

**Regulatory Takings: A Historical Overview
and Legal Analysis
for Natural Resource Management**

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TABLE OF CONTENTS

FOREWORD	iii
EXECUTIVE SUMMARY	1
INTRODUCTION	3
BACKGROUND	5
What Is a Taking?	5
Purpose and Effect of the Takings Clause	6
Effect of the Due Process Clause	6
Interpretation of the Takings Clause	7
EARLY CASES	8
Regulations Upheld as Exercise of Police Powers	8
<i>Munn v. People of Illinois</i>	8
<i>Mugler v. State of Kansas</i>	10
<i>Hadacheck v. Sebastian</i>	12
<i>Perley v. State of North Carolina</i>	14
The Genesis of Regulatory Takings	15
<i>Pennsylvania Coal Company v. Mahon</i>	16
The Dominance of Police Powers	18
<i>Village of Euclid v. Ambler Realty Company</i>	18
<i>Miller v. Schoene</i>	19
MODERN CASES	20
The Preservation of Police Powers	21
<i>Goldblatt v. Town of Hempstead</i>	21
<i>Penn Central Transportation Company v. City of New York</i>	22
<i>Andrus v. Allard</i>	26
<i>Kaiser Aetna v. United States</i>	27
Providing Additional Guidelines	29
<i>Agins v. City of Tiburon</i>	30
<i>Pruneyard Shopping Center v. Robins</i>	31

<i>Loretto v. Teleprompter Manhattan CATV Corp.</i>	33
<i>Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City</i>	36
<i>Keystone Bituminous Coal Association v. DeBenedictis</i>	39
Restricting Government Power	42
<i>First English Evangelical Lutheran Church of Glendale v. County of Los Angeles</i>	42
<i>Nollan v. California Coastal Commission</i>	45
<i>Lucas v. South Carolina Coastal Council</i>	47
<i>Dolan v. City of Tigard</i>	51
APPLICATION OF CASES TO HYPOTHETICAL SITUATIONS	54
Hypothetical Situation A1	54
Hypothetical Situation A2	55
Hypothetical Situation B1	56
Hypothetical Situation B2	58
Hypothetical Situation B3	58
Hypothetical Situation C	60
SUMMARY AND CONCLUSIONS	62
Summary	62
<i>Regulations Upheld as Exercise of Police Powers</i>	62
<i>The Genesis of Regulatory Takings</i>	64
<i>The Dominance of Police Powers</i>	65
<i>The Preservation of Police Powers</i>	66
<i>Providing Additional Guidelines</i>	69
<i>Restricting Government Power</i>	72
Conclusions	76

FOREWORD

We are a nation of laws, and the balance between the rights of the individual and the rights of society as a whole have been a major focus in the development of the legal foundation that underpins our society. In the context of our legal framework in the United States, power sharing between the government and the governed that began with the Magna Carta and English Common Law was significantly refined in the U.S. Constitution's guarantees of individual rights and freedoms. The original intent of the Constitution has now been further refined by two centuries of case law that have provided substantial clarification and interpretation.

As an extension of prevailing ethical standards, the law serves in part to regulate the behavior of individuals toward other individuals, holding together the fabric of peaceful, functioning society. In what has been termed "mutual coercion by mutual consent," we as individuals agree not to rob so that we ourselves might not be robbed, or to stop at a red light so that we might proceed through an intersection confident of our safety when the light is green. Disagreements over individual rights are often depicted as a vulnerable citizen up against the overwhelming power of a faceless bureaucratic government. Thanks to the protections in the Constitution, however, the "government" is still us. These disagreements are between individual citizens and the collective citizenry. They are about the extent to which we perceive a need to set standards for certain behaviors by our neighbors, and thereby agree to uphold those standards ourselves as individuals.

This tension between individual rights and the rights of society as a whole is inherent in our form of government, and the continuation of the debate is a sign that our democracy is still healthy and vigorous. The law is a living, dynamic institution. While it seldom reflect fads, it does continue to evolve to reflect changing social values and an advancing common code of moral and ethical behavior.

This discussion paper by Susan Stedfast chronicles the evolving interpretation in case law of the point at which governments' efforts to conserve natural resources and protect environmental quality for society as a whole incurs unfairly upon individual rights, thus becoming a "regulatory taking" deserving of compensation to the individual. Where this evolution is leading will be of major importance to the future of forest conservation in the United States. The forest land ownership pattern in the U.S. is unique among the developed countries of the world in that it is four-fifths private. Three-fifths of the nation's forest land is owned by individuals, who number in the millions. In addition to their value to their individual owners, these resources provide a variety of substantial and important public values--pure and abundant water, clean air, wildlife habitat, recreation opportunities, and a renewable supply of wood and fiber.

The laws of economics tell us that as a resource becomes more scarce it becomes more valuable. On private forest lands, all of these resources--those whose benefits accrue primarily

to the individual owner as well as those that accrue to society as a whole--are becoming more scarce and more valuable. This can be seen in declining habitat that threatens the continued existence of numerous species of animals and plants, and in the declining area available for growing wood as ecologically-sensitive public forest lands are withdrawn from intensive timber production.

And so the balancing act continues, and the courts will increasingly be turned to for guidance on the extent to which it is the civic duty of private forest landowners to protect scarce public values, and when the needs of society go beyond landowners' call of duty.

This discussion paper is intended as a reference resource, but also as a mechanism to help focus the debate on regulatory takings in natural resources conservation. It summarizes the major court cases relating to regulatory takings in environmental protection and natural resource conservation. It also helps to frame the issues at the center of the debate over what will be the appropriate balance between the rights of the individual and of society in a nation dedicated to democracy, and also to the stewardship of the natural resources and special places that have made this nation great, and defined the unique character of its people and culture.

The Pinchot Institute would like to thank the many individuals who provided advice and assistance in the preparation of this discussion paper. In particular, we would like to thank John Echeverria, Michael Gippert, James McElfish, and Eric Olson who provided technical review and guidance on the early drafts. We hope that this discussion paper will further inform and enrich a necessary and healthy debate that will help guide us all in addressing the growing challenges in conserving both our natural heritage and our democratic ideals.

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EXECUTIVE SUMMARY

This report examines court opinions relating to the issue of regulatory takings. Through this examination, factors and guidelines for application in regulatory takings cases are delineated. These factors and guidelines, summarized as follows, outline the relevant considerations for those who fear they have been subjected to a regulatory taking, as well as those who wish to steer clear of the accusation of having committed a regulatory taking.

- When presented with a regulatory taking claim, a court will first consider whether the claim before it is ripe for review. Has the party claiming a regulatory taking obtained a final decision from the relevant decisionmaking body and utilized available inverse condemnation procedures?
- Regulatory takings cases will be decided on a case by case basis: in general the outcome of no case is predetermined by the court's guidelines and the facts of each case must be considered.
- Generally the court will consider three factors: 1) the economic impact of the regulation on the owner's property; 2) the degree of interference with the owner's investment-backed expectations; and 3) the character of the governmental action alleged to have effected a regulatory taking.
- The court will consider a regulation's effect upon the owner's entire property, not simply portions thereof.
- A taking will always be deemed to have taken place where the governmental action involves a permanent physical occupation of property, regardless of whether the area occupied is small or is occupied by objects or individuals.
- A regulation which denies an owner of all economically beneficial or productive use of its land constitutes a regulatory taking. An exception to this guideline exists: the government may deny an owner all economically beneficial or productive use of its land if the uses prohibited are otherwise denied to the owner by other sources of law, such as state common law.
- An owner can obtain compensation from the government for the effect of a

regulation even if the regulation is subsequently invalidated, so long as the taking deprives the owner of all use of its property for a period of time. The compensation received would relate to that period during which the regulation was still in effect.

- Some regulatory taking guidelines and factors apply specifically to cases involving land use regulations:

- A land use regulation does not result in a taking if it substantially advances legitimate state interests and does not deny an owner economically viable use of its land.

- When a land use regulation involves exactions (e.g., the government requiring a landowner to dedicate a portion of its property to the public as a permit condition), the government must show 1) that a connection, an essential nexus, exists between the exaction imposed and the interest sought to be protected (in order for there to be a finding that the government is substantially advancing legitimate state interests), and 2) that the exaction imposed bears a reasonable relation to the legitimate state interests.

- The government must, in order to make the two showings just described, engage in an individualized determination which evidences that the exaction in its nature and extent is related to the state interests to be protected.

INTRODUCTION

The past five years have witnessed a nearly explosive increase in the intensity of the public debate on how best to use our nation's natural resources. Already well-established are the national environmental groups, which have supported increased regulation and engaged in litigation for the enforcement of existing regulations. In these efforts, the environmental groups have sought to secure the public interest through the conservation and, in instances, preservation of natural resources. Newer to the scene is the Wise Use Movement, which seeks to represent the views of private landowners and businesspeople in the debate over natural resource policy. To represent these views, the Wise Use Movement advocates decreased regulation and the protection of private landowners' rights. Like the environmental groups, the Wise Use Movement focuses much of its energy on the legislative process in order to obtain policies, laws and regulations consistent with its positions.

No doubt the environmental groups draw inspiration for their ongoing efforts from the large number of environmental statutes enacted in the 1970s. These same statutes, however, have also likely functioned as a catalyst for the Wise Use Movement; each additional grant of governmental regulatory authority increases the possibility of undue regulatory activity. The additional regulatory authority granted by Congress in the 1970s includes that contained in the Coastal Zone Management Act, the Endangered Species Act, and the Clean Water Act.

The Coastal Zone Management Act of 1972 provides for, among other things, grants to state governments for the development and implementation of state coastal zone management programs. More specifically, the statute envisions land and water use planning and regulation, increasing the likelihood of coastal zone regulation and land use restrictions not always welcome by landowners within the zone. The Endangered Species Act of 1973 and its related regulations prohibit significant habitat modification or degradation which kills or injures an endangered species. The Endangered Species Act therefore provides another basis for regulation of property, which in turn may result in claims of unwarranted governmental interference. The Clean Water Act of 1977 expands section 404, enacted earlier as part of the Federal Water Pollution Control Act Amendments of 1972. Section 404 restricts the discharge of dredged or fill material into

navigable waters and authorizes the issuance of permits as exceptions to such restrictions. Conceivably a denial of a section 404 permit for the filling of a wetland could render a property economically useless to its owner and result in the restricted landowner bringing claims against the government.

As the level of regulation aimed at protecting natural resources and the environment has increased, so has the number of individuals and entities impacted. Thus, in the debate over the best use of natural resources, we hear the voices of not only the environmental groups and the Wise Use Movement but also the voices of large industrial corporations, regulatory agencies, federal, state and local governments, as well as those of interested citizens who rely upon natural resources for income or for recreational opportunities. A recurring issue in the debate is the appropriate level of government regulation of natural resources. Environmental groups have proposed maintaining or increasing current levels of regulation, while the Wise Use Movement favors decreasing current levels or eliminating regulation. A variety of intermediate positions are espoused by others involved in the debate. The debate is also intensified by the assertion made by some that in many instances the level of regulation to which a landowner is subject is so high that an unconstitutional taking has occurred.

The debate over the appropriate level of regulation raises additional issues with long-term implications of their own. If the level of regulation is such that landowners often claim an unconstitutional taking, costly and time consuming litigation will likely follow. Similar litigation will ensue to the extent that landowners who disfavor environmental regulations contest the enforcement of such regulations. To the extent that courts decide in favor of landowners challenging regulations, the effectiveness of regulation for management of natural resources will decrease. However, to the extent that landowner claims are found invalid, it is the landowners' efforts and resources that will have been wasted.

As a better understanding of what may amount to an unconstitutional regulatory taking will assist all of those involved in the debate over determination of an appropriate level of regulation, a reexamination of regulatory takings case law is needed. Recent court decisions on this issue further accentuate the need for a fresh look at regulatory takings case law. The following is intended as a survey and analysis of existing regulatory takings case law for use by

resource managers, policymakers, private landowners, activists, and interested citizens alike.

BACKGROUND

What Is a Taking?

The Fifth Amendment to United States Constitution provides, in part, "nor shall private property be taken for public use, without just compensation."¹ Each of the terms contained in the provision (property, taken, public use, just compensation) is subject to interpretation and has been analyzed in court decisions. Most takings cases center upon the question of whether a taking of property has indeed occurred. Generally, for the purpose of the Fifth Amendment, property may be taken in two ways. The government may intrude directly on private property and take possession of it, or the government may so limit or regulate the use of the property that the effect is the same as if the government had actually taken possession of the property. Takings by the second method are described as regulatory takings.

Note that while a court may conclude that the government has engaged in a taking, not all takings are unconstitutional. It is the absence of just compensation which makes a taking unconstitutional. Landowners can obtain compensation for a taking in one of two ways. If his or her property is taken by direct intrusion, the government should initiate a condemnation proceeding in court. In the course of this proceeding, the appropriate level of compensation will be determined and ordered paid by the government to the landowner. If the government does not initiate a condemnation proceeding, or if the landowner believes that a taking has occurred because of undue regulation, the landowner may initiate an inverse condemnation proceeding. As with the condemnation proceeding, in an inverse condemnation proceeding the appropriate level of compensation will be determined and ordered paid by the government to the landowner.

¹ U.S. Constitution, amend. V.

Purpose and Effect of the Takings Clause

The Fifth Amendment, which contains the takings clause, was added to the Constitution in 1791 along with nine other amendments. These amendments, also known as the Bill of Rights, were adopted as limitations on the powers of the federal government. Having recently engaged in a revolution to overthrow British control in the country, Americans were wary of granting excessive power to the new federal government. Through the takings clause, they rendered it impermissible for the federal government to take property without paying just compensation to the landowner. While the takings clause was initially adopted as a limitation on the powers of the federal government, the U.S. Supreme Court has since declared that the clause also applies to state governments. The takings clause became applicable to state governments through the adoption of the Fourteenth Amendment in 1868, which prohibits states from denying a person the privileges he or she enjoys as a citizen of the United States (including just compensation for the taking of private property).²

Effect of the Due Process Clause

In addition to containing the takings clause, the Fifth Amendment also contains the due process clause, which provides "No person shall . . . be deprived of life, liberty, or property, without due process of law"³ The Fourteenth Amendment, which applies to the states directly, contains an almost identical due process clause. It should be emphasized that, in early cases, the Supreme Court generally determined the constitutionality of regulations by applying the requirements of one of these due process clauses. It was not until the 20th century that the Court increasingly assessed regulations with regard to the requirements of the takings clause. Under takings clause analysis, if the regulation is found unconstitutional, the government is (as noted above) required to pay compensation. Under due process analysis, if the regulation is

² The Supreme Court stated in *Penn Central Transportation Company v. City of New York*, 438 U.S. 103, 122 (1978), "the Fifth Amendment . . . of course is made applicable to the States through the Fourteenth Amendment, see *Chicago, B. & Q. R. Co. v. Chicago*, 166 U.S. 226, 239, 17 S.Ct. 581, 585, 41 L.Ed. 979 (1897)"

³ U.S. Constitution, amend. V.

found unconstitutional, it is invalidated. Despite this distinction, the Court has often cited due process analysis cases as precedent in deciding takings clause analysis cases. As a result, the line between the two types of analyses has been blurred. In addition, the earlier due process cases not only demonstrate the Court's initial attempts to deal with regulation but also elucidate the Court's later regulatory takings decisions. For these reasons, due process analysis cases as they relate to the issue of regulatory takings will be considered in this paper.

Interpretation of the Takings Clause

As the United States Supreme Court itself has admitted, "[t]he question of what constitutes a 'taking' for purposes of the Fifth Amendment has proved to be a problem of considerable difficulty."⁴ The Supreme Court has decided takings cases on a case by case basis, examining the circumstances of each individual case to determine whether a taking has occurred. Nonetheless, as successive takings cases have been decided, the Court has delineated factors to be considered in making case by case determinations. It may be questioned, however, whether the Court has applied these factors consistently. In addition, as with many areas of the law, new factors and guidelines, as enunciated by the Court, are often not susceptible to prediction. Despite all of this, a review of regulatory takings case law does discern some general rules for those seeking to assert a takings claim, as well as those seeking to avoid such assertions. The following serves as a survey of the sometimes meandering road that is the Court's regulatory takings jurisprudence and attempts to provide some sense of the Court's current direction on the issue of regulatory takings.⁵

⁴ Penn Central, 438 U.S. at 104.

⁵ This report will address primarily the court opinions of the U.S. Supreme Court, which, as the highest court in the United States, develops, through its opinions, precedent binding upon all other courts in the United States.

EARLY CASES

Regulations Upheld as Exercise of Police Powers

Challenges to government regulation were evident even in the 19th century. However, in the most often cited cases from this period the challenges failed and the regulations were upheld as valid exercises of the police powers by state governments.

Munn v. People of Illinois

As early as 1876, we have an example of a private business owner bringing a claim of unconstitutional regulation to court. In *Munn v. People of Illinois*,⁶ a court found that Munn had operated a public warehouse without a license in violation of an Illinois statute. Following the state court's judgment in Munn's case, he claimed the statute, which required licenses as part of a regulatory scheme to fix maximum prices for the storage of grain in warehouses, was unconstitutional. The ensuing court case was ultimately appealed to the U.S. Supreme Court.

Munn asserted that, among other provisions, the Illinois statute violated the Fourteenth Amendment's due process clause. The Court found that the General Assembly of Illinois had committed no violation of the U.S. Constitution by its enactment of the regulatory statute. The Court stated two bases for its decision: 1) the police powers; and 2) the public nature of Munn's business.

As to the police powers, the Court reflected upon the formation of the United States noting that the people granted to the government the power to act "as they deemed necessary for the common good and the security of life and property."⁷ As a result, "[w]hen one becomes a member of society, he necessarily parts with some rights or privileges which, as an individual not affected by his relations to others, he might retain."⁸ Citing the maxim *sic utere tuo ut alienum non laedus* (use your own so as not to harm others), the Court addressed the issue of

⁶ *Munn v. The People of the State of Illinois*, 94 U.S. 113 (1876).

⁷ *Id.* at 124.

⁸ *Id.* at 124.

regulatory statutes stating that the social compact "authorize[s] the establishment of laws requiring each citizen to so conduct himself, and so use his own property as not unnecessarily to injure another."⁹ The Court concluded that this social compact provided the source and basis for the police powers. Pursuant to these powers, the Court found that government may regulate how individuals act toward one another and how they use their property. The Court further noted the existence of many regulatory statutes and the Court's conclusion that none had been adjudged in violation of "constitutional prohibitions against interference with private property."¹⁰

In finding that the Illinois statute was not unconstitutional, the Court also took into account the nature of Munn's business. He charged fees to the public for the storage of grain in his Chicago warehouses where the grain of different owners was mixed together. Because of this, the Court concluded that Munn's business was one in which the public had an interest, and accordingly, the private property used by Munn in his business was "'affected with a public interest'".¹¹ The Court analogized Munn to innkeepers, bakers, ferrymen and other common carriers. Of common carriers, the Court stated that they "exercise a sort of public office, and have duties to perform in which the public is interested."¹² Furthermore, the Court stated "when private property is devoted to a public use, it is subject to public regulation."¹³ With this, the Court contrasted the hypothesized dissimilar situation of the government unconstitutionally compelling individuals to put their private property to uses in which the public had an interest.

In short, the Court upheld the Illinois statute because Munn's business was affected with a public interest (and therefore subject to regulation) and because the regulatory statute was a

⁹ Id. at 124.

¹⁰ Id. at 125.

¹¹ Id. at 126 (quoting *De Portibus Maris*, 1 Harg. L. Tr., 78).

¹² *Munn* at 130.

¹³ Id. at 130.

valid exercise of the state police powers.

Mugler v. State of Kansas

The case of *Mugler v. State of Kansas*¹⁴ is another from the 19th century in which the Supreme Court relied upon state police powers to uphold a regulatory statute. The facts of *Mugler* parallel those of the *Munn* case. *Mugler* constructed and operated a beer manufacturing establishment. After he had operated this brewery for a number of years, the Kansas legislature enacted a statute which: 1) prohibited the sale of intoxicating liquors; and 2) declared all places where intoxicating liquors were manufactured or sold nuisances and ordered them closed. *Mugler* was found guilty of violating this statute but claimed that the Kansas statute violated the Fourteenth Amendment including its due process clause. The decision in *Mugler*, however, differs notably from that of *Munn* insofar as *Mugler*'s property was deemed a nuisance and the use to which it was put noxious.

The U.S. Supreme Court considered *Mugler*'s claim but upheld the Kansas statute. In this case, the Court discussed further the states' police powers. As described by the Court, the states are empowered to regulate all internal matters relating to moral and political welfare. This power is so broad that it is within the authority of the states to destroy property. Citing earlier cases as support for its conclusion,¹⁵ the Court explained that the states may "protect the health, morals, and safety of their people by regulations that do not interfere with the execution of the powers of the general government, or violate rights secured by the constitution of the United States."¹⁶ The Court also noted that its opinion in the *Munn* case supported its decision in this case. "As was said in *Munn v. Illinois*, 94 U.S. 124, while power does not exist with the whole people to control rights that are purely and exclusively private, government may require 'each citizen to do conduct himself, and use his own property, as not unnecessarily to

¹⁴ *Mugler v. State of Kansas*, 8 S. Ct. 273 (1887).

¹⁵ *Gibbons v. Ogden*, 22 U.S. 1 (1824); *Beer Co. v. Massachusetts*, 97 U.S. 25 (1877) (state law prohibiting manufacture and sale of intoxicating liquors upheld).

¹⁶ *Mugler* at 296.

injure another.'"¹⁷

Although the Court discussed the breadth of the police powers, it is also delineated its limits. Acknowledging that the role of devising measures necessary for the protection of the public welfare belongs to the legislature, the Court emphasized "[i]t does not at all follow that every statute enacted ostensibly for the promotion of these ends is to be accepted as a legitimate exertion of the police powers of the state."¹⁸ Despite their police powers, there are constitutional limits which the legislatures cannot exceed. The Court indicated that, in order for regulatory measures to fall within these limits, a legislative measure and its provisions must bear a "substantial relation"¹⁹ to the public good sought. Nonetheless, acknowledging once again the breadth of the police powers, the Court stated "every possible presumption is to be indulged in favor of the validity of a statute."²⁰ Applying the standard of substantial relation, the Court upheld the Kansas regulatory statute upon its conclusion that the statute was "fairly adapted"²¹ to the goal of protecting Kansas communities from the ill effects of excessive alcohol consumption. In doing so, the Court conceded that it would defer to the Kansas legislature's determination of the need for such regulation.

The Court also decided that Mugler's claim included an allegation that application of the Kansas statute to him, and in particular the decrease in value of his brewery due to the prohibition of the manufacture and sale of intoxicating liquors, constituted a taking of property for public use without compensation or due process of the law (in violation of the Fifth and Fourteenth Amendments). The Court found that no such violations occurred. The Court reiterated that all property is used subject to the limitation that its use not injure others. "A prohibition simply upon the use of property for purposes that are declared, by valid legislation,

¹⁷ Id. at 296.

¹⁸ Id. at 297.

¹⁹ Id. at 297.

²⁰ Id. at 297.

²¹ Id. at 297.

to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or an appropriation of property for the public benefit."²² Thus, despite the devaluation of Mugler's property, the Court did not find the statute to effect an unconstitutional taking. In reaching this conclusion, the Court emphasized that the legislation did not interfere with Mugler's control or use of his property for lawful purposes; the restriction on the use of his property applied only to a forbidden use.

In upholding the Kansas statute and finding that Mugler's constitutional claims were not valid, the Court stated "[t]he exercise of the police power by the destruction of property which is itself a public nuisance, or the prohibition of its use in a particular way, whereby its value becomes depreciated, is very different from taking property for public use, or from depriving a person of his property without due process of law."²³ Accordingly, the Court's basis for upholding the statute was the conclusion that the state had properly exercised its police powers. Similarly, these same powers justified the limitations place on Mugler's use of his property, particularly since that use was now judged by the legislature to be a noxious use.

Hadacheck v. Sebastian

The case of *Hadacheck v. Sebastian*²⁴ is consistent with *Munn* and *Mugler*, as it upheld a regulatory statute because of the states' police powers. The facts of *Hadacheck* are very similar to those of *Mugler*. Hadacheck owned property on which he operated a brickyard. He was found guilty of violating a Los Angeles ordinance, which prohibited the operation of brickyards within the city limits. Hadacheck contested the judgment against him and argued before the U.S. Supreme Court that the ordinance violated the Fourteenth Amendment and that his property had been taken without just compensation in violation of the Fifth Amendment.

In support of his claims, Hadacheck explained that when he purchased the property on which he operated the brickyard, that area had not yet been annexed by the city and that he did

²² Id. at 301.

²³ Id. at 301.

²⁴ *Hadacheck v. Sebastian*, 36 S. Ct. 143 (1915).

not expect at that time that the property would later be situated within city limits.²⁵ He alleged that his property if used as a brickyard was worth \$800,000 but only \$60,000 if used for residential purposes. Hadacheck also claimed that he purchased the property because it contained a bed of clay suitable for brickmaking, that the property was no longer suitable for residential purposes due to excavations, and that brickmaking must take place at the site of a clay bed. He added that he invested in expensive machinery to operate the brickyard. Lastly, Hadacheck argued that the operation of his brickyard was not a nuisance under state law. To counter Hadacheck's arguments, the city government claimed that fumes, dust and other byproducts of the brick manufacturing had made some residents in the area ill. In addition, the government alleged that the ordinance did not "entirely deprive [Hadacheck] of his property and the use thereof".²⁶

In this 1915 case, the Court took an expansive view of the scope of the police powers, describing them as "one of the most essential powers of government,—one that is the least limitable."²⁷ The Court acknowledged that in instances the exercise of these powers may seem harsh in its effect on individuals, "but the imperative necessity for [their] existence precludes any limitation upon [them] when not exerted arbitrarily."²⁸ As to the harshness claimed by Hadacheck (due to the fact that he had purchased the property and purchased and operated brickmaking equipment assuming that the property would not be annexed by the city and become subject to its ordinance prohibiting brickyards), the Court stated that he had no vested interest in the non-annexed condition of the area in which he bought his property; the allowance of such interests would obstruct changes necessary for societal progress.

In finding that the application of the Los Angeles ordinance to Hadacheck did not constitute an unconstitutional taking, the Court also discussed its earlier decision in *Reinman v.*

²⁵ Hadacheck's conviction took place following the annexation by Los Angeles of an area which included his property.

²⁶ Hadacheck at 144.

²⁷ Id. at 145.

²⁸ Id. at 145.

Little Rock.²⁹ At issue in *Reinman* was a prohibition on livery stables. As with *Hadacheck*, Reinman had invested in property based upon conditions existing at the time of purchase, but, due to a subsequent ordinance, the value of the property fell. Reinman argued that the city had unconstitutionally declared what was otherwise a lawful business a nuisance. In its decision for the *Reinman* case, the Court conceded that Reinman's business was not a nuisance in and of itself, but that the legislature could determine that a such a business under certain circumstances is a nuisance and declare it such by law. The police powers enabled the government to do so. However, the Court noted in *Reinman*, as it did in *Mugler*, that these powers are not without limits. The powers "could not be exerted arbitrarily or with unjust discrimination."³⁰ Finding no arbitrariness or discrimination, the Court in *Reinman* found that the city had not acted unconstitutionally as alleged by Reinman.

The *Reinman* decision was described by the *Hadacheck* court as illustrative of the breadth of the police powers. In determining whether the government had exceeded these powers in *Hadacheck*, the Court stated "[w]e must accord good faith to the city in the absence of a clear showing to the contrary"³¹ Deciding that the city had exercised its police powers without exceeding their limits, the Court found that no constitutional violation had taken place.

Perley v. State of North Carolina

Four years after deciding *Hadacheck*, the Court was again presented with a case in which one party claimed that the regulatory statute at issue was constitutionally infirm. In *Perley v. State of North Carolina*,³² Perley had been indicted for violation of a North Carolina statute aimed at the protection of watersheds. Specifically, the statute provided that the process of removing timber from land within 400 feet of a watershed, held by a city or town for the

²⁹ *Reinman v. Little Rock*, 237 U.S. 171 (1914).

³⁰ *Hadacheck* at 146.

³¹ *Id.* at 147.

³² *Perley v. State of North Carolina*, 249 U.S. 510 (1919).

purpose of supplying water to the city or town, must include the removal from within 400 feet of the watershed of all tree-tops, boughs and other commercially undesirable portions of the trees harvested. During Perley's trial, it was found that the city of Asheville, North Carolina held land as a watershed and that Perley owned standing and fallen timber within 400 feet of that watershed. The trial court found Perley guilty of violating the North Carolina statute and fined him \$300. This decision was affirmed by the state supreme court.

In the ensuing appeal before the U.S. Supreme Court, Perley claimed, as he had earlier done, that the North Carolina statute was unconstitutional. He asserted that the statute violated the Fifth and Fourteenth Amendments by abridging his privileges and immunities as a U.S. citizen, depriving him of his property with due process, and denying him equal protection of the laws. The Court considered Perley's claims and found them to be without merit. In doing so, the Court emphasized that property and property rights "necessarily are subject to some exertions of government."³³ In addition, the Court focused upon the purpose of the North Carolina statute-- to reduce the risk of fire and the related damage to watersheds. "'Tree-tops, boughs, and laps' left upon the ground may not of themselves be a nuisance; but they may become dry, and the more quickly and certainly so from the denudation of the land of its trees, and therefore become a source of fires and the perils and damages of fires."³⁴ The Court also noted that the judgment of the state that such risks existed was expressed in the statute. Thus the Court found that it was without basis to agree with Perley "that the statute is not proportionate in its regulation nor that its application to defendant[s] property is arbitrary and unconstitutional."

The Genesis of Regulatory Takings

Just three years after it upheld government regulation against constitutional challenge in *Perley*, the Court issued an opinion in *Pennsylvania Coal Company v. Mahon*.³⁵ It is in *Pennsylvania Coal* that the Court, for the first time, found that a regulatory taking had occurred.

³³ Id. at 513.

³⁴ Id. at 514.

³⁵ *Pennsylvania Coal v. Mahon*, 43 S. Ct. 158 (1922).

Pennsylvania Coal Company v. Mahon

In this case, Mahon sued to prevent the Pennsylvania Coal Company from mining coal underneath his property. He had earlier acquired the deed for the surface rights to his property from the Pennsylvania Coal Company. In the deed issued by the Company in 1878, it reserved the right to remove all coal underneath the surface of the property. In 1921, however, the Pennsylvania legislature enacted a statute which prohibited any mining of coal which would cause residential structures on the surface to subside. Mahon relied upon this statute in attempting to prevent the Company from mining underneath his property.

When the case was brought before the U.S. Supreme Court, it found the application of the statute to the Company to be unconstitutional. In the opinion supporting its decision, the Court acknowledged the state's police powers but emphasized their limits. Without such limits, the police powers would render the contract and due process clauses of the U.S. Constitution meaningless. While the Court stated that great weight is given to the judgment of the legislature, its actions are always open to challenge to determine whether the legislature had exceeded its powers. In making such a determination, the facts of each individual case were to be considered. The Court indicated that one factor to be considered was diminution in value. When the diminution in value "reaches a certain magnitude, in most if not in all cases there must be an exercise of eminent domain and compensation to sustain the act."³⁶

In applying these standards to Mahon's case, the Court found that the Pennsylvania statute, by prohibiting mining under Mahon's property, sought to eliminate the mineral rights which the Company retained when it issued a deed to Mahon for his surface rights. The Court contrasted this to its finding that the damage to Mahon's property was not a nuisance, as the damage was not common or public. In addition, the Court did not consider the statute justified by concerns for public safety. It was not necessary to prevent mining altogether for this purpose; public safety could be provided for simply by giving notice prior to mining. In short, the Court concluded that "the statute does not disclose a public interest sufficient to warrant so

³⁶ Pennsylvania Coal at 159.

extensive a destruction of the [Company's] constitutionally protected rights."³⁷

The Court then proceeded to examine the validity of the statute itself. It found that the statute could not be sustained as an exercise of the police powers, insofar as it prevented mining in locations where the Company had reserved the right to do so. Engaging in a discussion of what have become known as regulatory takings, the Court explained that the government may so limit the use of property through regulations that the effect is as if the government physically seized or destroyed the property. Because the Pennsylvania statute required that all coal mining be in done in a manner such that no subsidence of residential properties was caused, the Court was persuaded that the statute made it "commercially impracticable"³⁸ for the Company to mine part of its coal. As a result, the statute effected a regulatory taking.

The Court warned of the danger of expanding the police powers to a greater and greater extent until private property virtually no longer existed. Limits were needed. In language often quoted since, the Court stated that "[t]he general rule at least is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."³⁹ The Court did not indicate how far was too far, specifying that "this is a question of degree--and therefore cannot be disposed of by general propositions."⁴⁰ The Court added that when the limits of the police powers were exceeded, the Constitution required compensation to the property owner.

In *Pennsylvania Coal v. Mahon*, the Court found that application of the Pennsylvania statute to the property beneath Mahon's to be unconstitutional and also found the statute itself unconstitutional. In doing so, the Court, with reference to the Fifth Amendment, enunciated the principles which support the concept of regulatory takings and invoked the limits of the states' police powers.

³⁷ Id. at 159.

³⁸ Id. at 160.

³⁹ Id. at 160.

⁴⁰ Id. at 160.

The Dominance of Police Powers

While *Pennsylvania Coal* established that regulation can lead to an unconstitutional taking, subsequent cases from the same time period indicate that the states' police powers remained intact.

Village of Euclid v. Ambler Realty Company

In 1926, the Supreme Court issued its opinion in the case of *Village of Euclid v. Ambler Realty Company*.⁴¹ This case resulted from a zoning ordinance adopted by the Village of Euclid. The Ambler Realty Company sought to prevent the enforcement of the ordinance in order to prevent a reduction in value of the Company's property. The Company alleged that, because the ordinance limited the use of its property to residential purposes, the value dropped from \$10,000 per acre to \$2,500 per acre. As a result, the Company argued that the ordinance deprived it of liberty and property without due process of law in violation of the Fourteenth Amendment.

The Court upheld the zoning ordinance against the Company's claims, and, in explaining its reasons for doing so, the Court discussed the need for and validity of regulations generally in advanced society. "Regulations, the wisdom, necessity and validity of which, as applied to existing conditions, are so apparent that they are now uniformly sustained, a century ago, or even half a century ago, probably would have been rejected as arbitrary and oppressive."⁴² The court stated that the increasing complexity of society in the 20th century renders regulations, to address concerns such as vehicular safety and zoning, necessary. The Court further explained that a measure could be found arbitrary and unreasonable (and therefore unconstitutional) at one time and then subsequently found to be reasonable, because, while the guarantees of the Constitution are constant, "the scope of their application must expand or contract to meet the new and different conditions which are constantly coming within the field of their operation."⁴³

⁴¹ *Village of Euclid v. Ambler Realty Company*, 272 U.S. 365 (1926).

⁴² *Village of Euclid* at 387.

⁴³ *Id.* at 387.

With this background, the Court proceeded to decide the validity of the zoning ordinance. The Court reasoned that in order for the ordinance to be upheld it must be found to be justified by the police powers. The determination of whether a valid exercise of the police powers had taken place was not susceptible to precise rules, the Court explained. The circumstances and conditions of each case needed to be considered. The Court did note that the maxim *sic utere tuo ut alienum non laedas* (which it described as the foundation for much of the common law of nuisances) could be employed as a guideline. Applying these principles to the zoning ordinance, the Court found it to be constitutional. The provision of the ordinance challenged excluded all buildings used for nonresidential purposes from certain sections of the village, including those sections where the Ambler Realty Company's property was located. The Court considered the public benefits of such zoning and referred to studies on the subject. It concluded that "the reasons are sufficiently cogent to preclude us from saying, as it must be said before the ordinance can be declared unconstitutional, that such provisions are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare."⁴⁴

Miller v. Schoene

The case of *Miller v. Schoene*⁴⁵ is often cited for the proposition that in instances the police powers are so broad as to justify not only the use of property but also its destruction. In *Miller*, the Virginia state entomologist ordered Miller to cut down a large number of ornamental red cedar trees growing on his property. The entomologist acted pursuant to the Cedar Rust Act of Virginia which had been adopted to prevent the transfer of a plant disease from red cedars to nearby apple orchards. The plant disease, harmless to red cedars, could transfer by various means to apple trees within a two mile radius and destroy them. Miller's trees were infected with the plant disease. The Act did not provide for compensation to account for the value of the standing trees lost or for the decrease in the value of the real property on which they had

⁴⁴ Id. at 395.

⁴⁵ *Miller v. Schoene*, 276 U.S. 272 (1928).

stood.⁴⁶ Miller challenged the Act as being in violation of the due process clause of the Fourteenth Amendment. The Supreme Court upheld the state regulatory statute. In doing so, the Court considered the facts and circumstances of the case before it. The Court noted that the only method of protecting apple orchards from cedar rust was the destruction of all red cedar trees within a two mile radius. The Court also acknowledged that cedar trees were not grown in substantial amounts for commercial purposes, whereas apples were a principal agricultural product in Virginia. Because of the effect of the cedar trees on apple orchards and because of the importance of apples for the state agriculture, the Court viewed the state as having to choose between the two trees.

The Court concluded that the state's decision to preserve the apple trees at the cost of losing the cedar trees was a proper exercise of the police powers. Because of the importance of apples to the state's agriculture, the Court considered the orchards to affect the public interest. "And where the public interest is involved preferment of that interest over the property interest of the individual, to the extent even of its destruction, is one of the distinguishing characteristics of every exercise of the police power which affects property."⁴⁷ Thus, the Court found that the Act did not violate the due process clause of the Fourteenth Amendment.

MODERN CASES

Early cases established that the states could employ their police powers to engage in valid regulation of private property. Nonetheless, *Pennsylvania Coal* made clear that if regulation was excessive an unconstitutional regulatory taking could occur. The concepts of regulatory takings and state police powers continue to appear in the Supreme Court's opinions during the second half of the twentieth century. As the cases below illustrate, successive cases have given the

⁴⁶ A lower level court opinion in this case did provide for the payment of \$100 to Miller to cover the cost of removing the trees.

⁴⁷ *Miller v. Schoene* at 279-80.

Court opportunity to refine the principles associate with these two concepts.

The Preservation of Police Powers

Goldblatt v. Town of Hempstead

*Goldblatt v. Town of Hempstead*⁴⁸ is similar to *Mugler*, *Munn* and *Hadacheck* in that the case was brought by a business owner whose property became subject to severe regulation. Since 1927, Goldblatt had mined sand and gravel from his property located in Hempstead. Due to Goldblatt's mining, a pit had been created which in depth was beneath the water table. In 1958, the Town of Hempstead amended an existing ordinance to prohibit excavation below the level of the water table. In an enforcement action against Goldblatt, he argued that the ordinance effectively prevented him from continuing his business and therefore took his property without due process of the law in violation of the Fourteenth Amendment.

In its opinion for this case, the Court reiterated many of the takings and police powers principles it previously articulated. Citing *Mugler* and *Hadacheck*, the Court stated "[i]f this ordinance is otherwise a valid exercise of the town's police powers, the fact that it deprives the property of its most beneficial use does not render it unconstitutional."⁴⁹ Referring at length to its decision in *Mugler*, the Court further explained that a prohibition on a use of property declared injurious to the public could not be deemed a taking; such a prohibition did not interfere with the landowner's ability to use his or her property for lawful purposes. Citing *Pennsylvania Coal*, however, the Court discussed the police powers' limits and conceded that a regulation might be so onerous that it constituted an unconstitutional taking. Again, as in *Pennsylvania Coal*, the Court declined to establish precise guidelines for acceptable levels of regulation. The Court did state, however, that "[a]lthough a comparison of values before and after is relevant, . . . it is by no means conclusive"⁵⁰

In applying the above principles to Goldblatt's case, the Court stated that it would benefit

⁴⁸ *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962).

⁴⁹ *Goldblatt* at 592.

⁵⁰ *Id.* at 594.

the government with the usual presumption of constitutionality. Determining the constitutionality of the ordinance, the Court further explained, required ultimately a decision of whether the application of the ordinance was a valid exercise of the police powers. In reaching such a decision, the Court concluded that the only criteria available to it was the standard of reasonableness. To determine the reasonableness of the regulation, the Court cited a need for evidence of the public injury against which the ordinance was to protect, alternatives to the ordinance, and the property owner's loss due to the ordinance. Finding that there was a "dearth"⁵¹ of evidence on these issues, and emphasizing that the property owner had the burden of providing such evidence, the Court found that application of the ordinance to Goldblatt was "a valid police regulation"⁵² and therefore constitutional.

Penn Central Transportation Company v. City of New York

At issue in *Penn Central Transportation Company v. City of New York*⁵³ was the use made of property owned for business purposes and more specifically renovations proposed for an existing structure on the property. The owners of the Grand Central Terminal in New York City made plans in 1968 to construct a 50 story tower on top of the Terminal. In 1965, the City had adopted its Landmarks Preservation Law, pursuant to a New York state enabling Act, and declared the Terminal a landmark in 1967. Because the Terminal had been designated a landmark, Penn Central Transportation Company (the owners of the Terminal) were required to obtain permission from the commission, established by the Act, prior to constructing the proposed tower. Penn Central's application for permission was denied. As a result, Penn Central sued the city claiming that the application of the Act to them had resulted in a taking in violation of the Fifth and Fourteenth Amendments and deprived them of due process in violation of the Fourteenth Amendment.

The opinion for this case provides a summary of takings law as of 1978 (the date of the

⁵¹ Id. at 595.

⁵² Id. at 596.

⁵³ *Penn Central Transportation Company v. City of New York*, 98 S. Ct. 2646 (1978).

Court's opinion). The Court explained that it had not established a "set formula"⁵⁴ for determining the existence of a taking. Instead, the Court had chosen to consider the "'particular circumstances'" of each case.⁵⁵ Nonetheless, in making these "essentially ad hoc, factual inquiries", there were, the Court specified, "several factors that have particular significance."⁵⁶

The first factors to be considered were the "economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations"⁵⁷ The character of the governmental action was also to be considered; a taking would more likely be found where the government had physically invaded property than when the government interference was derived from regulation aimed at securing the public interest. In this regard, the Court noted that the government was empowered to enact laws and implement programs which negatively impacted property values to some extent without having to pay compensation for the decreased value. The Court asserted that government could not function unless so empowered. At the same time, the Court cited *Pennsylvania Coal* and explained that "a state statute that substantially furthers important public policies may so frustrate distinct investment-backed expectations as to amount to a 'taking.'"⁵⁸

⁵⁴ Penn Central at 2659.

⁵⁵ Id. at 2659 (quoting *United States v. Central Eureka Mining Co.*, 357 U.S. 155, 168 (1958)).

⁵⁶ Penn Central at 2659.

⁵⁷ Id. at 2659.

⁵⁸ Id. at 2661. See also *Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust for Southern California*, 113 S. Ct. 2264 (1993). In *Concrete Pipe*, an employer claimed that liability assessed against it pursuant to amendments to the Employer Retirement Income Security Act of 1974, for pension plan benefits owed to its employees, amounted to a taking of Concrete Pipe's property. The Court rejected this claim, in part, by applying the investment-backed expectations factor. In doing so, the Court explained that the subject of the dispute, employer contributions to pension plans, had "long been subject to regulation, and "[t]hose who do business in the regulated field cannot object if the legislative scheme is buttressed by subsequent amendments to achieve the legislative end." *FHA v. The Darlington, Inc.*, 358 U.S. 84, 91, 79 S.Ct. 141, 146, 3 L.Ed.2d 132 (1958)" *Concrete Pipe* at 2291.

In delineating factors to be considered in takings cases, the Court also focused specifically on the subject of land use regulations. The Court noted that it had upheld land use regulation that had "destroyed or adversely affected recognized real property interests . . . in instances in which a state tribunal reasonably concluded that 'the health, safety, morals, or general welfare' would be promoted by prohibiting particular contemplated uses of land"⁵⁹ The Court considered zoning laws to be an example of such land use regulation and, citing *Euclid v. Ambler Realty Co.*, stated that they "have been viewed as permissible governmental action even when prohibiting the most beneficial use of the property."⁶⁰

In its discussion of zoning laws, the Court also cited and discussed with approval *Goldblatt, Schoene, Hadacheck, Reinman*, and *Mugler*. In its discussion of *Goldblatt*, the Court explained that it had even upheld zoning laws that "prohibited a beneficial use to which individual parcels had previously been devoted and thus caused substantial individualized harm."⁶¹ The Court further stated that it was able to conclude that no taking had occurred in *Goldblatt* because "the restriction served a substantial public purpose"⁶² Conversely, the Court indicated that "a use restriction on real property may constitute a 'taking' if not reasonably necessary to the effectuation of a substantial public purpose, . . . or perhaps if it has an unduly harsh impact upon the owner's use of the property."⁶³ Where a land use regulation was "reasonably related to the promotion of the general welfare", the Court further elaborated later in its opinion, diminution in value alone could not establish a taking and "that the 'taking' issue in these contexts was resolved by focusing on the uses the regulations permit."⁶⁴

In addition to delineating the above factors for consideration in takings cases, this case

⁵⁹ Penn Central at 2659.

⁶⁰ Id. at 2660.

⁶¹ Id. at 2660.

⁶² Id. at 2660.

⁶³ Id. at 2660-1.

⁶⁴ Id. at 2663.

is also notable for its enunciation of the principle that, for takings analysis purposes, the landowner's entire property, not separate segments, would be considered. Penn Central argued in part that the application of the landmarks statute to its property prevented it from developing the airspace above its property and therefore constituted a taking. In rejecting this argument, the Court stated "[i]n deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole--here, the city tax block designated as the 'landmark site.'"⁶⁵ In its takings analysis, the Court would not divide the landowner's parcel into segments and consider a regulation's effect on a single segment.⁶⁶

The Court applied the above factors to Penn Central's case and found that no taking had occurred. In doing so, the Court considered the degree of interference with Penn Central's use of its property imposed by the landmarks statute and found that it in no way interfered with the current use of the Terminal. In addition, the Court concluded that Penn Central could not infer from the commission's denial of its application that the commission would deny all applications for any construction atop the Terminal. If Penn Central submitted a proposal acceptable to the commission, it would be allowed to build on top of the Terminal. Also, the Court noted that Penn Central's air rights were transferable and that Penn Central retained the right to sell them to other property owners in the area. Thus, the Court found that the regulatory scheme imposed by the landmarks statute "permit[s] reasonable beneficial use of the landmark site" and the "restrictions imposed are substantially related to the promotion of the general welfare"⁶⁷ As a result, the Court upheld the New York City landmarks statute against Penn Central's constitutional challenge.

⁶⁵ Id. at 2662.

⁶⁶ See also *Concrete Pipe*, 113 S. Ct. 2264 (1993). The Court rejected the takings claim presented in this case, in part, by reaffirming its holding in *Penn Central*. The Court described its decision in *Penn Central* as one holding that "claimant's parcel of property could not first be divided into what was taken and what was left for the purpose of demonstrating the taking of the former to be complete and hence compensable." *Concrete Pipe* at 2290.

⁶⁷ *Penn Central* at 2666.

Andrus v. Allard

One year after *Penn Central*, the court issued a decision in the case of *Andrus v. Allard*⁶⁸ and again upheld the application of a regulatory statute. This case centered upon the Eagle Protection Act, the Migratory Bird Treaty Act, and regulations adopted in accordance with those Acts. Allard was in the business of buying and selling Indian artifacts. Some of the artifacts that he traded contained the feathers of birds protected by the Acts and their related regulations. As a result, Allard was prosecuted for violating the Acts. Allard contested his prosecution arguing that the Acts and their related regulations did not apply to artifacts in existence prior to the adoption of the Acts. Alternatively, if the Acts and related regulations prohibited the sale of artifacts in existence prior to the adoption of the Acts, the Acts and regulations violated the Fifth Amendment.

In deciding the case, the Supreme Court first determined that the Acts and regulations at issue did prohibit the sale of artifacts containing protected bird feathers even if such artifacts were in existence prior to the adoption of the Acts. The Court then proceeded to find the regulations constitutionally sound. In doing so, the Court emphasized that "[t]he regulations challenged do not compel the surrender of the artifacts, and there is no physical invasion or restraint upon them."⁶⁹ Similarly, the Court noted that Allard retained the rights to transport, possess, donate and devise his artifacts. The Court acknowledged that the regulations, in prohibiting the sale of the artifacts, did impose a significant restriction but reasoned that a taking does not always occur when one property right is denied. "At least where an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking, because the aggregate must be viewed in its entirety."⁷⁰

Citing *Penn Central*, the Court explained that factors had been developed to determine when takings in violation of the Fifth Amendment had occurred. The Court addressed one such factor-- reduction in value. It acknowledged that the regulation prevented the most valuable use

⁶⁸ *Andrus v. Allard*, 444 U.S. 51 (1979).

⁶⁹ *Andrus* at 65.

⁷⁰ *Id.* at 65-6.

of Allard's property but declared that that result was not dispositive of the taking issue. "[A] reduction in the value of property is not necessarily equated with a taking."⁷¹ In addition, the Court was not persuaded that Allard would be denied all economic benefit from his artifacts, suggesting that he could exhibit them for a fee. The Court also specified that, in takings analysis, loss of anticipated gains or future profits have been viewed as less compelling than the loss of other interests. Indeed, the Court stated "loss of future profits--unaccompanied by any physical restriction--provides a slender reed upon which to rest a takings claim."⁷²

In *Andrus v. Allard*, the Court also discussed the rationale for allowing regulation despite private property right infringements. Quoting *Pennsylvania Coal v. Mahon*, the Court asserted that regulation was the price paid for living and working in civilized society. Civilized society requires governmental regulation, and inherent in governmental regulation is the adjustment of rights to secure the public interest. Although such regulation often limits uses of private property from which economic value may be derived, "[g]overnment could hardly go on if to some extent values incident to property could not be diminished without paying for every such change in the general law."⁷³ Thus, the Court found that the regulations which led to the prosecution of Allard did not constitute an unconstitutional taking, despite the fact that the artifacts sold existed prior to the enactment of the protective legislation.

Kaiser Aetna v. United States

*Kaiser Aetna v. United States*⁷⁴ provides an example of regulation that has gone too far. Kaiser Aetna leased Kuapa Pond in Hawaii from its owner for development purposes. Prior to development, the pond (which, under Hawaii law, was private property despite being a body of water) was separated from a bay and the Pacific Ocean by a barrier beach. Following Kaiser

⁷¹ Id. at 66.

⁷² Id. at 66.

⁷³ Id. at 65 (quoting *Penn Central* at 413).

⁷⁴ *Kaiser Aetna v. United States*, 444 U.S. 164 (1979).

Aetna's development of the pond, it was connected to the bay and ocean by a channel constructed by Kaiser Aetna. Because of the connection created by the channel, the Army Corps of Engineers claimed that the pond had become "navigable water"⁷⁵ and that Kaiser Aetna must accordingly allow public access to the pond. The Corps sought a court order requiring Kaiser Aetna to allow such access. The issue created, therefore, was whether Kaiser Aetna, because of its improvements to Kuapa Pond which rendered the pond navigable water, could be required by the government to permit public access to the pond without compensation. The Supreme Court held that it could not be required to do so; such a requirement would amount to an unconstitutional taking.

In its 1979 decision, the Court agreed with the Corps that Kaiser Aetna's development had made the pond "navigable water". However, the court emphasized Congress' power to regulate navigable water (in part through the actions of the Corps) does not constitute an exception to the Fifth Amendment's takings clause; the requirements of that provision must be satisfied. The Court added that Congress' power under the Commerce Clause was sufficient for Congress to create a right of access to the pond. However, to act constitutionally in doing so, the government must pay for such right to avoid an uncompensated taking.

With reference to *Pennsylvania Coal Co. v. Mahon* and *Penn Central*, the Court set forth principles for the analysis of takings claims. It reiterated that no set formula had been established and that it must engage in an ad hoc factual inquiry for each case. It also described the factors employed by the Court in such inquiries. The Court would consider "the economic impact of the regulation, its interference with reasonable investment backed expectations, and the character of the governmental action"⁷⁶ In addition, where navigable waters were involved, the Court must consider the public interest in the maintenance of freely flowing interstate waters.

In its application of the above factors to Kaiser Aetna's case, the Court emphasized that

⁷⁵ "Navigable water" is a term with legal significance; through successive court opinions, it has been established that bodies of water deemed "navigable water" are subject to Congress' power to regulate pursuant to the Commerce Clause of the U.S. Constitution.

⁷⁶ Kaiser Aetna at 175.

Kaiser Aetna had "invested substantial amounts of money in making improvements."⁷⁷ Also, the Court noted that Kaiser Aetna had contacted the Corps prior to its construction of the channel and was told no permits were required for construction. By doing so, the Court reasoned, the Corps consented to the construction of the channel and thereby created expectations on the part of Kaiser Aetna. The Court then proceeded to discuss the nature of the interference with Kaiser Aetna's private property rights. The Court concluded that the limitations sought by the Corps would deny Kaiser Aetna the right to exclude others-- a right which the Court described as "one of the most essential sticks in the bundle of rights that are commonly characterized as property"⁷⁸ The Court also described the right to exclude as "universally held to be a fundamental element of the property right"⁷⁹ Having engaged in an inquiry of the facts surrounding the dispute between Kaiser Aetna and the Corps, the Court held that "the Government's attempt to create a public right of access to the improved pond goes so far beyond ordinary regulation or improvement for navigation as to amount to a taking under the logic of *Pennsylvania Coal v. Mahon*"⁸⁰

Providing Additional Guidelines

During the early 1980's, the Supreme Court appeared willing to continue upholding regulations and does so by applying previously enunciated guidelines. By the end of the decade, however, the Court delineated additional guidelines and decided its major takings cases not in favor of the government but in favor of the landowner.

⁷⁷ Id. at 176.

⁷⁸ Id. at 176.

⁷⁹ Id. at 179-80.

⁸⁰ Id. at 178.

Agins v. City of Tiburon

In *Agins v. City of Tiburon*,⁸¹ the regulation at issue was a zoning ordinance adopted by the city. Agins had previously acquired property in the city for development purposes. Following the adoption of the zoning ordinance, Agins was limited to the construction of only from one to five single family homes on his property. Because of this limitation, Agins filed a complaint seeking an inverse condemnation and a declaration that the zoning ordinance was unconstitutional. The Supreme Court held that the ordinance did not violate the Fifth or Fourteenth Amendments.

In its consideration of the ordinance, the Court enunciated a two-prong test for analyzing zoning ordinances. "The application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests, . . . or denies an owner economically viable use of his land"⁸² Applying the two-prong test enunciated, the Court found that the city's zoning ordinance "substantially advance[d] legitimate governmental goals."⁸³ The city had concluded that its ordinance would help prevent the conversion of open spaces to urban areas. By enacting the ordinance and exercising its police powers, the city sought to protect its citizens from the negative effects of urbanization. The Court characterized the city's purpose as long recognized as legitimate.

Although the Court applied the two-prong test in this case, it also discussed other principles applied in takings cases. The Court stated that "no precise rule determines when property has been taken"⁸⁴ and a weighing of public and private interests is necessary. As an example of a such a weighing, the Court cited *Euclid v. Ambler*. With respect to public and private interests, the Court noted that Agins' property was not the only property subject to the ordinance, and therefore the burdens imposed by the ordinance were shared by members of the

⁸¹ *Agins v. City of Tiburon*, 447 U.S. 255 (1980).

⁸² *Agins* at 260.

⁸³ *Id.* at 261.

⁸⁴ *Id.* at 260-1.

public. Similarly, the Court asserted that Agins, along with other members of the community, would benefit from the decreased urbanization achieved by the ordinance. Such benefit, the Court stated, must be considered in conjunction with any decrease in market value experienced by Agins. Lastly, the Court pointed out that Agins had not been prevented the best use of his land, and that he had not been denied any fundamental attribute of ownership (as occurred in *Kaiser*). Thus, the Court found no basis for holding the ordinance unconstitutional or for concluding Agins' Fifth and Fourteenth Amendment rights had been violated.⁸⁵

Pruneyard Shopping Center v. Robins

*Pruneyard Shopping Center v. Robins*⁸⁶ is another case, like *Kaiser Aetna*, which involved the right to exclude others. In *Pruneyard*, however, the Court did not find that application of the regulation at issue amounted to a taking. PruneYard Shopping Center was a privately owned shopping center in California. Robins and others had set up a table in the courtyard of the shopping center to ask passersby for petition signatures and to distribute pamphlets. The shopping center had a policy that prohibited the circulation of petitions on its property, and, as a result, a security guard asked Robins and the others to leave the shopping center. Robins filed a lawsuit to obtain a court order requiring the shopping center to allow Robins to solicit petition signatures in the shopping center. Robins argued that a provision of the California constitution, securing the right to petition, required that he be permitted access

⁸⁵ For a case applying the guidelines developed in *Agins* but with a different outcome, see *Loveladies Harbor, Inc. v. U.S.*, 21 Cl.Ct. 153 (1990), *aff'd*, 28 F.3d 1171 (Fed. Cir. 1994). In this case, the property owner held wetlands, that it wished to fill and develop for residential purposes. It applied to the Army Corps of Engineers for the permit required for filling the wetlands, but the application was denied. Due in large part to a finding that the permit denial resulted in a greater than 99% diminution in the value of the wetland property, the Claims Court found that the permit denial constituted a compensable taking and awarded the property owner \$2,658,000. "It is this court's judgment that the drastic economic impact on plaintiff's property, coupled with the court's earlier determination of a lack of a countervailing substantial legitimate state interest, 15 Cl.Ct. at 388-90, forms the basis for a finding that there has been a taking." *Loveladies Harbor, Inc.*, 21 Cl.Ct. at 160.

⁸⁶ *Pruneyard Shopping Center v. Robins*, 447 U.S. 74 (1980).

to the shopping center to solicit petition signatures. The owners of PruneYard Shopping Center claimed that to require such access would violate their Fifth and Fourteenth Amendment rights.

The Court found PruneYard's claim to be invalid. The Court conceded that private property does not lose its private nature merely by being situated in close proximity to other property (such as in a shopping center) or because the owner invites and encourages the public to enter onto his property. Nonetheless, the states retained their police powers, which enabled them to adopt in their constitution's provisions rights more expansive than those secured by the U.S. Constitution. Moreover, the police powers allowed states to "adopt reasonable restrictions on private property so long as the restrictions do not amount to a taking without just compensation or contravene any other federal constitutional provision."⁸⁷ The Court considered PruneYard's argument that the Fifth Amendment secures the right of property owners to exclude others from their property. Citing *Kaiser Aetna*, the Court did describe the right to exclude as "one of the essential sticks in the bundle of property rights"⁸⁸ Furthermore, the Court concluded that the California constitution operated to "take" that right to the extent that the California state court had interpreted the constitutional provision at issue to secure the right of petition on shopping center property. Nevertheless, the Court emphasized that "it is well established that 'not every destruction or injury to property by government action has been held to be a "taking" in the constitutional sense.'"⁸⁹ The Court explained, as it did in *Agins*, that the determination of constitutionality required a balancing of public and private interests. The factors to be considered in this analysis were "the character of the governmental action, its economic impact, and its interference with reasonable investment-backed expectations."⁹⁰ Citing *Pennsylvania Coal*, the Court stated that an application of these factors may result in the conclusion that a regulation has gone too far and created a taking.

⁸⁷ Pruneyard at 81.

⁸⁸ *Id.* at 82.

⁸⁹ *Id.* at 82 (quoting *Armstrong v. United States*, 364 U.S. 40, 48 (1960)).

⁹⁰ Pruneyard at 83.

Applying the above principles to PruneYard's case, the Court concluded that allowing Robins and the others to exercise their right to petition would not "unreasonably impair the value or use of their [PruneYard's] property as a shopping center."⁹¹ Robins and the others had not been disruptive or disorderly, and PruneYard could adopt time, place, and manner restrictions on the exercise of the right to petition. The fact that Robins and the others had physically entered onto PruneYard's property was not a decisive factor under the circumstances. In addition to applying takings principles to the case, the Court also distinguished it from *Kaiser Aetna*. The Court depicted the government's attempt to obtain a public right of access in *Kaiser Aetna* as interfering with Kaiser Aetna's investment backed expectations, whereas PruneYard had not demonstrated that the right to exclude others was so central to the use and value of their property as to amount to a taking. In short, the Court concluded that the California Supreme Court's decision recognizing the right of Robins and the others to petition for signatures in the PruneYard Shopping Center did not violate the shopping center owner's Fifth or Fourteenth Amendment rights.

Loretto v. Teleprompter Manhattan CATV Corp.

Two years following its decision in *PruneYard Shopping Center*, the Court issued an opinion for the case of *Loretto v. Teleprompter Manhattan CATV Corp.*⁹² This case involved both a regulation and physical occupation of property and therefore is helpful for discerning distinctions between the principles that apply to regulatory takings and those that apply to takings involving the physical use or seizure of property.

In 1971, Loretto purchased an apartment building in New York City. The prior owner of the building had given Teleprompter Manhattan CATV Corp. permission to furnish cable television service to tenants in the building and to install equipment on the building necessary for the television service. In addition, in 1973, the state of New York enacted a statute prohibiting landlords from interfering with the installation of cable television facilities on their

⁹¹ Id. at 83.

⁹² *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).

property. Loretto had not been aware of the presence of cable equipment on her building until after she had purchased it. In 1976, she sued Teleprompter, which had been given an exclusive franchise by the City of New York to provide all cable television service within certain areas of Manhattan. Loretto claimed that Teleprompter's installation of equipment on her building and others like it was a trespass and, to the extent that Teleprompter relied on the New York state statute in installing equipment, a taking without just compensation. In light of Loretto's claim and the facts surrounding the case, the Court determined that the issue to be decided was whether "a minor but permanent physical occupation of an owner's property authorized by government constitutes a 'taking' of property for which just compensation is due under the Fifth and Fourteenth Amendments of the Constitution."⁹³ The Court concluded that such action did constitute a taking.

In deciding *Loretto*, the Court strongly emphasized that the case involved a permanent physical intrusion, by virtue of the installation of equipment on the building, and based its decision on that fact. The Court did acknowledge that the New York statute, authorizing the installation of cable television equipment on apartment buildings, was "within the State's police power"⁹⁴ because cable television serves educational and community needs. However, the Court stated, a finding of validly exercised police power did not end the inquiry. The Court reasoned that an otherwise valid regulation might so interfere with property rights as to require compensation. Concluding that a permanent physical intrusion amounted to excessive interference, the Court proclaimed "a permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve."⁹⁵

To support its rule for permanent physical occupation, the Court surveyed earlier takings cases. Among others, the Court discussed *Penn Central* and reiterated that takings analysis requires ad hoc, factual inquiries. While there is no set formula to apply to these inquiries, guidelines do exist. The court noted the three factors having particular significance: 1) the

⁹³ Loretto at 421.

⁹⁴ Id. at 425.

⁹⁵ Id. at 426.

regulation's economic impact; 2) interference with investment-backed expectations; and 3) the character of the governmental action. The Court focused on the third factor. Government action amounting to a physical intrusion was deemed "a property restriction of an unusually serious character for purposes of the Takings Clause."⁹⁶ Moreover, government action amounting to a permanent physical occupation was extreme and forced the conclusion that a taking had occurred.

In reviewing prior cases involving intrusion onto property, the Court provided examples of actions taken by government subsequently found to constitute takings. Included among these were the installation of rails, underground wires or pipes, and telephone or telegraph lines. The Court noted that while the amount of property occupied by the materials installed by the government may be small, as in *Loretto*, a taking had still occurred. In addition, the Court explained that while permanent physical occupation of property may connote occupation by individuals, the government may also affect a permanent physical occupation by the placement of structures or materials on property. For this reason, the flooding of property by the government had also been found to be taking. In its discussion of the more recent cases, the Court cited *Kaiser Aetna* and *PruneYard Shopping Center* as examples of impermanent physical invasions of property, with *Kaiser* involving an easement of passage and *PruneYard* only a temporary physical invasion.

In *Loretto*, while emphasizing the serious nature of government intrusion onto property, the Court did also discuss government regulation that affects the landowner's use of his or her property but does not involve an intrusion. Such government regulation, the Court reaffirmed, may be upheld as justified by the public interest which it serves. The Court further explained that if a regulation did not subject the landowner to a physical occupation, the regulation "will be analyzed under the multifactor inquiry generally applicable to nonpossessory governmental activity."⁹⁷ The Court added that it viewed its decision in *Loretto* to be narrow in scope and primarily one which "affirm[ed] the traditional rule that a permanent physical occupation is a

⁹⁶ Id. at 426.

⁹⁷ Id. at 440.

taking."⁹⁸ The Court also made clear that its decision in *Loretto* did not question the states' authority to regulate the use of private property.

Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City

In *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*,⁹⁹ the Court enunciated another guideline for use by those analyzing takings. This case, as did *Agins v. Tiburon*, involved land use and zoning regulations. In 1973, the former owner of the property at issue in *Williamson* submitted a preliminary plat to the Williamson County Regional Planning Commission for the development of its property. The preliminary plat was approved by the Commission. However, the applicable zoning ordinance and regulations required that a final plat also be approved. Following approval of the preliminary plat, the former owner of the property invested \$3.5 million to construct a golf course and water and sewer facilities. By 1979, the Commission approved final plats for several sections of the property. Notably the county had changed its zoning ordinance in 1977, but the Commission decided to continue applying the ordinance as it existed in 1973 to the property at issue. However, in 1979, the Commission rethought its decision on this issue and began applying the revised ordinance to the property owner. Following this decision, the Commission asked the property owner to submit a new preliminary plat before seeking approval of any additional final plats. The new preliminary plat submitted to the Commission was not approved. The owner appealed this decision to the County Board of Zoning Appeals, which concluded that the Commission should apply the 1973 version of the zoning ordinance to the owner. Subsequently, Hamilton Bank of Johnson City acquired the property through foreclosure.

Following foreclosure, Hamilton Bank submitted another preliminary plat to the Commission. The Commission rejected this plat for eight reasons, including failure to comply with the 1977 version of the zoning ordinance, choosing to ignore the Board of Zoning Appeals

⁹⁸ Id. at 441.

⁹⁹ *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985).

decision (citing lack of jurisdiction) that the 1973 ordinance should apply. Following rejection of the Bank's preliminary plat, the Bank filed suit in federal court alleging the Commission had taken its property without just compensation. A jury found that the Bank "had been denied the 'economically viable' use of its property in violation of the Just Compensation Clause."¹⁰⁰ The jury also awarded \$350,000 in damages for the temporary taking of the Bank's property. In addition, the court issued a permanent injunction requiring the Commission to apply the 1973 version of the ordinance to the Bank. But the court also reversed the jury verdict finding a taking. On appeal to the federal court of appeal, the court reversed the lower court's decision and ruled that the jury verdict, finding a taking and awarding compensation, should stand. An appeal to the U.S. Supreme Court followed.

As analyzed by the Supreme Court, the issue before it was whether the Bank had brought its taking claim to court prematurely. The Court decided that the Bank had indeed brought its claim too soon. The Court explained "[b]ecause respondent has not yet obtained a final decision regarding the application of the zoning ordinance and subdivision regulation to its property, nor utilized the procedures Tennessee provides for obtaining just compensation, respondent's claim is not ripe."¹⁰¹ In particular, a regulatory takings claim is not ripe "until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue."¹⁰² By the Court's analysis, the Bank had not received a final decision from the Commission due to the fact that the Bank had not sought any variances to allow development to take place on the property in the manner it desired. The Court cited both the Commissions's authority and that of the Board of Zoning Appeals to grant variances. The Court further concluded that at least five of the eight problems identified in the Bank's plat by the Commission could have been resolved through the use of variances.

Elaborating further, the Court stated the very nature of a takings claim inquiry

¹⁰⁰ Id. at 182 (quoting App. at 32-33).

¹⁰¹ Williamson Planning Commission at 186.

¹⁰² Id. at 186.

necessitates that the Court have before it a final decision. Iterating the earlier established factors of "the economic impact of the challenged action and the extent to which it interferes with reasonable investment-backed expectations", the Court reasoned that these factors cannot be accurately applied to a decision that is not final.¹⁰³ "Those factors simply cannot be evaluated until the administrative agency has arrived at a final, definitive position regarding how it will apply the regulations at issue to the particular land in question."¹⁰⁴ While the jury in this case found that the Commission's rejection of the Bank's preliminary plat denied the Bank economically viable use of its property, if the Commission's eight objections had been addressed by variances, the jury's conclusion regarding a taking may have differed. Similarly, the Court concluded, it could not appropriately assess the Bank's taking claim until the Bank had sought and obtained or failed to obtain variances.

It is important to note that the Court in its opinion for this case distinguished between the concept of ripeness and exhaustion. The Bank had argued that as it had brought its claim to federal court pursuant to 42 U.S.C. sec. 1983, it was not required to first exhaust administrative remedies prior to bringing suit. The Court agreed but emphasized that the seeking of variances (and the resulting final decision) it required was not to be confused with the exhaustion of administrative remedies. "[T]he finality requirement is concerned with whether the initial decisionmaker has arrived at a definitive position on the issue . . . ; the exhaustion requirement generally refers to administrative and judicial procedures by which an injured party may seek review of an adverse decision and obtain a remedy"¹⁰⁵ As the Court required ripeness but not exhaustion, the Bank would not be required to appeal the decision of the Commission to the Board of Zoning Appeals for review, but it would be required to seek variances from the initial decisionmaker, the Commission.

As its second reason for concluding that the Bank had brought its takings claim prematurely, the Court cited the Bank's failure to utilize state provided procedures for obtaining

¹⁰³ Id. at 191.

¹⁰⁴ Id. at 191.

¹⁰⁵ Id. at 193.

compensation. The Court emphasized "because the Fifth Amendment proscribes takings *without just compensation*, no constitutional violation occurs until just compensation has been denied."¹⁰⁶ Thus takings claims against the federal government are premature until the property owner has utilized the procedures provided by the Tucker Act, 28 U.S.C. sec. 1491 for obtaining compensation.¹⁰⁷ Likewise state laws allow the bringing of inverse condemnation actions to obtain compensation. As the Bank had not made use of Tennessee's inverse condemnation procedure, it had not yet been denied compensation. Finding that the Bank's claim was premature, because it had neither utilized Tennessee's inverse condemnation procedures nor sought variances, the Court reversed the decision of the federal court of appeals and remanded the case for further proceedings.

Keystone Bituminous Coal Association v. DeBenedictis

In the 1986 case of *Keystone Bituminous Coal Association v. DeBenedictis*,¹⁰⁸ the Court reviewed a Pennsylvania statute which regulated the extraction of coal. In 1966, the Pennsylvania legislature enacted the Bituminous Mine Subsidence and Land Conservation Act and the state's Department of Natural Resources adopted regulations to implement the Act. The regulations prohibited mining that caused subsidence damage to three specified types of structures. The Keystone Bituminous Coal Association (an association of coal mine operators) filed suit challenging the Act and its related regulations. The Association argued that the provisions effected a taking of its property without compensation in violation of the Fifth and

¹⁰⁶ Id. at 194.

¹⁰⁷ For another case in which the Court decided that the landowner had brought its taking claim prematurely, see *Preseault v. Interstate Commerce Commission*, 494 U.S. 1 (1990), in which the landowner asserted the National Trails System Act Amendments of 1983 effected a taking in violation of the Fifth Amendment. The Court found the landowner's claim premature because it had not yet sought compensation for the alleged taking pursuant to the Tucker Act, which provides that the United States Claims Court has jurisdiction over any claim against the United States founded on the Constitution, a federal statute or regulation, or an express or implied contract with the United States.

¹⁰⁸ *Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U.S. 470 (1986).

Fourteenth Amendments. The Supreme Court decided that the Association's argument was not valid.

As support for its argument that the Pennsylvania Act and regulations violated its Fifth and Fourteenth Amendment rights, the Association cited *Pennsylvania Coal Co. v. Mahon*. In *Pennsylvania Coal*, as discussed above, the Supreme Court held that the implementation of a 1921 Pennsylvania statute, prohibiting mining which caused subsidence, violated the U.S. Constitution. The Association maintained that the similarities between *Pennsylvania Coal* and its case required that the Supreme Court find that the 1966 Pennsylvania statute was also unconstitutional. Despite the Association's assertions, the Court concluded that the Association's case was distinguishable from *Pennsylvania Coal*. The Court cited *Mugler*, *Miller v. Schoene*, and *Beer Co. v. Massachusetts* as support for its decision.

In explaining its reasons for distinguishing *Pennsylvania Coal*, the Court first discussed Justice Holmes' characterization of the 1921 statute in *Pennsylvania Coal* as one aimed solely at protecting private interests, specifically some private landowners' homes. In contrast, the Court in *Keystone* characterized the 1966 act as aimed at safeguarding the common welfare, not private interests. In enacting the 1966 statute, the Court viewed the legislature as "acting to protect the public interest in health, the environment, and the fiscal integrity of the area."¹⁰⁹ In short, the Court concluded that the state had validly exercised its police powers to abate a public nuisance-- subsidence caused by coal mining.

In addition to noting differences between the goals of the two statutes, the Court also noted that while the company claiming a taking in *Pennsylvania Coal* had demonstrated that the challenged statute made it impossible for it to engage in its business profitably, the Association had not made the same showing. Thus, the Association failed to demonstrate that the two factors delineated in *Agins v. Tiburon* and affirmed in *Penn Central* were present in its case; "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.'"¹¹⁰ The Court

¹⁰⁹ *Keystone* at 488.

¹¹⁰ *Id.* at 485 (quoting *Agins v. Tiburon* at 260).

concluded that the Association had not been denied economically viable use of its land and that the 1966 statute substantially advanced legitimate state interests. The Court further elaborated upon the second factor explaining that those alleging a regulatory taking have a "heavy burden"¹¹¹ in showing diminution in property value sufficient to support the finding of a taking. Having failed to meet the burden of evidencing the two factors, the Association was unsuccessful in arguing that the 1966 statute effected an unconstitutional taking.

In addition to distinguishing *Pennsylvania Coal*, the Court also referred to Justice Holmes discussion of reciprocity of advantage in *Pennsylvania Coal*. The concept of reciprocity of advantage, as explained by Justice Holmes, suggests that while an individual is burdened by restrictions placed on his or her property, this individual also greatly benefits from the restrictions placed on other individuals' property. The Court noted that Justice Holmes described such restrictions as "'properly treated as part of the burden of common citizenship'"¹¹² and reiterated that individuals own property subject to the limitation that their use of such property not be injurious to the community.

Also raised by the case of *Keystone* is the issue of whether the Court will consider in a takings case effects upon a portion of the claimant's property rather than the entire property. In *Keystone*, the Court reaffirmed the rule stated in *Penn Central* that the Court addresses "the nature of the interference with rights in the parcel as a whole"¹¹³ Similarly, the Court referred to *Andrus v. Allard* for the principle that "'where an owner possesses a full "bundle" of property rights, the destruction of one "strand" of the bundle is not a taking because the aggregate must be viewed in its entirety.'"¹¹⁴ The Association argued that the 27 million tons of coal which must remain in place to prevent the subsidence prohibited by the Pennsylvania statute had been "taken". However, the Court reasoned that the 27 million tons must be

¹¹¹ *Keystone* at 493.

¹¹² *Id.* at 491 (quoting *Kimball Laundry Co. v. United States*, 338 U.S. 1, 5 (1949)).

¹¹³ *Keystone* at 497 (quoting *Penn Central*, 438 U.S. at 130-1).

¹¹⁴ *Keystone* at 497 (quoting *Andrus*, 444 U.S. at 65-66).

considered in the context of the Association's entire property, the mining of most of which would not violate the statute. Having conducted this analysis, the Court concluded that the statute did not violate the Constitution.

Restricting Government Power

While for decades the Supreme Court had given governments broad latitude in the adoption of regulations (based largely upon the concept of police powers), by the late 1980s the Court appeared to have become less willing to uphold environmental regulations and instead was inclined to limit governments' regulatory flexibility in dealing with environmental issues.

First English Evangelical Lutheran Church of Glendale v. County of Los Angeles

The case of *First English Evangelical Lutheran Church of Glendale*¹¹⁵ was perhaps the first major Supreme Court case in the late 1980s to indicate that governments could now expect the Court to be less likely to affirm challenged environmental regulations or validate regulatory activity and instead be more likely to find an unconstitutional taking. In *First English*, the First English Evangelical Lutheran Church of Glendale brought suit claiming that the county government had unconstitutionally taken its property. The property at issue was located along the banks of the Middle Fork of Mill Creek in the Angeles National Forest. Following heavy flooding in that area in 1979, the county government adopted an ordinance prohibiting the building of any structures in the flood protection area for Mill Creek. Because of this prohibition, the Church was unable to rebuild the structures on its property (previously used as a campground) destroyed by the flood.

In its suit against the county, the Church engaged in an inverse condemnation proceeding alleging that the government had taken its property and sought compensation for the alleged taking. In response to the Church's allegations, the county government argued that the California Supreme Court's decision in *Agins v. Tiburon* provided that property owners were not

¹¹⁵ *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 107 S. Ct. 2378 (1987).

entitled to compensation for an alleged taking until the "challenged regulation or ordinance has been held excessive in an action for declaratory relief or a writ of mandamus and the government has nevertheless decided to continue the regulation in effect."¹¹⁶ Moreover, because there had been no such action or writ, the county government asserted that the court should not consider the Church's claim for compensation for a regulatory taking. Both the trial court and court of appeal were persuaded by the county's arguments. The California Supreme Court denied review and the case was appealed to the U.S. Supreme Court, where, in 1987, the court of appeal decision was reversed and remanded. The Supreme Court concluded that the decision in *Agins v. Tiburon* did not preclude the state court's consideration of the Church's taking claim. More importantly, the Court held that, for a property owner alleging a regulatory taking denying all use of his or her property, invalidation of the challenged regulation was not a sufficient remedy; compensation was owed for the taking of the property during the time when the regulation was in effect.

In addressing the California Supreme Court's decision in *Agins v. Tiburon*, the Court concluded that the California Supreme Court had erred in its conclusion that a property owner claiming a regulatory taking could not seek compensation until the challenged regulation had been invalidated. The Court explained that the protection of the Takings Clause may be invoked directly by a landowner in inverse condemnation proceedings; neither a condemnation proceeding by the government nor a proceeding invalidating the restrictive regulation need take place in order for the protection of the Takings Clause to be available to the landowner. In addition, the Court determined that the California Supreme Court had incorrectly decided in *Agins v. Tiburon* that the property owner's right to compensation applied only to the period of time after the regulation had been invalidated and during which the government nonetheless continued to enforce the regulation. The Court declared that such a remedy would not meet the demands of the Fifth Amendment. "[W]here the government's activities have already worked a taking of all use of property, no subsequent action by the government can relieve it of the duty to provide

¹¹⁶ First Evangelical at 2382.

compensation for the period during which the taking was effective."¹¹⁷ Thus, the Court held that while the invalidation of a regulation which restricts an owner's use of his or her property may end the taking, the property owner may nonetheless obtain compensation for the period of time during which the invalid regulation was in effect; invalidation of the regulation alone would be "a constitutionally insufficient remedy."¹¹⁸ In enunciating this principle, the Court emphasized that it applies only where, as in this case, the owner was denied "all use of property".¹¹⁹ In addition, the Court specified that the principle enunciated in this case would not apply to the delays usually encountered in obtaining building permits, variances, and changes to zoning ordinances.

In its opinion in *First English*, the Court did recognize the power of the government to take private property. The Fifth Amendment "does not prohibit the taking of private property, but instead places a condition on the exercise of that power."¹²⁰ What is required is compensation. Citing *Hawaii Housing Authority v. Midkiff*,¹²¹ the Court also affirmed that the decision to take private property for public use remains a legislative one. Nevertheless, the Court emphasized that select individuals cannot be made to carry burdens which should be shouldered by the public as a whole. The Court acknowledged that the principle enunciated in

¹¹⁷ Id. at 2389.

¹¹⁸ Id. at 2389.

¹¹⁹ Id. at 2389.

¹²⁰ Id. at 2385.

¹²¹ In denying a takings challenge to a state regulatory statute, the Court's opinion for *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984), provided guidance on what constitutes "public use" within the context of the Fifth Amendment taking clause. *Midkiff* alleged that his property had been taken by the State of Hawaii not for public use but for private use. The Court disagreed. It explained that the legislature, not the court, determines what constitutes public use; while such determination is subject to judicial review, generally the Court would defer to the legislature's judgment. In addition, the Court explained that in order for property to be deemed taken for public use it need not become public property; the property taken by the government could be transferred to individuals and still satisfy the public use requirement.

First English "undoubtedly lessen[s] to some extent the freedom and flexibility of land-use planners and governing bodies of municipal corporations when enacting land-use regulations."¹²² But the Court considered this result merely consistent with the just compensation clause of the Fifth Amendment, which it described as designed to limit the power of government.¹²³

Nollan v. California Coastal Commission

In 1987, the Court also issued its opinion in the case of *Nollan v. California Coastal Commission*.¹²⁴ The Nollans claimed that the government had taken their property and the Supreme Court concluded that their claim was valid. The property involved was a beachfront lot in Ventura County, on which the Nollans wished to build a new residence. In order to do so, they were required to first obtain a coastal development permit from the California Coastal Commission. The Commission granted the Nollans a permit but included a condition in its terms. Specifically, the permit required that the Nollans record a restriction on the deed for their property granting an easement to the public "to pass across a portion of their property bounded by the mean high tide line on one side, and their seawall on the other side."¹²⁵ The Nollans sought to have the Ventura County Superior Court invalidate the permit restriction but were unsuccessful. The Nollans then argued that the restriction effected a taking. The Superior Court found that a taking had occurred but was reversed on appeal. The Nollans appealed the case to the U.S. Supreme Court.

¹²² *First English* at 2389.

¹²³ Note that while the Court reversed the California court's decision that no compensation was due to the landowner, rather than finding an unconstitutional taking, the Court remanded the case to the California court for further proceedings; in the subsequent decision, the California Court found no unconstitutional taking. See *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 210 Cal. App. 3d 1353, 258 Cal. Rptr. 893 (2d Dist. 1989).

¹²⁴ *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987).

¹²⁵ *Id.* at 828.

The issue raised by the Nollans' case was whether the restriction included in their development permit violated the takings clause. In finding that it did, the Court presented the following analysis. The Court explained had the Commission required the Nollans to grant the public an easement across their property independent of any permit application, such action would have undoubtedly amounted to an unconstitutional taking. In so explaining, the Court reiterated that "the right to exclude [others is] 'one of the most essential sticks in the bundle of rights that are commonly characterized as property'"¹²⁶ The Court also noted its categorization of the easement's effect as a permanent physical occupation because the public was given the right to pass back and forth across the property continuously and found reasons to distinguish the Nollans' case from *PruneYard Shopping Center* and *Kaiser Aetna*, which also dealt with the right to exclude.

Thus, as framed by the Court, the issue to be decided was whether the decision that a taking had occurred was altered by the fact that the easement was to be granted as a condition to obtaining a development permit. The Court acknowledged that it had for many years upheld land use regulations (like the permit condition) as long as certain requirements were met. Specifically, the Court cited the test enunciated in *Agins v. Tiburon*; "land-use regulation does not effect a taking if it 'substantially advance[s] legitimate state interests' and does not 'den[y] an owner economically viable use of his land,'" .¹²⁷ The Court stated that generally a broad range of regulations and purposes had been deemed to meet these requirements. The Court also stated its assumption that the goals sought to be achieved by the Coastal Commission in creating the permit condition ("protecting the public's ability to see the beach, assisting the public in overcoming the 'psychological barrier' to using the beach created by a developed shorefront, and preventing congestion on the public beaches"¹²⁸) were legitimate state interests. The Court,

¹²⁶ Id. at 831 (quoting *Teleprompter*, 458 U.S. at 433 quoting *Kaiser Aetna*, 444 U.S. at 176).

¹²⁷ Nollan at 834 (quoting *Agins*, 447 U.S. at 260).

¹²⁸ Nollan at 835.

however, questioned whether the permit condition substantially advanced these interests.¹²⁹ The Court explained that it had not previously established standards for the degree of connection, the "essential nexus",¹³⁰ necessary between the state interest and the land use regulation used to secure that interest. The Court declined to establish such a standard in this case, concluding that the permit condition imposed in this case would not meet even the most liberal of standards; even the smallest degree of connection that the Court could envision adopting as a standard was not apparent in this case. Due to this, the Court held that imposition by the Commission of an easement on the Nollans' property would constitute a taking unless compensation was paid to the landowners.¹³¹

Lucas v. South Carolina Coastal Council

The 1992 case of *Lucas v. South Carolina Coastal Council*¹³² also involved regulations applied to the coastal region of a state and evidenced an inclination by the Court to give regulators less flexibility. In 1986, Lucas purchased two lots on the Isle of Palms in Charleston County, South Carolina. Lucas purchased the property with the intention of building single family homes on the lots. However, in 1988 the South Carolina legislature enacted the Beachfront Management Act, which had the effect of prohibiting Lucas from constructing any

¹²⁹ In explanation of its skepticism, the Court noted that it did not find credible the Coastal Commission's assertion that the requirement of a public easement along the oceanfront of the Nollan's property would mitigate the visual obstacle presented from the road by the Nollans' newly constructed residence; restrictions in construction width or height seemed, to the Court, better suited to this purpose. Similarly, the Court found it "impossible to understand" how the easement reduced the psychological barrier created by the new residence or remedied increased congestion on the public beach caused by the Nollans' residence. *Id.* at 838.

¹³⁰ *Id.* at 837.

¹³¹ For a lower court case decided a few years after *Nollan* and finding a taking (of mineral rights effected by the enactment of the Surface Mining Control and Reclamation Act of 1977), see *Whitney Benefits, Inc. v. U.S.*, 926 F.2d 1169 (1991), a U.S. Court of Appeals decision affirming the U.S. Claims Court's finding of a taking and its award of \$60,000,000.

¹³² *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886 (1992).

permanent habitable structures on his property. Lucas filed a suit against the state agency responsible for the implementation of the Act, the South Carolina Coastal Council, claiming that a taking had occurred and that he was owed compensation. The state trial court found that the Act rendered Lucas' property "'valueless'" ¹³³ and ordered the government to compensate Lucas in the amount of \$1,232,387.50. The state Supreme Court reversed the decision of the trial court reasoning that, as the regulation at issue was designed to prevent a harmful use of property tantamount to a nuisance, compensation was not required. Thus, the issue presented to the U.S. Supreme Court on appeal was whether the Act effected a taking of Lucas' property which required compensation.

In deciding Lucas' case, the Court reviewed earlier takings decisions and the principles upon which they were based. Citing *Pennsylvania Coal*, the Court reiterated the principle that while property may be regulated, regulation that goes too far will be recognized as a taking. The Court also reaffirmed that generally takings claims are decided on a case by case basis but also detailed two types of regulatory action that the Court has deemed compensable regardless of the public interest involved. First among these are regulatory actions which cause the property owner to suffer a physical invasion of his or her property. For examples of such actions, the Court cited *Teleprompter* and *Kaiser Aetna*. The second type of regulatory action involves those which "den[y] all economically beneficial or productive use of land."¹³⁴ As a rationale for this second principle, the Court suggests such a high degree of regulation is perhaps "the equivalent of a physical appropriation."¹³⁵

In its decision for the *Lucas* case, the Court also examined the state supreme court's basis for finding that no compensable taking had occurred. The Court described the state court's basis as a finding that the regulatory Act was justified as "an exercise of . . . 'police powers' to

¹³³ Id. at 2889 (quoting App. to Pet. for Cert. 37).

¹³⁴ Lucas at 2893.

¹³⁵ Id. at 2894.

mitigate the harm to the public interest . . .¹³⁶ in accordance with *Mugler*, *Hadacheck*, *Miller v. Schoene*, and *Goldblatt*. The Court agreed with the state court that many prior decisions, including those cited, "suggested that 'harmful or noxious uses' of property may be proscribed by government regulation without the requirement of compensation."¹³⁷ The Court also explained, however, that it now considered the noxious use rationale for regulation to simply be an earlier formulation of the modern principle relating to the substantial advancement of legitimate state interests; while the Court had earlier discussed regulations in terms of harm prevention, in modern analysis benefit protection was the focus. At the same time, the Court emphasized that whether a regulation prevents a harm or instead confers a benefit depends in large part upon who is doing the categorization; it is a subjective rather than objective determination.

For these reasons, in *Lucas*, the Court rejected the noxious use (or harm) rationale for finding a regulatory taking to be one which does not require compensation. "[T]he legislature's recitation of a noxious-use justification cannot be the basis for departing from our categorical rule that total regulatory takings must be compensated."¹³⁸ Indeed, the Court noted, that in none of the earlier cases employing a noxious use rationale for justifying a regulation was a total deprivation of property value involved. The Court asserted that to create a noxious use exception in the case of deprivation of all value is contrary to the Court's recognition that the states' police powers have limits.

While the Court rejected the state court's noxious use justification, it did offer another basis for justifying and affirming regulatory action that denies a property owner all value of his or her property. "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

¹³⁶ Id. at 2896.

¹³⁷ Id at 2897.

¹³⁸ Id. at 2899.

of his title to begin with."¹³⁹ To determine interests already excluded from the owner's estate, one looks to the title for the property and the "background principles" of the state's law of property and nuisance.¹⁴⁰ If such a search results in the conclusion that the restriction sought to be legislated is not one already created by these other sources of law, the state must compensate the landowner for the imposition of the newly legislated restriction. In examining such sources of law, the Court specified the following factors (associated with state nuisance law) as among those which should be considered:

the degree of harm to public lands and resources, or adjacent private property, posed by the claimant's proposed activities . . . , the social value of the claimant's activities and their suitability to the locality in question, . . . the relative ease with which the alleged harm can be avoided through measures taken by the claimant and the government (or adjacent private landowners) alike, . . . [whether] a particular use has long been engaged in by similarly situated owners . . . [and whether] other landowners, similarly situated, are permitted to continue the use denied to the claimant. "¹⁴¹

As to Lucas' case, the Court reasoned that it was unlikely that the other sources of South Carolina law would have restricted the essential use of his property. However, the Court concluded that it was for the South Carolina courts to determine whether other sources of South Carolina law imposed the same use restriction sought to be imposed on the Lucas property by the South Carolina Coastal Council. Accordingly, the Court reversed the state supreme court's earlier decision and remanded the case to the state court for further consideration. In doing so, the Court emphasized that in order for the Coastal Council to prevail in the case, it could not simply assert that Lucas' proposed use of the property was contrary to the public interest; the Council must instead show that the proposed use is one already restricted by other sources of law.

¹³⁹ Id. at 2899.

¹⁴⁰ Id. at 2900.

¹⁴¹ Id. at 2901.

In short, the Court's opinion in *Lucas* provided that a state government may not regulate property to the extent of denying all economic value without compensating the owner (despite its police powers) unless the use prohibited was also prohibited by the state's other sources of law. In instances where other sources of law prohibit the use, the regulation served to make the prohibition explicit. With the guidelines enunciated in *Lucas*, the Court restricted the states' ability to deny property owners' all economic value of their land; in such instances, the prohibition involved must already have existed in other sources of law or the state must compensate the property owner.

Dolan v. City of Tigard

In its 1994 opinion for the case of *Dolan v. City of Tigard*¹⁴², the Supreme Court further limited the regulatory flexibility of state governments. *Dolan* involved a store owned by Dolan and located in Tigard, Oregon on property through which Fanno Creek ran. She wanted to double the size of the store and pave its parking lot. In order to proceed with these plans, she applied to the City Planning Commission for a permit. The Commission issued a permit to Dolan but imposed conditions. The conditions required that Dolan dedicate to the city (1) that portion of her property which lay within the 100-year floodplain of the Creek for improvement of a storm drainage system and (2) an additional 15-foot strip of property to be used by the public as a bicycle path. Dolan requested that the Commission change the conditions but her request was denied. The Commission explained that the first condition was imposed so that the planned paved parking lot (an impervious surface) would not jeopardize the goals of Tigard's Drainage Plan. The second condition was explained as being in furtherance of Tigard's goal of decreasing automobile congestion. The Tigard City Council approved the Commission's final decision regarding the permit and Dolan appealed the Council approval to the Land Use Board of Appeals claiming that an uncompensated taking had occurred. Both the Land Use Board of Appeals and the Oregon Court of Appeals affirmed the Commission's decision. Once the case reached the U.S. Supreme Court, however, the lower court decision

¹⁴² *Dolan v. City of Tigard*, 114 S. Ct. 2309 (1994).

was reversed and remanded.

In analyzing the case, the Court noted (as it had in *Nollan*) that had the Commission required Dolan to transfer a portion of her property to the city independent of any permit application, a taking would have occurred. At the same time, the Court again acknowledged that land use regulations had been upheld against taking challenges as far back as the case of *Euclid v. Ambler* in 1926. Since the time of *Euclid*, the Court developed a test for assessing the constitutionality of land use regulations in *Agins v. Tiburon*; a land use regulation does not effect a taking if it substantially advances legitimate state interests and does not deny an owner economically viable use of his land. In a comparison of Dolan's case to *Agins v. Tiburon* and *Euclid*, the Court highlighted two differences. The earlier cases involved legislative decisions about an entire area of a city, whereas the determination in this case involved only one property owner. In addition, conditions imposed on Dolan were not simply a restriction on her use of the property but a requirement that she transfer a portion of her property to the city.

With respect to the need for a legitimate state interest, the Court explained that additional requirements must also be met. Citing *Nollan*, the Court stated "[i]n evaluating petitioner's claim, we must first determine whether the 'essential nexus' exists between the 'legitimate state interest' and the permit condition exacted by the city."¹⁴³ Unlike the conclusion reached on this issue in *Nollan*, the Court determined in the *Dolan* case that a nexus did exist between legitimate state interests and the conditions imposed on the landowner. A nexus existed between preventing flooding in Fanno Creek and limiting development in the Creek's 100-year floodplain. Similarly, a nexus existed between reducing traffic congestion and providing bike paths as alternative transportation routes.

The second additional requirement delineated by the Court in *Dolan* called for it "to determine whether the degree of the exactions demanded by the city's permit conditions bear the required relationship to the projected impact of petitioner's proposed development."¹⁴⁴ Having delineated the second requirement, the Court proceeded to determine how close a relationship

¹⁴³ Dolan at 2317.

¹⁴⁴ Id. at 2318.

must exist between the conditions imposed and the development proposed. In doing so, the Court referred to state court decisions and found that the state courts had taken a variety of positions that could be divided into three categories: the degree of connection required by the states was described by the Court as "lax", "very exacting", or a "'reasonable relationship'".¹⁴⁵ The Court concluded that the reasonable relationship standard best suited the requirements of the U.S. Constitution but chose to denominate it the "rough proportionality" standard. In describing this standard, the Court explained "[n]o precise mathematical calculation is required, but the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development."¹⁴⁶

The Court proceeded to apply its new standard to Dolan's case and found that the government had not satisfied its requirements. As to the first condition imposed on Dolan's permit (that she dedicate to the city that portion of her property which lay within the 100-year floodplain of Fanno Creek), the Court considered the impact of Dolan's proposed development. The Court agreed with the city that the paving of Nolan's parking lot would increase the flow of stormwater from her property, and that requiring her to leave that portion of her property lying within the 100-year floodplain undeveloped would aid in minimizing the paved parking lot's effect on stormwater flow. However, the Court also emphasized that the city required Dolan to do more than leave a portion of her property undeveloped; the city required her to transfer it to the city for use as a public greenway. Because of the public nature of the greenway, Dolan would lose the essential right to exclude others from that portion of her property. Moreover, the city had given no reason why, in order to improve its storm drainage system, the greenway on Dolan's property had to be public instead of private. Nor had the city made any "individualized determination"¹⁴⁷ to support that aspect of the first permit condition. As to the second permit condition (that Dolan dedicate to the city an additional 15-foot strip of property to be used by the public as a bicycle path), the Court found that "the city has not met

¹⁴⁵ Id. at 2318-19.

¹⁴⁶ Id. at 2319-20.

¹⁴⁷ Id. at 2321.

its burden of demonstrating that the additional number of vehicle and bicycle trips generated by the petitioner's development reasonably relate to the city's requirement for a dedication of the pedestrian/bicycle pathway easement."¹⁴⁸ While the city had found that the creation of a bike path could help alleviate increased vehicular traffic caused by the proposed expansion of Dolan's store (and the Court acknowledged that the expansion would likely increase vehicular traffic in the vicinity), the Court stated that the city could not rely upon such conclusory statements to justify the second permit condition and instead "must make some effort to quantify its findings in support of the dedication for the pedestrian/bicycle pathway"¹⁴⁹ As the city had not met the requirements stated by the Court, the Court reversed the lower court decision and remanded the case for further proceedings consistent with the Court's decision.

APPLICATION OF CASES TO HYPOTHETICAL SITUATIONS

Hypothetical Situation A1

A corporation owned a rock quarry from which it extracted stone. The corporation in turn sold extracted stone to its customer for a variety of uses, including construction. The rock quarry lie above and around an aquifer, which was part of a larger aquifer; residents in the area used water originating in the aquifer as part of their water supply. After the corporation had engaged in the stone mining business for over a decade, the state government determined that the corporation's process of extraction was releasing particles into the aquifer and negatively affecting the aquifer and related water supply. As a result, the state had an order issued prohibiting the corporation from continuing the process of extracting stone at the quarry. The corporation complied with the order but also sued the state for damages in an inverse condemnation proceeding alleging that its property had been taken in violation of the Fifth Amendment.

¹⁴⁸ Id. at 2321.

¹⁴⁹ Id. at 2322.

During the proceeding, the corporation argued that it had been denied all economically beneficial and productive use of its land, it had suffered a regulatory taking, and was owed compensation from the state. The corporation asserted that there was no other economically beneficial or productive use for its property other than as a stone quarry. The state argued that the corporation's taking claim was not warranted; the state explained that the quarry to which the order applied was just one of many owned and operated by the corporation on property contiguous with and adjacent to the quarry at which the corporation had been ordered to cease operations. The state further explained that the order did not apply to the remainder of the corporation's property, as that property was not located around and above the aquifer. The state emphasized that the property on which the corporation was able to continue its operations constituted 85 % of the corporation's total property with the closed quarry representing only 15 % of the entire property.

Given the facts presented above, a court will likely find that a taking did not occur based on precedent established by *Penn Central* and other similar cases. *Penn Central* and subsequent cases establish that in assessing takings claims, the court will consider a regulation's effect upon a claimant's entire property, not upon portions thereof. Thus, while it seems probable that a court would conclude that the state's regulatory actions in this hypothetical situation did deny the corporation all economically beneficial or productive use of its property consisting of the closed quarry, the court will likely focus upon the productive use the corporation may continue to make of the remaining 85 % of its property. As a result, it is unlikely that a court will find that a taking occurred.

Hypothetical Situation A2

In this hypothetical situation, the facts are exactly the same as they are for hypothetical situation A1 above, except that: 1) the quarry to which the order applies is the only property owned by the corporation; 2) approximately ten months after the order was issued the state revoked the order; and 3) the state revoked the order due to its revised conclusion (based upon further examination of data, generated for the quarry, in light of recent advancements in hydrogeological principles and models) that while the corporation's operations in the quarry did

affect the aquifer, the level of impact did not necessitate action by the state.

As the inverse condemnation proceeding continued, the state argued that the corporation no longer had a basis for claiming a taking; the order had been revoked and the corporation was free to resume operations at the quarry. The corporation responded that for ten months it had been required to cease rock quarry operations on its property, and, having been denied this use of the property and there being no other uses for which the property could be utilized, the corporation argued it had been deprived of all use of the property during those ten months. On this basis, the corporation continued to seek compensation from the state for a regulatory taking.

Given the facts presented above, a court will likely find, based on precedent established by *First English* and other similar cases, that the state owes the corporation compensation for a regulatory taking. *First English* and subsequent cases establish that the government may not avoid liability for a taking which denies the property owner all use of its property by ceasing the activity that effected the taking; even where the government abandons regulatory activity that effects such a taking, it continues to owe the property owner compensation for that period during which the regulatory activity was undertaken. In this hypothetical situation, it is likely (assuming a court finds persuasive the corporation's argument that it was deprived of all use of its property) that a court will conclude that the state owes the corporation compensation relating to the period beginning when the state had the order issued and ending when the state had the order revoked.

Hypothetical Situation B1

An individual owned property in an outlying area of a city which had experienced consistent increases in its population during the last three decades. The property owner decided that, with the growing population in the area, the construction of a shopping mall would be a profitable use of his property. Subsequently, he spent \$250,000 to plan and design the mall utilizing the services of consultants. After the property owner had taken these steps, the city adopted a zoning ordinance for the area in which the owner's property was situated. The ordinance provided that residential, but no commercial, development would be allowed in the area. The property owner learned of the zoning ordinance when his application for a building

permit was denied. He then sought a variance from the city government to allow commercial development on his property. This request was denied. As a result, the property owner sued the city for damages in an inverse condemnation proceeding alleging that his property had been taken in violation of the Fifth Amendment.

During the proceeding, the property owner emphasized that he had been planning to build a shopping mall on his property for some time and that he had invested significant sums of money in pursuit of this plan. He also argued that he would obtain a larger return on his investment in the property if he developed it for commercial use instead of residential; he based this assertion on his conclusion that the supply of residences in the city was beginning to meet demand. The city responded that it had adopted the zoning ordinance because, due to the increased population in the city, expansion in one of the city's existing residential areas now bordered the area to which the new zoning ordinance applied; by limiting development in this area to residential purposes only, the city sought to create a residential atmosphere in the area for the enjoyment and safety of its citizens living in the adjoining area as well as those it anticipated would reside in the newly zoned area. In addition, the city showed that, while the supply of residential buildings in the city was beginning to meet the demand for such structures, an unmet demand still existed and the income the property owner could expect to receive from the property developed for residential purposes would provide him with a return on his investment in the property.

Given the facts presented above, a court will likely find that a taking did not occur based on precedent established by *Agins* and other similar cases. *Agins* and subsequent cases establish that a land use regulation does not result in a taking if it substantially advances legitimate state interests and does not deny an owner economically viable use of its land. Assuming the court accepts the state interest argument offered by the city, this part of the takings analysis has been satisfied, and based upon cases like *Euclid v. Ambler* (which have acknowledged the legitimacy of zoning areas for residential use only) this outcome seems likely. The "segregation of residential, business, and industrial buildings will make it easier to provide fire apparatus suitable for . . . each section; . . . will increase the safety and security of home life; greatly tend to prevent street accidents, especially to children, by reducing the traffic and resulting confusion

in residential sections; . . . etc."¹⁵⁰ As to the economically viable use consideration, it seems likely the court would agree with the city that the property owner's opportunity to develop his property for residential purposes provides him with an economically viable use of the property.

Hypothetical Situation B2

In this hypothetical situation, the facts are exactly the same as they are for hypothetical situation B1 above, except that: 1) the owner never intended to use his property as a shopping mall site but instead always intended to develop the property for residential purposes; 2) the zoning ordinance adopted by the city provided for minimum lots sizes for residential development; 3) the property owner's application for a building permit detailed plans for residential development; 4) the city rejected the property owner's application because his plans did not comply with the minimum lot size requirements; and 5) immediately following denial of his permit application, the property owner sued the city for damages in an inverse condemnation proceeding alleging that his property had been taken in violation of the Fifth Amendment.

Given the facts presented above, a court will likely conclude, based on precedent established by *Williamson County* and other similar cases, that the property owner has brought his takings claim to court prematurely, as he did not, following the denial of his initial permit application, seek a variance from the city. A grant of a variance from the city would obviate the need for the property owner to bring a takings claim, while a denial would constitute a final decision from the relevant decisionmaking body ripe for review by the court.

Hypothetical Situation B3

In this hypothetical situation, the facts are exactly the same as they are for hypothetical situation B2 above, except that: 1) the property owner's permit application complied with the city's minimum lot size requirements; 2) the city granted the property owner's permit application; 3) as a condition of the permit grant the city required the property owner to dedicate 10% of his property for use as a public recreation area; 4) after the permit was granted with the condition,

¹⁵⁰ *Village of Euclid v. Ambler Realty Company*, 272 U.S. 365, 394 (1926).

the property owner requested that the city change the permit condition; 5) the city denied the property owner's request to change the permit condition; 6) following denial of this request, the property owner sued the city for damages in an inverse condemnation proceeding alleging that his property had been taken in violation of the Fifth Amendment.

During the proceeding, the city argued that in requiring the dedication of the recreation area, the city was seeking to secure the government's interest in maintaining the health of its citizens, including their physical and emotional well-being. Due to the residential development proposed by the property owner (which consisted of 76 single family homes), the city anticipated an increased demand for the city's recreational facilities. Indeed, the city had conducted a survey of individuals living in the residential area adjacent to the owner's property (as representative of the prospective purchasers of the owner's planned residences) and determined that more than a majority of those individuals were interested in, and expected to have available to them, recreational facilities. In response, the property owner argued that any additional demand for recreational facilities created by the sale of his 76 residences could be more than adequately met by facilities at a city high school located two miles away (which included a running track, two baseball diamonds, and a soccer field) and by a state park seven miles away (consisting of 372 acres, hiking trails, and picnic areas).

Given the facts presented above, a court more likely than not will conclude that the permit condition effected a taking. Precedent established by *Nollan* and *Dolan* suggests that a court assessing the claim presented by this hypothetical situation will focus upon the state interest involved. Similarly, it is likely that the court will consider the public health the city seeks to protect a legitimate state interest, and that an essential nexus, as required by *Nollan*, exists between public health and recreational facilities. It is also probable, however, that the city in this case has not met the additional requirements set forth in *Dolan*. Specifically, it would not appear that the city has shown that "the degree of exactions demanded by the city's permit conditio[n] bear[s] the required relationship to the projected impact of [the owner's] proposed development."¹⁵¹ The required relationship, as determined by the Supreme Court, is one of

¹⁵¹ *Dolan v. City of Tigard*, 114 S. Ct. 2309, 2318 (1994).

rough proportionality and is demonstrated by "an individualized determination [made by the city] that the required dedication is related both in nature and extent to the impact of the proposed development."¹⁵² Despite the survey conducted by the city in this case, the projected impact on recreational facilities generated by 76 new residences would not appear to justify the condition imposed by the city requiring that the property owner dedicate 10% of his property; in light of the capacity and extent of recreational facilities in the vicinity, the condition imposed would likely not be deemed to bear the necessary relationship in nature and extent to the impact of the owner's development of his property.

Hypothetical Situation C

An individual purchased a ranch at the cost of \$490,000. The ranch consisted of over 100 acres of property, a residence situated on the property, and a few other related structures. The individual purchased the ranch with the intention of using it to raise cattle but initially was using the ranch solely as a place for summer recreation away from his primary residence located in another state.

After having owned the property for two years, the property owner returned to the ranch one summer to find that electric power lines, and towers to hold the lines, had been installed on his property near one of its boundaries. After investigating the situation, the property owner determined that the power lines had been installed by the power company operating in the state with the authorization of the state government. The property owner subsequently complained to the state about the power lines. In response, the government explained that due to an increasing influx of new residents into the state, the electric power system as it existed in the state had become inadequate to provide sufficient electric power to the expanding population of the state. In addition, because of the mountain range abutting the property owner's ranch and other property in that area, the only feasible site for the power lines was across the property owner's ranch.

Finding the government's response unsatisfactory, the property owner sued the

¹⁵² Id. at 2319-20.

government alleging his property had been taken in violation of the Fifth Amendment. The property owner argued that the electric power lines were an intrusion on his property, interfered with his enjoyment of the property, and could interfere with his intended use of the property as a cattle ranch. The government asserted that the intrusion was minimal and was warranted by the public interest it sought to secure-- the provision of adequate electric power to all residents of the state.

Given the facts presented above, a court will likely find that a taking occurred based on precedent established by *Loretto* and other similar cases. Generally, in assessing regulatory taking claims, a court will apply the three factors delineated in *Penn Central* and cited in subsequent decisions: 1) the economic impact of the regulation on the owner's property; 2) the degree of interference with the owner's investment-backed expectations; and 3) the character of the governmental action alleged to have effected a regulatory taking. As to the first two factors, the court may consider the property owner's arguments and evidence regarding the investment he has made in the ranch, his plans to use it as a cattle ranch, and what interference the electric power lines and towers pose to this use. But the overriding factor in this hypothetical situation and the one upon which the court would likely focus is the third, the nature of the governmental action. As to this factor, the Supreme Court in *Loretto* stated unequivocally that government action resulting in a permanent physical occupation of property will always constitute a taking, regardless of whether the intrusion is effected by people or things and whether or not the area occupied is relatively small. The electric power lines and the towers holding them effect a permanent physical occupation of the property owner's ranch. "[P]ermanent occupations of land by such installations as telegraph and telephone lines, rails, underground pipes or wires are takings even if they occupy only relatively insubstantial amounts of space and do not seriously interfere with the landowner's use of the rest of his land."¹⁵³

¹⁵³ *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 430 (1982).

SUMMARY AND CONCLUSIONS

Summary

The advent of an industrialized, populous and increasingly complex society created a need for increased government regulation. As society advanced, the level of regulation increased. Ultimately the constitutionality of the restrictions placed on private property was questioned by those subject to the regulations' requirements. Initially, the U.S. Supreme Court upheld such regulations as proper exercises of the states' police powers. In 1922, however, the Supreme Court found that a challenged regulation violated the protections afforded by the U.S. Constitution. During the course of the twentieth century, the Supreme Court did nevertheless continue to acknowledge the existence of the states' police powers, but with increasing frequency, balanced these powers with the property rights of individuals. Ultimately, by the 1990s, the Court seemed inclined to safeguard the rights of private property owners and to concurrently diminish the ability of the states to regulate property. As to the future, a closer examination of the interrelationship of existing court decisions (which follows) assists in understanding current takings jurisprudence and predicting the outcome of future takings cases.

Regulations Upheld as Exercise of Police Powers

In early challenges to government regulation, the Supreme Court found the police powers to be a sufficient authority for the states to engage in regulatory activity. The police powers have as their source the desire of the nation's citizens (as evidenced by the formation of the government) that the government act to secure the common good. The police powers are also derived from the U.S. Constitution, specifically the Tenth Amendment, which provides "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."¹⁵⁴ The police powers and their source were discussed by the Supreme Court in its opinion for *Munn v. Illinois*.¹⁵⁵ The Court

¹⁵⁴ U.S. Constitution, amend. X.

¹⁵⁵ *Munn v. The People of the State of Illinois*, 94 U.S. 113 (1876).

based its finding in that case, that the constitutional challenge to an Illinois' statute was without merit, upon the police powers. In explaining its decision, the Court stated that members of society (such as *Munn*) part with some of their freedom by necessity in order that the government may act to secure the common good. Members of society are not free to use their property in a manner that is injurious to other members of society. Through their police powers, the states were authorized to enact laws and regulate activity to ensure that individuals did not engage in such injurious behavior.

In addition to *Munn v. Illinois*, *Mugler v. State of Kansas*¹⁵⁶ is also often cited as a case in which a regulatory statute was upheld as a valid exercise of the state's police powers against a constitutional challenge. The Court explained that through an exercise of the police powers, the states may regulate all internal matters relating to moral and political welfare. In addition, the powers encompassed the authority to destroy property. Nonetheless, the regulations enacted by the states pursuant to their police powers could not violate constitutionally protected rights. In assessing whether a regulation had exceeded its constitutional limits, the Court explained that a substantial relationship must have existed between the regulation and the public good sought. The Court also noted, however, that, in its assessment of a regulation, the Court would defer to the legislature's determination of need for the regulation. The Court would also allow all possible presumptions in favor of the regulation's validity. As to the specific issue of whether a taking had occurred, the Court stated that a regulation could not effect a taking when the use it prohibits was a noxious use (as in *Mugler's* case).

In the early twentieth century, the Court provided additional insight into legal principles relating to regulation with its opinion in the case of *Hadacheck v. Sebastian*.¹⁵⁷ As with *Munn* and *Mugler*, the Court found constitutional the regulation challenged by *Hadacheck* as a valid exercise of police powers. These powers, as viewed by the Court, were "one of the most essential powers of government,--one that is the least limitable."¹⁵⁸ The Court suggested that

¹⁵⁶ *Mugler v. State of Kansas*, 8 S. Ct. 273 (1887).

¹⁵⁷ *Hadacheck v. Sebastian*, 36 S. Ct. 143 (1915).

¹⁵⁸ *Id.* at 145.

these powers were limited only by the requirement that they not be exercised arbitrarily. Moreover, in assessing the arbitrariness of regulations, the Court stated it "must accord good faith to the . . . [government] in the absence of a clear showing to the contrary" ¹⁵⁹

Four years later, the opinion issued by the Court in *Perley v. State of North Carolina* ¹⁶⁰ states the Court's continued approval of regulatory restrictions placed upon property and property rights; "[i]t and they necessarily are subject to some exertions of government." ¹⁶¹ In holding that the regulatory statute challenged in this case withstood constitutional scrutiny, the Court emphasized the protection of the public welfare toward which the statute was aimed. The Court also noted that the state legislature explicitly acknowledged the need for such protection in its statute. Thus, the court opinions for the earliest constitutional challenges to regulation exhibited deference by the Court to the states and their legislatures. The deference was based upon the police powers accorded the states, and the Court appeared willing to champion these powers.

The Genesis of Regulatory Takings

In 1922, the Court issued its opinion in the case of *Pennsylvania Coal Company v. Mahon*. ¹⁶² This decision greatly strengthened the legal position of those alleging that a government regulation had effected an unconstitutional taking. In *Pennsylvania Coal*, the Court emphasized the limits of the states' police powers, and, while the Court remained inclined to give great weight to legislative determinations, such determinations were nonetheless described as open to challenge. The Court indicated that such challenges would be considered on a case-by-case basis, with diminution in property value as one factor to be considered.

In finding that the state statute in *Pennsylvania Coal* effected a taking, the Court

¹⁵⁹ Id. at 147.

¹⁶⁰ *Perley v. State of North Carolina*, 249 U.S. 510 (1919).

¹⁶¹ Id. at 513.

¹⁶² *Pennsylvania Coal v. Mahon*, 43 S. Ct. 158 (1922).

explained that a statute may so limit an owner's use of his or her property that the statute functions as the equivalent of a physical seizure of the property. As seen by the Court, the risk existed of so greatly expanding the police powers that private property rights would become meaningless. While some regulations were valid, those which went too far would be judged as having effected a taking requiring the government to compensate the owner of the regulated property.

The Dominance of Police Powers

In *Pennsylvania Coal*, the Court set forth principles making clear that regulations may effectively be challenged as creating unconstitutional takings. In subsequent cases, however, the Court did continue to find challenged regulations to be valid exercises of state police powers despite the principles delineated in *Pennsylvania Coal*. Two examples of such subsequent cases are *Village of Euclid v. Ambler Realty Company*¹⁶³ and *Miller v. Schoene*¹⁶⁴.

In *Euclid v. Ambler*, Amber Realty Company challenged the constitutionality of a regulation, specifically a zoning ordinance. The Court upheld the ordinance as a valid exercise of the police powers after examining the circumstances of the Company's case. The Court concluded that the facts and circumstances of the case "preclude[d] . . . [it] from saying . . . that such provisions are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare."¹⁶⁵ The Court also addressed society's need for regulations. Regulations that at one time would have been rejected as arbitrary were now in modern society judged as reasonable and acceptable. The growing complexity of our society rendered regulations necessary.

Miller v. Schoene provides another example of a post-1922 Supreme Court opinion in which the Court decided in favor of the government and not the landowner. Indeed, this decision held constitutional not only the regulation of property but also its destruction. Thus,

¹⁶³ *Village of Euclid v. Ambler Realty Company*, 272 U.S. 365 (1926).

¹⁶⁴ *Miller v. Schoene*, 276 U.S. 272 (1928).

¹⁶⁵ *Euclid v. Ambler*, 272 U.S. at 395.

the case served to demonstrate the broad scope that the Court might attribute to the police powers. Taking into account the facts and circumstances of the case, the Court weighed the public interest and property interest involved and concluded that the state's regulatory activity (aimed at securing the public interest but at the cost of a property interest) was a constitutional exercise of the police powers.

The Preservation of Police Powers

As the twentieth century progressed, regulations continued to face challenges in the courts. However, not infrequently the Supreme Court found such challenges to be without merit. In reaching its decisions, the Court established guidelines helpful in assessing the constitutionality of regulatory activity.

In 1961, the Court issued its decision in *Goldblatt v. Hempstead*.¹⁶⁶ In this decision, the Court explained that the fact that a regulation deprived an owner of the most beneficial use of his or her property did not alone establish an unconstitutional taking. The Court did, however, indicate that it would take into account the value of the regulated property before and after the adoption of the challenged regulation. Nonetheless, the Court reiterated that a regulation which prohibited a noxious use of property could not be deemed to effect an taking. In addition, the Court reaffirmed the presumption of constitutionality bestowed upon statutes and regulations issued by the government. Similarly, the party challenging a statute or regulation bore the burden of providing evidence that substantiates its claim of unconstitutionality.

The year 1978 brought with it the Court's often cited opinion for the case of *Penn Central Transportation Company*.¹⁶⁷ The case is most often cited for the principle it enunciated with regard to the concept of partial takings. The Court explained that in takings cases it would not consider the effect of regulations upon segments of the claimant's property; the regulation would be considered for its effect on the claimant's entire property. The practical effect of this principle is that, while a regulation may deprive a property owner of all use or

¹⁶⁶ *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962).

¹⁶⁷ *Penn Central Transportation Company v. City of New York*, 98 S. Ct. 2646 (1978).

value of a segment of his or her property, when considered for its effect on the property as a whole, the regulation may leave much property value intact or uses available.

In *Penn Central*, the Court also further elucidated factors to be applied in assessing taking claims. The first of these were the economic impact imposed by the regulation upon the property, as well as the extent of interference with the investment-backed expectations of the property owner. Considered in conjunction with these factors was the nature of the government activity; a physical intrusion was more likely to result in a taking than was a regulation. Also, the public interest involved was to be taken into account. Where a regulation was reasonably related to the public interest, even complete diminution in value would not amount to an unconstitutional taking. Conversely, a regulation might constitute a taking if it was "not reasonably necessary to the effectuation of a substantial public purpose" ¹⁶⁸ As a general matter, the Court also noted again that, while factors might be employed, there were no precise formulas by which to decide takings cases and that the circumstances of each case were to be considered. ¹⁶⁹

¹⁶⁸ Id. at 2660.

¹⁶⁹ For a more recent lower court opinion reiterating the validity of a case by case approach, see *Florida Rock Industries, Inc. v. U.S.*, 18 F.3d 1560 (Fed. Cir. 1994). In this case, the property owner applied to the Army Corps of Engineers for a permit under sec. 404 of the Clean Water Act, which would allow the owner to mine limestone located beneath its wetlands. The Corps denied the owner's application for a permit and the owner filed suit in the Court of Federal Claims alleging that the Corps had engaged in an uncompensated taking by denying the permit application. The court agreed and the government appealed to the U.S. Court of Appeals for the Federal Circuit. The Court of Appeals vacated the Court of Federal Claims decision and remanded the case to it for further consideration. Whereupon, the Court of Federal Claims again found a taking and the government again appealed, resulting in this 1994 opinion from the Court of Appeals. (The 1994 decision of the Court of Appeals vacated the second opinion of the Court of Federal Claims and remanded the case; to date, no resulting opinion has been issued by the Court of Federal Claims.)

While the Court of Appeals opinion pronounced again the need for a case by case approach, it also focused significantly upon the three factors outlined in *Penn Central*, and, with particular emphasis upon the economic impact factor, the court attempted to provide further guidance. First, the opinion stated that diminution in value is to be calculated based upon "the fair market value before and after the imposition of the regulatory restraint, and the extent of change, if any." Id. at 1566 n.12. Second, the court reasoned that, given the case by case

One year after *Penn Central*, the Supreme Court was presented with another takings claim. In *Andrus v. Allard*,¹⁷⁰ the Court considered the circumstances surrounding Allard's case and applied factors previously delineated by the Court. In addressing the issue of reduction in value, the Court acknowledged that Allard was prevented by regulations from putting his property to its most valuable use. The Court emphasized, however, that there were many other uses of the property available to Allard and that the right to sell was just one right of many in the bundle of rights. The Court noted as well that loss of anticipated profits constituted a weak basis for claiming a taking. Acknowledging the broader impact of its decision in *Andrus v. Allard*, the Court justified its decision in part by asserting that regulation is both necessary and the price paid by citizens for being members of civilized society.

In contrast to *Goldblatt*, *Penn Central*, and *Andrus*, the case of *Kaiser Aetna v. United States*¹⁷¹ provides a modern example of regulation gone too far. In its opinion for the case, the Court stated again that taking cases were to be decided by consideration of the facts of the specific case, but that factors may be used as a guide. As to specific factors, the Court explained that it would examine "the economic impact of the regulation, its interference with

approach adopted for the issue of takings, it was not possible to engage in "linedrawing" and establish a diminution in value (such as 75% or 90%), with regulatory actions resulting in diminution in excess of such percentage being presumed to have effected a taking. *Id.* at 1569. What was required instead, the court posited, was an analysis which engaged in a balancing of the interests involved. Such an analysis may be undertaken in part by making use of the guidelines developed by the courts, such as the factors outlined by the Supreme Court in *Penn Central*. With respect to the economic impact factor, the Court of Appeals offered additional aspects for consideration in the assessment of regulatory takings claims:

[A]re there direct compensating benefits accruing to the property, and others similarly situated, flowing from the regulatory environment? Or are benefits, if any, general and widely shared through the community and the society, while the costs are focused on a few? Are alternative permitted activities economically realistic in light of the setting and circumstances, and are they realistically available?

Id. at 1571.

¹⁷⁰ *Andrus v. Allard*, 444 U.S. 51 (1979).

¹⁷¹ *Kaiser Aetna v. United States*, 444 U.S. 164 (1979).

reasonable investment backed expectations, and the character of the governmental action¹⁷² Applying these factors to Kaiser Aetna's case, the Court noted that: 1) Kaiser Aetna had expended large sums of money to improve its property; 2) improvements were made with the expectation (created by the government) that the property would not be subject to the Army Corps of Engineers' regulations; and 3) the challenged regulation deprived Kaiser Aetna of one of the most important aspects of property rights-- the right to exclude. Considering these circumstances and applying the factors described, the Court found that an uncompensated (and therefore unconstitutional) taking had occurred. Lastly, it is worthy of note that the Court specifically stated that Congress' power to regulate navigable waters does not constitute an exception to the Fifth Amendment's protection against uncompensated takings.

Providing Additional Guidelines

During the 1980s, the Supreme Court was presented with additional taking claims and in the course of deciding such claims developed additional guidelines for takings analysis. In 1980, the Court found Agins' challenge to a City of Tiburon zoning ordinance to be without merit. The Court's decision for this case clearly delineated the standards by which zoning ordinances would be assessed; a zoning ordinance which in its application either "does not substantially advance legitimate state interests, . . . or denies an owner economically viable use of his land"¹⁷³ effects a taking. Yet, in its more general discussion of takings principles in *Agins v. City of Tiburon*, the Court also noted that "no precise rule determines when property has been taken"¹⁷⁴ and both public and private interests must be considered.

While denying another challenge to regulation of private property in the case of *Pruneyard Shopping Center v. Robins*,¹⁷⁵ the Court echoed its decision in *Agins*, reiterating

¹⁷² Id. at 175.

¹⁷³ *Agins v. City of Tiburon*, 447 U.S. 254, 260 (1980).

¹⁷⁴ Id. at 260-1.

¹⁷⁵ *Pruneyard Shopping Center v. Robins*, 447 U.S. 74 (1980).

the need to balance rights of the public with those of individuals. Similarly, the Court stated not all government action which injures or negatively affects private property constitutes a taking. However, the Court also emphasized the importance of the right to exclude others from one's property. To determine whether a regulation has gone too far in limiting property rights, the Court stated that the following factors were to be considered: "the character of the governmental action, its economic impact, and its interference with reasonable investment-backed expectations."¹⁷⁶

The factors specified in *Pruneyard* were again cited by the Court with approval two years later in the case of *Loretto v. Teleprompter Manhattan CATV Corp.*,¹⁷⁷ in which, however, the Court found that a taking had occurred. Among the three factors, the Court focused on the character of the governmental action. In *Loretto*, the statute at issue allowed a cable television company to permanently attach equipment on private property. Accordingly, the Court interpreted the character of the governmental action as one authorizing a permanent physical occupation of property. The Court stated unequivocally that "a permanent physical occupation authorized by government is a taking"¹⁷⁸ This conclusion resulted regardless of the fact that the area occupied was relatively small, whether the area was occupied by individuals or objects, and despite the regulation being one adopted pursuant to police powers and aimed at protecting legitimate public interests; the extent of governmental intrusion was too great. While stating this guideline, the Court did also state that a regulation not involving a physical occupation presented a different case and would "be analyzed under the multi-factor inquiry generally applicable to nonpossessory governmental activity."¹⁷⁹ Furthermore, the Court acknowledged the authority of the states to regulate property in the interest of the public.

Three years after deciding *Loretto*, the Court heard the case of *Williamson County*

¹⁷⁶ Id. at 83.

¹⁷⁷ *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).

¹⁷⁸ Id. at 426.

¹⁷⁹ Id. at 440.

Regional Planning Commission v. Hamilton Bank of Johnson City.¹⁸⁰ In this case, the Court reiterated that regulation that goes too far amounts to a taking. Similarly, the Court reaffirmed that among the factors to be considered in assessing takings claims "are the economic impact of the challenged action and the extent to which it interferes with reasonable investment-backed expectations."¹⁸¹ Nevertheless, the Court applied neither of these factors nor any others to assess the Bank's takings claim. Instead, the Court focused upon the threshold issue of ripeness and concluded that the Bank had brought its takings claim prematurely. In order to have avoided this determination, the Court explained, the Bank needed to have taken two steps, which it had failed to do. First, it should have obtained a final decision from the Williamson County Regional Planning Commission. More specifically, as the Bank had sought but failed to obtain approval for its plan of development, the Court would not deem the Commission's decision final until the Bank had also sought variances from the Commission, which process might have allowed the Bank to develop its property as planned. Second, the Bank should have utilized the inverse condemnation process established by state law; through such proceedings, the Bank could have obtained just compensation, if owed, and the possibility of an unconstitutional taking thus avoided.

In 1986, the Court denied a takings challenge in *Keystone Bituminous Coal Association v. DeBenedictis*.¹⁸² While the Association argued that the similarities of its case to *Pennsylvania Coal Co. v. Mahon* required a finding of a taking in its case, the Court found *Pennsylvania Coal* to be distinguishable. The Court noted that the statute in *Pennsylvania Coal* had been categorized as one aimed solely at protecting private interests, whereas the statute in the Association's case was a valid exercise of the police powers aimed at safeguarding the common welfare. More importantly, the Court again stated the guidelines for evaluating taking challenges to land use regulations: "land use regulation can effect a taking if it 'does not

¹⁸⁰ *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985).

¹⁸¹ *Id.* at 191.

¹⁸² *Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U.S. 470 (1986).

substantially advance legitimate state interests, . . . or denies an owner economically viable use of his land.'"¹⁸³ As to the first prong of this two-prong test, the Court concluded, based upon the above reasoning, that it had not been satisfied. The Court also found that the requirements of the second prong had not been met. In reaching this assessment, the Court emphasized that those alleging a regulatory taking have a "heavy burden"¹⁸⁴ in showing diminution in property value sufficient to support the finding of a taking. Lastly, the Court reaffirmed the rule stated in *Penn Central* that in takings cases the Court would assess the property owner's claims with reference to the owner's property as a whole rather than any one portion of the property.

Restricting Government Power

As the 1980s drew to a close, the Supreme Court appeared increasingly sympathetic toward the concerns of property owners and evidenced an inclination to advance property rights. In 1987, the Court decided *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*.¹⁸⁵ In this case, the Court established that a takings claim may be brought for the effect of a regulation despite its subsequent invalidation and discontinued enforcement. If a regulation has gone too far and effects a taking, the government's later cessation of enforcement does not extinguish the property owner's right to compensation; a takings claim could be brought for the period during which the regulation was enforced. The Court did note, however, that in order for a property owner to receive compensation under such circumstances, the owner must be denied "all use of property".¹⁸⁶ In recognizing the right to compensation for temporary takings, the Court did acknowledge that it was limiting the flexibility of government in its implementation and enforcement of regulations. Nonetheless, the Court was not deterred by this effect of its decision, finding its conclusions for the case consistent with the

¹⁸³ Id. at 485 (quoting *Agins*, 447 U.S. at 260).

¹⁸⁴ *Keystone*, 480 U.S. at 493.

¹⁸⁵ *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 107 S. Ct. 2378 (1987).

¹⁸⁶ Id. at 2389.

requirements of the Fifth Amendment and its intended purpose of placing limits on government.

In the same year the Court heard *First English*, it also heard the case of *Nollan v. California Coastal Commission*.¹⁸⁷ Here again the Court's decision was in favor of the property owner who claimed a taking. To assess the Nollans' claim that the conditions placed upon their building permit constituted a taking, the Court reaffirmed and applied the two-prong test delineated in *Agins v. Tiburon*. However, in doing so, the Court changed slightly the wording of the test changing it from an affirmative statement to a negative one: "land-use regulation does not effect a taking if it 'substantially advance[s] legitimate state interests' and does not 'den[y] an owner economically viable use of his land,'"¹⁸⁸ In order for the condition placed upon the Nollans' building permit not to constitute a taking, it had to meet both of these requirements. The Court focused upon the first. While the Court concluded that the state interests involved (protecting visual and physical access to, and preventing congestion on, the beach) were legitimate, the Court questioned whether the permit condition substantially advanced these interests. While recognizing that the Court had not previously established a standard for the connection necessary between the condition imposed and the interest sought to be advanced (and declining to establish such a standard), the Court declared that the permit condition under review would not withstand scrutiny under the most liberal of standards. In finding that the permit condition did effect a taking, it is noteworthy that the Court, as it had done in the past, emphasized the importance of the right to exclude others from one's property.

Into the 1990s, the Court still seemed inclined to champion the rights of property owners. In 1992, the Court reviewed the claims against the South Carolina Coastal Council as raised by Lucas.¹⁸⁹ In its opinion for this case, the Court reversed the South Carolina Supreme Court

¹⁸⁷ *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987).

¹⁸⁸ *Id.* at 834 (quoting *Agins*, 447 U.S. at 260). The test stated in *Agins* was: "The application of general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests, see *Nectow v. Cambridge*, 277 U.S. 183, 188, 48 S.Ct. 447, 448, 72 L.Ed. 842 (1928), or denies an owner economically viable use of his land" *Agins* at 260.

¹⁸⁹ *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886 (1992).

(which had found that the South Carolina Coastal Council had not taken Lucas' property) and remanded the case to the lower court for further proceedings not inconsistent with the Supreme Court opinion. To decide the case, the Court undertook a review of previous takings cases, including *Pennsylvania Coal*, *Teleprompter*, *Kaiser Aetna*, *Agins*, *Bituminous Coal*, and *Nollan*. In doing so, the Court cited with approval previously established principles. Although property might be regulated, a successful regulatory takings claim is one showing that a regulation had gone too far. Generally takings cases were to be decided on a case by case basis. In determining whether a regulatory taking had occurred, however, there were guidelines to be applied. A regulatory taking requiring compensation would be deemed to have occurred if the property owner had suffered a physical invasion no matter how small "(at least with regard to permanent invasions)".¹⁹⁰ Regulatory takings also occurred where regulatory actions "denie[d] all economically beneficial or productive use of land."¹⁹¹

The South Carolina Supreme Court (citing *Mugler*, *Hadacheck*, *Miller v. Schoene*, and *Goldblatt*) had reasoned that an exception to this rule regarding denial of all economic use applied where the regulatory action involved was one aimed at preventing harmful or noxious uses of property. The U.S. Supreme Court declared the South Carolina court's reasoning faulty for a number of reasons. First, the Court considered the noxious use rationale simply to be an earlier statement (derived from prior decisions) of what had developed into the modern principle relating to the substantial advancement of legitimate state interests. Second, and perhaps most importantly, in none of the earlier cases cited by the South Carolina court was there a total deprivation of property value. Third, to allow the exception described by the South Carolina court would be contrary to the acknowledged limits on states' police powers; where an owner is deprived of all value of his or her property, it was not enough for the state to assert that its regulatory action was for the purpose of preventing harm to the public.

While the Court rejected the exception described by the state court, the Court did develop and delineate in *Lucas* a new exception to the rule relating to the deprivation of all value.

¹⁹⁰ Id. at 2893.

¹⁹¹ Id. at 2893.

Specifically, the government might regulate property to an extent which deprived the owner of all value without committing a taking if the use prohibited by the regulation was one also denied to the owner by common law (i.e., the owner attempted to engage in a use with respect to his or her property which was not encompassed by his or her title to the property or was prohibited by the state's law of property and nuisance). As described, the exception developed by the Court was a limited one; where regulation deprived property of all its value, the state could avoid paying compensation to the owner only where the regulation prevented uses already otherwise prohibited. Thus, the exception was one of limited usefulness to regulators and of limited concern to those regulated; as stated by the Court, the exception allowed for implementation without compensation of regulations which merely make explicit otherwise existing law. As in *Nollan*, therefore, the Court in *Lucas* further limited the government's flexibility in regulating property and strengthened property rights.

The most recent case addressing regulatory takings is *Dolan v. City of Tigard*.¹⁹² The Court in this case again issued an opinion helpful to property owners. Similarly, the test stated in *Agins* was reaffirmed. As in *Nollan*, the Court focused on the first prong of this test (the state interest prong). While the Court had hesitated in *Nollan* to elaborate upon the specific requirements of this test, the Court in *Dolan* proceeded to outline additional requirements in reviewing the conditions imposed on Dolan's building permit. To conclude that a land use regulation substantially advances legitimate state interests, a court must first determine that there was an "essential nexus"¹⁹³ between the legitimate state interest and the regulation imposed on the landowner. Furthermore, if such a connection was found to exist, a court must also determine that the "degree of the exactions demanded by the city's permit conditions bear the required relationship to the projected impact of petitioner's proposed development."¹⁹⁴ As to what constituted the required relationship, the Court selected a reasonable relationship standard: "[n]o precise mathematical calculation is required, but the city must make some sort of

¹⁹² *Dolan v. City of Tigard*, 114 S. Ct. 2309 (1994).

¹⁹³ *Id.* at 2317.

¹⁹⁴ *Id.* at 2318.

individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development."¹⁹⁵ Thus, governments were required to engage in individual determinations and show that the restrictions imposed bore a reasonable relationship to the state interests at issue. Accordingly, as with other recent cases, the Court rendered governments' endeavor to regulate private property more difficult and thereby enhanced the protections afforded to property owners by the courts and the Constitution.

Conclusions

In the last century and the current, the Supreme Court developed case law on the subject of takings, which affects, indirectly or otherwise, the relationship between citizens and government and the application of regulations to property. In the earliest cases, the Court proclaims the power of state government to regulate private property. Pursuant to these police powers, the states have the authority to restrict the use to which an owner may put its property in order to prevent a harm to the general public. These police powers remain intact today and provide a basis for property regulation. Yet regulation may go too far.

Generally in determining whether government has exceeded its power and effected a regulatory taking, the Court will consider three factors: 1) the economic impact of the regulation on the property; 2) the degree of interference with the owner's investment-backed expectations; and 3) the character of the governmental action. Thus the Court takes into account the economic burden placed upon the individual landowner by regulation. In assessing this burden, however, the Court has made clear that it will consider the regulation's effect upon the owner's entire property, not simply portions thereof. At the same time that the Court establishes these guidelines, it also emphasizes that regulatory takings cases will be decided on a case by case basis; in general, the outcome of no case is predetermined by the Court's guidelines and the facts of each case must be considered. Nonetheless, the Court has ventured to declare that a taking will always be deemed to have taken place where the governmental action involves a permanent physical occupation of property. Under such circumstances, the Court will find that

¹⁹⁵ Id. at 2319-20.

a taking has occurred regardless of whether the area occupied is small or is occupied by objects or individuals. As an additional guideline, the Court has also stated that a property owner can obtain compensation from the government for the effect of a regulation, even if the regulation is subsequently invalidated, so long as the taking deprives the owner of all use of its property for a period of time. Thus, even where an offending regulation is invalidated or repealed, if it deprived the owner of all use of its property, the owner is owed compensation for that period during which the regulation was in effect; invalidation of the offending regulation alone is not a remedy sufficient for the dictates of the Constitution. It is important to note that before the Court will apply this guideline, or any other regarding regulatory takings, the Court must first consider whether the claim before it is ripe for review. Therefore, the Court will determine if the party claiming a regulatory taking obtained a final decision from the relevant decisionmaking body and also whether the claimant utilized available inverse condemnation procedures.

In addition to the three factors enumerated above, the Court has also delineated two factors to be considered in the more specific instance of challenges to land use regulations. A land use regulation does not result in a taking if it substantially advances legitimate state interests and does not deny an owner economically viable use of its land. Moreover, when a land use regulation involves exactions (e.g., the government requiring a landowner to dedicate a portion of its property to the public as a permit condition), two additional requirements developed by the Court apply. First, the government must show a connection, an essential nexus, between the exaction imposed and the interest sought to be protected in order for there to be a finding that the government is substantially advancing legitimate state interests. Second, the government must show that the exaction imposed bears a reasonable relation to the legitimate state interests. To make this showing, the government must engage in an individualized determination which evidences that the exaction in its nature and extent is related to the state interests to be protected.

Drawing upon the second factor cited above for land use regulations, and perhaps also the first of the three factors for general regulatory takings analysis, the Court has also established a rule, similar to the rule regarding permanent physical intrusions in its certitude. This rule provides that a regulation which denies an owner of all economically beneficial or productive use of its land constitutes a taking. The Court, however, has also created an

exception to this rule. The government may deny an owner all economically beneficial or productive use of its land if the uses prohibited are otherwise denied to the owner by other sources of law, such as state common law.

In hearing the regulatory takings cases presented to it, the Court's overarching goal, as in so many of its cases, would appear to be one of balancing the public interest with individual rights. It does so with reference to the Fifth Amendment and the Court's prior interpretations of this provision. The Court itself acknowledges that this area of law has been a difficult one for it, and thus inherently so for the individuals, businesses, government officials, natural resource managers and others who have come into contact with it. As regulation has increased, so have the number of regulatory takings cases presented to the Court. In deciding the cases, the Court has attempted to build upon prior decisions. In doing so, its analysis at times has reflected a predilection for the public interest and at other times the rights of individuals. It is fair to say that, as of the time of this writing, the latter hold favor with the Court. However, for the long term, this cannot be relied upon as a constant; the case law itself must be referred to and relied upon. While it is not all that we might seek from the Court in the form of guidance, it is that to which we are left. Therefore, the case law, as summarized above and as supplemented by future decisions, is an appropriate starting point for those seeking to determine whether they have suffered a taking, as well as those seeking to determine whether they risk effecting a taking, in violation of the Fifth Amendment of the U.S. Constitution.