration of exactly what harm the government is seeking to protect and

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281 See id.

282 Wilkins, *supra* note 143, at 23; see also Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 438 (1982) (physical invasion is per se a taking). This narrow focus may have developed from the language of the *Penn Central* opinion itself. See 438 U.S. at 124. After indicating that the third factor to be considered is the character of the governmental action, the *Penn Central* Court stated that a taking would be more readily found when the interference by the government was a physical invasion. Id. Nothing in the Court's opinion, however, commands that these two sentences be read together which would lead to a narrow inquiry of whether a government action involves a physical invasion.

283 See Wilkins, *supra* note 143, at 24. Professor Wilkins discusses the role of the public interest in a balancing test built upon the *Penn Central* factors, but he does not argue that the public interest should be a separate consideration. See id. Instead, he focuses on the “average reciprocity of advantage between affected property owners and the public.” Id. Thus, within Professor Wilkins's “public interest factor” is an implicit consideration of the private interest. See id. This note takes a different approach, however, and asserts that the public interest should be a factor that stands alone and is considered independent from the private interest. Otherwise, a true balancing test is impossible. Moreover, the approach taken in this note is designed to lessen the constraint on government regulation by broadening the consideration of the public interest. Professor Wilkins, on the other hand, wishes to see the *Penn Central* factors reinvigorated to provide property owners with additional constitutional protection and to constrain government action. See id.

284 See id.

how the benefits of that protection weigh against the harm to the private interest.286

Although the Penn Central Court began to recognize the necessity for consideration of the public interest in a compensation analysis, the Court was also concerned that economic injuries caused by public action might be borne disproportionately by only a few people if no compensation was given.287 The Court recognized, however, that whether a particular restriction will be rendered invalid will be based on the particular circumstances of the case.288 Therefore, under the Penn Central principles, when the economic injury is considered in context with the benefit of saving human lives, economic injury seems trivial.289 Fairness dictates that the government should be permitted to save, without compensating for economic harm, human lives that are clearly endangered.

The public interest has also been an explicit part of the takings analysis since Penn Central.290 For example, in Keystone Bituminous Coal Association v. DeBenedictis, the Court focused on the nature of subsidence mining as a public nuisance in order to distinguish the case from Pennsylvania Coal.291 Although the Pennsylvania Coal Court expressed concern that the subsidence mining act at issue in its case did not protect the general public, but merely one homeowner,292 the Keystone Court held that this statute prevented harm to the general public from subsidence mining.293 With such a holding, the Keystone Court explicitly affirmed that this notion, that the prohibition of a nuisance cannot be a taking, had survived later takings decisions.294

The Court also addressed the concept of public interest in Nollan v. California Coastal Commission.295 The Nollan Court's opinion focused on the lack of a rational nexus between the permit sought by the landowner and the condition attached to the permit.296 Im-

286 Wilkins, supra note 143, at 26.
287 438 U.S. at 124.
288 Id.
289 A philosophical discussion on the value of one human life versus one hundred is outside the scope of this note.
290 See Wilkins, supra note 143, at 24.
292 See Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413 (1922).
293 See Keystone, 480 U.S. at 895.
294 See Lawrence, supra note 6, at 407. Lawrence also suggests that this modern discussion of an historical theory has extended the nuisance theory to cover additional areas of contemporaneous concern and regulation. See id. at 408.
296 See id. at 837.
licit in this discussion, however, was the notion that a condition sufficiently tied to the permit would have been allowed. The basis for such a condition would have been the preservation of the public's view of the beach.

A balancing approach will result in a continuum of results from challenges to government actions that adversely affect property owners. The stronger the police power justification for a government act, the more likely such an act will withstand a challenge under the compensation prong of the Takings Clause. For example, one commentator has argued for consideration of the public interest in floodplain regulation. A prohibition on building in an area categorized as a floodplain is designed to save the lives of the hundreds of people who would build in the line of the flood without such regulation. The commentator argued, therefore, that weighing private losses against the public interest in saving lives would increase the likelihood that the consequences of the regulation would be fair without compensation.

Moreover, not every action taken on behalf of the public's health, safety or welfare will be justified. Floodline regulation, such as that described above, might not be valid without compensation in an area which floods only once every thousand years because the public interest in safety would be much less compelling. In such a case the burden on the private individual would be much more likely to outweigh the benefit to the public.

Thus, in , , and , the Court seems to have taken steps in the right direction. All that remains, therefore, is for the Court to continue to develop its analysis. The public interest does not end with the determination that the government has a valid purpose in enacting the regulation. The public also has an interest in determining whether compensation is required for that action. One property owner's economic interest cannot be con-

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297 See id. at 836.
298 See id.
299 Wilkins, supra note 143, at 27.
300 Id.
302 See id. Professor Plater noted that the desire of landowners to build where their homes might be destroyed by floods is based on aesthetic and economic concerns rather than notions of danger. Id. at 207. Building in such an area, however, only exacerbates the problem because each landowner is responsible for only a slight fraction of the increment in danger and the benefits continue to outweigh the costs. Id.
303 Id. at 203.
sidered as an isolated element; it must be considered with and balanced against the public harm being prevented.

VI. APPLICATION OF THE TAKINGS TEST TO LUCAS V. SOUTH CAROLINA COASTAL COUNCIL

Now, it's one thing to keep the neighborhood grocery store from falling down a mine shaft. It's something else again to suggest that if Mr. Lucas builds his house on the beach, the state of South Carolina is going to erode and wash up somewhere in Nova Scotia.304

The facts of Lucas v. South Carolina Coastal Council present the United States Supreme Court with an opportunity to refine the takings test in a way that explicitly considers the public interest. Under such an approach, the analysis of the two scenarios described above would not be so different after all. Applying the two-part takings test to the facts of Lucas will demonstrate that Mr. Lucas may not have a property interest that is protected by the Fifth Amendment.305 Even assuming that he does, however, the second part of the analysis demonstrates that the Beachfront Management Act does not effect a compensable taking of Mr. Lucas's property.306

A. Mr. Lucas Does Not Have a Property Interest That is Protected by the Fifth Amendment

The first question to be addressed in Lucas is whether the landowner has a legitimate property interest that is protected by the Fifth Amendment.307 The Supreme Court has had difficulty in


505 The parties did not argue this issue before the United States Supreme Court. See Respondent's Brief on the Merits at 6–8, Lucas v. South Carolina Coastal Council, 404 S.E.2d 895 (S.C.), cert. granted, 112 S. Ct. 436 (1991) (No. 91–453).

506 At the trial court, Mr. Lucas conceded that the purpose of the South Carolina Beachfront Management Act, to preserve the state beaches as a valuable resource, was both valid and proper. Lucas v. South Carolina Coastal Council, 404 S.E.2d 895, 896 (S.C.), cert. granted, 112 S. Ct. 436 (1991). Moreover, he failed to challenge the validity of the Act, thereby acknowledging the Act as a rational method by which to achieve this purpose. See id. Those issues then were not before the state supreme court, see id., nor are they before the United States Supreme Court. See Petition for Writ of Certiorari at 5, Lucas v. South Carolina Coastal Council, 404 S.E.2d 895 (S.C.), cert. granted, 112 S. Ct. 436 (1991) (No. 91–453). The sole issue presented in Lucas is whether this regulation goes too far and is thus a taking that must be compensated. See id.

507 See supra notes 37–95 and accompanying text for a discussion of the definition of a property interest that can be taken under the Fifth Amendment.
explicitly defining the notion of property in the context of land development.\textsuperscript{308} Some members of the Court have spoken of development as an essential use and an attribute of property ownership.\textsuperscript{309} Others have regarded development expectations as legitimate only if they are consistent with the public interest.\textsuperscript{310}

In 1887, in \textit{Mugler v. Kansas}, the Court recognized the notion that property cannot be developed without concern for the public welfare.\textsuperscript{311} As such, the Court held that legislation prohibiting the manufacture and sale of intoxicating liquor was a valid use of the police power.\textsuperscript{312} Thus, the Court recognized that the community must be able to control the use of private property for the general good and held that no taking arose from legislation prohibiting uses injurious to the health, morals or safety of the community.\textsuperscript{313}

Over time, the Court reduced the public interest philosophy of \textit{Mugler} to a narrow nuisance exception and relied on it only sporadically to justify the prohibition of noxious uses without compensation.\textsuperscript{314} Then in \textit{Penn Central Transportation Co. v. New York City}, the Court once again appeared willing to consider the principle of social welfare when it upheld New York City's landmark preservation law.\textsuperscript{315} The majority reasoned that the restrictions on the land were substantially related to the promotion of the general welfare and permitted the landowner reasonable use of the land.\textsuperscript{316} In his dissenting opinion in \textit{Penn Central}, Justice Rehnquist, however, sought to limit the applicability of the nuisance cases when he argued that the exception should apply only to regulations that

\begin{itemize}
\item \textsuperscript{308} For a further discussion of this topic, see Grayson P. Hanes and J. Randall Minchew, \textit{On Vested Rights to Land Use and Development}, 46 WASH. & LEE L. REV. 373 (1989).
\item \textsuperscript{310} See \textit{Keystone}, 480 U.S. at 491 n.20 (Stevens, J.); see also Nollan, 483 U.S. at 864 (Brennan, J., dissenting).
\item \textsuperscript{311} See 123 U.S. 623, 668-69 (1887).
\item \textsuperscript{312} Id.
\item \textsuperscript{313} See id. at 668.
\item \textsuperscript{314} See Jerry L. Anderson, \textit{Takings & Expectations Toward a "Broader Vision" of Property Rights}, 37 KAN. L. REV. 529, 538 (1989). One court even went so far as to state that \textit{Mugler} "is no longer a correct statement of the law." Florida Rock Indus. v. United States, 8 Ct. Cl. 160, 171 (1985), \textit{vacated in part}, 791 F.2d 893 (D.C. Cir. 1986), \textit{cert. denied}, 479 U.S. 1053 (1987). The nuisance exception to the takings doctrine was also somewhat hidden for a time behind the holding of Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922), which introduced the diminution in value test to determine if a taking had occurred. \textit{Id.} at 415.
\item \textsuperscript{315} See 438 U.S. 104, 138 (1977).
\item \textsuperscript{316} Id.
\end{itemize}
prohibit uses of land that actually endanger the community.\textsuperscript{317} Thus, Justice Rehnquist did not consider the notion that land use should be subject to society’s general well-being at the expense of the individual property owner.\textsuperscript{318}

In 1987, the Court reaffirmed the notion from Mugler that states may regulate to prevent injury to the public without compensating the property owner.\textsuperscript{319} In Keystone Bituminous Coal Association \textit{v.} DeBenedictis, the Court upheld a subsidence statute prohibiting mining that destroyed the surface support.\textsuperscript{320} By declaring that no individual has the right to use his property in a way that harms others, the Court concluded that the state had not taken anything when it prohibited subsidence mining.\textsuperscript{321} Again, as in Penn Central, Justice Rehnquist dissented.\textsuperscript{322} He argued that the scope of the nuisance exception should be restricted to instances of misuse or illegal use.\textsuperscript{323} Thus, in his view, certain uses of land are inherent rights and cannot be restricted without compensation.\textsuperscript{324}

The Court most recently attempted to resolve the issue of land development in \textit{Nollan v. California Coastal Commission}.\textsuperscript{325} In that case, the landowners challenged the right of the state to require them to grant the state an easement along their beachfront property in order to obtain a building permit.\textsuperscript{326} The Court held that there was not a sufficient nexus between the permit sought and the condition attached to it.\textsuperscript{327} Therefore, the Court held that the state had to pay for the easement in order to obtain it.\textsuperscript{328}

Justice Scalia, writing for the majority, called Justice Brennan’s dissenting proposition that a state can define the limits of property rights “peculiar,”\textsuperscript{329} even though the Court has stated that a state

\begin{footnotes}
\textsuperscript{317} See \textit{id.} at 145–46 (Rehnquist, J., dissenting).
\textsuperscript{318} See \textit{id.} (Rehnquist, J., dissenting).
\textsuperscript{320} \textit{Id.}
\textsuperscript{321} See \textit{id.} at 491 n.20. In finding that no compensable taking had occurred, the Court also considered whether the property had suffered a diminution in value. \textit{Id.} at 492 (“[A]lthough public interest in preventing the nuisance was substantial . . . we need not rest a decision on that alone.”).
\textsuperscript{322} See \textit{id.} at 506–21 (Rehnquist, C.J., dissenting).
\textsuperscript{323} \textit{Id.} at 512 (Rehnquist, C.J., dissenting).
\textsuperscript{324} See \textit{id.} (Rehnquist, C.J., dissenting).
\textsuperscript{326} \textit{Id.} at 828.
\textsuperscript{327} \textit{Id.} at 837.
\textsuperscript{328} \textit{Id.}
\textsuperscript{329} \textit{Id.} at 833 n.2.
\end{footnotes}
can do so. Moreover, Justice Scalia stated simply that the right to build on one’s own property cannot be considered a “governmental benefit.” Thus, Justice Scalia’s point of view tends to support the proposition that the right to develop one’s property is an inherent right.

Justice Brennan, joined by Justice Marshall, dissented from the holding in *Nollan.* Justice Brennan found Justice Scalia’s position on the right to build “curious.” He disagreed with the argument that the right to build on one’s own property had a “privileged natural rights status.” Justice Brennan asserted that the Nollans were on notice that the right to develop their property could be subject to government restrictions.

Justices Stevens and Blackmun each dissented in separate opinions. Both Justices agreed with Justice Brennan that the restriction on the right of the Nollans to obtain the development permit was a valid use of the police power. Justice Stevens went one step further, however, and explicitly agreed that state agencies must have flexibility to deal with the conflict between private property interests and the preservation of our natural resources.

These arguments regarding expectations and the right to develop private property really represent only a new version of an argument that has existed since *Pennsylvania Coal*: whether all the rights that are attached to property, such as the right to develop, must be viewed together as a single right for Takings Clause pur-

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530 See, e.g., Board of Regents v. Roth, 408 U.S. 564, 577 (1972) (property interests are defined by rules that stem, not from the Constitution, but from independent sources such as state law).

531 *Nollan,* 483 U.S. at 834 n.2. The case relied on by Justice Brennan was *Ruckelshaus v. Monsanto,* 467 U.S. 986 (1984), where the Court held that a federal law requiring a company to disclose trade secrets in order to obtain a government permit to manufacture a pesticide was not a taking. See *Nollan,* 483 U.S. at 858. Justice Brennan, in *Nollan,* reasoned that the right to obtain a permit to develop one’s land, like the right to register a pesticide, was a governmental benefit. See *Nollan,* 483 U.S. at 860 (Brennan, J., dissenting).

532 Id. at 860 n.10 (Brennan, J., dissenting).

533 *Id.* (Brennan, J., dissenting). Continuing to refer to *Ruckelshaus v. Monsanto,* 467 U.S. 986 (1984), Justice Brennan disagreed with Justice Scalia’s attempts to distinguish that case from *Nollan.* See *Nollan,* 483 U.S. at 860 n.10 (Brennan, J., dissenting). He argued that under a “natural rights” approach to takings, which the majority appeared to be asserting, the plaintiff in *Ruckelshaus* would have had a superior claim to its trade secrets and the disclosure law would have effected a taking. *Id.*

534 See *Nollan,* 483 U.S. at 860 (Brennan, J., dissenting).

535 See *id.* at 865–66 (Blackmun, J., dissenting), 866–67 (Stevens, J., dissenting).

536 See *id.* at 865 (Blackmun, J., dissenting), 867 (Stevens, J., dissenting).

537 See *id.* at 867 (Stevens, J., dissenting).
poses. In other words, the argument focuses on whether, in order to determine if a property right has been taken, one should look at the entire parcel of property or consider individual rights within the entire "bundle" of property rights. It appears that Justice Scalia would argue that the property is comprised of many individual inherent rights and if just one is destroyed, a taking has occurred. Under this theory, if the government interferes with a landowner's right to develop the property, a taking will be found.

Other members of the Court, however, appear to believe that the property and the rights attached thereto must be viewed as a whole. Under this theory, governmental interference with development rights would need to be considered along with the remaining uses of the parcel in order to determine if a property interest has been taken. Thus, a prohibition on development would not necessarily effect a taking.

The question of development rights, therefore, is one that promises to remain for a number of years. If, however, the question of Mr. Lucas's right to develop his land cannot be resolved by an analysis of inherent property rights, perhaps it can be analyzed visually. If Mr. Lucas stood on his property and looked merely to the right and to the left, he would most likely believe that he was free to build a home. His neighbors had already built homes and it is unlikely that he would see any obstacle in his path to his own land development. Should he, and the Court, look to the front and back, however, those obstacles might become apparent.

To the front would stand the ocean, seemingly endless. To the back would undoubtedly stand land, comprised of trees, grass and other visible living organisms. But where is the line that separates them? There is none written in the sand. Our only hope is to write one in the laws. Perhaps the sight of the ocean might then place a doubt in the mind of a reasonable landowner. Mr. Lucas undoubtedly purchased his property for the view and all that accompanies it. He should not be so shortsighted to believe that he alone is

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9 See Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 419 (1922) (Brandeis, J., dissenting).

An additional ground for the argument that Mr. Lucas never had the right to develop his property is that coastal land has always been held in the "public trust." The topic of the public trust is, however, outside the scope of this note. For a discussion of some of the issues surrounding the topic of the public trust, see Gilbert L. Finnell, Jr. Public Access to Coastal Public Property: Judicial Theories and the Taking Issue, 67 N.C. L. Rev. 627 (1989); Joseph L. Sax, The Public Trust Doctrine in Natural Resources Law: Effective Judicial Intervention, 68 Mich. L. Rev. 471 (1971).
entitled to those treasures, treasures that future generations would then be denied due to his "rights" to build on the beachfront.

The question that still remains, however, is whether such a seed of doubt is sufficient to give the landowner notice of potential limits on his or her property rights. That is for the Court to decide. It is imperative that the Court approach the *Lucas* decision with an eye towards the future, and as Justice Brennan so eloquently suggested in *Nollan*, turn to a broader vision of property rights.\(^{541}\) The Beachfront Management Act exists because the South Carolina legislature recognized the need for this broader vision.\(^{542}\) Thus, under this view, Mr. Lucas would not have a legitimate expectation of developing his property and thus would not have a property interest that could be taken under the Fifth Amendment.

**B. The Beachfront Management Act Does Not Effect a Compensable Taking of Mr. Lucas's Property**

Determining whether Mr. Lucas has a property right that can be taken under the Fifth Amendment is only the first step in the takings analysis.\(^{543}\) Assuming that he does have a valid property interest, a second question remains. It must be determined whether the State of South Carolina must compensate Mr. Lucas for that property interest. Under the balancing test articulated in this note, Mr. Lucas is not entitled to any compensation.

1. The Arguments of the Parties

Mr. Lucas made several arguments to the Court. His first argument was that a categorical nuisance exception to the compensation requirement of the Fifth Amendment is contrary to the Court's modern takings jurisprudence.\(^{544}\) He argued that under *Pennsylvania Coal* the private interest cannot be ignored, even if the state has a legitimate reason for regulating land use.\(^{545}\) Mr. Lucas thus apparently recognized the need for a balancing approach in takings cases. Mr. Lucas's second argument, however, retreated


\(^{543}\) See *supra* note 305 and accompanying text for a discussion of the issues before the United States Supreme Court in *Lucas*.


\(^{545}\) Id. at 14–15.
from this admirable position. He argued that even if the Court were to recognize a nuisance exception, the Court should not apply that exception when the regulation eliminates the value of property. Thus, in his second argument, Mr. Lucas appeared to argue for a bright-line or categorical decisionmaking tool.

Mr. Lucas's final argument once again apparently recognized the need for a balancing test. In this argument, he asserted that a valid public purpose should not automatically cause a police power action to be valid. He cited to Penn Central, arguing that a takings inquiry must include an analysis of "the character of the government action." Thus, Mr. Lucas argued that in order to evaluate a takings claim, a court must inquire into both the public and private interest.

Rather than debate the advantages of one bright-line approach over the other, the respondent, South Carolina Coastal Council, appeared to focus its arguments on the need to fully balance all the interests involved. The Council turned to the language of the Penn Central Court and referred to the three factors that should be considered. These factors were the character of the government action, interference with investment-backed expectations and the economic impact of the action.

Focusing on the character of the government action, the Council argued that the Beachfront Management Act was aimed at the prevention of severe public harm. Arguing that these harms are analogous to those that the United States Supreme Court faced in Mugler v. Kansas, the Council asserted that prevention of such harms cannot be a taking. Thus, like Mr. Lucas, the Council asked, as an alternative to a balancing test, for a bright-line exception to the compensation requirement of the Takings Clause.

Thus, even though each party has made several arguments, each included one argument for a bright-line exception to the com-

546 See id. at 19-28.
547 Id. at 19.
548 See id. at 35-45.
549 Id. at 35.
550 Id. at 38.
551 Id. at 45.
553 Id. at 18-19.
554 Id.
555 See id. at 7.
556 Id. at 37-38. The South Carolina Coastal Council also argues that Mr. Lucas has not established that his property has suffered a total diminution in value. Id. at 47.
557 See id. at 28-40.
Moreover, it was the bright-line rules that the parties stressed during oral argument to the Court. Mr. Lucas asked that the Supreme Court hold that the Beachfront Management Act constituted a taking of his private property because he has no economic use left for his land. The South Carolina Coastal Council, on the other hand, asked that the Court hold that the Act was not a taking because it is the prevention of a public nuisance. If the Court were to adopt either of these provisions, it would have a dramatic impact on future governmental regulation.

On the one hand, to say that beach erosion is a public nuisance may go too far. It might become possible for the government to regulate anything under such a broad definition. On the other hand, if the Court requires the state of South Carolina to compensate Mr. Lucas simply because his land has lost its development value, the government will have lost much of its ability to regulate in any way. For example, a zoning ordinance might no longer be valid if it stripped the landowner of the right to build a multi-story...
structure. Moreover, the effect upon the coastal regions around the United States would be profound. No government could pass a protective regulation, no matter how imminent the harm was, without fear of causing a taking. Approaching *Lucas* under a balancing test that accounts for all interests involved would, however, apply to only the parties to this case and would not have such broad, overreaching effects.

2. The Analysis Under a Balancing Test

Mr. Lucas is clearly a very sympathetic plaintiff. The trial court found that Mr. Lucas’s property, worth more than one million dollars without the building prohibition, had no economic value remaining after the restrictions were imposed.\(^{363}\) A further exploration of the situation, however, indicates that this is incomplete.

For example, the National Flood Insurance Program\(^{364}\) protects beachfront property owners from economic damage due to the erosion of the shore by the ocean.\(^{365}\) Without this program, many oceanfront property owners would be unable to obtain insurance on the private market except at prohibitive premium rates.\(^{366}\) Because of the exorbitant cost of private insurance or the fear of building an uninsured home that might fall into the sea, many property owners might not have bought their property without the federal insurance protection.\(^{367}\) Thus, the conditions that make it possible for someone like Mr. Lucas to live at the edge of the beach were largely created by the federal government.\(^{368}\) It seems unjust that the state government should have to pay Mr. Lucas for “taking” any increased property value caused by the flood insurance program.

Even assuming that Mr. Lucas successfully argues that the value of his property has substantially decreased, the Court should nevertheless consider and protect the public interest. In this case, Mr.
Lucas has not challenged the purpose of the Beachfront Management Act. The South Carolina Supreme Court held that the Act’s purpose was to prohibit development along South Carolina beaches that would jeopardize the stability of the beach, accelerate erosion and endanger adjacent property. The Act also refers to the beach area as a habitat for many threatened or endangered species of plants and animals, a natural health environment for the citizens of the state and an important part of the state’s tourism industry.

Even if these purposes are not enough, under a balancing test, to offset the economic harm suffered by Mr. Lucas, the public interest in human safety should be considered as well. The Beachfront Management Act explicitly recognizes the fact that South Carolina has no coordinated state policy for handling post-storm emergencies along the state beaches. Such a plan should, however, be the second line of defense in dealing with such emergencies, not the first. Prohibiting building in areas that are particularly susceptible to damage from a storm will save human lives. For example, a hurricane often causes man-made structures to break apart and become projectiles. These projectiles are often whole houses that create significant danger to homes and their inhabitants. Moreover, the property debris severely inhibits and increases the cost of any rescue and relief program that is in effect. The disasters caused by this debris could be prevented if only people were not in its path.

Consideration of the public thus insures a careful balancing of all the interests involved in Lucas. Under the factors established by the Supreme Court in Penn Central, any economic harm suffered by Mr. Lucas is clearly offset by the public need for the Beachfront Management Act. The Act is the only protection for the natural beachfront environment and animal habitats. Moreover, the Act not only reduces the cost of storm clean-up and rescue, it eliminates much of the need for these programs in the first place. Most importantly, however, the Beachfront Management Act protects human habitats and saves human lives.

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571 See Plater, supra note 301, at 203.
574 Id.
575 Id.
A thing is right when it tends to preserve the integrity, stability, and beauty of the biotic community. It is wrong when it tends otherwise.\textsuperscript{376}

The time has come for the United States Supreme Court to move towards a broader vision of property rights. The Court can no longer hide behind ineffective labels and confusing analytical approaches to determine when government must compensate a landowner for a regulatory action. It is time for the Court to acknowledge explicitly that what one may do with one's property is bounded on all sides by the public’s interest in health, safety and the preservation of our natural environment. \textit{Lucas v. South Carolina Coastal Council} presents the Court with an opportunity to refine takings jurisprudence in a way that recognizes these interests.

In \textit{Lucas}, the severity of the harm that the Beachfront Management Act seeks to prevent outweighs the economic cost to the individual landowner. If the Supreme Court avoids an explicit balancing of these interests now and requires the government of South Carolina to compensate Mr. Lucas for his land, the decision will have a profound impact on coastal regions around the country. In these difficult economic times, governments cannot afford to compensate landowners for even temporary takings and thus cannot take any action to protect these fragile zones. That leaves government only with the option of waiting until the destruction of our beaches and coastal areas has become complete. Only then will the courts recognize the public interest in environmental regulations and acknowledge the necessity of accounting for all the interests involved in such a regulation. If we had known thirty years ago what we now know, the country would be in better shape today. We cannot wait until the destruction is complete. The United States Supreme Court has the opportunity to change course now. By applying a fact-specific balancing test that includes equal consideration of all interests, public and private, the Court will be acting to preserve our natural community for generations to come.

\textsc{Janet McClafferty Dunlap}

\textsuperscript{376} Aldo Leopold, \textit{A Sand County Almanac, and Sketches Here and There} 224–25 (1949).