

THIS LAND IS MY LAND: THE CLASH BETWEEN PRIVATE PROPERTY AND THE PUBLIC INTEREST IN LUCAS V. SOUTH CAROLINA COASTAL COUNCIL¹

*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.³ 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

¹ 404 S.E.2d 895 (S.C.), cert. granted, 112 S. Ct. 436 (1991).

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 ENVTL. 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).

⁴ Patrick Wiseman, *When the End Justifies the Means: Understanding Takings Jurisprudence in a Legal System With Integrity*, 63 ST. JOHN'S L. REV. 433, 437 (1989).

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. Stoebuck, *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

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.*

⁹ Eugene Linden, *Demanding Payment for Good Behavior*, TIME, Feb. 3, 1992, at 52.

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.*

The United States Supreme Court held, in a unanimous opinion, that the ordinance did

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.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.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.¹⁶ In November 1991, the United States Supreme Court granted Mr. Lucas's petition for certiorari.¹⁷

In determining whether a taking has occurred in a case like *Lucas*, a court must undertake a two-step analysis.¹⁸ First, a court determines if there is a property interest that is protected by the Fifth Amendment.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.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.²¹ In another case, the Court considered discrete portions of a building

not effect a per se physical taking. *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. *Id.* at 1528. Instead, the Court viewed the ordinance as merely regulating the relationship between a landlord and a tenant. *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. *Id.*

The plaintiffs in *Yee* also argued that the ordinance effected a regulatory taking, and not just a per se physical taking. *See id.* at 1531. The Court, however, held that this question was not properly presented in the petition for certiorari. *Id.* Therefore, the Court declined to decide the question of whether the ordinance effected a taking under a factual inquiry. *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. *See PFZ Properties, Inc. v. Rodriguez*, 928 F.2d 28, 29 (1st Cir. 1991), *cert. dismissed*, 112 S. Ct. 1151 (1992).

¹⁴ *See Lucas v. South Carolina Coastal Council*, 404 S.E.2d 895, 896 (S.C.), *cert. granted*, 112 S. Ct. 436 (1991).

¹⁵ *Id.* at 899-901.

¹⁶ *See id.* at 896.

¹⁷ *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 436 (1991).

¹⁸ *See* Andrea L. Peterson, *The Takings Clause: In Search of Underlying Principles Part I—A Critique of Current Takings Clause Doctrine*, 77 CAL. L. REV. 1301, 1304 (1989).

¹⁹ *See id.* at 1302, 1304.

²⁰ *See id.* at 1304.

²¹ *See Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 130-31 (1978).

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

²² See *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 438 (1982).

²³ See *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1003-04 (1984) (trade secrets); *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 161 (1980) (interpleader fund); *United States v. General Motors Corp.*, 323 U.S. 373, 377-78 (1945) (tenancy).

²⁴ Peterson, *supra* note 18, at 1304.

²⁵ *Id.*

²⁶ *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978).

²⁷ Peterson, *supra* note 18, at 1304; see also *United States v. Cherokee Nation of Oklahoma*, 480 U.S. 700, 703-04 (1987) (bright-line test); *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980) (bright-line test); *Penn Central*, 438 U.S. at 128-35 (multi-factor balancing test); *Hadacheck v. Sebastian*, 239 U.S. 394, 411 (1915) (bright-line test); *Mugler v. Kansas*, 123 U.S. 623, 658 (1887) (bright-line test).

²⁸ See Peterson, *supra* note 18, at 1333; see also *Penn Central*, 438 U.S. at 128-35.

²⁹ 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 effects 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).

³⁰ Peterson, *supra* note 18, at 1305.

³¹ See *infra* notes 37-95 and accompanying text.

³² See *infra* notes 96-224 and accompanying text.

of the South Carolina Supreme Court in *Lucas*.³³ 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.³⁴ Section V then proposes that the Court should explicitly include the public interest as a factor in this balancing test.³⁵ 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.³⁶

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.*³⁷

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.³⁸ Although the word "property" may seem familiar, the United States Supreme Court has defined the concept in various ways.³⁹ The Court has found property interests in physical parcels of property⁴⁰ and economic rights.⁴¹ 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.⁴²

³³ See *infra* notes 225–47 and accompanying text.

³⁴ See *infra* notes 248–75 and accompanying text.

³⁵ See *infra* notes 276–303 and accompanying text.

³⁶ See *infra* notes 304–75 and accompanying text.

³⁷ JEAN-JACQUES ROUSSEAU, *Discourse on the Origin and Foundations of Inequality Among Men*, in *THE FIRST AND SECOND DISCOURSES* 141 (Roger D. Masters ed., 1964).

³⁸ 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.

³⁹ Peterson, *supra* note 18, at 1304.

⁴⁰ See *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 438 (1982); *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 130–31 (1978).

⁴¹ See *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1003–04 (1984) (trade secrets); *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 161 (1980) (interpleader fund); *United States v. General Motors Corp.*, 323 U.S. 373, 377–78 (1945) (tenancy).

⁴² See *Bowen v. Gilliard*, 483 U.S. 587, 607 (1987) (right to receive support payments from a noncustodial parent not vested); *Bowen v. Public Agencies Opposed to Social Security Entrapment*, 477 U.S. 41, 55 (1986) (right to prevent removal of contract termination clause not vested).

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.⁴³ 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.⁴⁴ 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.⁴⁵ The Court noted that the city had designated the parcel as a whole, encompassing the entire block, as a landmark site.⁴⁶ Therefore, the Court reasoned that the plaintiff's takings claim must be analyzed with respect to the whole parcel, which included the airspace.⁴⁷ 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.⁴⁸

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.⁴⁹ In *Loretto*, the alleged taking was the permanent physical installation of a cable wire on

⁴³ 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.*

⁴⁵ *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.

⁴⁶ *Id.* at 130.

⁴⁷ *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. 603, 604, 610 (1927) (ordinance establishing mandatory set-back lines for homes is valid).

⁴⁸ *Penn Central*, 438 U.S. at 130; see also *Hodel v. Indiana*, 452 U.S. 314, 335 (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).

⁴⁹ 458 U.S. 419, 421 (1982).

the roof and side of an apartment building the plaintiff owned.⁵⁰ 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.⁵¹ 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.⁵² 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.⁵³

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.⁵⁴ 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.⁵⁵ 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.⁵⁶ 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.⁵⁷ 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.*

⁵⁴ See *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1003-04 (1984) (trade secrets); *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 161 (1980) (interpleader fund); *United States v. General Motors Corp.*, 323 U.S. 373, 377-78 (1945) (tenancy).

⁵⁵ 323 U.S. 373, 377-78 (1945).

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 378.

with the tenant's interest in the property, whether it was a fee simple or a tenancy.⁵⁸ Thus, the *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.⁵⁹

Similarly, in 1980, in *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.⁶⁰ At issue in *Webb's* was whether the state or the depositors owned the interest earned on the money deposited in the fund.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.⁶² *Webb's*, as the depositor, then brought a claim to require the clerk to release the interest money.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.⁶⁴ Thus, the court held that there could be no taking because the interest earned during that time was not private property.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.⁶⁶ Therefore, the *Webb's* Court held that the creditors had a property right in their respective portions of the fund.⁶⁷ The Court thus concluded that the clerk's retention of the interest constituted a taking of private property.⁶⁸

⁵⁸ *Id.*

⁵⁹ *See id.*

⁶⁰ 449 U.S. 155, 161 (1980).

⁶¹ *Id.* at 158. The case involved an agreement between two Florida corporations whereby one agreed to purchase substantially all the assets of the other. *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. *Id.* To protect itself, the purchaser, pursuant to state law, filed a complaint of interpleader and interpleaded as defendants *Webb's* and its creditors. *Id.* at 156-57. The purchaser then tendered the purchase price to the court thereby requiring creditors to seek relief in the court. *Id.*

⁶² *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. *Id.* at 157-58. Thus, the receiver moved to have the fund turned over to him and the court granted the motion. *Id.* at 158.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.* at 158-59.

⁶⁶ *Id.* at 161.

⁶⁷ *Id.*

⁶⁸ *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.⁶⁹ 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.⁷⁰ Monsanto claimed that the required disclosure of confidential commercial information constituted a taking of private property.⁷¹ 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.⁷² 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.⁷³ Thus, the Court affirmed that in addition to tangible parcels of land,⁷⁴ valid property rights could be found in intangible economic rights.⁷⁵

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.⁷⁶ 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.⁷⁷ The case involved a written agreement, pursuant to federal law, between the State of California and the United States Secretary of Health and

⁶⁹ 467 U.S. 986, 1003-04 (1984).

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.*

⁷³ *Id.* at 1003.

⁷⁴ See, e.g., *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 438 (1982); *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 131 (1978).

⁷⁵ See *Ruckelshaus*, 467 U.S. at 1003; see also *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 161 (1980); *United States v. General Motors Corp.*, 323 U.S. 373, 377-78 (1945).

⁷⁶ See *Bowen v. Gilliard*, 483 U.S. 587, 607 (1987); *Bowen v. Public Agencies Opposed to Social Security Entrapment*, 477 U.S. 41, 55 (1986).

⁷⁷ 477 U.S. at 55.

Human Services in which the state agreed to participate in the Social Security system.⁷⁸ A subsequent change in the federal law eliminated a termination provision in the agreement.⁷⁹ 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.⁸⁰ The Court reasoned in part, however, that the contractual right at issue was not one over which the State had any bargaining power.⁸¹ Rather, the Court viewed the provision in the contract as only part of a larger regulatory program.⁸² 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.⁸³

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.⁸⁴ 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").⁸⁵ 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.⁸⁶ 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.⁸⁷ 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.⁸⁸ 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.*

⁸⁴ 483 U.S. 587, 607 (1987).

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 rights⁹³ 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

*[T]his 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.

⁹¹ Compare *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 130-31 (1978) (property is entire parcel of land) with *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 438 (1982) (property can be a small portion of a larger tangible thing).

⁹² See *Bowen v. Gilliard*, 483 U.S. at 607 (child support payments); *Bowen v. Public Agencies Opposed to Social Security Entrapment*, 477 U.S. 41, 55 (1986) (contract termination provision); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1003-04 (1984) (trade secrets); *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 161 (1980) (interpleader fund); *United States v. General Motors Corp.*, 323 U.S. 373, 377-78 (1945) (tenancy).

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).

⁹⁴ See *Bowen v. Gilliard*, 483 U.S. at 609 (child support payments); *Bowen v. Public Agencies Opposed to Social Security Entrapment*, 477 U.S. at 55 (contract termination provision).

⁹⁵ Peterson, *supra* note 18, at 1308.

⁹⁶ *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978) (Brennan, J., opinion of the Court).

⁹⁷ See generally *Large*, *supra* note 3, at 6; *Lawrence*, *supra* note 6, at 394.

nuisance exception to the compensation requirement.⁹⁸ 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.⁹⁹ The third group is comprised of the cases decided during the 1986–87 Term, where the Court attempted to clarify the takings doctrine.¹⁰⁰

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.¹⁰¹ 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.¹⁰² 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.¹⁰³ The state legislature subsequently passed an act to give effect to that amendment, declaring, in part, that places that manufactured liquor were public nuisances.¹⁰⁴ As a result of the legislation the plaintiff's building, which he had specially

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).

¹⁰⁰ See Large, *supra* note 3, at 35; see also *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 837 (1987); *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 322 (1987); *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 501–02 (1987).

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.¹⁰⁵

Although the *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.¹⁰⁶ Such legislation, the Court observed, did not deprive the owner of the use of the property for lawful purposes.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.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,¹⁰⁹ the Court held that the limitation on the plaintiff's use of his land did not constitute a taking.¹¹⁰

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

¹⁰⁵ *Id.* at 657.

¹⁰⁶ *Id.* at 668-69.

¹⁰⁷ *Id.* at 669.

¹⁰⁸ *Id.* at 662.

¹⁰⁹ See *id.* at 665. For a general discussion of this proposition, see Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1196-1201, 1235-45 (1967); Joseph L. Sax, *Takings and the Police Power*, 74 YALE L.J. 36, 38-39, 48-50 (1964).

¹¹⁰ *Mugler*, 123 U.S. at 675.

¹¹¹ 239 U.S. 394, 411 (1915).

¹¹² *Id.* at 408.

¹¹³ 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. *Id.* at 404-05. The court discharged the writ and remanded the prisoner to custody. *Id.* at 405. A writ of error was subsequently granted by the United States Supreme Court. *Id.*

¹¹⁴ *Id.* at 410.

¹¹⁵ *Id.* at 410-11; see also *Mugler v. Kansas*, 123 U.S. 623, 668-69 (1887).

brickyards within the limits of the city was clearly within the state's power.¹¹⁶ Thus, the Court held that there was no taking.¹¹⁷

B. Cases 1922-1987

Although the Supreme Court never explicitly rejected the nuisance exception to the Takings Clause established in *Mugler*,¹¹⁸ 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.¹¹⁹ In that year, in *Pennsylvania Coal Co. v. Mahon*, the Court held that a state act prohibiting subsidence mining of coal was a taking.¹²⁰ The act required mining companies to leave pillars of coal behind to support the weight of the land above.¹²¹ Writing for the majority, Justice Holmes conceded that government did not have to pay compensation every time property value was affected,¹²² but he noted that at some point the decline in value would cross a line and become a taking of property.¹²³ 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.¹²⁴ The Court held that in this case the line had been crossed and the subsidence act was unconstitutional.¹²⁵

Justice Brandeis dissented in *Pennsylvania Coal*, arguing that the case involved the prevention of a nuisance.¹²⁶ In his opinion, such a restriction, imposed to protect the public health, safety or morals from danger, did not constitute a taking.¹²⁷ 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 413.

¹²³ *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.

¹²⁴ *Pennsylvania Coal*, 260 U.S. at 414.

¹²⁵ *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.

¹²⁶ *Id.* at 417 (Brandeis, J., dissenting).

¹²⁷ *Id.* (Brandeis, J., dissenting).

nuisance.¹²⁸ 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.¹²⁹ Under this approach, he would have found no taking.¹³⁰

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.¹³¹ In subsequent cases, however, the Court has not always adhered to this analysis.¹³² 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.¹³³ 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.¹³⁴ 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.¹³⁵ Finally, the Court held that for a legitimate public purpose, the State could destroy some property interests without paying for them.¹³⁶

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.¹³⁷ 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.¹³⁸

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.

¹³² *Large*, *supra* note 3, at 16; see also *Goldblatt v. Hempstead*, 369 U.S. 590, 593-94 (1962) (application of nuisance theory); *United States v. Central Eureka Mining*, 357 U.S. 155, 168-69 (1958) (consideration of nature of invasion).

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.

¹³⁷ 438 U.S. 104, 138 (1977). See *supra* notes 44-48 and accompanying text for a discussion of the facts of the case.

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.¹³⁹

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.¹⁴⁰ 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.¹⁴¹ The first factor the Court noted was the economic impact of the regulation on the landowner.¹⁴² The second factor the Court identified was the extent to which the regulation interfered with investment-backed expectations.¹⁴³ The third factor the *Penn Central* Court highlighted was the character of the government action.¹⁴⁴

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.¹⁴⁵ The Court then applied these factors to the case before it.¹⁴⁶ The Court accepted the landowner's argument that the landmark law burdened some property owners more than others.¹⁴⁷ The Court refused, however, to accept the argument that this diminution in property value was alone sufficient to effect a taking.¹⁴⁸ Instead, the Court held that legislation designed to promote the general welfare must commonly bur-

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.¹⁴⁹

Justice Rehnquist dissented from the majority opinion in *Penn Central*.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.¹⁵¹ Under the facts of *Penn Central*, he asserted, no nuisance was being prohibited.¹⁵² Thus, according to Justice Rehnquist, the government should have compensated the landowner for its loss.¹⁵³

Since *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.¹⁵⁴ In 1980, however, in *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.¹⁵⁵ In that case, the landowners had acquired five acres of unimproved land intending to develop the land for residential purposes.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.¹⁵⁷ Without seeking administrative relief under the zoning ordinance, the landowner brought suit claiming that the land had been taken.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.¹⁵⁹ Thus, the Court held that there was no taking.¹⁶⁰

¹⁴⁹ *Id.* at 133, 135.

¹⁵⁰ *See id.* at 138-53 (Rehnquist, J., dissenting).

¹⁵¹ *Id.* at 144-45 (Rehnquist, J., dissenting).

¹⁵² *Id.* at 145 (Rehnquist, J., dissenting).

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. *Id.*

¹⁵⁴ Lawrence, *supra* note 6, at 399; *see also* *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 84 (1980); *Kaiser Aetna v. United States*, 444 U.S. 164, 179-80 (1979).

¹⁵⁵ 447 U.S. 255, 260 (1980). Although the language in the *Agins* opinion is similar to that in *Penn Central*, the *Agins* Court used the word "or" to separate the factors. *See id.* This would seem to indicate that an "either/or" test applied in *Agins*, rather than the *Penn Central* balancing test. Peterson, *supra* note 18, at 1328.

¹⁵⁶ *Agins*, 447 U.S. at 257.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* at 257-58.

¹⁵⁹ *See id.* at 262.

¹⁶⁰ *Id.* at 262-63.

Although the Court did not indicate whether the two-part *Agins* test established a clear rule to be applied to takings cases,¹⁶¹ there is one area of takings law where the Court has explicitly attempted to provide a bright-line rule.¹⁶² The Court has frequently found a taking when the government physically invades property or expropriates it for the government's own use.¹⁶³ 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.¹⁶⁴ The case involved the installation of a cable wire and related equipment on an apartment building owned by the plaintiff.¹⁶⁵ The Court concluded that because the government had taken the area actually occupied by the cable facilities, it was required to pay just compensation.¹⁶⁶

Thus, prior to the 1986-87 Term, the Court had approached takings cases in several different ways.¹⁶⁷ The historical nuisance doctrine articulated in *Mugler* was never abandoned by the Court;¹⁶⁸ instead, the Court added to takings jurisprudence with the diminution in value theory from *Pennsylvania Coal*,¹⁶⁹ the multi-factor balancing test of *Penn Central*,¹⁷⁰ and a rearticulation of the factors of the balancing test in *Agins*.¹⁷¹ Moreover, in *Loretto*, the Court indicated that regulations that cause a physical intrusion by the government are, per se, a taking.¹⁷²

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).

¹⁶⁴ 458 U.S. 419, 426 (1982). See *supra* notes 49-52 and accompanying text for a discussion of the facts of the case.

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.¹⁷³ 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*,¹⁷⁴ did not effect a taking of private property for which compensation was required.¹⁷⁵ The *Keystone* Court distinguished its case from *Pennsylvania Coal* on two grounds.¹⁷⁶ First, although the *Pennsylvania Coal* Court held that its statute had a limited public purpose,¹⁷⁷ the *Keystone* Court held that the subsidence mining act before it had a valid public purpose.¹⁷⁸ The act prevented mining that caused subsidence to public buildings, homes or cemeteries.¹⁷⁹ Thus, the *Keystone* Court held the purpose of the act to be the valid prevention of a public nuisance.¹⁸⁰

The second distinguishing factor between *Pennsylvania Coal* and *Keystone* was the manner in which the Court measured the diminution in value of the property.¹⁸¹ Although the *Keystone* Court relied on the same basic test enunciated in *Pennsylvania Coal*, the *Keystone* Court measured the plaintiff's percentage loss differently.¹⁸² 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.¹⁸³ Because only two percent of the total amount of coal had to be left behind to prevent subsidence, and the owner

¹⁷³ See Large, *supra* note 3, at 35. For an in-depth discussion of the cases decided that term, see generally Frank Michelman, *Takings, 1987*, 88 COLUM. L. REV. 1600 (1988).

¹⁷⁴ *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 412-13 (1922).

¹⁷⁵ *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 501-02 (1986).

¹⁷⁶ See *id.* at 485, 493.

¹⁷⁷ *Pennsylvania Coal*, 260 U.S. at 413-14 (the statute appeared to be aimed at the protection of only one home).

¹⁷⁸ *Keystone*, 480 U.S. at 485.

¹⁷⁹ *Id.* at 476.

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.

¹⁸¹ *Keystone*, 480 U.S. at 493.

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.*

¹⁸³ *Keystone*, 480 U.S. at 498-99.

could mine the rest, the *Keystone* Court noted that the landowner retained economic use of the land.¹⁸⁴ Thus, the Court held that there was no taking.¹⁸⁵

In a dissenting opinion, Chief Justice Rehnquist advanced two theories of takings analysis not addressed by the majority in the five-four decision.¹⁸⁶ First, he stated that the reliance on the nuisance exception in this case was misplaced.¹⁸⁷ The Chief Justice argued that the previous nuisance cases served "discrete and narrow purposes."¹⁸⁸ He maintained, however, that the statute in *Keystone* was based essentially on an economic concern rather than on public safety.¹⁸⁹ 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.¹⁹⁰

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."¹⁹¹ 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.¹⁹² Thus, the question of what unit of property a takings inquiry should focus on was an issue debated by the *Keystone* Court.¹⁹³

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.¹⁹⁴ The restriction at issue in the case was a county flood plain ordinance that

¹⁸⁴ *Id.* at 498-99.

¹⁸⁵ *Id.*

¹⁸⁶ See *id.* at 506-21 (Rehnquist, C.J., dissenting).

¹⁸⁷ *Id.* at 512 (Rehnquist, C.J., dissenting).

¹⁸⁸ *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.

¹⁸⁹ *Keystone*, 480 U.S. at 513 (Rehnquist, C.J., dissenting).

¹⁹⁰ See *id.* (Rehnquist, C.J., dissenting).

¹⁹¹ *Id.* at 517 (Rehnquist, C.J., dissenting).

¹⁹² *Id.* at 520-21 (Rehnquist, C.J., dissenting).

¹⁹³ Lawrence, *supra* note 6, at 415.

¹⁹⁴ 482 U.S. 304, 307 (1986).

prohibited the redevelopment of areas devastated by previous storm runoff.¹⁹⁵ The plaintiff, a church, owned a camp for handicapped children that was destroyed in the flood.¹⁹⁶ Because the ordinance prevented the church from rebuilding, the church filed suit.¹⁹⁷

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.¹⁹⁸ 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.¹⁹⁹ 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.²⁰⁰

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.²⁰¹ 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.²⁰² 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.²⁰³ The Court held that without this nexus, the Commission must compensate the Nollans for the easement.²⁰⁴

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ See Lawrence, *supra* note 6, at 426. Neither of the courts below had held that the complaint properly alleged a taking under federal or state law. *Id.* For a discussion of other plausible bases upon which the Court could have refused to hear the case, see *id.* at 426–27.

¹⁹⁹ *First English*, 482 U.S. at 321.

²⁰⁰ *Id.* After the Court remanded the case for further proceedings, the lower court found that there was no taking. *First English Evangelical Lutheran Church v. County of Los Angeles*, 210 Cal. App. 3d 1353, 1374 (Cal. Ct. App. 1989).

²⁰¹ See 483 U.S. 825, 841–42 (1987).

²⁰² *Id.* at 828.

²⁰³ *Id.* at 837.

²⁰⁴ *Id.* Because of the Court's inquiry into the effectiveness of the governmental condition attached to the permit, some commentators have argued that the Court is embarking on a course of heightened scrutiny for land use regulation. See Craig A. Peterson, *Land Use Regulatory "Takings" Revisited: The New Supreme Court Approaches*, 39 HASTINGS L.J. 335, 338 (1988); *The Supreme Court, 1986 Term—Leading Cases*, 101 HARV. L. REV. 119, 245–50 (1987). In 1988, however, the Court in *Pennell v. City of San Jose*, 485 U.S. 1 (1988), held a takings challenge to a rent control ordinance to be premature. *Id.* at 9–10. At issue in *Pennell* was a

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-

"tenant hardship" clause that allowed a hearing officer to consider the effect a rent increase would have on a tenant. *Id.* at 4. The landlords argued that consideration of the hardship to the tenants reduced the rents below an objectively reasonable amount and therefore constituted a taking. *Id.* at 9. The *Pennell* Court, however, found no evidence that the clause had ever been used to reduce rents below the figure that would have been set based on other factors in the ordinance. *Id.* at 9-10. The Court reasoned that constitutionality should be judged only in an actual factual setting that makes such a decision necessary. *Id.* at 10. Thus, the Court found the claim to be premature. Dissenting in *Pennell*, Justice Scalia argued, however, that the fact that the landlords were not able to show specific harm was not enough to prevent consideration of the claim on the merits. *See id.* at 18-19 (Scalia, J., dissenting). He asserted that this inability was no reason to shield the "alleged constitutional injustice" from judicial scrutiny. *Id.* (Scalia, J., dissenting).

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 (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.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.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.²¹⁶ Thus, the Court created a categorical exception, like the *Mugler* nuisance exception, to the compensation prong of the takings test.²¹⁷

In sum, rather than clarify existing takings jurisprudence during the 1986–87 Term, the Court added several new considerations to a takings analysis.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.²¹⁹ The Court also held that even a temporary taking must be compensated.²²⁰ In addition, the Court failed to overrule the *Mugler* noxious use or nuisance exception²²¹ and added a new categorical exception to the compensation requirement.²²² Moreover, the Court decided some cases with language reminiscent of the *Penn Central* balancing test.²²³ Therefore, it is arguable whether the takings doctrine was in fact clarified during the term.²²⁴

²¹⁴ 480 U.S. 700, 703–04 (1987).

²¹⁵ *Id.* at 701.

²¹⁶ *See id.* at 706.

²¹⁷ *See id.* at 705 (indicating that no balancing test is required); *see also* Lawrence, *supra* note 6, at 433–34.

²¹⁸ *See* Peterson, *supra* note 18, at 1304.

²¹⁹ *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 837 (1987).

²²⁰ *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 307 (1987).

²²¹ Lawrence, *supra* note 6, at 395; *see also* *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); *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922) (noting that damage was not a public nuisance). *But see Penn Central*, 438 U.S. at 134 n.30 (Brennan, J.) (expressing some skepticism about the theory).

²²² *See United States v. Cherokee Nation of Oklahoma*, 480 U.S. 700, 703–04 (1987) (navigational right-of-way precludes taking).

²²³ *See, e.g.,* *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 490 (1987) (nature of state action); *Ruckelshaus v. Monsanto*, 467 U.S. 986, 1010 (1984) (investment-backed expectation); *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979) (investment-backed expectation).

²²⁴ *See* Peterson, *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-

²²⁵ *Lucas v. South Carolina Coastal Council*, 404 S.E.2d 895, 896 (S.C.) (Toal, J., opinion of the court), cert. granted, 112 S. Ct. 436 (1991).

²²⁶ Petition for Writ of Certiorari at 3, *Lucas v. South Carolina Coastal Council*, 404 S.E.2d 895 (S.C.), cert. granted, 112 S. Ct. 436 (1991) (No. 91-453).

²²⁷ *Id.*

²²⁸ S.C. CODE ANN. §§ 48-39-10 to -360 (Law. Co-op 1987 & Supp. 1991). The Act included detailed legislative findings regarding the coastal beach and dune system. See *id.* § 48-39-250. Among these findings was the determination that "[a] long-range comprehensive beach management plan is needed for the entire coast of South Carolina to protect and manage effectively the beach/dune system, thus preventing unwise development and minimizing man's adverse impact on the system." *Id.* § 48-39-250(11). Moreover, the Act contained an explicit policy statement establishing the state's goal of preserving the beach/dune system as "a buffer from tides, storm surge, hurricanes, and normal erosion." *Id.* § 48-39-260(1)(a). One commentator recognized the Act almost immediately as both innovative and a potential problem under the takings clause. See Natasha Zalkin, Comment, *Shifting Sands and Shifting Doctrines: The Supreme Court's Changing Takings Doctrine and South Carolina's Coastal Zone Statute*, 79 CAL. L. REV. 205, 208-09 (1991) (describing the Act as a revolutionary coastal management act with several controversial provisions).

²²⁹ S.C. CODE ANN. §§ 48-39-280, 48-39-290 (Law. Co-op 1987 & Supp. 1991).

²³⁰ *Lucas v. South Carolina Coastal Council*, 404 S.E.2d 896, 896 (S.C.), cert. granted, 112 S. Ct. 436 (1991). The South Carolina Coastal Council has argued that Mr. Lucas's claim is not ripe for adjudication because the Beachfront Management Act was subsequently amended to allow a landowner in Mr. Lucas's position to apply for a permit to build a more permanent structure. See Respondent's Brief on the Merits at 8-12, *Lucas v. South Carolina Coastal Council*, 404 S.E.2d 896, cert. granted, 112 S. Ct. 436 (1991) (No. 91-453). The issue of ripeness, however, is outside the scope of this note.

pensation.²³¹ The lower court agreed and awarded him \$1,232,387.50 as just compensation for the regulatory taking.²³² 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.²³³

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.²³⁴ The state court did acknowledge, however, that there are certain factors that courts generally consider.²³⁵ 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.²³⁶ Moreover, the *Lucas* court noted that in some situations certain factors may deserve more weight than others and in some cases may be determinative.²³⁷ One such situation, the court noted, is when the regulation exists to prevent serious public harm.²³⁸ The court then held that the Beachfront Management Act prevented a serious harm to the public.²³⁹ 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.²⁴⁰

Justice Harwell, joined by Justice Chandler, dissented from the *Lucas* decision.²⁴¹ Justice Harwell argued that to allow such an in-

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.²⁴² Moreover, he argued that none of the stated purposes of the Beach-front Management Act could be labeled the prevention of a nuisance.²⁴³ He asserted, therefore, that because Mr. Lucas's property had no fair market value, the state must compensate him.²⁴⁴

Mr. Lucas subsequently filed a Petition for Rehearing with the South Carolina Supreme Court.²⁴⁵ The petition was denied on June 17, 1991.²⁴⁶ The United States Supreme Court granted Mr. Lucas's Petition for Certiorari on November 18, 1991.²⁴⁷

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

*[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.*²⁴⁸

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

²⁴² *Id.* at 906 (Harwell, J., dissenting).

²⁴³ *Id.* (Harwell, J., dissenting).

²⁴⁴ *Id.* at 907 (Harwell, J., dissenting).

²⁴⁵ Petitioner's Brief on the Merits at 9, *Lucas v. South Carolina Coastal Council*, 404 S.E.2d 895 (S.C.), *cert. granted*, 112 S. Ct. 436 (1991) (No. 91-453).

²⁴⁶ *Id.*

²⁴⁷ *Lucas v. South Carolina Coastal Council*, 404 S.E.2d 895 (S.C.), *cert. granted*, 112 S. Ct. 436 (1991) (No. 91-453).

²⁴⁸ Michelman, *supra* note 173, at 1629.

²⁴⁹ Bruce W. Burton, *Predatory Municipal Zoning Practices: Changing the Presumption of Constitutionality in the Wake of the "Takings Trilogy"*, 44 ARK. L. REV. 65, 79 (1991).

²⁵⁰ *Id.* at 81; *see also* *Loretto 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).

²⁵¹ Burton, *supra* note 249, at 84; *see also* *Miller v. Schoene*, 276 U.S. 272, 280 (1928) (diseased cedar trees); *Hadacheck v. Sebastian*, 239 U.S. 394, 411 (1915) (brickyard); *Mugler v. Kansas*, 123 U.S. 623, 668-69 (1887) (brewery); *cf.* *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 485-87 (1987) (subsidence mining).

²⁵² Burton, *supra* note 249, at 85. *See generally* *Agins v. City of Tiburon*, 447 U.S. 255 (1980); *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

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.

²⁵³ Burton, *supra* note 249, at 87; *see also* *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 107 (1978) (historic preservation).

²⁵⁴ *See, e.g., Keystone*, 480 U.S. at 490 (nature of state action); *Ruckelshaus v. Monsanto*, 467 U.S. 986, 1010 (1984) (investment-backed expectation); *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979) (investment-backed expectation).

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 *Aguins 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."²⁶⁰ 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.²⁶¹ Other courts have found that public harm must be more broadly defined and encompass the notion of public welfare or interest as well.²⁶²

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,²⁶³ the existence of diseased cedar trees,²⁶⁴ and subsidence mining.²⁶⁵ Despite these decisions, it is not clear whether a government may prohibit subsidence mining where there are no homes or cemeteries²⁶⁶ or whether diseased trees may be destroyed without compensation if there is no apple orchard within hundreds of miles.²⁶⁷ Nor is it clear whether the cedar trees could be destroyed if only one apple tree was in danger.²⁶⁸ 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.²⁶⁹ 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

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).

²⁶² See *Carter v. South Carolina Coastal Council*, 314 S.E.2d 327, 329 (S.C. 1984) (state may regulate use of property to protect the public interest).

²⁶³ See *Hadacheck v. Sebastian*, 239 U.S. 394, 411 (1915).

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

²⁶⁵ See *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 485-87 (1987).

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.*

²⁶⁹ Compare *Empire Kosher Poultry, Inc. v. Hallowell*, 816 F.2d 907, 914-16 (3rd Cir. 1987) (government may regulate to prevent harm from disease) with *Carter v. South Carolina Coastal Council*, 314 S.E.2d 327, 329 (S.C. 1991) (state may regulate use of property to protect the public interest).

nuisance 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 regulations. 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 compensation 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.*

²⁷¹ *See Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 213 (1986) (withdrawal liability from pension fund); *Ruckelshaus v. Monsanto*, 467 U.S. 986, 1001-03 (1984) (disclosure of trade secrets).

²⁷² 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 of the homes. *See, e.g., Life Concepts, Inc. v. Harden*, 562 So. 2d 726, 728 (Fla. Dist. Ct. 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 bright-line 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 regulation²⁷⁹ and the interference with investment-backed expectations,²⁸⁰ seem

in takings jurisprudence. See Wiseman, *supra* note 4, at 465. This note does not dispute that some takings cases might be decided under the rules. A balancing approach, however, should also encompass these situations.

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.*

²⁷⁶ Douglas O. Linden, *New Directions for Preservation Law: Creating an Environment Worth Experiencing*, 20 ENVTL. L. 49, 51 (1990).

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 438 U.S. 104, 124 (1977).

²⁸⁰ See *id.*

to account fully for the interests of the private party. The third factor, however, the character of the government invasion,²⁸¹ 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.²⁸² To read the third factor in this manner fails, however, to account for the second interest described above, that of the public.²⁸³ 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.²⁸⁴ 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.²⁸⁵ 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

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.*

²⁸⁵ See *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124 (1977).

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.

²⁹¹ See *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 485-87 (1987).

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.

²⁹⁵ See *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 836 (1987).

²⁹⁶ See *id.* at 837.

plicit in this discussion, however, was the notion that a condition sufficiently tied to the permit would have been allowed.²⁹⁷ The basis for such a condition would have been the preservation of the public's view of the beach.²⁹⁸

A balancing approach will result in a continuum of results from challenges to government actions that adversely affect property owners.²⁹⁹ 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.³⁰⁰ For example, one commentator has argued for consideration of the public interest in floodplain regulation.³⁰¹ 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.³⁰² 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.³⁰³

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 *Penn Central*, *Keystone* and *Nollan*, 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-

²⁹⁷ See *id.* at 836.

²⁹⁸ See *id.*

²⁹⁹ Wilkins, *supra* note 143, at 27.

³⁰⁰ *Id.*

³⁰¹ See Zygmunt J.B. Plater, *The Takings Issue in a Natural Setting: Floodlines and the Police Power*, 52 TEX. L. REV. 201, 202 (1974).

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

³⁰⁴ *Property Owners Strike Back*, WASH. TIMES, Nov. 19, 1991, at F2.

³⁰⁵ 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).

³⁰⁶ 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.*

³⁰⁷ 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.³⁰⁸ Some members of the Court have spoken of development as an essential use and an attribute of property ownership.³⁰⁹ Others have regarded development expectations as legitimate only if they are consistent with the public interest.³¹⁰

In 1887, in *Mugler v. Kansas*, the Court recognized the notion that property cannot be developed without concern for the public welfare.³¹¹ As such, the Court held that legislation prohibiting the manufacture and sale of intoxicating liquor was a valid use of the police power.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.³¹³

Over time, the Court reduced the public interest philosophy of *Mugler* to a narrow nuisance exception and relied on it only sporadically to justify the prohibition of noxious uses without compensation.³¹⁴ Then in *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.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.³¹⁶ In his dissenting opinion in *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

³⁰⁸ For a further discussion of this topic, see Grayson P. Hanes and J. Randall Minchew, *On Vested Rights to Land Use and Development*, 46 WASH. & LEE L. REV. 373 (1989).

³⁰⁹ See *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 512 (1987) (Rehnquist, C.J., dissenting); see also *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 833-34 n.2 (1987) (Scalia, J.).

³¹⁰ See *Keystone*, 480 U.S. at 491 n.20 (Stevens, J.); see also *Nollan*, 483 U.S. at 864 (Brennan, J., dissenting).

³¹¹ See 123 U.S. 623, 668-69 (1887).

³¹² *Id.*

³¹³ See *id.* at 668.

³¹⁴ See Jerry L. Anderson, *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 *Mugler* "is no longer a correct statement of the law." *Florida Rock Indus. v. United States*, 8 Ct. Cl. 160, 171 (1985), *vacated in part*, 791 F.2d 893 (D.C. Cir. 1986), *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. *Id.* at 415.

³¹⁵ See 438 U.S. 104, 138 (1977).

³¹⁶ *Id.*

prohibit uses of land that actually endanger the community.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.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.³¹⁹ In *Keystone Bituminous Coal Association v. DeBenedictis*, the Court upheld a subsidence statute prohibiting mining that destroyed the surface support.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.³²¹ Again, as in *Penn Central*, Justice Rehnquist dissented.³²² He argued that the scope of the nuisance exception should be restricted to instances of misuse or illegal use.³²³ Thus, in his view, certain uses of land are inherent rights and cannot be restricted without compensation.³²⁴

The Court most recently attempted to resolve the issue of land development in *Nollan v. California Coastal Commission*.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.³²⁶ The Court held that there was not a sufficient nexus between the permit sought and the condition attached to it.³²⁷ Therefore, the Court held that the state had to pay for the easement in order to obtain it.³²⁸

Justice Scalia, writing for the majority, called Justice Brennan's dissenting proposition that a state can define the limits of property rights "peculiar,"³²⁹ even though the Court has stated that a state

³¹⁷ See *id.* at 145-46 (Rehnquist, J., dissenting).

³¹⁸ See *id.* (Rehnquist, J., dissenting).

³¹⁹ See *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 491 (1987).

³²⁰ *Id.*

³²¹ See *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. *Id.* at 492 ("[A]lthough public interest in preventing the nuisance was substantial . . . we need not rest a decision on that alone.")

³²² See *id.* at 506-21 (Rehnquist, C.J., dissenting).

³²³ *Id.* at 512 (Rehnquist, C.J., dissenting).

³²⁴ See *id.* (Rehnquist, C.J., dissenting).

³²⁵ See 483 U.S. 825, 841-42 (1987).

³²⁶ *Id.* at 828.

³²⁷ *Id.* at 837.

³²⁸ *Id.*

³²⁹ *Id.* at 833 n.2.

can do so.³³⁰ Moreover, Justice Scalia stated simply that the right to build on one's own property cannot be considered a "governmental benefit."³³¹ 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*.³³² Justice Brennan found Justice Scalia's position on the right to build "curious."³³³ He disagreed with the argument that the right to build on one's own property had a "privileged natural rights status."³³⁴ Justice Brennan asserted that the Nollans were on notice that the right to develop their property could be subject to government restrictions.³³⁵

Justices Stevens and Blackmun each dissented in separate opinions.³³⁶ 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.³³⁷ 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.³³⁸

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-

³³⁰ 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).

³³¹ *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 *id.* at 859 (Brennan, J., dissenting).

³³² See 483 U.S. at 842-64 (Brennan, J., dissenting).

³³³ *Id.* at 860 n.10 (Brennan, J., dissenting).

³³⁴ *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.*

³³⁵ See *Nollan*, 483 U.S. at 860 (Brennan, J., dissenting).

³³⁶ See *id.* at 865-66 (Blackmun, J., dissenting), 866-67 (Stevens, J., dissenting).

³³⁷ See *id.* at 865 (Blackmun, J., dissenting), 867 (Stevens, J., dissenting).

³³⁸ *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.³³⁹ 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.³⁴⁰ 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

³³⁹ See *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 419 (1922) (Brandeis, J., dissenting).

³⁴⁰ 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.³⁴¹ The Beachfront Management Act exists because the South Carolina legislature recognized the need for this broader vision.³⁴² 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.³⁴³ 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.³⁴⁴ He argued that under *Pennsylvania Coal* the private interest cannot be ignored, even if the state has a legitimate reason for regulating land use.³⁴⁵ Mr. Lucas thus apparently recognized the need for a balancing approach in takings cases. Mr. Lucas's second argument, however, retreated

³⁴¹ See *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 864 (1987) (Brennan, J., dissenting).

³⁴² See S.C. CODE ANN. § 48-39-250 (Law. Co-op 1987 & Supp. 1991).

³⁴³ See *supra* note 305 and accompanying text for a discussion of the issues before the United States Supreme Court in *Lucas*.

³⁴⁴ See Petitioner's Brief on the Merits at 14, *Lucas v. South Carolina Coastal Council*, 404 S.E.2d 895 (S.C.), cert. granted, 112 S. Ct. 436 (1991) (No. 91-453).

³⁴⁵ *Id.* at 14-15.

from this admirable position.³⁴⁶ 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.³⁴⁷ 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.³⁴⁸ In this argument, he asserted that a valid public purpose should not automatically cause a police power action to be valid.³⁴⁹ He cited to *Penn Central*, arguing that a takings inquiry must include an analysis of "the character of the government action."³⁵⁰ Thus, Mr. Lucas argued that in order to evaluate a takings claim, a court must inquire into both the public and private interest.³⁵¹

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.³⁵² The Council turned to the language of the *Penn Central* Court and referred to the three factors that should be considered.³⁵³ These factors were the character of the government action, interference with investment-backed expectations and the economic impact of the action.³⁵⁴

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.³⁵⁵ 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.³⁵⁶ 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.³⁵⁷

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

³⁴⁶ See *id.* at 19-28.

³⁴⁷ *Id.* at 19.

³⁴⁸ See *id.* at 35-45.

³⁴⁹ *Id.* at 35.

³⁵⁰ *Id.* at 38.

³⁵¹ *Id.* at 45.

³⁵² See Respondent's Brief on the Merits at 18-50, *Lucas v. South Carolina Coastal Council*, 404 S.E.2d 895 (S.C.), *cert. granted*, 112 S. Ct. 436 (1991) (No. 91-453).

³⁵³ *Id.* at 18-19.

³⁵⁴ *Id.*

³⁵⁵ See *id.* at 7.

³⁵⁶ *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.

³⁵⁷ See *id.* at 28-40.

pensation analysis.³⁵⁸ Moreover, it was the bright-line rules that the parties stressed during oral argument to the Court.³⁵⁹ 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.³⁶⁰ 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.³⁶¹ 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.³⁶² 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

³⁵⁸ See Petitioners Brief on the Merits at 19-28, *Lucas v. South Carolina Coastal Council*, 404 S.E.2d 895 (S.C.), *cert. granted*, 112 S. Ct. 436 (1991) (No. 91-453); Respondent's Brief on the Merits at 28-40, *Lucas v. South Carolina Coastal Council*, 404 S.E.2d 895 (S.C.), *cert. granted*, 112 S. Ct. 436 (1991) (No. 91-453).

³⁵⁹ See Transcript of Oral Argument at 3 and 33-34, *Lucas v. South Carolina Coastal Council*, 404 S.E.2d 895 (S.C.), *cert. granted*, 112 S. Ct. 436 (1991) (No. 91-453).

³⁶⁰ See Petitioner's Brief on the Merits at 19-28, *Lucas v. South Carolina Coastal Council*, 404 S.E.2d 895 (S.C.), *cert. granted*, 112 S. Ct. 436 (1991) (No. 91-453). Mr. A. Camden Lewis, attorney for Mr. Lucas, began his oral argument by stating, "Our position is simple. When Mr. Lucas was denied all economically viable uses of his land, these principles demand that Mr. Lucas be paid just compensation for that taking." Transcript of Oral Argument at 3, *Lucas v. South Carolina Coastal Council*, 404 S.E.2d 895 (S.C.), *cert. granted*, 112 S. Ct. 436 (1991) (No. 91-453). This prompted one of the Justices to ask, "Would you be willing to give it to me?" *Id.*

³⁶¹ See Respondent's Brief on the Merits at 28-40, *Lucas v. South Carolina Coastal Council*, 404 S.E.2d 895 (S.C.), *cert. granted*, 112 S. Ct. 436 (1991) (No. 91-453). Mr. C.C. Harness III, attorney for the South Carolina Coastal Council, did, however, retreat slightly from this categorical approach when pressed by the Justices. See Transcript of Oral Argument at 33-34, *Lucas v. South Carolina Coastal Council*, 404 S.E.2d 895 (S.C.), *cert. granted*, 112 S. Ct. 436 (1991) (No. 91-453). The Justices asked Mr. Harness whether the state of South Carolina, under his theory, could require the removal of existing homes. *Id.* Mr. Harness replied that the state could not require such removal for two reasons. See *id.* First, he said, one must consider the reasonable expectations of landowners who have already built. *Id.* Second, he said, one must look to the fact that South Carolina is attempting to prevent ongoing damage to the land by prohibiting new construction. *Id.* Thus, Mr. Harness appeared willing to acknowledge that prohibiting damage from the existing structures could not be justified by the Council's bright-line nuisance standard. See *id.*

³⁶² Kaplan, *supra* note 7, at 70. 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.*

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 Program³⁶⁴ 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.

³⁶³ Petitioner's Brief on the Merits at 8, *Lucas v. South Carolina Coastal Council*, 404 S.E.2d 895 (S.C.), cert. granted, 112 S. Ct. 436 (1991) (No. 91-453).

³⁶⁴ 42 U.S.C.S. §§ 4001-4128 (Law. Co-op 1989 & Supp. 1991).

³⁶⁵ *Id.* § 4001(g)(2).

³⁶⁶ See William J. Siffin, *Bureaucracy, Entrepreneurship, and Natural Resources: Witless Policy and the Barrier Islands*, 1 CATO J. 293, 296 (1981).

³⁶⁷ See *id.*

³⁶⁸ *Id.* at 295. Another way to phrase this argument is to say that the price that Mr. Lucas paid for his land included the right to be insured by the National Flood Insurance Program. It must be recognized, however, that this same argument could be used to assert that the federal government indirectly encouraged Mr. Lucas to buy the property in the first place.

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.³⁶⁹ 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.³⁷⁰

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.³⁷¹ 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.³⁷² 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.³⁷³ These projectiles are often whole houses that create significant danger to homes and their inhabitants.³⁷⁴ Moreover, the property debris severely inhibits and increases the cost of any rescue and relief program that is in effect.³⁷⁵ 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.

³⁶⁹ *Lucas v. South Carolina Coastal Council*, 404 S.E.2d 895, 897 (S.C.), *cert. granted*, 112 S. Ct. 436 (1991).

³⁷⁰ S.C. CODE ANN. § 48-39-250(1)(c) (Law. Co-op 1987 & Supp. 1991).

³⁷¹ See Plater, *supra* note 301, at 203.

³⁷² S.C. CODE ANN. § 48-39-250(10).

³⁷³ Respondent's Brief on the Merits at 32, *Lucas v. South Carolina Coastal Council*, 404 S.E.2d 895 (S.C.), *cert. granted*, 112 S. Ct. 436 (1991) (No. 91-453).

³⁷⁴ *Id.*

³⁷⁵ *Id.*

CONCLUSION

*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.*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. *Lucas v. South Carolina Coastal Council* presents the Court with an opportunity to refine takings jurisprudence in a way that recognizes these interests.

In *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.

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³⁷⁶ ALDO LEOPOLD, A SAND COUNTY ALMANAC, AND SKETCHES HERE AND THERE 224-25 (1949).