TAKINGS AND BEYOND: IMPLICATIONS FOR REGULATION

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I. INTRODUCTION

This past decade marks a critical juncture in the evolution of the Fifth Amendment.[1] Until recently, the Fifth Amendment "private property rights" debate occurred primarily among traditional land-use planners, zoning boards, and attorneys engaged in state and local land-use law. Yet with the advent of the expanded regulatory state in the 1970s, where everything from consumer protection to the environment and from communications to energy generation and transmission has become increasingly subject to federal control,[2] it was only a matter of time before the "property rights" banner would be waved with a new fervency. The debate has broadened to include—if not been driven by—those involved in the ever-growing focus on environmental and natural resource protection, including recent sweeping changes in the energy field.

The Fifth Amendment provides, "[N]or shall private property be taken for public use without just compensation."[3] The exploding cost of

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1. In 1987, the Supreme Court decided three cases that essentially launched the modern era of regulatory takings. Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987); First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304 (1987); and Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1987). *See also* Pennell v. City of San Jose, 485 U.S. 1 (1988); Hodel v. Irving, 481 U.S. 704 (1987). *See generally* William W. Fisher III, *The Significance of Public Perceptions of the Takings Doctrine*, 88 Colum. L. Rev. 1774 (1988); Frank Michelman, *Takings, 1987*, 88 COLUM. L. REV. 1600 (1988); Craig A. Peterson, *Land Use Regulatory "Takings" Revisited: The New Supreme Court Approaches*, 39 HAST. L. J. 335 (1988). Of course, there were earlier cases, but for the most part they failed to advance the regulatory takings debate very far. *See* MacDonald, Sommer & Frates v. Yolo County, 477 U.S. 340 (1986); Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172 (1985); Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc., 452 U.S. 264 (1981); San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621 (1981); Agins v. City of Tiburon, 447 U.S. 255 (1980); Andrus v. Allard, 444 U.S. 51 (1979); Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104 (1978). The last of these cases, *Penn Central*, at least purported to establish substantive criteria for determining when a regulation might constitute a taking. *See infra* notes 229-231 and accompanying text.

2. *See generally* MARC K. LANDY ET AL., THE ENVIRONMENTAL PROTECTION AGENCY: ASKING THE WRONG QUESTIONS: FROM NIXON TO CLINTON 22-45 (1990); CASS R. SUNSTEIN, AFTER THE RIGHTS REVOLUTION: RECONCEIVING THE REGULATORY STATE (1990).

3. U.S. CONST. Amend. V.

protecting natural resources, coupled with increased awareness of the need for and type of protection necessary, have forced many to consider expansive command and control regulation. Environmental regulation and natural resource protection are expensive and, to some, a luxury afforded only by industrialized nations.[4] Environmental compliance costs have escalated enormously since the early 1970s, when many of the environmental programs were first established.[5] To these costs, the country must now add the expense of ensuring biological diversity through ecosystem protection, such as preserving wetlands or habitat areas for endangered or threatened species. With a majority of these resources occurring on private property, if the government were to acquire rather than simply regulate the use of these areas, the cost would be prohibitive. So instead of acquiring this property, advocates of resource protection press for regulation to control property use.

The regulatory takings issue is also receiving increasing interest in the energy field. Within the context of electric restructuring, for example, the treatment of stranded costs of the traditional utility forced into a new, competitive environment is a fundamental issue. It has been suggested that, unless the utility is given the opportunity to recover its stranded costs in full, a regulatory taking has occurred.[6] Additionally, some commentators have argued that recent policy statements by the Federal Energy Regulatory Commission (FERC) relating to the relicensing of hydroelectric projects may raise serious regulatory takings issues.[7]

Courts, therefore, are being asked more and more to resolve the balance between preserving effective regulatory control options and protecting private property. Many observers hoped that the Supreme Court's foray into the subject in 1992, with its decision in *Lucas v. South Carolina Coastal Council*,[8] would provide much-needed guidance to lower courts—and to some extent, it did. But to many on both sides of the environmental versus property rights debate, the decision failed to provide the hoped for decisive victory. As a consequence, it has been left to the lower courts, primarily the United States Court of Federal Claims and the United States Court of Appeals for the Federal Circuit, to implement the Court's vision for regulatory takings.

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4. Some argue that our focus on environmental regulation affects our international economic competitiveness and that we need to coordinate our international efforts and attempt to harmonize the international economic and environmental arenas. *See* Richard B. Stewart, *Environmental Regulation and International Competitiveness*, 102 YALE L.J. 2039 (1993).

5. *See* WALTER A. ROSENBAUM, ENVIRONMENTAL POLITICS AND POLICY 12 (1995)(the United States now spends around $140 billion annually).

6. *See* Charles E. Bayless, *Stranded Cost Recovery: A Practical Argument for Utilities*, PUB. UTIL. FORT., June 1, 1997, at 40; Leigh H. Martin, Note, *Deregulatory Takings: Stranded Investments and the Regulatory Compact in a Deregulated Electric Utility Industry*, 31 GA. L. REV. 1183 (1997); Peter Navarro, *A Guidebook and Research Agenda for Restructuring the Electric Industry*, 16 ENERGY L.J. 347, 368 (1995) (discussing the takings issue in the stranded costs context).

7. *See* Michael A. Swiger et al., *Paying for the Change: Can the FERC Force Dam Decommissioning at Relicensing?*, 17 ENERGY L.J. 163, 179-186 (1996).

8. 505 U.S. 1003 (1992).

These courts, following Justice Scalia's direction in *Lucas* to look to background principles to determine whether a property right has been taken, generally have looked only to state nuisance and property law to determine whether any limitations inhere in a landowner's title, thus usually defeating the claim that the governmental action constitutes a taking. However, such a narrow inquiry is neither mandated by *Lucas* nor appropriate. Both federal and state statutory and common law serve as relevant background principles which can shape the contours of property interests. Courts should recognize the appropriate role of state and federal statutory law, because such a recognition would better represent a balance between protecting an individual's property rights and allowing governments, both state and federal, to modify their regulatory schemes as progress in science and other fields illuminate problems and issues which previously were not known or understood.

Much is at stake in this widespread public debate, both practically and as a matter of constitutional theory. Senator Joseph Biden even began the Senate's questioning during the confirmation hearings on Associate Justice Clarence Thomas by brandishing a copy of University of Chicago Law Professor Richard Epstein's book *Takings: Private Property and the Power of Eminent Domain*[9] and expressing concern that the nominee might sacrifice the environment under the guise of protecting private property rights, inserting into the Constitution what is called the "economic rights" philosophy or doctrine.

Supporters of "economic rights" argue that property "ownership" embraces a "bundle of rights" and that government interference with any particular strand in that bundle requires compensation, whether that interference is in the nature of zoning, economic controls or environmental regulation. To these advocates, compensation may be required when, for example, a landowner is limited by a height restriction to building only a four-unit apartment complex instead of a six-unit structure. In this instance, the government has interfered with one of the strands in the bundle of rights and rendered the property less valuable, and it must compensate for that loss if it cannot show a health or public safety justification. Similarly, if a landowner is required to obtain a federal permit before she can begin development on her property, then any economic loss, whether caused by governmental delay or by the inability to develop any portion of the parcel, would call for governmental compensation. Such a doctrine would effectively chill a considerable amount of regulation, and leave the economic market place as the guarantor of the form and pace of "progress"—both economic and environmental—in our society.

Until recently, however, most scholars generally believed that such principles of laissez-faire constitutionalism were successfully buried. These principles flourished in the late nineteenth and early twentieth centuries.[10]

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9. RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN (1985).

10. *See, e.g.*, Lochner v. New York, 198 U.S. 45 (1905). *See infra* note 208 and accompanying

During that period's heyday, the Court held unconstitutional a variety of economic and social legislation that people now take for granted. After the mid-1930's, the Court began to uphold the constitutionality of legislation that might have been suspect in prior years. This shift brought the Court into the modern era of giving considerable deference to the economic judgment of government.[11] The movement, urging greater protection for "economic rights", threatens to reverse this trend, possibly leaving in its wake a variety of economic, social, and environmental regulation supported by all but a very select group.[12]

Conversely, some champions of the environment apparently believe that the public good not only justifies any environmental regulation but also that the public good warrants imposing on the individual landowner the cost of achieving these laudable societal goals.[13] Yet, by uncritically elevating the rights of the community over the rights of the individual, this argument could be as destructive to traditional "liberalism" as is the "economic rights" movement. The argument necessarily embraces a "communitarian" governmental theory. In the past few years, legal and economic scholars have been engaged in a dialogue about "communitarian" rights, a notion that the community itself has rights that can trump individual rights. This perspective is shared by both liberals and conservatives, and the implications of this theory are only now being explored. What is important to note, however, is that the communitarian theory is being used to justify not only environmental and similar regulation, but also social legislation such as drug testing, abortion, hand gun control, and prayer in the school. For those who believe in traditional "liberal" values, a communitarian theory could then undermine commonly held precepts about the scope of individual rights.

Consequently, more is at stake in a case like *Lucas v. South Carolina Coastal Council* than whether individual property owners should be compensated when the government has rendered their property valueless. Hanging in the balance is the extent to which changes in science and in prevailing thought on regulated industries can be effectuated by new regulatory programs, and the degree to which individuals, rather than society as a whole, will be asked to shoulder the burden of progress.

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11. *See, e.g.*, Williamson v. Lee Optical, 348 U.S. 483 (1955).

12. Professor Joseph Sax ably championed the argument against "economic rights" well before the "economic rights" approach began to gain greater prominence in the 1980's. *See* Joseph L. Sax, *Takings, Private Property and Public Rights*, 81 YALE L.J. 149 (1971); Joseph L. Sax, *Takings and the Police Power*, 74 YALE L.J. 36 (1964). *See also* Joseph L. Sax, *Property Right, and the Economy of Nature: Understanding Lucas v. South Carolina Coastal Counsil*, 45 STAN. L. REV. 1433 (1993); Joseph L. Sax, *Some Thoughts on the Decline of Private Property*, 58 WASH. L. REV. 481 (1983).

13. *See generally* ERIC T. FREYFOGLE, JUSTICE AND THE EARTH: IMAGES FOR OUR PLANETARY SURVIVAL (1993); CAROL M. ROSE, PROPERTY AND PERSUASION: ESSAYS ON THE HISTORY, THEORY, AND RHETORIC OF OWNERSHIP (1994); Eric T. Freyfogle, *Context and Accommodation in Modern Property Law*, 41 STAN. L. REV. 1529 (1989); Stephen A. Gardbaum, *Law Politics, and the Claims of Community*, 90 MICH. L. REV. 685 (1992); James P. Karp, *A Private Property Duty of Stewardship: Changing Our Land Ethic*, 23 ENVT. L. 735 (1993).

The problem is the same as that which Justice Holmes faced in the bedrock case of regulatory takings, *Pennsylvania Coal v. Mahon.*[14] He recognized that governmental regulation, if unchecked, could be as detrimental to private property as an out-and-out appropriation of the property. Writing for the Court, he stated "the natural tendency of human nature [would be] to extend the qualification more and more until at last private property disappears."[15] This led Justice Holmes to pen the now famous phrase, "while property may be regulated to a certain extent, if regulation goes too far, it will be recognized as a taking."[16]

The obvious question confounding scholars and courts alike, however, is how to tell when a regulation has gone too far. Every regulation renders some "right" to the unrestrained use of property worthless.[17] With such high stakes, it is not surprising that, during Justice Clarence Thomas' first year on the Court, three property rights cases[18] received considerable media attention.[19]

Of those three cases, the Supreme Courts' decision in *Lucas v. South Carolina Coastal Council* has become the seminal case for scholars, pundits, and courts to begin their exploration into the scope of the Fifth Amendment takings jurisprudence.[20] Yet before they stray beyond the pa-

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14. 260 U.S. 393 (1922).

15. *Id.* at 415.

16. *Id.*

17. In the regulatory takings context, it is not the tangible property itself that is being taken; rather, it is the inchoate right to use the physical property in a certain manner which is taken.

18. Yee v. City of Escondido, 503 U.S. 519 (1992); PFZ Properties, Inc. v. Rodriguez, 503 U.S. 257 (1992) (dismissing writ as improvidently granted); *see Lucas*, 505 U.S. 1003.

19. *See, e.g.*, Kirstin Downey, *A Conservative Supreme Court Addresses Property Rights*, WASH. POST, Feb. 16, 1992, at H1; H. Jane Lehman, *Landowners Go to Court to Fight for Property Rights*, WASH. POST, Jan. 4, 1992, at E1; L. Gordon Crovitz, *Economic Rights and the Constitution-III: Justices to Decide If Even Land Developers Have Civil Rights*, WALL ST. J., Dec. 11, 1991, at A17; Paul M. Barrett, *Supreme Court Signals Willingness to Draw Line Between Government Power and Property Rights*, WALL ST. J., Dec. 9, 1991, at A16; L. Gordon Crovitz, *Justices Have No Reason to Fear Private Property*, WALL ST. J., Nov. 27, 1991, at A9; *Loss-of-land Case Could Dent Rules on Environment*, THE NEW ORLEANS TIMES-PICAYUNE, Nov. 19, 1991, at A4.

20. Scholarship on the Fifth Amendment is now too extensive for any comprehensive listing of sources, but see generally DAVID L. CALLIES, AFTER *LUCAS*: LAND USE REGULATION AND THE TAKING OF PROPERTY WITHOUT COMPENSATION (1993); DENNIS J. COYLE, PRPERTY RIGHTS AND THE CONSTITUTION: SHAPING SOCIETY THROUGH LAND USE REGULATION (1993); JAMES V. DELONG, PROPERTY MATTERS: HOW PROPERTY RIGHTS ARE UNDER ASSAULT—AND WHY YOU SHOULD CARE (1997); STEVEN J. EAGLE, REGULATORY TAKINGS (1996); JAMES W. ELY, JR., THE GUARDIAN OF EVERY OTHER RIGHT (1992); WILLIAM A. FISCHEL, REGULATORY TAKINGS: LAW, ECONOMICS, AND POLITICS (1995); MARGARET JANE RADIN, REINTERPRETING PROPERTY (1993); Richard C. Ausness, *Regulatory Takings and Wetland Protection in the Post-Lucas Era*, 30 LAND & WATER L. REV. 349 (1995); Hope M. Babcock, *Has the Supreme Court Finally Drained the Swamp of Takings Jurisprudence?: The Impact of Lucas v. South Carolina Coastal Council on Wetlands and Coastal Barrier Beaches*, 19 HARV. ENVTL. L. REV. 1 (1995); James E. Brookshire, *"Taking" the Time to Look Backward*, 42 CATH. U. L. REV. 901 (1993); James S. Burling, *Property Rights, Endangered Species, Wetlands, and Other Critters—Is It Against Nature to Pay for a Taking?*, 27 LAND & WATER L. REV. 309 (1992); Bruce W. Burton, *Regulatory Takings and the Shape of Things to Come: Harbinger of a Takings Clause Reconstellation*, 72 OR. L. REV. 63 (1993); Richard A. Epstein, *Lucas v. South Carolina Coastal Council: A Tangled Web of Expectations*, 45 STAN. L. REV. 1369 (1993); Peter L.

rameters the Supreme Court established in that case, they should first understand what the Court held, what it did not hold, and the historical basis for its decision.

Part II of the article discusses the *Lucas* case. It explores the background and history of the case and provides an overview of the Supreme Court's decision. Next, Part III of the article canvasses some historical underpinnings and traces the development of the regulatory takings doctrine through *Lucas*. Finally, Part IV discusses a number of post-*Lucas* cases in the Court of Federal Claims and the United States Court of Appeals for the Federal Circuit, with an analysis and critique of some of the trends that appear in the implementation of the *Lucas* decision. It also addresses the effect of *Lucas* on takings analysis in the field of utility ratemaking.

II. PROTECTING THE SOUTH CAROLINA COAST: *LUCAS V. SOUTH CAROLINA COASTAL COUNCIL*

A. The South Carolina Beachfront Management Act

In 1988, the South Carolina legislature amended the South Carolina 1977 Coastal Zone Management Act by enacting the 1988 Beachfront Management Act.[21] Under the 1977 Act,[22] South Carolina participated in a federal program to protect coastal waters, tidelands, beaches, and primary oceanfront sand dunes.[23] The 1977 Act restricted development in the dunes adjacent to the Atlantic Ocean.[24] The 1988 Beachfront Management Act extended the areas protected from new development to a zone drawn from the mean high water mark to a set-back line established by the South Carolina Coastal Council. The set-back line was to be based on the greatest extent of erosion in the previous forty years, plus an additional twenty

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Henderer, *The Impact of Lucas v. South Carolina Coastal Council and the Logically Antecedent Question: A Practicioner's Guide to Fifth Amendment Takings of Wetlands*, 3 ENVTL. LAW. 406 (1997); Ronald J. Krotoszynski, Jr., *Fundamental Property Rights*, 85 GEO. L.J. 555 (1997); Richard J. Lazarus, *Putting the Correct "Spin" on Lucas*, 45 STAN L. REV. 1411 (1993); Glynn S. Lunney, Jr., *A Critical Reexamination of the Takings Jurisprudence*, 90 MICH. L. REV. 1892 (1992); Frank Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundation of "Just Compensation" Law*, 80 HARV. L. REV. 1165 (1967); Jed Rubenfeld, *Usings*, 102 YALE L. J. 1077 (1993); Glenn P. Sugameli, *Takings Issues In Light of Lucas v. South Carolina Coastal Council: A Decision Full of Sound and Fury Signifying Nothing*, 12 VA. ENVTL. L. S. 439 (1993); Gerald Torres, *Taking and Giving: Police Power, Public Value, and Private Right*, 26 ENVTL. L. 1 (1996); Hon. John M. Walker, Jr., *Common Law Rules and Land-Use Regulations: Lucas and Future Takings Jurisprudence*, 3 SETON HALL CONST. L.J. 3 (1993); Robert M. Washburn, *Reasonable Investment-Backed Expectations As A Factor In Defining Property Interest*, 49 WASH. U. J. URB. & CONTENP. L. 63 (1996); *A Colloquium on Lucas: Introduction and Decision*, 23 ENVTL. L. 869 (1993); *Lucas v. South Carolina Coastal Council: Colloquium*, 10 PACE ENVTL. L. REV. 1 (1992).

21. S.C. CODE ANN. §§ 48-39-250 to 48-39-360 (Law. Co-op. 1988).

22. S.C. CODE ANN. §§ 48-39-10 to 48-39-360 (Law. Co-op. 1977).

23. S.C. CODE ANN. § 48-39-10(J) (Law Co-op. 1977). *See also* Coastal Zone Management Act of 1972, 16 U.S.C. §§ 1451-1464 (1994).

24. S.C. CODE ANN. § 48-39-10(I).

feet.[25] Virtually no construction could take place seaward of the set-back line.[26] Under the 1988 Act, there was no provision for waiver of the construction ban seaward of the line. The legislature enacted the 1988 amendments to protect life and property, provide the basis for tourism, provide habitat for numerous species of plants and animals (including endangered and threatened species), and provide a natural health environment for the citizens of South Carolina.

In 1990, South Carolina amended the 1988 Act to allow individuals to seek a waiver to the ban.[27] A special permit allowing construction, however, could not be granted when the proposed construction would be on an active beach. Further, if a permit were issued, the recipient was required to agree to remove a structure if the Council so ordered because, in the Council's view, it was detrimental to the public health, safety, or welfare.[28]

B. The Perils of David Lucas

David H. Lucas purchased two residential lots on the Isle of Palms, South Carolina, in 1986, for $975,000. He intended to build a single-family home on each lot, one for himself and one for resale.[29] At the time he purchased the lots, there were no state or local regulations which would have prohibited the contemplated construction. Mr. Lucas' two lots were separated by an intervening lot on which a house had already been constructed. Additionally, there were homes already built on the other sides of the two lots. Mr. Lucas' property was 300 feet from the ocean.[30] In 1988, the South Carolina legislature passed the 1988 Beach Management Act, as discussed. The set-back line established under the Act by the South Carolina Coastal Council was landward of Mr. Lucas' property.[31] Thus, Mr. Lucas could not develop his land.

He filed suit in the South Carolina Court of Common Pleas, claiming that the 1988 amendments had effected a taking of his land. He argued that, regardless of whether the 1988 Act was a legitimate exercise of the state's police power by extinguishing the full value of his land, the state owed him just compensation.[32]

The state trial court agreed. The court found that, at the time Mr. Lucas purchased the property, there were no restrictions on its use for residential development. The court went on to find that the 1988 amendments permanently prohibited Mr. Lucas from developing the lots, thus depriving him of any reasonable economic use of the lots and rendering them value-

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25. *See* S.C. CODE ANN. § 48-39-280(A).

26. The Act allowed for construction of docks, piers, and walkways. S.C. CODE ANN. § 48-39-290(A).

27. *See* S.C. CODE ANN. § 48-39-290(D)(1).

28. *Id.*

29. Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1006 (1992).

30. *Id.* at 1008.

31. *Id.*

32. *Id.* at 1009.

less.[33] The state trial court therefore concluded that the property had been "taken" by the Act of the legislature and ordered that just compensation be paid, $1,232,387.50.[34]

C. *The South Carolina Courts Attempt to Protect the Coast*

On appeal, the South Carolina Supreme Court disagreed, holding that the state did not owe Mr. Lucas just compensation even though South Carolina's Beachfront Management Act of 1988,[35] as applied, denied him all economically viable use of his property. The state Supreme Court framed the issue as one of "whether governmental regulation of the use of property, in order to prevent serious public harm, amounts to a 'regulatory taking' of property for which compensation must be paid."[36]

The South Carolina Supreme Court, in holding that there had been no regulatory taking, left undisturbed the trial court's finding that the property no longer had economic value. Rather, it reasoned that a taking does not occur when a valid regulation serves to prevent serious public harm.[37] Because Mr. Lucas had not contested the validity of the legislative findings, the court accepted them as legitimate—that South Carolina's shores are a valuable public resource, that development contributes to the erosion and destruction of the public resource, and that prohibiting new residential construction is necessary to prevent a public harm.[38] The state supreme court rejected the argument that, by itself, the deprivation of all economically viable use by a regulation constitutes a taking. It concluded that existing cases supported the proposition that, although the duty to pay compensation may not be exclusive of the proper exercise of the state's police power, when a regulation exists to prevent serious public harm, no compensation is due to an individual who claims a loss of value from the regulation, because no taking has occurred.[39] The court therefore reversed the trial court, with two Justices dissenting.

D. *The Debate Begins: The State, Lucas and Interest Groups Seek to Sway the Supreme Court*

The United States Supreme Court granted Mr. Lucas' petition for *certiorari*,[40] which became the opening gambit for the parties and an array of special interests to attempt to influence the outcome of the case. To begin with, Mr. Lucas accepted the legitimacy of the state act, but sought to

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33. *Lucas*, 505 U.S. at 1009.

34. *Id.*

35. S.C. CODE ANN. §§48-39-10 to 48-39-360 (Law Co-op. 1997).

36. Lucas v. South Carolina Coastal Council, 404 S.E.2d 895, 896 (1991).

37. *Id.* at 896 (citing Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1987)).

38. *Lucas*, 404 S.E.2d at 898.

39. *Lucas*, 404 S.E.2d at 899 (relying on Mugler v. Kansas, 123 U.S. 623 (1884); Hadacheck v. Sebastian, 239 U.S. 394 (1913); Miller v. Schoene, 276 U.S. 272 (1922); and Goldblatt v. Hempstead, 369 U.S. 590 (1962)).

40. Lucas v. South Carolina Coastal Council, 502 U.S. 966 (1991).

persuade the Court that the "categorical nature of the nuisance exception—which would deny compensation whenever a legislature finds that a certain activity poses a public hazard—cannot be reconciled with the approach taken by . . . [the Supreme] Court in 'as applied' challenges of regulatory takings since at least 1922."[41] Lucas also argued that, even if a nuisance exception existed, it would not apply here since the landowner was simply seeking to build a house—not a nuisance at common law.[42] He argued that the lower court should have applied the Court's test for regulatory takings set forth in *Penn Central Transportation Co. v. New York City*.[43] In *Penn Central,* the Court indicated that a regulatory takings analysis is essentially an *ad hoc* factual inquiry that explores several factors.[44] Mr. Lucas then pressed the Court to adopt a *per se* rule requiring payment of just compensation whenever a regulation deprives a property owner of all economically viable use of her property, regardless of any "nuisance exception" that might exist in the abstract.[45]

The South Carolina Coastal Council (Coastal Council), among other arguments, countered that the case was not ripe for review and that the Court should reject any bright-line economic impact takings argument.[46] Characterizing Lucas' position as "extreme," the Coastal Council argued that the Court must examine several factors, and where, as here, "the restriction on development is necessary to prevent serious injury to public health and safety and substantial physical harm to nearby properties, no taking" should result.[47] Lucas' sole emphasis on the economic impact of the regulatory regime, according to the state, ignored the other relevant aspects of the takings inquiry.[48] The Coastal Council relied upon several cases, but offered *Mugler v. Kansas*[49] as the quintessential case for its position.[50] According to the Coastal Council, *Mugler* and other cases supported the principle that police power measures designed to protect the public health and safety outweigh the economic impact of any regulation in any takings analysis.[51] Lastly, the Coastal Council argued that, even under a traditional takings analysis, Lucas should be denied compensation due to

41. Petitioner's Brief on the Merits at 10, Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992) (No. 91-453).

42. *Id.* Counsel asserted that the cases relied upon by the lower court occurred before the rise of modern takings analysis, and those earlier cases were simply substantive due process cases in which the issue before the Court was whether the exercise of the police power was legitimate. *Id.* at 14.

43. Penn Central Transportation Co. v. New York City, 438 U.S. 104 (1978).

44. Petitioner's Brief on the Merits at 15, *Lucas*, 505 U.S. 1003 (1992) (No. 91-453).

45. *Id.* at 19. Petitioner raised other arguments as well, one argument asserting that the state act was designed to promote a public good, not prevent a public harm. *Id.* at 38. Another argument maintained that a valid exercise of the police power does not obviate the Fifth Amendment. *Id.* at 35.

46. Respondent's Brief on the Merits at 6, *Lucas*, 505 U.S. 1003 (1992) (No. 91-453).

47. *Id.* at 13.

48. *Id.* at 18-19.

49. 123 U.S. 623 (1887).

50. Respondent's Brief on the Merits at 20-21, *Lucas*, 505 U.S. 1003 (1992) (No. 91-453).

51. *Id.* at 26. The state emphasized that Lucas never challenged the asserted public health and safety justification for the state program. *Id.*

the unreasonableness of his investment-backed expectations.[52]

Various groups and entities recognized the potential importance of this case and filed *amicus curiae* briefs urging that the Court adopt a particular perspective. Many of these *amicus* briefs were embroiled in semantics; they reflect the natural tendency toward developing simple categories. The asserted "nuisance" or "nuisance-like" exception to the takings clause is a prime example. A major issue before the Court was whether there was a "nuisance" exception to the takings clause, which might support the state's attempt to avoid compensation. Yet, the term "nuisance" is an ill-defined catch-all concept for categorizing particular uses of property; it reflects a legal conclusion rather than a mode of analysis from which constitutional principles can spring.

The United States Department of Justice (DOJ), for instance, supported the concept of a "nuisance exception" when the regulatory measure substantially furthers the public interest in preventing nuisance-type activities or serious harm to the public health or safety.[53] Concerned that the exception does not swallow the rule—and thus be coterminous with a valid exercise of the police power, the DOJ proposed that "the regulatory measure must substantially further an established nuisance-prevention or public health and safety purpose, in terms of the nature, degree, proximity, and context of the harm concerned."[54] The Institute For Justice (IFJ), along with University of Chicago law professor Richard Epstein, proffered an alternative view—that is, landowners must be compensated for the loss in value, whether great or small, for the "imposition of any restriction upon use, above and beyond those inherent in the law of nuisance."[55] The IFJ urged that the Court adopt an approach that would require compensa-

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52. *Id.* at 27.

53. Brief for the United States as Amicus Curiae in Support of Reversal at 7-8, *Lucas*, 505 U.S. 1003 (1992) (No. 91-453).

54. *Id.* at 12-13. The Justice Department also relied heavily upon Mugler v. Kansas, 123 U.S. 623 (1887), and argued that against the historical background of allowing the abatement of nuisance-type activities, it was not inconsistent with notions of protecting private property to reject a Fifth Amendment claim in those instances in which the police power was being exercised to abate nuisances and protect the public health and safety from serious harm. *Id.* at 15-16. After all, "[i]f the use of property in a particular way was not part of the owner's 'bundle' at the time he acquired the property, he cannot claim the government has 'taken' from him the right to that use." *Id.* at 16. But the Justice Department limited its argument to those instances where the governmental regulation does not depart from the common law origins of a nuisance. *Id.* at 17.

55. Brief of the Institute For Justice as Amicus Curiae in Support of Petitioner at 10, *Lucas*, 505 U.S. 1003 (1992) (No. 91-453). The Institute expressly disavowed the argument presented by Lucas:

> In his arguments throughout the case, Lucas has avoided one implicit consequence of his argument. Lucas takes the position that the regulation automatically requires full compensation where the restriction on use results in a total loss of value, but acknowledges that South Carolina is free to impose substantial restrictions on use where there is some residual use in question. In essence, Lucas has sought to develop a *per se* rule that deals with the wipe-out case but does not extend his theory to any case of partial restrictions. This approach is conceptually inadequate because it creates a gratuitous and unprincipled conceptual gulf between total restriction on use and massive partial restrictions.

Id. at 11.

tion to be paid whenever valid regulatory programs adversely affect the value of private property, and the government regulation exceeds the legal remedies available to private parties. A ruling under this approach would have greatly expanded the set of instances when compensation is required, potentially chilling a vast array of appropriate state and local regulations.

Some environmental organizations argued that compensation is unnecessary if the government regulation legitimately relates to preventing "significant public harm." Similarly, Professor Humbach of Pace University Law School, in a brief on behalf of the National Growth Management Leadership Project, suggested that compensation should not be required when the legislature acts to restrain uses deemed "likely to harm or injure other persons or the community as a whole."[56] The environmental community sought to persuade the Court that an exception to the compensation principle was necessary.[57] Such an exception, however, effectively would have embraced a view that private property is subject to an implied "public good" limitation. In fact, an attorney for the Coastal Council, C.C. Harness, III, has since testified before Congress that the government should be able to ensure that use of property is consistent with the public good.

E. The Court's Decision

Such a divergence in argument, not surprisingly fostered a divided Court in *Lucas*. Although the Court produced a majority opinion; one Justice concurred in the judgment, two Justices filed dissenting opinions, and one Justice would have dismissed the writ of certiorari as improvidently granted.

In the majority opinion authored by Justice Scalia, the Supreme Court reversed. As an initial matter, the Court rejected South Carolina's argument that the case was not ripe.[58] It reasoned that the prudential ripeness argument was not one that deprived the Court of jurisdiction and, because the South Carolina Supreme Court had eschewed the ripeness argument to reach the merits, it would do the same.[59] On the merits of the case before it, the Court canvassed its regulatory takings jurisprudence and noted that

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56. Brief of the Members of the National Growth Management Leadership Project as Amicus Curiae in Support of Respondent at 6-7, *Lucas*, 505 U.S. 1003 (1992) (No. 91-453).

57. *See* Brief of Sierra Club, The Humane Society of the United States and the American Institute of Biological Sciences as Amici Curiae in Support of Respondent, *Lucas*, 505 U.S. 1003 (1992) (No. 91-453); Brief of Nueces County, Texas; Scituate, Massachusetts Conservation Commission; Chatham, Massachusetts Conservation Commission; American Littoral Society; Chesapeake Bay Foundation; Coast Alliance; Environmental Defense Fund; National Audubon Society; Natural Resources Defense Council; National Wildlife Federation; South Carolina Wildlife Federation; Dr. Joseph F. Donoghue; Dr. Paul T. Gayes; Dr. Joseph T. Kelley; Dr. Orrin Pilkey; Dr. Rutherford H. Platt and Dr. Stan Riggs as Amici Curiae in Support of Respondent, *Lucas*, 505 U.S. 1003 (1992) (No. 91-453).

58. South Carolina argued that, because the 1990 amendments provided a procedure by which an individual could apply for a special permit to build seaward of the setback line and Mr. Lucas had not availed himself of the procedure, the case was unfit for review. *See Lucas*, 505 U.S. at 1010-11.

59. *Id.* at 1012-14.

the inquiry has traditionally been an *ad hoc* one.[60] However, the Court stated that in two contexts it has generally awarded compensation without case-specific inquiries: physical invasion and instances in which regulation "denies all economically beneficial or productive use of land."[61] The Court indicated that the justification for the second category is severalfold. First, from the standpoint of the claimant, there is little difference between a total deprivation of beneficial use and a physical appropriation. Second, where all economically beneficial use vanishes, it is less realistic to assume that "the legislature is simply adjusting the benefits and burdens of economic life."[62] Finally, when a regulation deprives the owner of all beneficial use of his land, there is a greater risk that the legislature is attempting to press the land into public service without paying compensation.[63]

The Court, however, did recognize a limit to the compensation principle within this context:

> Where the State seeks to sustain regulation that deprives land of all economically beneficial use, we think it may resist compensation only if the logically *antecedent inquiry* into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with. This accords, we think, with our "takings" jurisprudence, which has traditionally been guided by the understandings of our citizens regarding the content of, and the State's power over, the "bundle of rights" that they acquire when they obtain title to property. It seems to us that the property owner necessarily expects the uses of his property to be restricted, from time to time, by various measures newly enacted by the State in legitimate exercise of its police powers .... And in the case of personal property, by reason of the State's traditionally high degree of control over commercial dealings, he ought to be aware of the possibility that new regulation might render his property economically worthless .... In the case of land, however, we think the notion ... that title is somehow held subject to the "implied limitation" that the State may subsequently eliminate all economically valuable use is inconsistent with the historical compact recorded in the Takings Clause ....[64]

The Court thus set out a rule that "confiscatory regulations" require compensation, unless the limitation involved inhered in the title itself, "in

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60. *Id.* at 1014-16.

61. *Lucas*, 505 U.S. at 1015 (citations omitted). The court recognized in this latter category the denominator problem—that is, how does a court determine the property interest against which to measure the decline in economic value. *See id.* at 1016 n. 7. Simply put, suppose a developer has 100 acres of land which she would like to develop, and she is denied the ability to develop 10 acres. The denial restricts the developer's ability to develop 100% of the 10 acre parcel. Whether one looks at the large parcel or the smaller parcel as the relevant parcel controls the takings analysis when compensation turns on whether the owner has been deprived of all economically viable use of her land. This problem is generally referred to as the denominator problem. The Court's answer to the problem was to look at how the owner's reasonable expectations have been shaped by the state's property law—whether and to what degree the State's law has accorded legal recognition and protection to the particular interest in land with respect to which the takings claimant alleges a diminution in (or elimination of) value. *Id.*

62. *Id.* at 1017 (citations and quotations omitted).

63. *Id.* at 1018.

64. *Lucas*, 505 U.S. at 1027-28 (emphasis added). In reaching this conclusion, the Court noted that the statements in its earlier takings jurisprudence relating to "harmful or noxious uses" was merely an early attempt to get at the principles just described. *Id.* at 1022-26.

the restrictions that background principles of the State's law of property and nuisance already place upon land ownership."[65] Courts must look to "existing rules and understandings that stem from an independent source such as state law" to determine whether, in being deprived of all economically viable use of her land, an owner is entitled to compensation.[66] The Court then remanded the case to the South Carolina Supreme Court to apply the *Lucas* framework.[67]

Justice Kennedy concurred in the Court's judgment. He wrote that the majority's focus on the common law of nuisance, in determining an owner's reasonable expectations, is too narrow. In his view, an owner's reasonable expectations had to be understood in light of the whole of our legal tradition.[68]

Justices Blackmun and Stevens dissented. As an initial matter, Justice Blackmun thought the case was not ripe for review. On the merits, he nonetheless wrote that the Court's takings jurisprudence had long recognized the "principle that the State has full power to prohibit an owner's use of property if it is harmful to the public."[69] Justice Blackmun also contended the Court's ruling was not supported by history.[70] Justice Stevens, in his dissent, added that the Court erred first by adopting a categorical rule for regulatory takings, and second, by focusing too narrowly on state nuisance law. Lastly, Justice Souter would have dismissed the writ of certiorari as improvidently granted.

F. The Debate Over Lucas

The decision is far from momentous, but it does finally provide a much needed theoretical structure for analyzing how far the government may go in regulating private property without affording compensation to adversely affected landowners. Justice Scalia's opinion reflects an effort to instruct the supporters of an expansive view of the Fifth Amendment, as well as those who oppose compensation because of its chilling effect on land use and environmental regulations, that "takings" law is indeed premised on property interests, not talismanic categories or exceptions that are confusing to even the most astute taxonomist. It will now be in-

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65. *Id.* at 1029.

66. *Id.* at 1030.

67. The South Carolina Supreme Court heard arguments on remand and determined that no background principles of South Carolina law would have prevented Mr. Lucas from developing his two lots. It therefore remanded to the trial court on the issue of damages, finding that a temporary taking had occurred between the time of the passage of the 1988 Amendments and the date of its remand order. *See* Lucas v. South Carolina Coastal Council, 424 S.E.2d 484 (S.C. 1992). The case was eventually settled for $1.5 million, and the state, at least at one point, ironically attempted to secure funding for the settlement by selling the lots for development. H. Jane Lehman, *Accord Ends Fight Over Use of Land*, WASH. POST, July 17, 1993, at E1.

68. Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1035 (1992) (Kennedy, J., concurring).

69. *Id.* at 1051 (Blackmun, J., dissenting).

70. *Id.* at 1055-60.

cumbent for those on either side to focus on the relationship between the effect of a governmental regulation and the asserted harm to a property interest.

The commonplace notion of "property interests" reflects an attempt to describe what interests the law will protect. *Property interests* are generally guided by an owner's reasonable expectations under relevant law at the time the owner acquires title to the property. If state law and/or commonly accepted practice sanctions building homes in an area, then a person could be said to have a reasonable expectation that she could build a home on a lot in that area. Such an expectation might, under state law, rise to the level of a protected *property interest.*

Conversely, if, for example, under state statutory or common law, a property owner could not reasonably expect to develop the land into a shopping mall, then no *interest* would be "taken" by denying the development. Similarly, a person who buys land along the beach knowing that construction is prohibited would not have a reasonable expectation that she could build a house on the lot. Property owners may also reasonably expect that the use of property will "be restricted, from time to time, by various measures newly enacted by the State" when legitimately exercising its powers.[71]

This, also, is where the concept of "nuisance" applies. If a state or private party could successfully bring a lawsuit to halt a particular use of property, then state law cannot be said to create a reasonable expectation to serve as the basis for a protected *interest.*

This focus on property interests is also applicable to instances where a landowner has been denied something less than all economically beneficial use of property, according to the majority opinion in *Lucas.* The Court leaves it up to relevant background principals of property law to decide, for example, whether owners can reasonably expect to build on one hundred percent of their property as opposed to ninety percent, and it reaffirms that the impact of a regulation on an owner's investment-backed expectations must be considered when a government regulation does something less than deprive an owner of all value.

G. Understanding History

Yet, is such an approach supportable? Regulatory takings jurisprudence has long relied upon history to prove its point—that a regulation which diminishes the value of property either does or does not require compensation. Courts have regularly looked to early American jurisprudence, citing examples of cases in which legislatures would take land or other property interests by regulation and (1) not pay compensation, to support a finding that no regulatory taking had occurred, or (2) pay the affected land owner compensation, to support a finding that just compensation is required. With that in mind, it is useful to review at the outset the

71. *Id.* at 1027.

evolution of the takings doctrine. Within this broad historical context, it is also important to consider that the very notion of what property is may not remain static over long periods but may change over time, thus making practical use of the history even more difficult.

III. THE EVOLUTION OF A NATIONAL PROPERTY RIGHTS DEBATE

A. *The Idea of Property*

Few concepts today are so taken for granted yet so elusive as the ideas of "property" and "ownership." The notion that, when property is taken and pressed into public service, just compensation must be paid has a long lineage. It was not until the first half of the 19th century, however, that this concept ascended to a prominent place in American law. Understanding an overview of this history and the changing notion of property is important for placing the current regulatory takings doctrine in its proper context.

Early English experience provided some examples of the payment of compensation when the King took property for the public good.[72] But it was John Locke, writing during the late seventeenth century, who provided the theoretical support for ensuring the protection of private property in a "democratic" society. John Locke explained that the primary function of government is to preserve that inalienable right to property.[73] He argued that the tenet that a sovereign could not take an individual's property without compensation derived from three fundamental principles. First, the right to own property, which he defined as a man's life, liberty, and estate, was a natural right—one which predated society.[74] Second, people left this state of nature and entered into society to make these property rights more secure.[75] "The great and *chief end* therefore, of Mens uniting into Commonwealths, and putting themselves under Government, *is the Preservation of their Property*. To which in the state of Nature there are many things wanting."[76] Third, a sovereign has no claim to absolute dominion.[77] From these three propositions, Locke concluded that the principle that it is a mistake to believe that "the Supreme or *Legislative Power* of any Commonwealth, can do what it will, and dispose of the Estates of the Subject *arbitrarily*, or take any part of them at pleasure."[78]

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72. 6 Hen. 8, ch. 17 (Eng.); 31 Hen. 8, ch. 4 (Eng.). *See* William B. Stoebuck, *A General Theory of Eminent Domain*, 47 WASH. L. REV. 553, 566 (1972). The Magna Charta has also been invoked in support of this compensation principle. *See* FRANK R. STRONG, SUBSTANTIVE DUE PROCESS OF LAW: A DICHOTOMY OF SENSE AND NONSENSE 3-25 (1986); *cf.* Young v. McKenzie, 3 Ga. 31, 44 (Ga. 1847).

73. JOHN LOCKE, *The Second Treatise of Government: An Essay Concerning the True Origin, Extent, and End of Civil Government, in* TWO TREATISES OF GOVERNMENT 323 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690).

74. *Id.* at 350.

75. *Id.* at 276.

76. *Id.* at 350-51.

77. *Id.* at 267-68.

78. *Id.* at 361. For an excellent critique of the Lockean model, see Myrl L. Duncan, *Property as a*

Writing seventy-five years after Locke, Sir William Blackstone similarly commented that the preservation of vested property rights is the chief end of government; when a property right is taken for the public good, it must be accompanied by the payment of compensation.[79] Like Locke before him, Blackstone wrote that rights to property are natural rights,[80] acquired originally on a use-based theory,[81] but that in the state of nature, these rights vested in someone only as long as the use continued, albeit leaving them somewhat insecure.[82] It was to remedy this situation, according to Blackstone, that people originally left the state of nature and formed societies.[83] As a consequence, Blackstone believed that when, Parliament asserts its eminent domain power, it acts indulgently and must provide a "full indemnification and equivalent for the injury thereby sustained."[84]

B. The American Colonial Experience

To the modern observer, the American colonial period appears to demonstrate only a marginal adherence to these principles.[85] Many examples of the taking of property during this period involved the taking of land without compensation for public improvements, such as the construction of roads.[86] In these cases, compensation was generally not provided when unsettled land was taken,[87] but was often paid when cultivated or fenced-in land was pressed into public service.[88] It is arguable that this experience does not necessarily support the proposition that property rights could be freely appropriated. With extensive tracts of undeveloped land in America, many colonies may not have felt the need to pay compensation for

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Public Conversation, Not a Lockean Soliloquy: A Role for Intellectual and Legal History in Takings Analysis, 26 ENVTL. L. 1095 (1996).

79. 2 WILLIAM BLACKSTONE, COMMENTARIES 4 (4ed. 1876).

80. *See Id.* at 3-4.

81. *Id.* at 8.

82. *Id.* at 3-4.

83. "[I]t became necessary to entertain conceptions of more permanent dominion; and to appropriate to individuals not the immediate *use* only, but the very *substance* of the thing to be used." *Id.* at 4.

84. 1 WILLIAM BLACKSTONE, COMMENTARIES 135 (4th ed. 1876). "All the legislature does is to oblige the owner to alienate his possessions for a reasonable price; and even this is an exertion of power, which the legislature indulges with caution . . . ." *Id.*

85. *See generally* John F. Hart, *Colonial Land Use Law and its Significance for Modern Takings Doctrine*, 109 HARV. L. REV. 1252 (1996) (discussing land use laws in colonial America and concluding that colonial governments regulated land use extensively for purposes other than classic nuisance) [hereinafter Hart, Colonial Land Use]; John F. Hart, *Forfeiture of Unimproved Land in the Early Republic*, 1997 U. ILL. L. REV. 435 (1997).

86. William M. Treanor, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 YALE L.J. 694, 695 (1985) [hereinafter Treanor].

87. *Id.* at 695; *cf.* Hart, Colonial Land Use, *supra* note 85, at 1260-61 (discussing colonial laws in Massachusetts and New York which provided for forfeiture of land that was not seated or improved within three years).

88. Treanor, *supra* note 86, at 695. *See also* Mensch, *The Colonial Origins of Liberal Property Rights*, 31 BUFF. L. REV. 635, 675 (1982).

unimproved land because no *property* was taken.[89] Two prevailing notions of property would have supported such a distinction between the taking of unimproved land without compensation and the taking of seated or improved land with a compensation requirement. Under the feudal concept of property, all land was held in the king—either mediately or immediately. Under such a system, the land holder did not "own" the property itself in a modern sense of the word, but rather had claims only to the improvements thereon and to the use of the land.[90] Under an alternative concept of property where property was a natural right, unused land did not constitute a vested property right.[91]

Also, professor Hart describes several other instances in which "property" is "taken" by the colonial legislatures and for which the owner received no compensation. For example, a law in the Plymouth colony provided that, if an individual did not operate his mine for the period of one year, the government could appoint another to exploit the natural resources.[92] Another colony, Connecticut, enacted a mining law that went even further. The statute allowed mine owners who were operating their mines to be dispossessed of their mines if they did not exploit the natural resources quickly enough.[93] Similar laws were in effect in Maryland and elsewhere to encourage the development of mills, foundries and forges.[94] Colonial statutes also addressed issues more familiar to the modern observer, such as limits on property development for aesthetic and population density reasons.

Perhaps the most ironic group of colonial land use regulations, however, involved wetlands. Many of the colonies enacted laws requiring owners of land to drain their wetlands to make them suitable for cultivation. The statutes provided no compensation to the property holder. Such laws were passed in Massachusetts, Connecticut, New York, Pennsylvania, South Carolina, and New Jersey.[95] Professor Hart's scholarship suggests that, at best, the American colonial experience, with respect to the protection of property rights, was a speckled one.

C. The New Nation

As the early American republic emerged, so too did two visions of the role of property in the American experience: one in which an individual's property was integral to the nation's survival as a democracy because it en-

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89. This distinction between improved or cultivated land and unimproved land was implicit in Locke's distinction between land and property. "As much land as a Man Tills, Plants, Improves, Cultivates, and can use the Product of, so much is his Property." LOCKE, *supra* note 73, at 290.

90. *See* SIR FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I 232-33 (2d. ed. reissued 1988).

91. *See supra* notes 80-84 and accompanying text.

92. *See* Hart, Colonial Land Use, *supra* note 85, at 1265. Again, this may not be as telling as Professor Hart suggests, given the then-prevailing concepts of vested property rights.

93. *See* Hart, Colonial Land Use, *supra* note 85, at 1265-66.

94. *See* Hart, Colonial Land Use, *supra* note 85, at 1267.

95. *See* Hart, Colonial Land Use, *supra* note 85, at 1268-69.

sured owners their independence, and another in which, although property was important, private interests were properly subordinated to the general good of the community.[96] In this latter theory, property was held under an implied obligation to the state and to the public good.

> Private Property . . . is a Creature of Society, and is subject to the Calls of that Society, whenever its Necessities shall require it, even to the last Farthing; its contributions therefore to the public Exigencies are . . . to be considered . . . the Payment of a just Debt.[97]

To republicans such as Franklin, property, which was not a natural right, was an important creation of society, but the security of property had to take a secondary role to the needs of the community.[98] This vision entrusted the liberties and security of the citizens to the legislature of the various states. However, the early American experience demonstrated that this trust was not warranted.[99]

Although the post-revolutionary period demonstrated less than full devotion to an uncompromising protection of private property rights,[100] with the adoption of the Constitution a more individualistic system was instituted, one with a fundamentally different view of society and property rights than had been previously held.[101] The federalists, similar to Locke and Blackstone, saw the protection of property and other liberties as the chief end of government.[102] Indeed, in Federalist 10, James Madison wrote that the protection of "the diversity in the faculties of men, from which the rights of property originate . . . is the first object of government."[103] Similarly, in Federalist 54, Madison wrote that "[g]overnment is instituted no less for the protection of property than of the persons of individuals."[104] To secure this protection, Madison introduced the clause in the Fifth Amendment: "nor shall private property be taken for public use, without just compensation."[105] Madison believed these protections to be funda-

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96. *See* Gregory S. Alexander, *Time and Property in the American Legal Culture*, 66 N.Y.U. L. REV. 273, 280 (1991); see also James M. McElfish, Jr., *Property Rights, Property Roots: Rediscovering the Basis for Legal Protection of the Environment*, 24 ENVTL. L. REV. 10231 (1994).

97. Treanor, *supra* note 86, at 700 (quoting Benjamin Franklin).

98. Treanor, *supra* note 86, at 700 (quoting Benjamin Franklin); JENNIFER NEDELSKY, PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM 172 (1990) [hereinafter Nedelsky].

99. NEDELSKY, *supra* note 98, at 4; Treanor, *supra* note 86, at 704.

100. All the states except South Carolina apparently enacted laws confiscating the Loyalists' property without compensation. Treanor, *supra* note 86, at 698 n.12. Nonetheless, many colonists were hostile to uncompensated takings. William W. Fisher III, *Ideology, Religion, and the Constitutional Protection of Private Property: 1760-1860*, 39 EMORY L.J. 65, 95 (1990) [hereinafter Fisher].

101. NEDELSKY, *supra* note 98, at 2-9; Treanor, *supra* note 86, at 712.

102. A student of this period has observed that "[t]he great focus of the Framers was the security of basic rights, property in particular. . . ." NEDELSKY, *supra* note 98, at 92. Madison believed that "[t]he rights of property were based on natural rights." *Supra* note 98 at 35. David Mayer aptly notes that even Thomas Jefferson likely believed that the right to property is founded in our "natural wants." DAVID N. MAYER, THE CONSTITUTIONAL THOUGHT OF THOMAS JEFFERSON 77-79 (1994).

103. THE FEDERALIST NO. 10, at 78 (James Madison) (Clinton Rossiter ed., 1961).

104. THE FEDERALIST NO. 54, at 339 (James Madison) (Clinton Rossiter ed., 1961).

105. U.S. CONST. Amend. V.

mental rights,[106] and although the Fifth Amendment was legally binding only on the federal government, it had much broader implications.[107] During the framing of the Constitution, the people were deemed to have an inalienable right to property—that is, a natural right to acquire, dispose of, and use property.[108]

D. *Early State Development of Proto-Regulatory Takings*

Not surprisingly, therefore, during the nation's formative years the requirement of just compensation was often based on fundamental or natural law.[109] Few states had compensation clauses in their constitutions immediately after the revolution,[110] but several others had provisions similar to Article 39 of the Magna Carta.[111] Pennsylvania and Delaware had inserted compensation provisions into their constitutions by 1792.[112] Throughout this period, the sanctity of property rights took root and began to blossom, as state legislatures and courts applied the requirement of just compensation when property was taken, even when there was no specific provision in the state constitution to do so.[113]

In many of these early state cases, there were no explicit constitutional provisions dictating compensation.[114] Rather, these courts based their decisions upon natural rights and justice—natural law—of which the Fifth Amendment was merely declaratory.[115] In New York, for example,

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106. Treanor, *supra* note 86, at 714.

107. Fisher, *supra* note 100, at 101-102 and n.147; Treanor, *supra* note 86, at 708.

108. *In VanHorne's Lessee v. Dorrance*, 2 Dall. 304, 310 (1795), Justice Patterson observed that "it is evident; that the right of acquiring and [possessing] property and having it protected, is one of the natural, inherent, and unalienable rights of man." *Id.* at 310. *See generally* THE FEDERALIST NO. 10 (James Madison)(Clinton Rossiter ed. 1961); J.A.C. Grant, *The "Higher Law" Background of the Law of Eminent Domain*, WIS. L. REV. 67 (1931) [hereinafter grant]; *See also* Alexander, *supra* note 96; Stuart Bruchey, *The Impact of Concern for the Security of Property Rights on the Legal System of the Early American Republic*, WISC. L. REV. 1135 (1980); Fisher, *supra* note 100.

109. *See generally* MORTON HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1780-1860 (1977) [hereinafter Horwitz]; Grant, *supra* note 108; Harry N. Scheiber, *Instrumentalism and Property Rights: A Reconsideration of American "Styles of Judicial Reasoning" in the 19th Century*, WIS. L. REV. 1 (1972); William Stoebuck, *A General Theory of Eminent Domain*, 47 WASH. L. REV. 553 (1972); *see also* Kris Kobach, *The Origins of Regulatory Takings: Setting the Record Straight*, UTAH L. REV. 1211, 1228 (1996) (citing three sources of early constraints on governmental takings: state constitutional law, natural law, and common law).

110. *See* Kobach, *supra* note 109, at 1228 (stating that Massachusetts enacted a compensation clause in 1780 and that Vermont's constitution provided for compensation after 1786). In addition, the Northwest Ordinance provided a compensation requirement for the Northwest Territory (1787).

111. *See* Grant, *supra* note 108, at 81. Article 39 provided that no freeman could be deprived of his freehold except by a judgment of his peers.

112. Kobach, *supra* note 109, at 1229.

113. For a more complete discussion, see Kobach, *supra* note 109; Grant, *supra* note 108. Professor Grant, after surveying state cases involving eminent domain during the first half of the nineteenth century, concludes that the only state "courts to reject the rule that compensation must be made when private property is taken for public use were those of the Carolinas." Grant, *supra* note 108, at 80.

114. HORWITZ, *supra* note 109, at 63-66.

115. Kobach, *supra* note 109. Professor Kobach traces the development of the regulatory takings doctrine from the early state courts' decisions, frequently based on natural law, through Justice

there were several such cases in the first quarter of the nineteenth century. In *Gardner v. Village of Newburgh*,[116] Chancellor Kent held a statute void for failing to provide compensation to an individual whose riparian rights were taken. Such compensation, according to Kent, was required by "natural equity." In *People v. Platt*,[117] Chief Justice Spencer, citing *Fletcher v. Peck*[118] and *New Jersey v. Wilson*,[119] found that while a statute which required dam owners to modify their dams to allow fish to pass did not render the grant to Platt (which allowed him to build the dam) null and void, it did impair a material and essential part of the grant. Under the statute, Platt would have had to change the dam substantially. Therefore, according to the court, the statute unconstitutionally impaired Platt's contract. The court stated that "[p]rivate property may, in many instances, be appropriated to public use; but such appropriations are constitutional, legal, and justifiable, only when a fair and just equivalent is awarded to the owner of the property thus taken."[120] Chief Justice Spencer again held a New York statute void because it violated this fundamental principle in *Bradshaw v. Rogers*.[121] He held first that the Fifth Amendment did not apply to the state, and the New York constitutional provision requiring compensation was not yet operative.[122] Nonetheless, he found that both of these provisions were "declaratory of a great and fundamental principle of government; and any law violating the principle must be deemed a nullity, as it is against natural right and justice."[123]

Throughout the early 19th century, state courts more and more required that statutes taking a citizen's property for the public good be accompanied by compensation for the taking, even where the state constitution was silent and even when the takings involved regulation rather than appropriation.[124] New Jersey state courts began to hold that compensation was required when property was taken (in the 1830s and 1840s)[125] even though the New Jersey constitution had no such clause until 1848. Likewise, New Hampshire,[126] Georgia,[127] Iowa,[128] Massachusetts[129] and Mary-

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Holmes' decision in *Mahon* and then to *Lucas*. He also discusses the leap from cases involving physical takings to takings of water rights— *i.e.*, the right to the use of the water— to modern regulatory takings cases.

116. 2 Johns. Ch. 162 (N.Y. Ch. 1816).

117. 17 Johns 195 (N.Y. 1819).

118. 10 U.S. (6 Cranch) 87 (1810).

119. 11 U.S. (7 Cranch) 164 (1812).

120. *Platt*, 17 Johns. Ch. at 215.

121. 20 Johns. Ch. 103 (N.Y. Ch. 1822). For other New York state cases awarding compensation without a constitutional provision, *see* Beekman v. Saratoga & Schenectady R. R. Co., 18 Wend. 9 (N.Y. 1831).

122. *Bradshaw*, 20 Johns. Ch. at 106.

123. *Id.*

124. *See generally* Kobach, *supra* note 109, at 1223-59; Grant, *supra* note 108.

125. *See* Sinnickson v. Johnson, 17 N.J.L. 129, 145 (N.J. 1839) (the right to compensation is incident to the power of taking property); Bonaparte v. Camden & A.R. Co., 3 F. Cas. 821 (D. N.J. 1830) (the right of the owner to receive and the duty of the legislature to provide compensation is absolute.).

126. Bristol v. New-Chester, 3 N.H. 524, 535 (1826) (when eminent domain is exercised, natural

land,[130] held the concept of property to be a natural right requiring protection from uncompensated takings by state legislatures. In *Henry v. Dubuque*,[131] for example, the Iowa Supreme Court held that "the plaintiff needed no constitutional declaration to protect him in the use and enjoyment of his property . . . . To be thus protected and thus secure is a right inalienable, a right which a written constitution may recognize and declare, but which existed independently of and before such recognition, and which no government can destroy."

The history of compensation in Pennsylvania in the early nineteenth century, on the other hand, appears, at first glance, out of line with in many other states. In fact, in a dissent to *Lucas*, Justice Blackmun referred to an early Pennsylvania case as demonstrative of the proposition that many states in the nineteenth century viewed compensation for property taken for public benefit as a bounty rather than a requirement to the property owner.[132] However, that proposition is not so clear.[133] In *McClenham v. Curwin*,[134] the defendant, a company incorporated pursuant to an act of the Assembly to construct a road from Philadelphia to Lancaster, entered onto the plaintiff's land. The plaintiff brought an action for damages against the turnpike company.[135] According to the court, in all the grants made by William Penn, his successors and the state, an allowance of six

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justice requires compensation be made); Proprietors of the Piscataqua Bridge v. The New Hampshire Bridge, 7 N.H. 35, 66 (1834) (one of the first principles of justice is that when property is taken without the owner's consent, compensation must be provided).

127. Young v. McKenzie, 3 Ga. 31, 39-44 (1847) (it is a great common law principle founded in natural justice that eminent domain gives the legislature control of property for public use; provided, just compensation be made to the citizen thereof); Parham v. The Justices of the Interior Court, 9 Ga. 341, 355 (1851) (the right of accumulating, holding, and transmitting property lies at the foundation of civil liberty).

128. Henry v. Dubuque & Pacific R.R. Co., 10 Iowa 540, 543-544 (1860) (to be secure in the possession of one's property is an inalienable right).

129. Gedney v. Tewksbury, 3 Mass. 307, 310 (1807); Perry v. Wilson, 7 Mass. 393 (1811). Massachusetts *did* have a compensation clause in its constitution at the time of these cases and sporadically had provided compensation during the colonial period. *See supra* notes 87 & 95 and accompanying text. For a brief discussion of Massachusetts law and some controversy surrounding exceptions to the principle of just compensation, see GEORGE DRAGO, LAW IN THE NEW REPUBLIC: PRIVATE LAW AND THE PUBLIC ESTATE 30-35 (1983).

130. Harness v. Chesapeake & Ohio Canal Co., 1 Md. Ch. 248 (1848).

131. 10 Iowa 540, 543-44 (Iowa 1860).

132. *Lucas*, 505 U.S. at 1056-57 (Blackmun, J., dissenting) (citing *M'Clenachan v. Curwin*, 3 Yeates 362, 373 (Pa. 1802)).

133.

> There were exceptions to this trend, but most were more apparent than real. For example, until the early nineteenth century, the courts in Pennsylvania . . . continued to deny compensation to owners of lands seized by the state for highway construction, but the plausible rationale for this stance was that the proprietary land grants from which the claimants traced their title *expressly provided* that the grantees were receiving more acreage than they had purchased to enable government to lay out roads across the premises. (emphasis added)

Fisher, *supra* note 100, at 105.

134. 3 Yeates 362 (Pa. 1802).

135. *Id.* at 362-363.

acres per hundred was made at no cost to the grantee for roads and highways.[136] The turnpike company in no way disputed that when private property was taken, compensation must be paid. However, because no value or consideration had ever been paid by the grantees for the additional six percent of land, the company argued, it was held in trust for the community. Thus, when the community needed property for public purpose, no compensation was owed. Chief Judge Shipen, delivering the opinion for the court, agreed. "The six percent additional allowance to a purchaser's grant relieves the constitutional burden of paying compensation for the land in order to build public highways."[137]

In a case decided after Pennsylvania had adopted a just compensation provision in its constitution,[138] the court declared that "the property of the citizen shall not be taken and applied to public uses without the consent of his representatives, and without just compensation being made."[139] This fundamental concept of providing compensation for property taken for the public good was so compelling that throughout the early nineteenth century state courts frequently implemented this protection of property rights, even prior to having an applicable constitutional peg on which to hang their decisions.[140] According to Kobach, although decisions declining to recognize regulatory takings as compensable continued to appear, there had developed a significant body of case law requiring compensation for such takings.[141]

E. Property Rights and the New Court

This same appreciation of the importance of property rights was a dominant theme throughout the development of our federal constitutional jurisprudence. A prominent legal historian notes that the period from 1789-1910 marks a "broad tendency to stress the stability of property rights in the American Legal Order."[142] Despite Chief Justice Marshall's opinion in *Barron v. The Mayor & City Council of Baltimore*,[143] holding that the Fifth Amendment to the United States Constitution did not apply to the

136. *Id.* at 363.

137. *Id.*

138. McMasters v. The Commonwealth, 3 Watts 292 (Pa. 1834).

139. *Id.* at 294.

140. Professor Kobach summarizes the period this way:

> [N]umerous state courts recognized devaluative takings [*i.e.*, regulations that devalued rather than appropriated property] to be compensable at an early stage in American legal history .... Although no single orthodoxy of devaluative takings gripped all the states, numerous shared principles emerged. The most prominent was undoubtedly the strong version of the bundle-of-sticks understanding of property ....

Kobach, *supra* note 109, at 1259.

141. Kobach, *supra* note 109, at 1260.

142. Harry N. Scheiber, *Property Law, Expropriation, and Resource Allocation by Government, 1789-1910*, *reprinted in* LAWRENCE FRIEDMAN & HARRY N. SCHEIBER, AMERICAN LAW AND THE CONSTITUTIONAL ORDER 132 (1978).

143. 32 U.S. (7 Pet.) 243 (1833).

states, the Court's cases prior to the Fourteenth Amendment nevertheless repeatedly confirmed the importance of protecting private property rights.[144] However, many of the Court's initial "property rights" decisions focused on the constitutional prohibition against impairing contracts.[145] This should not be surprising, since the early nineteenth century witnessed a "conflation of property and contract rights."[146]

In its first opinion on the eminent domain power,[147] the Court held that a state could exercise this power against a corporate franchise.[148] In 1795, Vermont granted the West River Bridge Company the exclusive right to build and operate a toll bridge over the West River. Forty-four

144. Justice Story, for instance, commented "[t]hat government can scarcely be deemed to be free where the rights of property are left solely dependent upon the will of a legislative body without any constraint. The fundamental maximums of a free government seem to require that the rights of personal liberty and private property should be held sacred." Wilkinson v. Leland, 27 U.S. 627, 657 (1829). Justice Story similarly noted the importance of securing private property rights in *Terrett v. Taylor*, 9 Cranch 43 (1815).

145. It is now well accepted that decisions during the Marshall Court protected vested property rights from encroachment. *See* Trustees of Dartmouth College v. Woodward, 17 U.S. 518 (1819); Fletcher v. Peck, 10 U.S. 87 (1810). *See generally* CHARLES P. MAGRATH, YAZOO, LAW AND POLITICS IN THE NEW REPUBLIC: THE CASE OF *FLETCHER V. PECK* 102 (1966) ("The Court's decision [in *Fletcher v. Peck*] elevated vested property to a position of primacy in the hierarchy of American constitutional values."). Under Chief Justice Taney, the Court continued to protect property interests, but its decisions reflected an expanding concept of property that incorporated economic change. *See* Charles River Bridge Co. v. Warren River Bridge Co., 36 U.S. 420 (1837). *See generally* JAMES WILLARD HURST, LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH CENTURY UNITED STATES (1956); STANLEY KUTLER, PRIVILEGE AND CREATIVE DESTRUCTION: THE *CHARLES RIVER BRIDGE* CASE (1971). Indeed, the *Charles River Bridge* case involved "competing values of stability and change, of maintenance of property rights and keeping the way clear for new developments." CARL B. SWISHER, THE OLIVER WENDELL HOLMES DEVISE HISTORY OF THE SUPREME COURT OF THE UNITED STATES V: THE TANEY PERIOD 1836-64 at 75 (1974). In making his argument about impairing the obligation of contracts, counsel for Charles River Bridge even argued that the act in question threatened to take his client's property at the expense of the public. *Id.* at 81-82. A similar issue surfaced later on in the Sinking Fund Cases, 99 U.S. 700 (1878), where the Court addressed the ability of Congress to amend the character of a railroad company.

146. THOMAS C. SHEVORY, JOHN MARSHALL'S LAW: INTERPRETATION, IDEOLOGY, AND INTEREST 99 (1994). Another biographer of Chief Justice Marshall notes that "the principle of vested rights received endorsement by the Court, but the authority to enforce property rights upon the states depended upon a contractual obligation's being impaired by state action." HERBERT A. JOHNSON, THE CHIEF JUSTICESHIP OF JOHN MARSHALL 1801-1835 at 174 (1997). *E.g.*, Satterlee v. Matthewson, 27 U.S. 380 (1829) (explaining Court's limited jurisdiction to review the taking of "property rights"). Thus, absent any impairment of an obligation of a contract, the Court was without jurisdiction to review state statutes that upset settled vested property rights. *See* Baltimore & Susquehanna R.R. Co. v. Nesbit, 51 U.S. 395 (1850). *See generally* James L. Kainen, *The Historical Framework for Reviewing Constitutional Protection for Property and Contract Rights*, 79 CORNELL L. REV. 87 (1993); *Stephen Siegel, Understanding the Nineteenth Century Contract Clause: The Role of the Property-Privilege Distinction and "Takings" Clause Jurisprudence*, 60 S. CAL. L. REV. 1 (1986).

147. In *Respublica v. Sparhawk*, 1 Dall. 357 (1788), the question was whether compensation was required for the seizure of flour unreturned during the revolutionary war. Relying upon the law of nations, as well as general principles that warranted destroying property during exigent times, Chief Justice M'Kean concluded compensation was unnecessary. *See generally* Brookshire, *supra* note 20, at 902-905 (discussing "takings' in times of war).

148. West River Bridge Co. v. Dix, 47 U.S. 507 (1848).

years later, the state passed an internal improvement act sanctioning further development along the river, conditioned upon the payment of compensation for the taking of any property (including franchises). The West River Bridge Company challenged the new statute, claiming that the State could not, under the pretext of the eminent domain power, abrogate its contractual obligation with the company by taking its franchise right, even though it afforded compensation.[149] The Court upheld the exercise of the power as a necessary incident to sovereignty. In a separate concurrence, Justice Woodbury demonstrated that the weight of authority sanctioned the use of the eminent domain power, but only upon payment of compensation.[150]

The period of economic expansion and increased regulatory activity following the Civil War brought with it new efforts to test the scope of the states' police powers, including the power to infringe upon property rights and take private property.[151] State and local exercise of the expanding police power invariably affected private conduct and use of private property. Prior to the Civil War, state court judges such as Lemuel Shaw already had begun to establish the ability of states to exercise regulatory power to protect the health, welfare and safety of citizens.[152] The degree to which government could regulate conduct and use of property became a principal focus of challenges to the exercise of the police power. Such challenges were based primarily on the newly adopted "due process" clause of the Fourteenth Amendment, which provided that "nor shall any State deprive any person of life, liberty, or property, without due process of law."[153] The Court noted that until the Fourteenth Amendment "[i]t has never been seriously contended that such laws raised any question growing out of the Constitution of the United States."[154] The adoption of the Fourteenth Amendment, however, provided an opportunity for parties to press for further limitations on state action. In particular, the clause became viewed

149. *Id.* at 531. *See also* SWISHER, *supra* note 145, at 471.

150. West River Bridge Co., at 539-49.

151. The focus quite often was on whether the eminent domain power could be delegated, or whether the power was being used for a private use, or whether the power was the appropriate mechanism for determining compensation. *See, e.g.,* Otis Co. v. Ludlow Mfg. Co., 201 U.S. 140 (1906) (upheld mill-dam statute, where compensation provided); Clark v. Nash, 198 U.S. 361 (1905) (whether valid condemnation for a public use); Fallbrook Irrigation Dist. v. Bradley, 164 U.S. 112 (1896) (upheld delegation of eminent domain power to irrigation district); Head v. Amoskeag Mfg. Co., 113 U.S. 9 (1885) (upheld mill-dam statute); Cole v. City of La Grange, 113 U.S. 1 (1885) (statute authorizing compensable taking of private property held not for a public use); Boom Co. v. Patterson, 98 U.S. 403, 406 (1879) (reconfirming inherent right of sovereign to exercise eminent domain power), *overruled by* Olson v. United States, 292 U.S. 246 (1934); Holyoke Co. v. Lyman, 82 U.S. 500 (1873) (upheld claim of interference with fishery interest by construction of mill dam); Kohl v. United States, 91 U.S. 367 (1876) (upheld the Federal government's exercise of eminent domain power).

152. *See generally* LEONARD W. LEVY, THE LAW OF THE COMMONWEALTH AND CHIEF JUSTICE SHAW 229-265 (1957). Professor Levy observed that "Shaw revealed an almost precocious understanding of the central premise of the police power—the right of the legislature to 'interfere' with 'liberty' or 'property' for the sake of the common welfare." *Id.* at 243.

153. U.S. CONST. Amend. XIV, § 1.

154. Bartemeyer v. Iowa, 85 U.S. 129, 132 (1874).

as a potential vehicle for curbing regulation of business activity, under the premise that the protection against deprivation of liberty and property without due process included the right to continue to engage in any activity lawful when first undertaken.[155]

The post-Civil War "due process" challenges generally were not based directly upon the just compensation clause. Not until the late 1890s did the Court hold that the requirement of "due process of law" incorporates the concept of "just compensation."[156] Nevertheless, when resolving due process challenges prior to the incorporation of the Fifth Amendment, the Court often decided whether there was a "deprivation" of any protected "property" interest. The Court's decisions defined two general categories of instances where no deprivation of property occurred. First, the Court ruled that damages resulting from regulation, without more, did not constitute a "deprivation" within the meaning of the Fourteenth Amendment. When governmental action neither regulated nor restricted the use of property, no *deprivation* occurred if the value of property was only indirectly and incidentally affected. Second, the Court ruled that property owners did not have any vested *property* interest in any particular continued use of property or in any particular conduct that interfered with the enjoyment of property by others.

The Court distinguished between the lawful exercise of the police power causing "incidental" or "consequential" damage and a "taking." Reviewing various earlier cases, the Court noted that they "recogniz[ed] . . . the distinction between an incidental injury to rights of private property resulting from the exercise of governmental powers, lawfully and reasonably exerted for the public good, and the *taking*, within the meaning of the Constitution, of private property for public use."[157] The Court held that governmental activity neither directly burdening private property nor regulating its use did not "take" any "property" interest. Landowners, for instance, could not claim any vested right in the continued maintenance of

155. During the post Civil War period until shortly after the turn of the century, the law of property converged with the notion of contractual liberty—unrestrained free enterprise. *See* MARTIN J. SKLAR, THE CORPORATE RECONSTRUCTION OF AMERICAN CAPITALISM, 1890-1916 at 48 (1988). *See generally* HERBERT HOVENKAMP, ENTERPRISE AND AMERICAN LAW 1836-1937 (1991); ARNOLD PAUL, CONSERVATIVE CRISIS AND THE RULE OF LAW: ATTITUDES OF THE BENCH AND BAR, 1887-1895 (1960); WILLIAM SWINDLER, COURT AND CONSTITUTION IN THE 20TH CENTURY: THE OLD LEGALITY 1889-1932 (1969). For example, Justice Holmes, when sitting as a state court judge, disagreed with the majority of the Supreme Judicial Court of Massachusetts that the State's effort to restrict a mill owner's right to make contracts with weavers violated the rights of property. *See* SHELDON M. NOVICK, HONORABLE JUSTICE: THE LIFE OF OLIVER WENDELL HOLMES 197 (1989). For a survey of "takings" cases during the time of the Fuller Court, see James W. Ely, Jr., *The Fuller Court and Takings Jurisprudence,* 2 J. SUP. CT. HIST. 120 (1996).

156. Chicago, Burlington and Quincy Ry. Co. v. City of Chicago, 166 U.S. 226 (1896); *see also* Fallbrook Irrigation Dist. v. Bradley, 164 U.S. 112, 158, 161 (1896) (suggesting that "due process" includes considering whether property was taken for a public use). The requirement for just compensation was a limitation upon the use of the eminent domain power. United States v. Jones, 109 U.S. 513, 518 (1883). *Cf.* Noble v. Union River Logging R.R. Co., 147 U.S. 165 (1893) (revocation of vested right-of-way without compensation held void).

157. Chicago, Burlington and Quincy Ry. Co. v. Illinois, 200 U.S. 561, 582-83 (1906).

the status quo of surrounding land—*i.e.*, a status quo that, if changed, would diminish a particular landowner's property value. In an opinion written by Justice Brewer, an ardent defender of property rights,[158] the Court noted that the exercise of the police power was not invalid simply because it worked pecuniary injury when the governmental action was unrelated to the use of private property.[159] Thus, landowners whose property fronted streets, for example, failed to persuade the Court to hold unconstitutional changes in street grading.[160] Another common example of incidental damage occurred when governmentally authorized construction along navigable waterways incidentally affected riparian and other landowners. The Court held that the due process clause generally did not bar such an exercise of the police power,[161] reasoning that such damages result from the "incidental consequence" of improvements on navigable highways, with the government exercising a dominant and pre-existing servitude rather than taking any private property.[162]

A good illustration is *Northern Transportation Co. of Ohio v. City of Chicago*.[163] There, state-approved construction by the City of Chicago caused the interruption of a company's access to the Chicago River, where it maintained its dock and warehouse. The company brought a nuisance action against the city, claiming that it was entitled to compensation for consequential damages.[164] The Court rejected this argument, holding that "acts done in the proper exercise of governmental powers, and not directly encroaching upon private property, though their consequences may impair its use, are universally held not to be a taking within the meaning of the constitutional provision."[165] The Court many years earlier had rejected a similar challenge by a plantation owner along the Mississippi River, whose

158. PAUL, *supra* note 155, at 70.

159. L'Hote v. New Orleans, 177 U.S. 587, 596-99 (1900) (upholding authorization of what otherwise might have been deemed a nuisance at common law).

160. *Cf.* Marchant v. Pennsylvania Ry. Co., 153 U.S. 380 (1894); City of Chicago v. Taylor, 125 U.S. 161 (1888). *See also* Saver v. City of New York, 206 U.S. 536 (1907). Earlier decisions rejected landowners' attempts to effectively impose a negative servitude upon surrounding land, by arguing for compensation as a result of incidental activity unrelated to the use of the landowners' property. The Court held that "one cannot build his house on the top of a hill in the midst of a city, and require the grade of the street to conform to his convenience, at the expense of the public." Smith v. The Corp. of Wash., 61 U.S. (20 How.) 135, 148 (1858). *See* Goszler v. Corp. of Georgetown, 19 U.S. (6 Wheat.) 593 (1821); City of Boston v. Lecraw, 58 U.S. (17 How.) 426 (1855).

161. *See* Manigault v. Springs, 199 U.S. 473 (1905); Bedford v. United States, 192 U.S. 217 (1904); Scranton v. Wheeler, 179 U.S. 141 (1900); Eldridge v. Trezevant, 160 U.S. 452 (1896). *Cf.* Yates v. Milwaukee, 77 U.S. (10 Wall.) 497 (1871) (compensation required upon removal of wharf, where there was no showing by the city that the wharf constituted a nuisance or obstruction to navigation).

162. Gibson v. United States, 166 U.S. 269, 274-76 (1897) (congressionally authorized construction of dike in the Ohio river); United States v. Cherokee Nation, 480 U.S. 700, 704 (1987); Lewis Blue Point Oyster Cultivation Co. v. Briggs, 229 U.S. 82, 87-88 (1913); Boone v. United States, 944 F.2d 1489, 1494-95 (9th Cir. 1991). *See generally* Eva H. Morreale, *Federal Power in Western Waters: The Navigation Power and the Rule of No Compensation*, 3 NAT. RESOURCES J. 1 (1963).

163. 99 U.S. 635 (1879).

164. *Id.* at 641.

165. *Id.* at 642.

property was adversely affected by the State's efforts to re-direct some of the waters flowing to or from the Mississippi.[166]

Conversely, in *Pumpelly v. Green Bay Co.*,[167] the Court held that a taking occurred when there was a direct and substantial injury to property. There, the operation of a governmentally approved dam flooded certain private property, completely destroying its value. After rejecting statutory defenses and noting that the takings clause of the Fifth Amendment did not apply to the States, the Court examined the Wisconsin Constitution, which contained a just compensation provision similar to the Fifth Amendment. The Court noted that "this limitation on the exercise of the right of eminent domain is so essentially a part of American constitutional law that it is believed that no State is now without it . . . ."[168] The Court then rejected the argument that the injury was consequential, and held that a taking could occur when there is a "serious interruption to the common and necessary use of property . . . ."[169]

The decisions upholding police power measures directly affecting private conduct and use of private property should not be interpreted as supporting the uncompensated taking of private property. In these cases, litigants frequently sought to establish a vested or property right in the status quo, often arguing that they were being deprived of a liberty or property interest when the exercise of the police power restrained their opportunity to engage in a particular conduct or previously allowed use of property.[170] Such arguments prompted the Court to focus on the scope of the police power as well as the nature and use of property when considering a possible due process violation.[171] No "taking" of "private property" occurred

166. Withers v. Buckley, 61 U.S. (20 How.) 84 (1858) (noting that the Fifth Amendment did not apply to the States and thus deciding the case on other grounds).

167. 80 U.S. (13 Wall.) 166 (1872).

168. *Id.* at 177. Not until *Murdock v. The City of Memphis*, 87 U.S. (20 Wall.) 590 (1875), did the Court consider its jurisdiction over state law issues. *Cf.* Chicago & N.W. Ry. Co. v. Chicago, 164 U.S. 454 (1896) (federal issue must be presented in state court to seek writ of error). *See generally* MITCHELL WENDELL, RELATIONS BETWEEN FEDERAL AND STATE COURTS (1949).

169. *Pumpelly*, 80 U.S. at 179. *See also* Manigault v. Springs, 199 U.S. 473, 484-85 (1905) ("[W]here there is a practical destruction or material impairment of the value of plaintiff's lands, there is a taking which demands compensation . . . .").

170. *See generally* PAUL, *supra* note 155. Although the majority in the *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873), rejected the argument that a restraint on the exercise of a trade constituted a deprivation of property, Justice Bradley believed otherwise. *Id.* at 127.

171. The focus on the "use" of property supported the Court's conclusion in *Munn v. Illinois*, 94 U.S. 113 (1877), that businesses affected with the public interest could be regulated and that such regulation did not deprive a company of property without due process of law. *See generally* Harry N. Scheiber, *The Road to Munn: Eminent Domain and the Concept of Public Purpose in the State Courts*, *reprinted in* LAW IN AMERICAN HISTORY 329 (Donald Fleming & Bernard Bailyn eds., 1971). However, such businesses could not be required to transfer their property to private individuals. Missouri Pac. Ry. Co. v. Nebraska, 164 U.S. 403 (1896). Nor could states establish rates for such businesses when the *effect* would be confiscatory, without the payment of compensation or due process. *See* Chicago, Milwaukee & Saint Paul Ry. Co. v. Minnesota, 134 U.S. 418, 456 (1890); Stone v. Farmer's Loan & Trust Co., 116 U.S. 307 (1886); Wilcox v. Consolidated Gas Co., 212 U.S. 19, 41-44 (1909); City of Knoxville v. Knoxville Water Co., 212 U.S. 1, 16 (1909). *But cf.* Fort Smith Light & Traction Co. v.

when the exercise of the police power affected a change in the status quo—even though particular economic interests may have relied on that status quo.[172] It became axiomatic both that the legislature could not contract away the police power[173] and that "[n]o person has a vested interest in any rule of law, entitling him to insist that it shall remain unchanged for his benefit."[174] It was in this context that a commentator could confidently assert that "an act which came within the scope of the State police power could not be termed a deprivation of property."[175]

The Court held that states could constitutionally exercise their police power to regulate or prohibit an activity or use of property that interfered with another person's equal enjoyment in the use of their property. Such police power measures did not deprive an owner of any vested property interest without due process because it had become well established that no person has the right to continue using property in such a way as to harm others. In *Bartemeyer v. Iowa*,[176] for example, the defendant challenged his conviction for selling liquor, arguing that the prohibition on the sale of liquor violated the Fourteenth Amendment. The Court rejected the argument, but in so doing noted that if the prohibition applied to liquor manufactured prior to the prohibition, then a serious issue would arise as to whether it deprives an owner of property without due process of law.[177] Concurring, Justice Bradley emphasized that compensation is required when vested rights are taken away for the public good, but that no such property interest existed in *Bartemeyer*.[178]

Board of Improvement of Paving Dist. No. 16 of City of Fort Smith, Ark., 274 U.S. 387, 390 (1927) ("[T]he imposition of burdens, otherwise legitimate, upon a public service company, cannot be held invalid as confiscatory because the permitted rate does not allow an adequate return.").

172. In his treatise on constitutional limitations, Thomas Cooley observed that no vested rights exist in the status quo:

> In organized society every man holds all he possesses, and looks forward to all he hopes for, through the aid and under the protection of the laws; but as changes of circumstances and of public opinion, as well as other reasons affecting the public policy, are all the while calling for changes in the laws, and as these changes must influence more or less the value and stability of private possessions, and strengthen or destroy well-founded hopes, and as the power to make very many of them could not be disputed without denying the right of the political community to prosper and advance, it is obvious that many rights, privileges, and exemptions which usually pertain to ownership under a particular state of the law, and many reasonable expectations, cannot be regarded as vested rights in any legal sense.

THOMAS COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS 437 (1868) (Footnotes omitted).

173. Boyd v. Alabama, 94 U.S. 645 (1877) (lottery); Stone v. Mississippi, 101 U.S. 814 (1880) (same).

174. New York Cent. R.R. Co. v. White, 243 U.S. 188, 198 (1917).

175. CHARLES WARREN, 2 THE SUPREME COURT IN UNITED STATES HISTORY 572 (rev. ed. 1947).

176. 85 U.S. (18 Wall.) 129 (1873).

177. *Id.* at 133.

178. Justice Bradley explained that the law "was not in this case an invasion of property existing at the date of its passage, and the question of depriving a person of property without due process of law does not arise." *Bartemeyer*, 85 U.S. at 136. Justice Field also concurred, distinguishing *Bartemeyer* from the *Slaughter-House Cases*, where the Court upheld a state grant of a partial monopoly to one

Similarly, in *Boston Beer Co. v. Massachusetts*,[179] a company authorized to manufacture malt liquor argued that it had acquired such a vested right through its state incorporation and therefore was free from the exercise of the State's police power. The Court held liquor prohibition to be an appropriate exercise of the police power, which the state cannot divest.[180] "If the public safety or the public morals require the discontinuance of any manufacture or traffic, the hand of the Legislature cannot be stayed from providing for its discontinuance, by any incidental inconvenience which individuals or corporations may suffer."[181] The Court added, however, that "[w]e do not mean to say that property actually in existence, and in which the right of the owner has become vested, may be taken for the public good without due compensation."[182]

Bartemeyer and *Boston Beer* both confirmed the principle that police power could be constitutionally exercised to abate conduct and use of property that is noxious and harmful. The Court applied this same principle in *Northwestern Fertilizing Co. v. Hyde Park*,[183] where the police power was exercised to abate a nuisance that had been previously permitted. The state incorporated a fertilizing company to transport, manufacture and convert dead animals and animal matter into fertilizer. Subsequently, the company was given two years to stop transporting matter through Hyde Park. In an action brought against the corporation for refusing to stop its business, the company argued that its charter created a contract (or property) right that could not be impaired unless through condemnation. The Court rejected the company's argument, holding that the activity clearly involved a nuisance and that the police power "rests upon the fundamental principle that everyone shall so use his own as not to wrong and injure another. To regulate and abate nuisances is one of its ordinary functions."[184] And, since the government cannot contractually guarantee freedom from the exercise of the police power, the exercise in this instance was valid.[185]

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company in the slaughtering business, thus excluding others from engaging in the business. *Id.* at 137-38. Justice Field later wrote that the right to acquire, dispose of and use property is an inalienable right, but limited to the extent that such use "will not impair the equal enjoyment by others of their property." Crowley v. Christensen, 137 U.S. 86, 90 (1890) (upholding prohibition on the right to sell liquor).

179. 97 U.S. 25 (1878).

180. *Id.* at 33.

181. *Id.* at 32.

182. *Id.*

183. 97 U.S. 659 (1878).

184. *Id.* at 667.

185. Subsequent cases upheld the *power* to prohibit or regulate one's ability to engage in activity or conduct deemed injurious to the health and safety of others. *See* Pierce Oil Corp. v. City of Hope, 248 U.S. 498 (1919) (storing of gasoline); Northwestern Laundry v. City of Des Moines, 239 U.S. 486 (1916) (emission of Reinman v. City of Little Rock, 237 U.S. 171 (1915) (livery stables); Sligh v. Kirkwood, 237 U.S. 52 (1915) (unsafe citrus fruits); Gardner v. Michigan, 199 U.S. 325 (1905) (garbage collection and disposal); California Reduction Co. v. Sanitary Reduction Works, 199 U.S. 306 (1905) (same); Fischer v. City of Saint Louis, 194 U.S. 361 (1904) (upheld prohibition on dairy or cow stables to be built or maintained in city without permission); New York & N. E. R. Co. v. Bristol, 151 U.S. 556 (1894) (railroad crossing); Patterson v. Kentucky, 97 U.S. 501 (1878) (illuminating fluids).

Against this background, the Court decided *Mugler v. Kansas*,[186] much heralded in the briefs before the Court in *Lucas* as establishing a "nuisance" exception to the just compensation principle. But *Mugler* was simply another example of the Court's evolving response to the parade of "due process" challenges to the exercise of the states' police power. Sellers and manufacturers of alcoholic beverages challenged Kansas' law prohibiting the manufacture and sale of liquor.[187] The Court had to decide whether the state's police power could be constitutionally exercised in this fashion. Prior decisions had already established that the police power encompassed such regulation.[188] Yet, counsel for the liquor sellers argued, *inter alia*, that the prohibition was an unconstitutional attempt to deprive parties of their right to engage in the continued operation of the brewery. The state replied, *inter alia*, that parties acquire no vested right to engage in a particular business "detrimental to the public health or public morals, because of the absence of any legislation on the subject."[189]

The Court held that the Fourteenth Amendment did not restrict the exercise of the state's police power to prohibit the manufacture and sale of liquor. The Court first reviewed prior decisions upholding the state's power to regulate the manufacture and local sale of liquor. It then rejected the argument that the police power could not regulate the right to manufacture liquor for one's own use, concluding that, as in the case of *Munn v. Illinois*,[190] the power to regulate emanates from the power to protect society from the injurious consequences to others from the activity. The Court then explained that state legislatures have the power to determine what activity causes injurious consequences justifying the exercise of the police power, subject to the courts' constitutional responsibility to determine whether it is a legitimate exercise of that power.[191]

The *Mugler* Court, therefore, rejected the parties' specific argument that the prohibition must fail because they had a vested right to continue to engage in the manufacture and sale of liquor.[192] The Court held that the

186. 123 U.S. 623 (1887).

187. Kansas charged Mugler with manufacturing and selling liquor without a license in violation of the law, and Mugler challenged his conviction by claiming that he "was denied rights, privileges and immunities guaranteed by the constitution . . . ." *Mugler*, 123 U.S. at 653. In a separate action, Kansas sought to close down Ziebold & Hagelin's brewery. *Id.* at 654.

188. Foster v. Kansas, 112 U.S. 205 (1884); Boston Beer Co. v. Massachusetts, 97 U.S. 25 (1878); Bartemeyer v. Iowa, 85 U.S. (18 Wall.) 129 (1873); License Cases, 46 U.S. (5 How.) 504 (1847), *overruled by* Leisy v. Harden, 135 U.S. 100 (1890).

189. Mugler v. Kansas, 31 L. Ed. 205, 207 (1887).

190. 94 U.S. 113 (1877).

191. *Mugler*, 123 U.S. at 660-62. "If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge . . . ." *Id.* at 661. Justice Harlan's majority opinion in *Mugler* echoed other opinions by Justice Harlan, in which the Court held that the exercise of the police power had to be reasonably related to a legitimate state objective. *See* Hennington v. Georgia, 163 U.S. 299 (1896); Brimmer v. Rebman, 138 U.S. 78 (1891); Minnesota v. Barber, 136 U.S. 313 (1890).

192. The Court summarized the parties' argument as follows:

State had not and could not contract away its police power, nor had it "give[n] any assurance, or come under an obligation, that its legislation upon that subject would remain unchanged."[193] In accordance with prior decisions, the Court reaffirmed that "all property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community."[194]

The Court also refuted defendants' reliance on *Pumpelly v. Green Bay Co.*, emphasizing that *Mugler* did not involve the state's power of eminent domain; instead, "the question now before us arises under what are, strictly, the police powers of the [S]tate . . . [and] the present case must be governed by principles that do not involve the power of eminent domain . . . ."[195] It ruled that a prohibition on use cannot be deemed a deprivation of property simply because it causes pecuniary loss "by reason of their not being permitted, by a noxious use of their property, to inflict injury upon the community."[196] Lastly, the Court declined to construe the statute as necessarily authorizing the forfeiture of property lawfully in existence prior to the prohibition.[197] The Court subsequently indicated, in *Lawton v. Steele*,[198] that forfeiture of articles declared to be illegal and a nuisance, such as illegal fishing nets or diseased cattle, might rise to the level of a due process violation if the property being taken were of great value.

In his oft-repeated observation that "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking," Justice Holmes brought "due process" and "takings" analysis together.[199] From this seminal decision in *Pennsylvania Coal Co. v. Mahon* evolved the contemporary concept of a regulatory taking,[200] thus plaintiffs sought an injunction against the mining of coal underlying their property.[201]

> [I]t is contended that, as the primary and principal use of beer is as a beverage; as their respective breweries were erected when it was lawful to engage in the manufacture of beer for every purpose; as such establishments will become of no value as property, or, at least, will be materially diminished in value, if not employed in the manufacture of beer for every purpose, the prohibition upon their being so employed is, in effect, a taking of property for public use without compensation, and depriving the citizen of his property without due process of law.

Mugler, 123 U.S. at 664.

193. 123 U.S. at 669.

194. *Id.* at 665.

195. *Id.* at 668.

196. *Id.* at 669. *See generally* ERNST FRUEND, POLICE POWER, PUBLIC POLICY AND CONSTITUTIONAL RIGHTS 568-69 (1904) (explaining *Mugler* and the distinction between indirect pecuniary loss and taking, noting that the State cannot compensate for pecuniary losses incurred as result of prohibiting a specific noxious use of property). Justice Harlan, writing the majority opinion in *Mugler*, later wrote in *Chicago B. & Q. R. Co. v. City of Chicago*, 166 U.S. at 235-6, that the "[d]ue protection of the rights of property has been regarded as a vital principle of republican institutions."

197. 123 U.S. at 671-72.

198. 152 U.S. 133 (1894).

199. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).

200. 260 U.S. 393 (1922).

201. Plaintiffs had previously conveyed the subsurface estate to the company.

They alleged the removal of coal would cause the subsidence of their house, contrary to the state law known as the Kohler Act. The trial court refused to issue an injunction, holding instead the company had the right to remove the coal and that plaintiffs only sought to prevent a private injury. On appeal, the state supreme court held the Kohler Act was a police measure which did not "contemplate the taking of private property for public use," and it upheld the Act.[202]

The U.S. Supreme Court reversed, first observing, as applied to Pennsylvania Coal Company's property, the statute destroyed the company's existing contract and property rights.[203] The Court then balanced the extent of the taking, which it viewed as "great," against the public interest, which it viewed as minimal and not involving a common nuisance.[204] Thus, the Court concluded "[i]f we were called upon to deal with the plaintiffs' position alone we should think it clear the statute does not disclose a public interest sufficient to warrant so extensive a destruction of the defendant's constitutionally protected rights."[205] In the remainder of the opinion, the Court held, because the Act went too far and apparently did not

202. Mahon v. Pennsylvania Coal Co., 118 A. 491, 493 (1922).

203. Pennsylvania Coal Co., 260 U.S. at 413.

204. *Id.* at 413-414. Justice Holmes had earlier indicated that the line between an acceptable police power measure and a taking was a matter of degree. Hudson County Water Co. v. McCarter, 209 U.S. 349, 355 (1908); Rideout v. Knox, 19 N.E. 390, 392 (1889). *See also* Portsmouth Harbor Land & Hotel Co. v. United States, 260 U.S. 327 (1922) (constant firing of ammunition over property may effect taking of easement). In Missouri Pacific Ry. Co. v. Nebraska, 217 U.S. 196 (1910), for example, the state sought to require the Missouri Pacific Railroad Co. to construct a connecting line and facilities, at its own expense, to a new grain elevator nearby. The railroad refused and was then sued. It argued, *inter alia*, that the statute violated the Fourteenth Amendment. Justice Holmes began the Court's (Harlan and McKenna dissented) analysis by noting that "there is no provision in the statute for compensation to the railroad for its outlay in building and maintaining the side tracts required." *Id.* at 205. And while Holmes observed that states may "cut down" or "modify" "property rights" to a "certain limited extent" when exercising the police power, he added that "railroads, after all, are property protected by the Constitution, and there are constitutional limits to what can be required . . . for taking such property away." *Id.* at 206. Justice Holmes is viewed as having been progressive and fully supportive of the exercise of state regulatory power, and thus a noted biographer of Holmes treats the *Mahon* decision as somewhat of an aberration. G. EDWARD WHITE, JUSTICE OLIVER WENDELL HOLMES: LAW AND THE INNER SELF 392-403 (1993). For an insightful inquiry into Justice Holmes' opinion in *Mahon*, see Robert Brauneis, *The Foundation of Our Regulatory Takings Jurisprudence: the Myth and Meaning of Justice Holmes' Opinion in* Pennsylvania Coal Co. v. Mahon, 106 YALE L.J. 613 (1996). *See also* Joseph F. DiMento, *Mining the Archives of Pennsylvania Coal: Heaps of Constitutional Mischief*, 11 J. LEGAL HIST. 396 (1990); E.F. Roberts, Mining With Mr. Justice Holmes, 39 VAND. L. REV. 287 (1986); Carol M. Rose, Mahon *Reconstructed: Why the Takings Issue is Still a Muddle*, 57 S. CAL. L. REV. 561 (1984).

205. Pennsylvania Coal Co. v. Mahon, 260 U.S. at 414. The Court distinguished *Plymouth Coal Co. v. Pennsylvania*, 232 U.S. 531 (1914), where the Court had upheld a statute requiring the maintenance of pillars while mining to protect the safety of miners. The coal company had argued that the method for determining the appropriate width of the pillar violated due process. *Id.* at 540. Noted scholars have questioned whether this case even presented any serious issue warranting the Court's attention. *See* ALEXANDER M. BICKEL & BENNO C. SCHMIDT, JR., 10 THE OLIVER WENDELL HOLMES DEVISE, HISTORY OF THE SUPREME COURT OF THE UNITED STATES: THE JUDICIARY AND RESPONSIBLE GOVERNMENT 1910-1921 at 306-307 (1984).

secure any "average reciprocity of advantage,"[206] it was an unconstitutional exercise of the police power. However, the Court indicated the State's exercise of the police power, in these circumstances, would be constitutional if accompanied by just compensation.[207]

For the most part, *Mahon* represented the extreme of the myriad of due process cases that reached the Court during this century's first seventy-five years. Aside from the Court's short foray into substantive due process, and protecting property rights through an acceptance of a *laissez faire* theory of economic liberty in cases such as *Lochner v. New York*,[208] the Court generally upheld the exercise of the police power that involved restrictions on the use of property,[209] including zoning.[210] In *Hadacheck v. Sebastian*,[211] for example, the owner had for many years conducted a perfectly legal brickyard business on a plot which overlay the clay deposits used in manufacturing the bricks. As the City of Los Angeles grew, however, it annexed the area in which the brickyard was located, which became primarily residential in character. The city then passed an ordinance only prohibiting the operation of the brickyard. The ordinance did not, for example, prohibit the extraction of the clay to be transported elsewhere, or any other business which might be conducted on the site. The owner was convicted of the misdemeanor of continuing to operate the brickyard and

206. Pennsylvania Coal Co. v. Mahon, 260 U.S. at 415. A concept similar to "average reciprocity of advantage" had been used in earlier due process cases to justify the imposition of assessments on landowners for such public activities as draining swamps and building roads. *See* Davidson v. City of New Orleans, 96 U.S. 97 (1877). *But cf.* Myles Salt Co. v. Board Of Commissioners of Iberia & St. Mary Drainage District, 239 U.S. 478, 485 (1916) (held that power arbitrarily exercised where burden imposed without any "compensating advantage"). *See also*, Nashville Cent. & St. L. Ry. V. Walten, 294 U.S. 405 (1935). Justice Holmes also used the phrase in Jackman v. Rosenbaum Co., 260 U.S. 22, 30 (1922). For a good discussion of the average reciprocity of advantage concept, see Lynda J. Oswald, *The Role of the "Harm/Benefit" and "Average Reciprocity of Advantage" Rules in a Comprehensive Takings Analysis*, 50 VAND. L. REV. 1449 (1997).

207. The opinion concludes with the caveat that "we assume that an exigency exists that would warrant the exercise of eminent domain." Pennsylvania Coal Co. v. Mahon, 260 U.S. at 416.

208. 198 U.S. 45 (1905). *See generally* PAUL KERNS, JUDICIAL POWER AND REFORM POLITICS: THE ANATOMY OF LOCHNER V. NEW YORK (1990); FRANK R. STRONG, SUBSTANTIVE DUE PROCESS OF LAW: A DICHOTOMY OF SENSE AND NONSENSE (1986); Herbert Hovenkamp, *The Political Economy of Substantive Due Process*, 40 STAN. L. REV. 379, (1988); Glen E. Summers, Comment, *Private Property Without Lochner: Toward a Takings Jurisprudence Uncorrupted By Substantive Due Process*, 142 U. PA. L. REV. 837 (1993). *See also*, G. Edward White, *Revisiting Substantive Due Process and Holmes' Lochner Dissent*, 63 BROOKLYN L. REV. 87 (1997).

209. *See, e.g.*, Edgar A. Levy, Leasing Co., Inc. v. Siegel, 258 U.S. 242 (1922) (landlord-tenant law); St. Louis Poster Adver. Co. v. City of Saint Louis, 249 U.S. 269 (1919) (a ban on billboards); Murphy v. California, 225 U.S. 623 (1912) (banning billiard halls); Laurel Hill Cemetery v. City & County of San Francisco, 216 U.S. 358 (1910) (banning interments); Welch v. Swasey, 214 U.S. 91 (1909) (providing building height restrictions). *But cf.* Louisville Joint Stock Land Bank v. Radford, 296 U.S. 555 (1935) (Frazier-Lemke Act deprived mortgagee of property right); Dobbins v. City of Los Angeles, 195 U.S. 223 (1904) (questioning exercise of police power over gasworks, in light of the facts). *See also supra* note 185.

210. Gorieb v. Fox, 274 U.S. 603 (1927); Zahn v. Board of Public Works, 274 U.S. 325 (1927); Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926); *but cf.* Washington ex rel. Seattle Title & Trust Co. v. Roberge, 278 U.S. 116 (1928); Nectow v. City of Cambridge, 277 U.S. 183 (1928).

211. 239 U.S. 394 (1915).

brought a habeas corpus petition alleging that the statute violated the Due Process Clause. The Court was not asked to address whether just compensation should be paid; rather, the case focused on the effect the ordinance had in depriving the owner of his ability to continue conducting the *business* of the brickyard—just one of the many bundles of rights in the property.[212] The lower court had stated the regulation was not precluded by the fact "the value of the investments made in the business . . . will be greatly diminished."[213] The Court rejected Hadacheck's plea, which one observer has described as simply another example of a property owner attempting to continue a "pig-in-the-parlor pattern."[214]

Miller v. Schoene,[215] decided after *Pennsylvania Coal Co. v. Mahon*, is another instance in which the exercise of the police power was validated. In an effort to preserve the commercially valuable apple crop, the Virginia State Entomologist had directed that cedar trees near apple orchards be destroyed to eliminate the disease the cedar trees were suspected of transmitting. Certain cedar tree owners challenged the validity of the law. The statute provided for payment to the owners for the costs of removal of the trees and also reserved to them ownership of the felled trees. In this context, if a taking occurred, the only property interest arguably taken would have been the interest present in the trees while they were standing. The Court decided that the statute was a valid exercise of the State's police power.[216]

Next, in a case with facts somewhat similar to *Hadacheck*, the Court in *Goldblatt v. Town of Hempstead*,[217] upheld an ordinance completely banning further sand and gravel mining operations. The town of Hempstead had grown such that residential development and schools now surrounded an extensive sand and gravel pit where prior excavations had created a twenty-acre lake. What had once been a perfectly legal and unobjectionable activity now had become incompatible with its surroundings. The town passed an ordinance that effectively prohibited the excavation activity, concededly the most beneficial use of the property. The Court in this case did consider whether the regulation required the payment of just compensation, but the posture of the case offered the Court with the opportunity to avoid any lengthy analysis. After noting that "[t]here is no set formula to determine where regulation ends and taking begins"[218] the Court stated that "[h]ow far regulation may go before it becomes a taking we need not now decide, for there is no evidence in the present record which even remotely suggests that prohibition of further mining will re-

212. Professor Arnold Reitze views this case as an early example of local air pollution regulation, although he notes that the ordinance regulated only a small portion of the city that was still largely undeveloped, yet developing. ARNOLD W. REITZE, JR., AIR POLLUTION LAW 15 (1995).

213. Hadacheck, 239 U.S. at 408.

214. STRONG, *supra* note 208, at 119-121.

215. 276 U.S. 272 (1928).

216. *See generally,* STRONG, *supra* note 208, at 155-158.

217. 369 U.S. 590 (1962).

218. *Id.* at 594.

duce the value of the lot in question."[219] As a consequence, the Court simply held that the issue of whether a compensable taking had occurred could *not* be decided without further evidence and consideration of the private property owner's interest.

These three cases, *Miller*, *Hadacheck*, and *Goldblatt*, became coupled with the Court's decision in *Mugler* to form the basis for the decision in *Keystone Bituminous Coal Ass'n v. De Benedictis.*[220] In *Keystone*, Pennsylvania coal operators brought a facial challenge to the validity of a statute which required that certain coal deposits be left in place to prevent subsidence, or settling, of the surface due to mining. The Court's opinion sets out the task before the Court: "[t]he *two* factors that the Court considered relevant [in *Mahon*] have become integral parts of our takings analysis. We have held that land use regulation can effect a taking if it 'does not substantially advance legitimate state interests, . . . *or* denies an owner economically viable use of his land.'"[221] The opinion then states the essence of its holding: the application of *both* tests, not just one, demonstrates that the facial challenge must fail. First, unlike the Kohler Act, the character of the governmental action involved here leans heavily against finding a taking; the Commonwealth of Pennsylvania has acted to arrest what it perceives to be a significant threat to the common welfare. Second, there is no record in this case to support a finding similar to the one the Court made in *Pennsylvania Coal*, that the Subsidence Act makes it impossible for petitioners to profitably engage in their business or that there has been undue interference with their investment-backed expectations.[222]

The Court first determined whether the statute served a legitimate public purpose. It described prior cases as expressing "[t]he Court's hesitance to find a taking when the state *merely* restrains uses of property that are tantamount to public nuisances."[223] The Court said that this past "hesitance" to find a compensable taking when a State merely prohibits a nuisance was consistent with the notion of "average reciprocity of advantage" noted in *Pennsylvania Coal.* However, this did not end the analysis. In a footnote, the Court referenced the other rationale for the "hesitance," namely, the "simple theory" that since no individual has a right to use his property so as to create a nuisance or otherwise harm others, nothing is "taken" when the nuisance is enjoined.[224] The Court further indicates in this footnote that any "nuisance exception" to the takings guarantee is "not coterminous with the police power itself."[225]

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219. *Id.*

220. 480 U.S. 470 (1987).

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

222. *Id.* at 485.

223. *Id.* at 491 (emphasis added).

224. *Id.* at 491 n.20.

225. 480 U.S. at 491 n. 20 (quoting *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 145 (1978) (Rehnquist, J., dissenting)). In his dissenting opinion in *Keystone*, the current Chief Justice elaborated on this language, stating among other things that the exception to the takings guarantee is in fact one based not on nuisance, but premised on allowing the government to prevent a "misuse or

Such was the relevant background when the Court reasoned in *Lucas,* in deciding whether a landowner who has been deprived of all economically viable use of her land is entitled to compensation, courts must look to an independent source such as the state property law, to determine whether the limit inhered in the title to the property.

IV. IMPLICATIONS OF *LUCAS*

A. Implementation of Lucas

Since *Lucas*, courts have begun to explore the limits for finding a *per se* categorical regulatory taking.[226] It is now commonplace to distinguish between categorical regulatory takings and partial regulatory takings.[227] The former involve those situations where the government has deprived the owner of all economically viable use of the property, as in *Lucas*, while in the latter the government's actions have not been so drastic. In order to prove that the government has effected a partial regulatory taking, a property owner must prevail under an *ad hoc* factual inquiry into the particular circumstances of the case, balancing the three factors first identified by the

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illegal use" and is a "narrow" one. *Keystone*, 480 U.S. at 512 (quoting *Penn Central* (Rehnquist, J., dissenting)). In effect, if there is an exception, it is certainly wrong to label it a "nuisance" exception and it would appear to require considerably more illegality or harm than Lucas's proposed construction of two houses. The Chief Justice's dissent goes on to state that "we have not accepted the proposition that the State may completely extinguish a property interest or prohibit all use without providing compensation," a fair description of the effect of the Beachfront Management Act on Lucas's property. *Id.* at 513.

226. The *per se* categorical taking rule applies only to the taking of real property; consequently, programs that effectively deprive a property owner of money, whether through taxes, assessments, or otherwise, do not fit within the *Lucas per se* rule. *See* Branch v. United States, 69 F.3d 1571, 1576-1577 (Fed. Cir. 1995), *cert. denied*, 117 S. Ct. 55 (1996).

227. *See* Broadwater Farms Joint Venture v. United States, 121 F.3d 727 (Fed. Cir. 1997); Florida Rock Indus., Inc. v. United States, 18 F.3d 1560, 1570 (Fed. Cir. 1994); Good v. United States, 39 Fed. Cl. 81 (Fed. Cl. 1997); Norman v. United States, 38 Fed. Cl. 417, 425-426 (Fed. Cl. 1997). In some instances, however, the Federal Circuit has appeared to place the categorical taking analysis inside the triparte *ad hoc* balancing test. *See* Alves v. United States, 133 F.3d 1454, 1457 (Fed. Cir. 1998); Creppel v. United States, 41 F.3d 627, 631 (Fed. Cir. 1994). A partial taking should not be confused with a temporary taking, which occurs when the government temporarily deprives a property owner of all, or substantially all, economically viable use of the their property, and the government is responsible for "extraordinary delay" in the regulatory process. *Norman*, 38 Fed. Cl. at 426-427; *see* Anaheim Gardens v. United States, 33 Fed. Cl. 24, 36 (Fed. Cl. 1995); Tabb Lakes, Inc. v. United States, 26 Cl. Ct. 1334, 1352-54 (1992); 1902 Atlantic Ltd. v. United States, 26 Cl. Ct. 575, 579 (Cl. Ct. 1992); Dufau v. United States, 22 Cl. Ct. 156 (Cl. Ct. 1990). *See also* Lutheran Church of Glendale v. County of Los Angles, 482 U.S. 304 (1987); Agins v. City of Tiburon, 447 U.S. 255 (1980); Danforth v. United States, 308 U.S. 271 (1939). In *Bass Enters. Prod. Co. v. United States*, 35 Fed. Cl. 615 (Fed. Cl. 1996), the government sought to transform a permanent taking case into a temporary taking case, where the government denied applications for a permit to drill on the public lands but presumably did so only until other federal agencies could act. The trial court rejected the government's approach, *id.*, but the Federal Circuit concluded otherwise. Bass Enters. Prod. Co. v. United States, 133 F.3d 893 (Fed. Cir. 1998). *See generally*, Gregory M. Stein, *Pinpointing the Beginning and Ending of a Temporary Regulatory Taking*, 70 WASH. L. REV. 953 (1995).

Court in *Penn Central Transportation Co. v. New York City*:[228] "(1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the character of the governmental action."[229] The application of this *ad hoc* balancing approach generally has not been rewarding for litigants,[230] and thus the focus typically shifts to trying to establish a *per se* taking, whether as a physical occupation case, such as in *Lorreto v. Telepromter Manhattan CATV Corp.*,[231] or a *Lucas per se* categorical regulatory taking. This usually means wrestling with the "parcel as a whole" problem or determining whether *Lucas'* logically antecedent inquiry limits the property use.

The "parcel as a whole" question involves determining whether, in the first instance, the property at issue reflects the entirety of the property for the takings analysis.[232] The Court in *Lucas* largely left this issue open,[233] with the Court of Federal Claims and the Federal Circuit filling in the gap.

> To determine whether a mere diminution in value has occurred or whether the owner has in fact been denied all economically viable use, a court must compare the ratio of the land subject to restrictions with the plaintiff's entire property or "the parcel as a whole" . . . . For this reason, a court's determination of what constitutes the parcel as a whole—which has been called "the denominator problem"—is critical to this analysis. . . . In fact, the definition of the parcel often controls the entire takings analysis.[234]

In circumstances involving residential or commercial development of separately identifiable lots, these lower courts have made it clear that they will not necessarily examine the impact of any restrictions on a lot-by-lot basis.[235] The inquiry, however, nevertheless turns on the unique facts of each case, with a taking typically occurring only when the relevantly burdened lot is distinguishable from the remaining property.[236] Thus, in

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228. 438 U.S. 104 (1978).

229. *Norman*, 38 Fed. Cl. at 426 (quoting Connolly v. Pension Benefit Guar. Corp., 475 U.S. 211, 225 (1986), (quoting Penn Central Transp. Corp. v. New York City, 438 U.S. at 124)).

230. The difficulty with line drawing was discussed at length in *Florida Rock Indus., Inc. v. United States*, 18 F.3d 1560 (Fed. Cir. 1994), *cert. denied*, 513 U.S. 1109 (1995). In *Bowles v. United States*, 31 Fed. Cl. 37 (Fed. Cl. 1994), one of the few cases where the plaintiff has prevailed, the court applied both the *per se* and *ad hoc* balancing approach to find a taking. *See also* Whitney Benefits, Inc. v. United States, 926 F.2d 1169 (Fed. Cir. 1991); United Nuclear Corp. v. United States, 912 F.2d 1432 (Fed. Cir. 1990).

231. 458 U.S. 419 (1982).

232. Broadwater Farms Joint Venture, 121 F. 3d 727 (Fed. Cir. 1997); Loveladies Harbor, Inc. v. United States, 28 F.3d 1171, 1180 (Fed. Cir. 1994); *Norman*, 38 Fed. Cl. at 426.

233. *See supra* note 61 and accompanying discussion.

234. Broadwater Farms Joint Venture v. United States, 121 F.3d 727 (Fed. Cir. 1997) (citation omitted).

235. Broadwater Farms Joint Venture, 121 F.3d 727 (Fed. Cir. 1997); Tabb Lakes, Ltd. v. United States, 10 F.3d 796, 802 (Fed. Cir. 1993). *See also* Clajon Prod. Corp. v. Petera, 70 F.3d 1566 (10th Cir. 1995) (regulations limiting the number of permits available to hunt and a claim involving an alleged taking of hunting rights, with the court rejecting assertion that relevant property interest was the right to hunt).

236. For cases prior to *Lucas*, *see* Ciampitti v. United States, 22 Cl. Ct. 310 (1991); Deltona Corp.

Loveladies Harbor, Inc. v. United States,[237] the Federal Circuit considered the relevant parcel to be the 12.5 acres limited by the application of the section 404 dredge and fill (wetlands) program, not the original 250 surrounding acres that included 199 acres of already-developed property. Conversely, in *Broadwater Farms Joint Venture v. United States*,[238] the court held that all twenty-seven lots of a particular phase in the developer's project constituted the relevant parcel. The court looked to factors such as when the lots were purchased, how they were financed and how they were to be developed.[239]

The next major issue involves determining whether there are any limitations that inhere in the owner's title that would preclude a taking. This first requires distinguishing between the "logically antecedent inquiry" and an owner's reasonable investment-backed expectations.[240] As one court observed,

> The initial inquiry by the court—whether the plaintiff has a property interest—is not determined by examining whether plaintiff has "reasonable investment backed expectations." Such an inquiry is only relevant when assessing whether government regulation has effected a taking by regulation of an acknowledged and existing property interest. . . . The presence of "reasonable backed expectations" does not aid in establishing the existence of the property interest.[241]

Initially, the Court of Federal Claims concluded that federal laws can serve as relevant background principles for determining the scope of a property right.[242] In *M & J Coal Co. v. United States*,[243] for example, the

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v. United States, 657 F.2d 1184 (Ct. Cl. 1981); Jentgen v. United States, 657 F.2d 1210 (Ct. Cl. 1981). In one instance, the landowner did overcome the *ad hoc* approach. *See* Fromanek v. United States, 26 Cl. Ct. 332 (1992).

237. 28 F.3d 1171 (Fed. Cir. 1994). For a critique of the Federal Circuit's approach, *see* Michael C. Blumm, *The End of Environmental Law? Libertarian Property, Natural Law, and the Just Compensation Clause in the Federal Circuit*, 25 ENVTL. L. 171 (1995).

238. 121 F.3d 727 (Fed. Cir. 1997).

239. *Id. See also* Forest Properties, Inc. v. United States, 39 Fed. Cl. 56 (Fed. Cl. 1997) (finding that the relevant parcel was the entire 62 acre project).

240. *See generally* Lynn E. Blais, *Takings, Statutes, and the Common Law: Considering Inherent Limitations on Title*, 70 S. CAL. L. REV. 1 (1996); Fred P. Bosselman, *Limitations Inherent in the Title to Wetlands at Common Law*, 15 STAN. ENVTL. L.J. 247 (1996); John A. Humbach, *Evolving Thresholds of Nuisance and the Takings Clause*, 18 COLUM. J. ENVTL. L. 1 (1993). Since *Lucas*, Justices Scalia and O'Connor have expressed concern with a state court's ability to fabricate background principles that may not have previously existed. Stevens v. City of Cannon Beach, 114 S. Ct. 1332 (1994) (Scalia, J., dissenting from denial of cert.). For an interesting foray into "customary" law and how it might serve as background principles in a particular circumstance, *see* David J. Bederman, *The Curious Resurrection of Custom: Beach Access and Judicial Takings*, 96 COLUM. L. REV. 1375 (1996).

241. Store Safe Redlands Assocs. v. United States, 35 Fed. Cl. 726, 734 (Fed. Cl. 1996). *See also* Good v. United States, 39 Fed. Cl. 81 (1997).

242. Preseault v. United States, 27 Fed. Cl. 69, 88 (Fed. Cl. 1992), *rev'd*, 100 F.3d 1525 (1996); M & J Coal Co. v. United States, 30 Fed. Cl. 360, 367 (Fed. Cl. 1994), *aff'd*, 47 F.3d 1148 (Fed. Cir. 1995), *cert. denied*, 516 U.S. 808 (1995); Lake Pleasant Group v. United States, 32 Fed. Cl. 429, 434 (Fed. Cl. 1994) ("[T]he evaluation of plaintiff's purported property interest requires an examination of the limitations in state *and federal law* that inhere in plaintiff's title." (emphasis added)).

243. 47 F.3d 1148 (Fed. Cir. 1995).

federal circuit refused to find a taking in the federal regulation of coal mining activities that affected the public health and safety, observing that federal law can serve as a source of rules or understandings limiting the uses of property.[244] For instance, consistent with *Lucas'* reference to the federal navigational servitude,[245] lower federal courts have held that this federal servitude inheres in an owner's title and overrides any property interest in lands lying below the mean high water mark.[246]

But the argument for applying federal laws as background principles has since been rejected. In a plurality opinion by the Federal Circuit in *Preseault v. United States*,[247] the court dismissed the government's defense of the Rails-to-Trails program, when the government argued that decades of federal legislation over interstate railroads could serve as relevant "background principles" defining the scope of property rights.[248]

In *Forest Properties, Inc. v. United States* (FPI),[249] this conclusion was then adapted to a regulatory taking case involving the denial of a dredge and fill permit under section 404 of the Clean Water Act. The United States argued in *FPI* that federal laws must be considered when examining whether there were any pre-existing limits on the property owner's title.[250] The court termed this the "notice defense"— *i.e.*, that an owner who purchases property is on notice of pre-existing and valid laws restricting the development of that property.[251] The court rejected this argument, noting that the issue is relevant only when examining reasonable investment-backed expectations:

> [T]his Court believes that, where there is a regulatory permit procedure in effect, the plaintiff's compensable interest is best examined on the merits in

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244. *Id.* at 1153.

245. *Lucas*, 505 U. S. at 1029.

246. Good v. United States, 39 Fed. Cl. 81 (Fed. Cl. 1997); Marks v. United States, 34 Fed. Cl. 387, 403 (Fed. Cl. 1995), *cert. denied*, 118 S. Ct. 852 (1998); *Cf.* Kaiser Aetna v. United States, 444 U.S. 164 (1979); United States v. R. B. Rands, 389 U.S. 121 (1967); United States v. 30.54 Acres, 90 F.3d 790 (3d Cir. 1996).

> The holdings of the Supreme Court and the Federal Circuit establish that the Government owes no compensation for injury or destruction of a claimant's rights when they lie within the scope of the navigational servitude, which encompasses, at least, properties below the [mean high water mark].

Applegate v. United States, 35 Fed. Cl. 406, 414-415 (Fed. Cl. 1996). *See also* Lechuza Villas West v. California Coastal Comm'n, 60 Cal. App. 4th 218, 70 Cal. Rptr. 2d 399 (1997) (limitations on development below the mean high tide, where those lands are considered state lands under state law).

247. 100 F.3d 1525 (Fed. Cir. 1996).

248. *Id.* at 1538. The analysis in *Preseault* is questionable. It essentially focuses on the lack of any enforcement of a federal law to protect against any harm; the court also treats the case as a physical takings case and not a regulatory takings case. *Id.* at 1539-1540. *Cf.* The Chevy Chase Land Co. v. United States, 37 Fed. Cl. 545, 583 (Fed. Cl. 1997) (following *Preseault*, but questioning its reasoning by further suggesting that pre-existing federal limitations may provide such a basis for limiting rights in property). *See also* Kim v. City of New York, 681 N.E.2d 312, 314-315 (1997) (noting that antecedent inquiry applied to both physical and regulatory takings).

249. 39 Fed. Cl. 56 (Fed. Cl. 1997).

250. *Id.* at 71.

251. *Id.*

> terms of the owner's reasonable investment-backed expectations and not as a threshold matter in terms of whether or not the landowner owned a compensable property interest.[252]

The court proceeded to conclude that the proposed dredging and filling of the lakebottom property in *FPI* would not have been prohibited under state nuisance or property law "such that the use was not a part of the plaintiff's ownership interest."[253]

This distinction between reasonable expectations[254] and the logically antecedent inquiry is particularly significant if the latter inquiry is limited to state nuisance and common law. In *Store Safe Redlands Associates v. United States*,[255] for instance, the Court of Federal Claims rejected the government's argument that expectations can define the property interest. It offered the following observation of where the government's argument could lead:

> Under such logic, Congress could pass a law that stated that no one could build on their property. After all property had passed hands once, the right to build on one's property would be lost to everyone. Such an argument is not based on the property law of any American state or upon the Constitution of the United States.[256]

But, of course, this observation misses the mark. Just as state nuisance and property law do, federal and state statutory law define the contours of property interests.[257] Congress could indeed pass such a law and subsequent purchasers ought to be foreclosed from arguing they have a

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252. *Id.* at 71-72.

253. *Id.* at 72.

254. Avenal v. United States, 100 F.3d 933, 937 (Fed. Cir. 1996) (entrepreneurs should have expected government actions); Branch v. United States, 69 F.3d 1571, 1582 (Fed. Cir. 1995) (expectations in the bank regulatory field); Klump v. United States, 38 Fed. Cl. 243, 249 (Fed. Cl. 1997) (federal regulations defined reasonable investment-backed expectations for unauthorized cattle grazing on public lands); Abrahim-Youri v. United States, 36 Fed. Cl. 482, 486 (Fed. Cl. 1996) (government involvement in international commerce a part of the reasonable investment-backed expectations of those engaged in such commerce), *aff'd*, No. 97-5011, 1997 U.S. App. LEXIS 35321 (Fed. Cir. Dec. 4, 1997); Bass Enter. Prod. Co. v. United States, 35 Fed. Cl. 615, 620 (Fed. Cl. 1996), *rev'd and remanded*, 133 F.3d 893 (Fed. Cir. 1998).

255. 35 Fed. Cl. at 735.

256. *Id.* The court further reasoned that, because property rights run with the land, it would be illogical to preclude a property owner from challenging regulatory actions that predated the owner's purchase of the property. *Id.*

257. *See* Blais, *supra* note 240. *See also* Kim v. City of New York, 681 N.E.2d 312 (N.Y. 1997); Anello v. Zoning Bd. of Appeals, 678 N.E.2d 870 (N.Y. 1997); Hunziker v. State, 519 N.W.2d 367 (Iowa 1994). In *Kim*, the court observed that,

> [i]t would be an illogical and incomplete inquiry if the courts were to look exclusively to common-law principles to identify the pre-existing rules of State property law, while ignoring statutory law in force when the owner acquired title.... [T]o accept this proposition would elevate common law over statutory law, and would represent a departure from the established understanding that statutory law may trump an inconsistent principle of the common law....

681 N.E.2d at 315. The court in *Kim* also distinguished a footnote in Nollan v. California Coast Comm'n, 483 U.S. 825, 833 n. 2 (1987), that at first glance might have suggested a contrary approach, noting that in that case there was no pre-existing restriction on the relevant property interest. *Id.* at 316 n. 3.

property right in the first instance. After all, "no one is considered to have a property interest in a rule of law."[258] If the law changes and all development is precluded, just as if alcohol, cigarettes or firearms are subsequently banned, those who obtain the relevant property after the law is changed cannot argue they have been deprived of anything as a consequence of the changed law.[259] Any other approach would turn the clock back to the nineteenth century, when businesses argued that they had a property interest in the continued ability to engage in certain businesses, free from governmental interference. The appropriate answer to the concern animating the court in *Store Safe* is to note that its hypothetical overlooks the obvious: existing owners would still be able to sue for a takings,[260] and such a law effectively would freeze property ownership and force the takings lawsuits.[261] In short, there would be no new owners.

Yet, even if federal law is irrelevant to the logically antecedent inquiry, it may nevertheless limit an owner's reasonable investment-backed expectations when a categorical *per se* taking is unavailable. Federal law may put a subsequent purchaser of property on notice of restrictions on the use of property, thus limiting that owner's reasonable expectations.[262] "Generally, when an owner buys property with knowledge of restrictions upon the development of that property, he assumes the risk of any economic loss."[263] In *Good v. United States*,[264] for instance, the plaintiff argued that the denial of a permit to dredge and fill wetlands and access navigable waters constituted a taking.[265] In dismissing plaintiff's claim, the court, in part, looked to the pervasive pre-existing federal regulatory regime as limiting the plaintiff's reasonable investment-backed expectations.[266]

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258. Branch v. United States, 69 F.3d 1571, 1577-1578 (Fed. Cir. 1995), *cert. denied*, 117 S. Ct. 55 (1996). *See also* American Commerce Nat'l Bank v. United States, 38 Fed. Cl. 271 (Fed. Cl. 1997).

259. As the Supreme Court has said:

> [E]ven with respect to vested property rights, a legislature generally has the power to impose new regulatory constraints on the way in which those rights are used, or to condition their continued retention on performance of certain affirmative duties. As long as the constraint or duty imposed is a reasonable restriction designed to further legitimate legislative objectives, the legislature acts within its powers in imposing such new constraints or duties.

United States v. Locke, 471 U.S. 84, 104 (1984).

260. *See e.g.*, Cook v. United States, 37 Fed. Cl. 435 (Fed. Cl. 1997) (change in law that precluded mining claimant on public land from obtaining fee simple title to property).

261. The court in Anello v. Zoning Bd. of Appeals, 678 N.E.2d 870 (N.Y. 1997), made this precise point. *See also* Basile v. Town of Southampton, 678 N.E.2d 489, 490-491 (N.Y. 1997) ("Whatever taking claim the prior landowner may have had against the environmental regulation of the subject parcel, any property interest that might serve as the foundation for such a claim was not owned by claimant here who took title after the redefinition of the relevant property interests . . . .").

262. "A regulatory scheme affecting the property at issue at the time of purchase can significantly discount an owner's investment-backed expectations." Forest Properties, Inc. v. United States, 39 Fed. Cl. 56, 76 (Fed. Cl. 1997).

263. Atlas Enters., Ltd. v. United States, 32 Fed. Cl. 704, 708 (Fed. Cl. 1995).

264. 39 Fed. Cl. 81 (Fed. Cl. 1997).

265. *Id.* at 84.

266. *Id. Compare* United Nuclear Corp. v. United States, 912 F.2d 1432, 1436 (Fed. Cir. 1990) In *United Nuclear,* the court observed that the fact that United agreed that the leases would

These issues-the denominator problem, the independent source to which courts should look for guidance in evaluating whether a *Lucas*-like taking has occurred, and the role of an owner's reasonable investment-backed expectations-were not conclusively resolved by the Court in *Lucas*. Consequently, lower courts are left to grapple with these issues on their own with only limited guidance from the Supreme Court. With respect to the second of these issues, the Federal Circuit appears to be taking an overly restrictive approach. The *Lucas* court spoke of looking at background principles, such as state property and the common law, to determine whether a limitation inheres in the title to an owner's property; it did not command courts to look exclusively at this as a source. Background principles-state and federal, statutory and common law-play an important role not only in determining whether an individual's investment-backed expectations are reasonable, but also in the proper conception of property and property rights. *Lucas* did not foreclose the recognition of such broader principles.

B. Lucas and Utility Rate Setting

In another corner of the takings realm, *Lucas* is likely to have a less prominent role. Within the context of ratemaking, *Duquesne Light Co. v. Barasch*[267] still stands out as the preeminent takings case.[268] In *Duquesne*, the Supreme Court faced a claim by a utility that, by enacting legislation which prohibited the setting of rates based on physical plants until those plants became operational, the Pennsylvania legislature took the company's property without providing just compensation. Duquesne Light Company (Duquesne) joined a venture in 1967 to build seven nuclear power plants.[269] After the oil price increases and the Three Mile Island accident in the 1970s, the outlook for the demand for nuclear energy fell, and the plans for four of the plants were canceled. Duquesne sought permission from the Pennsylvania Public Utility Commission (PUC) to recover the capital already invested in the canceled plants through a ten-year amortization.[270] The PUC found that the investment in the nuclear facilities was prudent when made and granted the utility's request.[271] The Pennsylvania Office of Consumer Advocate asked the PUC to reconsider in light

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be subject to future regulation does not indicate that United fairly can be said to have anticipated that the Secretary would apply a new policy requiring tribal approval of mining plans to leases entered into almost six years earlier, in reliance on which United had expended some $5 million. *Id.*

267. 488 U.S. 299 (1989).

268. For a more detailed discussion of *Duquesne* and its implications, see The Honorable Richard Cudahy, *Comment: Shedding Light on Duquesne*, 12 ENERGY L.J. 259 (1991); A. Lawrence Kolbe & William B. Tye, *The Duquesne Opinion: How Much "Hope" Is There for Investors in Regulated Firms*, 8 YALE J. ON REG. 113 (1991); Richard Goldsmith, *Utility Rates and "Takings,"* 10 ENERGY L.J. 241 (1989). *See generally*, Richard J. Pierce, Jr., *Public Utility Regulatory Takings: Should the Judiciary Attempt to Police the Political Institutions*, 77 GEO. L. J. 2031 (1989).

269. *See Duquesne*, 488 U.S. at 302.

270. *Id.*

271. *Id.* at 302-03.

of a recent Pennsylvania legislative enactment, which limited consideration of certain costs in a utility's rate base.[272] The PUC reaffirmed its decision, relying on the fact that, by allowing Duquesne to amortize the capital over ten years, the PUC was not allowing these costs in the rate base.[273] The Office of Consumer Advocate appealed, and the Commonwealth court determined that the PUC had correctly interpreted the statute.[274] The Pennsylvania Supreme Court, however, reversed.[275] It rejected the utility's argument that the law took the utility's property without just compensation.[276]

The Supreme Court of the United States granted certiorari and upheld the state supreme court's decision.[277] In reaching its conclusion, the Court evaluated and rejected the utility's taking claim. The Court stated that the guiding principle for takings claims in the ratemaking context "has been that the Constitution protects utilities from being limited to a charge for their property serving the public which is so 'unjust' as to be confiscatory . . . . If the rate does not afford sufficient compensation, the State has taken the use of utility property without paying just compensation and so violated the Fifth and Fourteenth Amendments."[278] In determining whether a rate is confiscatory, however, courts must look at the total effect of the rate order and recognize that the justness and reasonableness of a rate for a utility will depend on the risks under a particular rate-setting system.[279] Performing this analysis, the Court concluded that the Pennsylvania rate system did not transgress constitutional bounds. "The Constitution within broad limits leaves the States free to decide what rate-setting methodology best meets their needs in balancing the interests of the utility and the public."[280]

One would expect little change in the courts' analysis of takings claims within the utility rate-setting area after *Lucas*. First and foremost, the Court in *Lucas* focused primarily on the limits of the government's ability to restrict an owner's use of his land.[281] Because this focus is significantly different from the focus in *Duquesne*, the analysis for determining whether a rate has been set too low as to amount to a taking is unlikely to be affected. Second, one of the key issues in most regulatory takings cases outside the utility rate context is the denominator problem: against what parcel does a court measure the loss of economic value? When it comes to a

272. *Id.* at 303 (citing S.B. 893, 181st Leg., 1987-88 Reg. Sess. (Pa. 1987)).

273. *See Duquesne*, 488 U.S. at 304.

274. *Id.* at 305 (citing Cohen v. Pennsylvania P.U.C., 494 A.2d 58 (Pa. Commw. 1985)).

275. *Id.* (citing Barasch v. Pennsylvania P.U.C., 532 A.2d 325 (Pa. 1987)).

276. *See Duquesne*, 488 U.S. at 305 (citing 532 A.2d at 335).

277. *See Duquesne*, 488 U.S. at 316.

278. *See Duquesne*, 488 U.S. at 307-08 (citations and quotations omitted).

279. *Id.* at 310. The Court noted that one of the elements that is always relevant in evaluating whether a rate is confiscatory "is the return investors expect given the risk of the enterprise." *Id.* at 314 (citing F.P.C. v. Hope Nat. Gas Co., 320 U.S. 591, 603 (1944)).

280. *See Duquesne*, 488 U.S. at 316.

281. *See Lucas*, 505 U.S. at 1027-28.

utility's claim that a rate is so low as to be confiscatory, the Court has already resolved the denominator problem. Rather than focus on any individual element of a rate order, courts are to evaluate the effect of the entire rate order on the utility's property.[282] This, too, is likely to minimize the effect of *Lucas* on rate-setting proceedings. Next, unlike the typical regulatory takings case, utilities do receive compensation for having their property devoted to public service—the rates charged and collected. The question in this context is simply whether the compensation is just: whether the rates charged are so unjust and unreasonable so as to be confiscatory. Such an inquiry is significantly different than the one the Court faced in *Lucas*, where Mr. Lucas was deprived of all economic use of land.[283] Rarely in a rate-setting context would a utility's claim rise to this level of economic deprivation.

Finally, *Lucas* recognized that, as an antecedent inquiry, courts must look to background principles to determine whether the restriction complained of inhered in the title to the owner's property.[284] Although this inquiry cannot be transposed directly to the utility rate-setting context—utilities voluntarily devote their property to public service in exchange for an adequate return on capital—an analogous inquiry can be made. A utility operates within a heavily regulated environment in which public utility commissions set the rates a utility may charge. Given such background principles, it would be unreasonable for a utility to demand the method for determining rates never change, unless the state is willing to pay compensation for every regulatory change. Under *Duquesne*, states must pay compensation to utilities only if the change in methodology makes the set rates confiscatory. In short, the Court's pronouncements in *Lucas* should have little effect on its decision in *Duquesne*.[285]

V. CONCLUSION

Is the decision in *Lucas v. South Carolina Coastal Council* a "revisionist reading of venerable precedents" as stated by Justice Stevens or is it simply an unexceptional resort to existing principles? It is probably more of the latter than the former, although it is beginning to play a major role in the raging dialogue over striking the appropriate balance between private property and environmental regulation: how should we regulate wetlands yet protect property rights; how should we protect endangered species and their habitat without unwisely taking property rights; how should we handle utilities' stranded costs associated with moving to a more competitive electric industry; and, how should we control the flow of water in

282. *See Duquesne,* 488 U.S. at 310.

283. *See Lucas*, 505 U.S. at 1003.

284. *See Lucas*, 505 U.S. at 1027-28.

285. A Westlaw search reveals that only one federal case cites to both *Lucas* and *Duquesne*. *See* Garelick v. Sullivan, 987 F.2d 913 (2d Cir. 1993). The case does not involve utility rate setting, but instead is a case in which the court rejected regulatory takings claims that allege a federal statute setting limits on the amounts physicians could charge Medicare patients amounted to a compensable taking.

western rivers and streams without depriving farmers of their irrigation water. These are vital issues to the nation's future, and the lower courts are beginning to grapple with the more formidable issues left unresolved in the *Lucas* decision. In one area, for instance, they are applying Justice Scalia's instruction—to look to background principles to determine if prohibition of a given use inheres in the title to the property—too narrowly. A broader antecedent inquiry is called for, as federal and state law, statutory and common law, shape individuals' property interests.