ARTICLES

REGULATORY TAKINGS AND THE SUPREME COURT: HOW PERSPECTIVES ON PROPERTY RIGHTS HAVE CHANGED FROM *PENN CENTRAL* TO *DOLAN*, AND WHAT STATE AND FEDERAL COURTS ARE DOING ABOUT IT[*]

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I. INTRODUCTION: AN OVERVIEW OF TAKINGS, MAINLY REGULATORY

Much has been made of the terrible state of takings jurisprudence since the U.S. Supreme Court recommenced deciding takings cases twenty-five years ago after half a century of silence.[1] In the

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1. *See, e.g.*, Michael M. Berger & Gideon Kanner, *The Need for Takings Law Reform: A View from the Trenches — A Response to Taking Stock of the Takings Debate*, 38 SANTA CLARA L. REV. 837 (1998); Lynda L. Butler, *The Politics of Takings: Choosing the*

1920s, the U.S. Supreme Court decided, in quick succession, *Pennsylvania Coal Co. v. Mahon*,[2] *Village of Euclid v. Ambler Realty Co.*,[3] and *Nectow v. City of Cambridge*,[4] creating regulatory takings, validating the technique of zoning, then holding zoning can be a Fourteenth Amendment taking as applied. After thus holding zoning facially or generally constitutional on the one hand, but susceptible of being unconstitutionally applied on the other, the Court then abandoned the field to the states until its bizarre decision in *Village*

Appropriate Decisionmaker, 38 WM. & MARY L. REV. 749 (1997); J. Peter Byrne, *Ten Arguments for the Abolition of the Regulatory Takings Doctrine*, 22 ECOLOGY L.Q. 89 (1995); Matthew J. Cholewa & Helen L. Edmonds, *Federalism and Land Use After* Dolan: *Has the Supreme Court Taken Takings from the States?*, 28 URB. LAW. 401 (1996); John A. Humbach, *Evolving Thresholds of Nuisance and the Takings Clause*, 18 COLUM. J. ENVTL. L. 1 (1993); Gideon Kanner, *Hunting the Snark, Not the Quark: Has the U.S. Supreme Court Been Competent in Its Efforts to Formulate Coherent Regulatory Takings Law?*, 30 URB. LAW. 307 (1998); Julian R. Kossow, Dolan v. City of Tigard, *Takings Law, and the Supreme Court: Throwing the Baby out with the Floodwater*, 14 STAN. ENVTL. L.J. 215 (1995); James E. Krier, *The Takings-Puzzle Puzzle*, 38 WM. & MARY L. REV. 1143 (1997); James A. Kushner, *Property and Mysticism: The Legality of Exactions As a Condition for Public Development Approval in the Time of the Rehnquist Court*, 8 J. LAND USE & ENVTL. L. 53 (1992); Jan G. Laitos, *Takings and Causation*, 5 WM. & MARY BILL RTS. J. 359 (1997); Richard J. Lazarus, *Counting Votes and Discounting Holdings in the Supreme Court's Takings Cases*, 38 WM. & MARY L. REV. 1099 (1997); Richard J. Lazarus, *Putting the Correct "Spin" on* Lucas, 45 STAN. L. REV. 1411 (1993); Daniel R. Mandelker, *Of Mice and Missiles: A True Account of* Lucas v. South Carolina Coastal Council, 8 J. LAND USE & ENVTL. L. 285 (1993); Andrea L. Peterson, *The Takings Clause: In Search of Underlying Principles, Part I — A Critique of Current Takings Clause Doctrine*, 77 CAL. L. REV. 1299 (1989); Mark Sagoff, *Muddle or Muddle Through? Takings Jurisprudence Meets the Endangered Species Act*, 38 WM. & MARY L. REV. 825 (1997); Joseph L. Sax, *Property Rights and the Economy of Nature: Understanding* Lucas v. South Carolina Coastal Council, 45 STAN. L. REV. 1433 (1993); David Schultz, *Scalia, Property and* Dolan v. Tigard*: The Emergency of a Post-*Carolene Products *Jurisprudence*, 29 AKRON L. REV. 1 (1995); William Michael Treanor, *The* Armstrong *Principle, The Narratives of Takings, and Compensation Statutes*, 38 WM. & MARY L. REV. 1151 (1997); William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782 (1995); Norman Williams & R. Jeffrey Lyman, *Where Are South Carolina and the Supreme Court Taking Us?*, 16 VT. L. REV. 1111 (1992); Michael Allan Wolf, *Fruits of the "Impenetrable Jungle": Navigating the Boundary Between Land-Use Planning and Environmental Law*, 50 WASH. U. J. URB. & CONTEMP. L. 5 (1996).

2. 260 U.S. 393 (1922).

3. 272 U.S. 365 (1926).

4. 277 U.S. 183 (1928). It is worth noting that neither the *Euclid* nor the *Nectow* decisions refer to the Fifth Amendment, raising the possibility they are substantive due process rather than Fifth Amendment cases, later references by the Court notwithstanding. *See* JULIAN CONRAD JUERGENSMEYER & THOMAS E. ROBERTS, LAND USE PLANNING AND CONTROL LAW § 10.4, at 425–26 (1998).

of Belle Terre v. Boraas[5] (decided appropriately, on April Fool's day). It was left to the states to interpret — and generally to erode — Holmes's regulatory taking doctrine over the intervening half-century, sorting out what aspects of zoning, subdivision and other public land use controls were legal, when, and why.

Erode they did. Regulatory takings were virtually moribund by the time the Court re-examined the concept in the past two decades. In point of fact, the Court has not done so badly, ultimately, though it hardly distinguished itself in the first batch of its more or less recent takings cases. In 1978, in *Penn Central Transportation Co. v. New York City*,[6] and 1980, in *Agins v. City of Tiburon*,[7] the Court suggested standards for partial regulatory takings. In 1985, it erected a ripeness barrier to applied challenges of land use regulations on takings grounds in *Williamson County Regional Planning Commission v. Hamilton Bank*,[8] and reiterated its position in 1986 in *MacDonald, Sommer & Frates v. County of Yolo*.[9] In 1987, it attempted to recharacterize Holmes's *Pennsylvania Coal* decision as "advisory" and resurrected the redoubtable "denominator issue" from *Penn Central* in *Keystone Bituminous Coal Ass'n v. DeBenedictis*.[10] Also in 1987, the Court laid to rest any misconception over remedies for regulatory takings in *First English Evangelical Lutheran Church v. County of Los Angeles*.[11] Again in 1987 (a truly watershed year!),[12] the Court presented us with the doctrine of unconstitutional land development conditions using the nexus test in *Nollan v. California Coastal Commission*,[13] to which it returned in 1994 to add the proportionality requirement in *Dolan v. City of Tigard*.[14] Finally, in 1992 the Court gave us a controversial categorical or "per se" rule on "total" regulatory takings, though with two exceptions, nuisance and background principles of a state's law of

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5. 416 U.S. 1 (1974).
6. 438 U.S. 104 (1978).
7. 447 U.S. 255 (1980).
8. 473 U.S. 172 (1985).
9. 477 U.S. 340 (1986).
10. 480 U.S. 470 (1987).
11. 482 U.S. 304 (1987).
12. *See generally* Michael M. Berger, *The Year of the Taking Issue*, 1 BYU J. PUB. L. 261 (1987) (discussing the regulatory taking cases appearing before the U.S. Supreme Court in 1987).
13. 483 U.S. 825 (1987).
14. 512 U.S. 374 (1994).

property, in *Lucas v. South Carolina Coastal Council*.[15]

It is the states, and some federal courts, that have muddled the puddle. Let's agree at the outset that the Court ignored the clear direction the states were heading by the 1970s, which was to explain *Pennsylvania Coal* away into virtual irrelevance.[16] Whether this is or was philosophically good or bad, that's what state courts had done.[17] Good or bad in this Article means whether we have a pretty good idea of where the Court is going and what rules it expects to be applied to takings[18] (mainly regulatory where all the fuss is about, but physical as well, though briefly). I submit that we do have such an idea. The problem is many commentators don't much like the direction the Court has gone since at least 1987,[19] because its decisions tend toward the protecting of rights in property rather than governmental regulation. Whether that's good or bad depends a lot on one's perceptions of property and the place of government in the scheme of things. This Article makes no such judgments (well, not many, anyway) but focuses instead on what the Court tells us about the rules for mainly regulatory takings.

This Article suggests that what the Court has done is clear enough for most purposes. The problem is what the states and lower federal courts have done with the Court's pronouncements. First, an introductory word about basic property rights, followed by some introductory commentary on physical and regulatory takings. Next, this Article surveys the Court's takings jurisprudence from 1978 to 1998, concluding that there are plenty of reasonably clear rules with respect to regulatory takings, even though applying them is still pretty tough. Lastly, this Article summarizes and comments upon what the states, and some federal courts, have done with the guidance which the U.S. Supreme Court has provided on regulatory takings, from total to partial, exceptions noted and included.

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15. 505 U.S. 1003 (1992).

16. *See* FRED BOSSELMAN, DAVID CALLIES & JOHN BANTA, THE TAKING ISSUE 139–235 (1973); ROBERT MELTZ, DWIGHT H. MERRIAM & RICHARD M. FRANK, THE TAKINGS ISSUE 35–36, 187 (1998).

17. *See, e.g.*, cases cited *infra* note 40.

18. *See, e.g.*, Douglas W. Kmiec, *Inserting the Last Remaining Pieces into the Takings Puzzle*, 38 WM. & MARY L. REV. 995 (1997).

19. *See* sources cited *supra* note 1. Some commentators even claim to discern a conspiracy at work. *See* Douglas T. Kendall & Charles P. Lord, *The Takings Project: A Critical Analysis and Assessment of the Progress So Far*, 25 B.C. ENVTL. AFF. L. REV. 509 (1998).

A. Property Rights as Fundamental Rights

Property rights, and in particular rights in land, have always been fundamental to and part of the preservation of liberty and personal freedom in the United States.[20] They are particularly so today.[21] Professor Richard Epstein, in his seminal work on property and takings, describes "[t]he notion of exclusive possession" as "implicit in the basic conception of private property."[22] It is so recognized in the first edition of the American Law Institute's Restatement of the Law of Property in 1936:

> § 7 Possessory Interests in Land.
>
> A possessory interest in land exists in a person who has (a) a physical relation to the land of a kind which gives a certain degree of physical control over the land, and an intent so to exercise *such control as to exclude* other members of society in general from any present occupation of the land.[23]

The U.S. Supreme Court has cited this section with approval in several cases discussing property rights.[24]

B. Physical Takings and Invasions

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20. For a summary of the thirteenth and fourteenth century roots of our present constitutional principles and the treatment of property rights through the late 1980s, see Norman Karlin, *Back to the Future: From* Nollan *to* Lochner, 17 SW. U. L. REV. 627, 637–38 (1988). "To the framers [of the Constitution], identifying property with freedom meant that if you could own property, you were free. Ownership of property was protected." *Id*. at 638. For a series of essays on property rights in America between the seventeenth and twentieth centuries, see LAND LAW AND REAL PROPERTY IN AMERICAN HISTORY (Kermit L. Hall ed., 1987).

21. *See* William W. Van Alstyne, *The Recrudescence of Property Rights as the Foremost Principle of Civil Liberties: The First Decade of the Burger Court*, 43 LAW & CONTEMP. PROBS. 66 (1980); Carol M. Rose, *Property As the Keystone Right?*, 71 NOTRE DAME L. REV. 329 (1996). For an excellent argument concerning the fundamental nature of property rights under the substantive due process clause, see Ronald J. Krotoszynski, Jr., *Fundamental Property Rights*, 85 GEO. L.J. 555 (1997).

22. RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 63 (1985).

23. RESTATEMENT OF PROPERTY § 7 (1936) (emphasis added).

24. *See*, *e.g.*, Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 435–36 (1982).

Perhaps the strongest language comes from the Court's opinion in *Kaiser Aetna v. United States*.[25] There, the Army Corps of Engineers claimed that certain improvements to Kuapa Pond in Hawaii Kai resulted in a navigational servitude which precluded the pond's owners from denying public access to the pond.[26] In holding that "[h]ere, 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 Co. v. Mahon*,"[27] the Court said:

> In this case, we hold that the "right to exclude," so universally held to be a fundamental element of the property right, falls within this category of interests that the Government cannot take without compensation. This is not a case in which the Government is exercising its regulatory power in a manner that will cause an insubstantial devaluation of petitioners' private property; rather, the imposition of the . . . servitude . . . will result in an actual physical invasion of the privately owned marina. And even if the Government physically invades only an easement in property, it must nonetheless pay just compensation.[28]

In a different context, the Court decided in *Loretto v. Teleprompter Manhattan CATV Corp.*,[29] that the placing of cable television cables and a small silver box on the rooftop of a multifamily multistory building was a sufficient violation of the constitutionally-protected right of a private property owner to exclude to warrant compensation.[30] The Court began its analysis by declaring that while it has often upheld regulation of property use "where deemed necessary to promote the public interest," "[a]t the same time, we have long considered a physical intrusion by government to be a property restriction of an unusually serious character for purposes of the Takings Clause."[31] The Court continued, "[a]lthough this

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25. 444 U.S. 164 (1979).
26. *See id*. at 168.
27. *Id.* at 178.
28. *Id.* at 179–80 (footnote and citations omitted); *see also* Consolidated Rail Corp. v. City of Gahanna, No. 95APE12-1578, 1996 WL 257457, at **3–4 (Ohio Ct. App. May 16, 1996) (citing Kaiser Aetna v. United States, 444 U.S. 164 (1979)).
29. 458 U.S. 419 (1982).
30. *See id*. at 421.
31. *Id.* at 426.

Court's most recent cases have not addressed the precise issue before us, they have emphasized that physical *invasion* cases are special and have not repudiated the rule that any permanent physical *occupation* is a taking."[32]

Describing such physical occupation as "the most serious form of invasion of an owner's property interests," the Court borrowed a metaphor: "[T]he government does not simply take a single `strand' from the `bundle' of property rights: it chops through the bundle, taking a slice of every strand."[33] The Court particularly emphasized the adverse effects of such an invasion:

> Moreover, an owner suffers a special kind of injury when a *stranger* directly invades and occupies the owner's property. As [another part of the opinion] indicates, property law has long protected an owner's expectation that he will be relatively undisturbed at least in the possession of his property. To require, as well, that the owner permit another to exercise complete dominion literally adds insult to injury. Furthermore, such an occupation is qualitatively more severe than a regulation of the *use* of property, even a regulation that imposes affirmative duties on the owner, since the owner may have no control over the timing, extent, or nature of the invasion.[34]

In a more recent declaration of "involuntary" physical taking, a U.S. district court found the excavation of test pits, the drilling and sampling of borings, and the installation of monitoring wells by a solid waste management authority to be a permanent physical taking in *Juliano v. Montgomery-Otsego-Schoharie Solid Waste Management Authority*.[35] Although the court considered the space taken "arguably minimal," the court determined this unimportant under *Loretto*.[36]

C. Regulations as Constitutionally-Protected Takings

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32. *Id.* at 432 (emphasis added).
33. *Id.* at 435.
34. *Id.* at 436 (citations omitted and emphasis added).
35. 983 F. Supp. 319, 322, 329 (N.D.N.Y. 1997).
36. *See id*. at 325.

While regulations of land were analyzed differently from physical takings for much of the early history of the United States, this changed radically in 1922 with the near-unanimous decision of the U.S. Supreme Court in *Pennsylvania Coal Co. v. Mahon*.[37] There, the Court held that a regulation which goes "too far" is a taking of property, presumably much as the physical taking or invasion of property is a taking of property noted in the previous section.[38] Of course, in both instances — regulatory takings and physical takings/invasions — property rights are preserved and the Constitution's Fifth Amendment protection may be viewed as irrelevant — so long as the property owner receives just compensation for the property interest taken. While state and lower federal courts have hewed strictly to the requirement of compensation for the latter, state courts chose largely to ignore the new doctrine of regulatory takings during the 1960s and 1970s, particularly as government regulation for a host of environmental, "welfare"-like public purposes proliferated.[39] Thus, various state appellate and supreme courts as well as many federal courts, upheld regulations which substantially devalued or destroyed the economically beneficial use of the relevant property interest to preserve various areas.[40]

This trend toward upholding such "regulatory takings" accelerated, due in part to a glacial silence from the U.S. Supreme Court following *Pennsylvania Coal* in 1922 and *Village of Euclid v. Ambler*

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37. 260 U.S. 393 (1922).

38. *See id.* at 415. For general comment on *Pennsylvania Coal*, see BOSSELMAN, CALLIES & BANTA, *supra* note 16; STEVEN J. EAGLE, REGULATORY TAKINGS (1996); EPSTEIN, *supra* note 22; WILLIAM A. FISCHEL, REGULATORY TAKINGS: LAW, ECONOMICS, AND POLITICS (1995); JAN LAITOS, THE LAW OF PROPERTY RIGHTS PROTECTION (1998); MELTZ, MERRIAM & FRANK, *supra* note 16. For an often argued, though somewhat revisionist view of what *Pennsylvania Coal* may mean, see Robert Brauneis, *"The Foundation of Our `Regulatory Takings' Jurisprudence": The Myth and Meaning of Justice Holmes's Opinion in* Pennsylvania Coal Co. v. Mahon, 106 YALE L.J. 613 (1996).

39. *See* BOSSELMAN, CALLIES & BANTA, *supra* note 16, at 141–235.

40. *See*, *e.g.*, Steel Hill Dev., Inc. v. Town of Sanbornton, 469 F.2d 956, 962–63 (1st Cir. 1972) (forest conservation districts); Candlestick Properties, Inc. v. San Francisco Bay Conservation & Dev. Comm'n, 89 Cal. Rptr. 897, 906 (Cal. Ct. App. 1970) (shorelines); Maher v. City of New Orleans, 235 So. 2d 402, 405–06 (La. 1970) (historic preservation); *In re* Spring Valley Dev., 300 A.2d 736, 754 (Me. 1973) (pond shore); Potomac Sand & Gravel Co. v. Governor of Md., 293 A.2d 241, 252 (Md. 1972) (tidal waters); McNeely v. Board of Appeal, 261 N.E.2d 336, 345 (Mass. 1970) (local business district); Golden v. Planning Bd., 285 N.E.2d 291, 304–05 (N.Y. 1972) (growth management); Just v. Marinette County, 201 N.W.2d 761, 772 (Wis. 1972) (wetlands).

Realty Co.[41] Aside from a brief foray into zoning as applied in 1928,[42] and the destruction of one form of private property (red cedar trees) to preserve another (apple trees) in 1928,[43] the Court abandoned the field to state and lower federal courts for nearly half a century.[44] When it did break this silence on April Fool's Day in 1974, it did so to ignominiously uphold a local ordinance prohibiting three or more persons unrelated by blood or marriage from living in the same single family house in order to preserve "[a] quiet place where yards are wide, people few, and motor vehicles restricted . . . where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people."[45] Once having dipped its collective toe in this dank swamp, however, the Court soon found itself enmeshed in the arcane law of regulatory takings and property rights, and for which it very nearly threw in the towel, showing itself to be a very different Court from the *Pennsylvania Coal* Court in 1922.[46]

II. PARTIAL TAKINGS AND PROPERTY RIGHTS: PENN CENTRAL TRANSPORTATION CO. v. NEW YORK CITY

This the Court did in the much-heralded historic preservation case of *Penn Central Transportation Co. v. New York City*.[47] There, the Court upheld New York City's Landmarks Preservation Law which effectively prohibited Penn Central from constructing a fifty-five story office building in the air rights above Grand Central Station, a designated landmark under the law.[48] Penn Central claimed both the designation and the prohibition constituted a facial and applied taking of its property under the Fifth and Fourteenth Amendments.[49]

The Court held that "landmarking" itself was broadly constitu-

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41. 272 U.S. 365 (1926).

42. *See* Nectow v. City of Cambridge, 277 U.S. 183 (1928).

43. *See* Miller v. Schoene, 276 U.S. 272, 277, 280 (1928).

44. *See* DENNIS J. COYLE, PROPERTY RIGHTS AND THE CONSTITUTION: SHAPING SOCIETY THROUGH LAND USE REGULATION 40–49 (1993).

45. Village of Belle Terre v. Boraas, 416 U.S. 1, 2, 9 (1974).

46. *See* JAMES W. ELY, JR., THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS 136 (2d ed. 1998).

47. 438 U.S. 104 (1978).

48. *See id*. at 115–16, 138.

49. *See id.* at 128–29.

tional and that the individual application of the law to Grand Central Station left sufficient remaining use of the property so as to be neither a total nor a partial taking.[50] Before reaching the merits of the case, however, the Court discussed in some detail the standards (or lack thereof) that applied in takings cases.[51]

First, the Court candidly admitted it was having trouble formulating much of a precise standard, at least for regulatory takings:

> The question of what constitutes a "taking" for purposes of the Fifth Amendment has proved to be a problem of considerable difficulty. While this Court has recognized that the "Fifth Amendment's guarantee . . . [is] designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole," this Court, quite simply, has been unable to develop any "set formula" for determining when "justice and fairness" require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons. Indeed, we have frequently observed that whether a particular restriction will be rendered invalid by the government's failure to pay for any losses proximately caused by it depends largely "upon the particular circumstances [in that] case."[52]

Nevertheless, the Court suggested "several factors" that have "particular significance" when it engages in "these essentially ad hoc, factual inquiries:"

> [1.] The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations. [(later also "reasonable expectations of the claimant")] [2.] So, too, is the character of the governmental action. [3.] A "taking" may more readily be found when the interference with property can be characterized as a physical invasion by government, than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good.[53]

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50. *See id*. at 128–38.
51. *See id*. at 123–28.
52. *Id.* at 123–24 (alterations in original) (citations omitted).
53. *Penn Central*, 438 U.S. at 124 (citations omitted).

While much of the foregoing language applies principally to regulatory takings, number three in substantial part does not. Indeed, it is initially more than a little surprising for Justice Brennan to suggest that a physical invasion may only "more readily" be found to be a Fifth Amendment taking.[54] Except for the exceedingly rare and doctrinally irrelevant exception, the Court has always required compensation for physical takings, against which the Fifth Amendment was unequivocally designed to protect.

Clearly this is the message of the *Loretto* case briefly discussed in Part I: even the most de minimis invasion absolutely requires compensation.[55] The answer, of course, is that Justice Brennan is quite prepared to chip away at the Fifth Amendment's physical takings jurisprudence as well as its regulatory takings jurisprudence. Part of a three-Justice dissent in *Loretto* in 1982, Justice Brennan would characterize providing compensation for such physical takings as "archaic."[56]

What follows in Justice Brennan's *Penn Central* discussion of the Court's three relevant factors is instructive as to the law of regulatory takings in 1978. Citing to one of Justice Holmes's famous lines in *Pennsylvania Coal*, that "[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," the Court notes that it has observed, in a wide variety of contexts, government execution of laws or programs that adversely affect economic values.[57] Taxing power and lack of interference with "interests that were sufficiently bound up with the reasonable expectations of the claimant to constitute `property'" are noted first.[58]

More importantly "for this case" the Court cites to *Miller v. Schoene*[59] and similar cases for the proposition that the Court has "upheld land-use regulations that destroyed or adversely affected recognized real property interests."[60] The cases cited, of course, are

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54. *See id.*

55. *See supra* notes 29–33 and accompanying text.

56. *See* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 455 (1982) (Blackmun, J., dissenting).

57. *Penn Central*, 438 U.S. at 124.

58. *Id.* at 124–25.

59. 276 U.S. 272 (1928).

60. *Penn Central*, 438 U.S. at 125.

primarily those in which government closed down nuisance-like activities, a distinction of considerable importance in today's property rights context as we shall see in Part IV. For now, it is the proposition that is important: if a state tribunal could reasonably conclude that "`the health, safety, morals or general welfare' would be promoted by prohibiting particular contemplated uses of land," then the destruction of recognized property interests is justified without compensation.[61] This appears to raise "the character of the governmental action" to one of particular, if not paramount, importance.[62] As we shall see, the Court quickly picks up on this criterion when it reconsiders *Pennsylvania Coal* ten years later in *Keystone*.[63] As for the first criterion — the reasonable, distinct, investment-backed expectations of the property owner, this also becomes particularly significant, but not until the cases from the 1990s, as we shall again see in Part IV. The Court reiterates the importance of this factor, citing *Pennsylvania Coal* as the "leading case for the proposition."[64]

Last, the Court deals with what has become commonly known as the "denominator" issue: against which collection of private property rights do we measure that which has allegedly been taken in deciding, first, if there has been a total taking, and if not, if there has been a partial taking?[65] Noting that Penn Central owns adjacent

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61. *Id.*

62. *Id.* at 124.

63. *See infra* notes 101–19 and accompanying text.

64. *Penn Central*, 438 U.S. at 127.

65. *See id*. at 130–31. It is clear after *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992) discussed *infra* in Part IV, that there is a distinction between "partial" and "total" regulatory takings. It was, of course, not so clear after *Penn Central*, except perhaps in hindsight. After *Lucas*, *total* taking by regulation refers to a regulation that deprives a property owner of "all economically beneficial use," or 100% of the economically useful value of the property. This does not mean the property interest is without market value (indeed, the Lucas lots had value, even as restricted to no economically beneficial use) but only that there was no beneficial use of an economic nature left — no residential, commercial or industrial use, nor any structural use of any kind. A *partial* taking, on the other hand, results when a regulation deprives a property interest of only some of its economically beneficial use — as in *Penn Central*, where the Court found economically beneficial commercial use remained even though the required preservation of the terminal building under New York regulation rendered the construction of a proposed office building virtually impossible at that site. Of course, the issue in the gray area between partial and total regulatory taking then devolves into which interests in real property are the relevant ones (the so-called denominator issue). As the *Lucas* Court noted in footnote 7, when a regulation renders 90 acres of a 100-acre parcel unusable, is this a total taking of the 90 unusable acres, or a partial taking (90%) of the entire 100-acre parcel? *See Lucas*, 505 U.S. at 1016 n.7.

property, the court held:

> "Taking" jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, 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."[66]

III. PROPERTY/TAKINGS CASES IN THE 1980s: WANDERING IN THE WILDERNESS

The Court's "jurisprudence" following *Penn Central* is among the most dissatisfying in the law of property in its history. Several times the Court accepted cases dealing with regulatory takings only to decide not to decide them, confessing in one instance that review had been "improvidently granted."[67] Such guidance that existed suggests that the Court itself was sharply divided over where to go. Indeed, in the first half of the 1980s, the Court failed to make a majority statement on the merits in regulatory takings at all, while nevertheless clarifying that even a de minimis physical taking required compensation. What emerged was, first, a foreshadowing of the takings position of the 1987 takings trilogy of cases, part of which, second, reinforced the *Penn Central* emphasis on the reason for the governmental regulation at the expense of the effect on real property interests. But, it was not until the 1990s, as discussed in Part IV, that interests in real property regained their importance in the regulatory aspect of takings jurisprudence. Even the physical takings cases were divided decisions, although the Court eventually reaffirmed that physical takings and invasions are always takings requiring compensation.

A. Physical Takings: Always Compensable

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66. *Penn Central*, 438 U.S. at 130–31.
67. *See* PFZ Properties, Inc. v. Rodriguez, 503 U.S. 257, 257 (1992).

In *Loretto v. Teleprompter Manhattan CATV Corp.*,[68] the Supreme Court held clearly that even a de minimis physical invasion required compensation regardless of an adequate public purpose: "Although this Court's most recent cases have not addressed the precise issue before us, they have emphasized that physical invasion cases are special and have not repudiated the rule that any permanent physical occupation is a taking."[69] Thus, the Court continued: "[T]he government does not simply take a single `strand' from the `bundle' of property rights: it chops through the bundle, taking a slice of every strand."[70]

Of course, the Court more or less did away with the public purpose requirement of the Fifth Amendment in *Hawaii Housing Authority v. Midkiff*,[71] by stating unequivocally that it "will not substitute its judgment for a legislature's judgment as to what constitutes public use `unless the use be palpably without reasonable foundation.'"[72] Later, the exercise of eminent domain must only be "rationally related to a conceivable public purpose."[73] Even if the legislative act fails in its public purpose, so long as the legislature "*rationally could have believed* that the [Act] would promote its objective,"[74] it will be sufficient for the public purpose clause of the Fifth Amendment. Nevertheless, invasions of any sort are takings requiring compensation. The Court built upon the language of *Kaiser Aetna v. United States*,[75] holding in effect that even if the Government physically invades only an easement in property, it must pay just compensation.[76] The Ninth Circuit used *Midkiff* to uphold a condominium land reform ordinance of the City and County of Honolulu which is virtually identical in purpose to Hawaii's land reform statute, even though none of the public purposes of the latter ever came to pass.[77]

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68. 458 U.S. 419 (1982).
69. *Id*. at 432.
70. *Id.* at 435.
71. 467 U.S. 229 (1984).
72. *Id.* at 241 (quoting United States v. Gettysburg Elec. Ry., 160 U.S. 668, 680 (1896)).
73. *Id.* at 241.
74. *Id.* at 242 (alteration in original).
75. 444 U.S. 164 (1979).
76. *See* Nollan v. California Coastal Comm'n, 483 U.S. 825, 834 (1987).
77. *See* Richardson v. City of Honolulu, 124 F.3d 1150, 1155–60 (9th Cir. 1997).

B. The Early 1980s: The "Notion" of Regulatory Takings

The Court lost little time in enlarging upon the views of property rights and takings in regulatory contexts which it had expressed in *Penn Central* in a series of decisions which deftly avoided actually deciding a regulatory taking case for nearly ten years — with one exception. In *Agins v. City of Tiburon*,[78] the Court held that downzoning California ridgetop property from several units per acre to one to five units on the entire five acre parcel was a limitation on development that (so far) fell short of a regulatory taking since it "neither prevent[ed] the best use of [the] land,"[79] as in *United States v. Causby*,[80] "nor extinguish[ed] a fundamental attribute of ownership,"[81] as in *Kaiser Aetna*. Never mind that both are eminent domain, physical taking/invasion cases.

That the application of compulsory physical takings jurisprudence to regulatory takings, surely the view of the Court before *Pennsylvania Coal*,[82] began to trouble even the Court's most liberal members is clear from the first of the nondecisions, *San Diego Gas & Electric Co. v. City of San Diego*.[83] There, the Court narrowly refused to consider a public utility challenge to the rezoning of part of its property, where it had planned construction of a power plant, from industrial to open space classifications "because of the absence of a final judgment" under California law.[84] In a stinging dissent, Justice Brennan, writing for a four-Justice minority, but with the substantive concurrence of Justice Rehnquist who agreed with the majority only on the "final judgment" issue, declared:

> In my view, once a court establishes that there was a regulatory "taking," the Constitution demands that the government entity pay just compensation for the period commencing on the date the regulation first affected the "taking," and ending on the date the government entity chooses to rescind or otherwise amend the regulation. This interpretation, I believe, is supported by the express words and purpose of the Just Compensation Clause [presumably of the

78. 447 U.S. 255 (1980).
79. *Id.* at 257, 262–63.
80. 328 U.S. 256 (1946).
81. *Agins*, 447 U.S. at 262.
82. *See* BOSSELMAN, CALLIES & BANTA, *supra* note 16, at 105–23.
83. 450 U.S. 621 (1981).
84. *Id.* at 623–25, 630.

> Fifth Amendment] . . . .
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> . . . [M]ere invalidation would fall far short of fulfilling the fundamental purpose of the Just Compensation Clause. That guarantee was designed to bar the government from forcing some individuals to bear burdens which, in all fairness, should be borne by the public as a whole. When one person is asked to assume more than a fair share of the public burden, the payment of just compensation operates to redistribute that economic cost from the individual to the public at large. Because police power regulations must be substantially related to the advancement of the public health, safety, morals, or general welfare, it is axiomatic that the public receives a benefit while the offending regulation is in effect. If the regulation denies the private property owner the use and enjoyment of his land and is found to effect a "taking," it is only fair that the public bear the cost of benefits received during the interim period between application of the regulation and the government entity's rescission of it.[85]

Strong stuff. As we shall see, a majority of the Court so holds five years later. The essence of the Court's commentary, while not abandoning the compensation issue, shifts at least in part to the more critical issue: when is a regulation a taking? First, the Court takes on, as it must, *Pennsylvania Coal*, a task which it began in its notorious ripeness decision in 1985.

In *Williamson County Regional Planning Commission v. Hamilton Bank*,[86] the Court erected its infamous "ripeness" barrier to applied, as compared to facial, regulatory takings lawsuits.[87] Its two-

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85. *Id.* at 653–54, 656–57 (Brennan, J., dissenting) (footnotes and citations omitted).

86. 473 U.S. 172 (1985).

87. *See id*. at 186. For a critical commentary on *Hamilton Bank*, see Michael M. Berger, *Happy Birthday, Constitution: The Supreme Court Establishes New Ground Rules for Land-Use Planning*, 20 URB. LAW. 735 (1988); Michael M. Berger, *"Ripeness" Test for Land Use Cases Needs Reform: Reconciling Leading Ninth Circuit Decisions Is an Exercise in Futility*, 11 ZONING & PLAN. L. REP. 57 (1988); Michael M. Berger, *The Civil Rights Act: An Alternative Remedy for Property Owners Which Avoids Some of the Procedural Traps and Pitfalls in Traditional "Takings" Litigation*, 12 ZONING & PLAN. L. REP. 121 (1989); Michael M. Berger, *The "Ripeness" Mess in Federal Land Use Cases or How the Supreme Court Converted Federal Judges into Fruit Peddlers*, 1991 INST. ON PLAN. ZONING & EMINENT DOMAIN § 7; Brian W. Blaesser, *Closing the Federal Courthouse Door on Property Owners: The Ripeness and Abstention Doctrines in Section 1983 Land Use Cases*, 2 HOFSTRA PROP. L.J. 73 (1988); Douglas W. Kmiec, *Disentangling Substantive Due Process and Taking Claims*, 13 ZONING & PLAN. L. REP. 57 (1990); R. Jeffrey Lyman, *Finality Ripeness in Federal Land Use Cases from* Hamilton Bank *to* Lucas, 9 J. LAND

part requirement — (1) a final decision under government regulatory laws, and (2) a seeking of just compensation under the state's eminent domain procedures — is irrelevant to the substance of property rights which is the subject of this analysis, except of course, that inability to bring takings challenges because of the ripeness barrier makes it difficult to protect property rights through court redress.

However, in the course of its opinion, the Court cast the first considerable doubt on a literal interpretation of *Pennsylvania Coal*'s takings language. Referring to that landmark case and some of its progeny, including some physical takings cases like *Kaiser Aetna*, the Court said:

> Even assuming that those decisions meant to refer literally to the Taking Clause of the Fifth Amendment, and therefore stand for the proposition that regulation may effect a taking for which the Fifth Amendment requires compensation, and even assuming further that the Fifth Amendment requires payment of money damages to compensate for such a taking, the jury verdict in this case cannot be upheld.[88]

The Court had never before suggested either that *Pennsylvania Coal* was anything less than a Fifth Amendment case, or that compensation might not be available for regulatory takings. As we shall see in the section on the takings trilogy below, the compensation issue was quickly dealt with two years later. However, the revisionist views of *Pennsylvania Coal* continued unabated into the 1990s,[89] though not without vigorous dissent from the Court's conservative

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USE & ENVTL. L. 101 (1993); Daniel R. Mandelker & Michael M. Berger, *A Plea to Allow the Federal Courts to Clarify the Law of Regulatory Takings*, LAND USE L. & ZONING DIG., Jan. 1990, at 3; Daniel R. Mandelker & Brian W. Blaesser, *Applying the Ripeness Doctrine in Federal Land Use Litigation*, 11 ZONING & PLAN. L. REP. 49 (1988); Gregory Overstreet, *The Ripeness Doctrine of the Taking Clause: A Survey of Decisions Showing Just How Far Federal Courts Will Go to Avoid Adjudicating Land Use Cases*, 10 J. LAND USE & ENVTL. L. 91 (1994); Thomas E. Roberts, *Ripeness and Forum Selection in Fifth Amendment Takings Litigation*, 11 J. LAND USE & ENVTL. L. 37 (1995); Gregory M. Stein, *Regulatory Takings and Ripeness in the Federal Courts*, 48 VAND. L. REV. 1 (1995).

88. *Hamilton Bank*, 473 U.S. at 186 (citing *San Diego Gas*, 450 U.S. at 647–53 (Brennan, J., dissenting)).

89. *See, e.g.*, Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1987); MacDonald, Sommer & Frates v. County of Yolo, 447 U.S. 340 (1986).

block. In *MacDonald, Sommer & Frates v. County of Yolo*,[90] the Court once again decided not to decide a takings case because it was not "ripe."[91]

C. 1987: The Takings Trilogy

In 1987, the Court in short order decided three cases that both signaled the final (so far) decision challenging the authority of *Pennsylvania Coal*, and marked the beginning of the reassertion of the paramount position of private property rights in land regulatory taking cases similar to that which it enjoys in physical taking cases. In *First English Evangelical Lutheran Church v. County of Los Angeles*,[92] the Court made crystal clear that compensation must always be an available remedy for a regulatory taking,[93] thus reversing a short-lived trend commenced by Mr. Justice Stevens in *MacDonald, Sommer & Frates* and in his months-old majority opinion in *Keystone* discussed below. Since the parties agreed, for the purposes of this litigation, that the offending regulation "denied appellant all use of its property,"[94] there was no opportunity to examine what constitutes a taking (this comes later in *Lucas* discussed in Part IV). Aside from cryptic references to "whether the county might avoid the conclusion that a compensable taking had occurred by establishing that the denial of all use was insulated as a part of the State's authority to enact safety regulations"[95] (arguably picked up in *Lucas* five years later as the "nuisance exception") and not "deal[ing] with the quite different questions that would arise in the case of normal delays in obtaining building permits, changes in zoning ordinances,

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90. 447 U.S. 340 (1986). For a general overview of ripeness, see Thomas E. Roberts, *Ripeness After* Lucas, *in* AFTER *LUCAS*: LAND USE REGULATION AND THE TAKING OF PROPERTY WITHOUT COMPENSATION 11 (David L. Callies ed., 1993).

91. *See MacDonald, Sommer & Frates*, 447 U.S. at 348–53. The Court lowered the ripeness barrier just a bit in *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725, 730–31, 744 (1997), when it held that a final agency decision to deny the landowner permission to build on her rural lot was ripe for takings purposes even though she had not applied for the (minimal) transferable development rights available to her. For further commentary on *Suitum*, see Julian Conrad Juergensmeyer et al., *Transferable Development Rights and Alternatives After* Suitum, 30 URB. LAW. 441 (1998).

92. 482 U.S. 304 (1987).

93. *See id.* at 313–22.

94. *Id.* at 313.

95. *Id.*

variances, and the like,"[96] the Court clearly and unequivocally grounded its opinion in an unvarnished reading of *Pennsylvania Coal*: "As Justice Holmes aptly noted more than 50 years ago, `a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change.'"[97]

In *Nollan v. California Coastal Commission*,[98] the Court had less to say about regulatory takings, despite the later language of Justice Scalia, and rather more to say about fundamental property rights, reasserting the importance of their preservation against physical invasions, however slight or infrequent. After quoting the language from *Loretto* about permanent physical invasions ("our cases uniformly have found a taking to the extent of the occupation, without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner") the Court said:

> We think a "permanent physical occupation" has occurred, for purposes of that rule, where individuals are given a permanent and continuous right to pass to and fro, so that the real property may continuously be traversed, even though no particular individual is permitted to station himself permanently upon the premises.[99]

The Court then repeated the *Agins* formulation of the takings rule, and for the second time in ten years, noted the lack of guidance the Court has provided in this area:

> We have long recognized that 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[.]" Our cases have not elaborated on the standards for determining what constitutes a "legitimate state interest" or what type of connection between the regulation and the state interest satisfies the requirement that the former "substantially advance" the latter.[100]

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96. *Id*. at 321.

97. *Id.* at 321–22 (quoting Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 416 (1922)).

98. 483 U.S. 825 (1987).

99. *Id.* at 832.

100. *Id.* at 834 (first and second alteration in original and citation omitted) (quoting Agins v. City of Tiburon, 447 U.S. 255, 260 (1980)).

What exactly can constitute such a state interest is clear from the first of the trilogy: *Keystone Bituminous Coal Ass'n v. DeBenedictis*.[101] Once again, the Court had before it a Pennsylvania statute regulating the coal industry, this time requiring fifty percent of the coal beneath certain structures to be left in place in order to minimize the risk of subsidence.[102] Once again, coal companies, through an association, contended that such a requirement takes private property without compensation, this time by substantially eliminating one of three estates in land (the support estate) recognized under Pennsylvania property law.[103] This time, however, the challenge was a facial one (thereby eliminating ripeness as an issue) and a narrow majority found no taking.[104]

The decision is particularly noteworthy for its direct assault on *Pennsylvania Coal*. Emphasizing the arguably applied attack (as compared to the facial attack here) based on Justice Holmes's observation that *Pennsylvania Coal* was a "case of a single private house," the *Keystone* Court characterized most of the opinion as "advisory," particularly that portion of it declaring the Kohler Act as a whole unconstitutional.[105] The *Keystone* Court then noted how Justice Holmes relied on two propositions critical to the *Pennsylvania Coal* decision.[106] First, the Kohler Act, because it protected only private interests, "could not be `sustained as an exercise of the police power.'"[107] It was merely a balancing of two private interests: the surface homeowner and the subsurface mining company. Second, the Kohler Act also made it "commercially impracticable" to mine coal.[108]

Applying these "advisory" principles, the *Keystone* Court found the character of the governmental action (the first half of the *Agins* test) "leans heavily against finding a taking; the Commonwealth of Pennsylvania has acted to arrest what it perceives to be a significant

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101. 480 U.S. 470 (1987).
102. *See id*. at 474–77.
103. *See id*. at 478–79.
104. *See id*. at 474.
105. *See id*. at 483–84.
106. *See id*. at 484.
107. *Keystone*, 480 U.S. at 484 (quoting Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 414 (1922)).
108. *See id*.

threat to the common welfare."[109] This the Court characterizes on these facts as restraining "uses of property that are tantamount to public nuisances [(shades of the *Lucas* exception?)] . . . consistent with the notion of `reciprocity of advantage'" as drawn from *Pennsylvania Coal*.[110] While each is burdened by such a restriction, each benefits by the restrictions placed on others, a burden of the common citizenship. Apparently, mining coal under these circumstances is the equivalent of a public nuisance. In "acting to protect the public interest in health, the environment, and the fiscal integrity of the area" the Commonwealth is "exercising its police power to abate activity akin to a public nuisance."[111] The Court suggests this alone is enough to shield the statute from a takings challenge. However, there is more.

Second, the Subsidence Act makes it neither "impossible for petitioners to profitably engage in their business [(forerunner to denial of all economically beneficial use?)], [n]or that there has been undue interference with their investment-backed expectations" (the partial takings test from *Penn Central*).[112] The Court first notes that the Subsidence Act requires the property owners to leave less than two percent of their coal in place.[113] Since they can continue mining, presumably there is no total taking of the kind found later in *Lucas*. The focus now shifts to the "denominator" issue raised in *Penn Central*: what segment of property should the Court consider in determining whether there has been a total or partial taking? The coal association observed that the support estate is a separately recognized real property interest under Pennsylvania law, and this is the estate which has been taken.[114] Citing *Penn Central*, the Court held that the support estate does "not constitute a separate segment of property for takings law purposes."[115] "We do not consider Justice Holmes' statement that the Kohler Act made mining of `certain coal' commercially impracticable as requiring us to focus on the individual pillars of coal that must be left in place."[116] This is particularly

109. *Id*. at 485.
110. *Id.* at 491.
111. *Id.* at 488.
112. *Id.* at 485.
113. *See Keystone*, 480 U.S. at 496.
114. *See id*. at 497.
115. *Id*. at 498.
116. *Id.*

true since the support estate, according to the Court, has no value if separated from at least the mineral estate, of which there is so much left.[117] "Thus, in practical terms, the support estate has value only insofar as it protects or enhances the value of the estate with which it is associated."[118] Moreover, "Petitioners have acquired or retained the support estate for a great deal of land, only part of which is protected under the Subsidence Act" leaving a huge part even of that estate untouched.[119]

It is difficult to quarrel with the result, provided the Subsidence Act is viewed as a regulatory taking, rather than the government authorization of a physical invasion as the dissent argues. What is troublesome is the suggestion that a legitimate state purpose alone may be sufficient to shield a regulation from a takings challenge (though in fact the denomination of the act as nuisance-preventing removes some of the sting) coupled with the broad restatement of the "denominator" issue suggesting that even if the entire support estate were "taken" it would still amount to a defensible partial taking without compensation. This proved the liberal wing of the Court's undoing. *Keystone* was not cited in either of the later 1987 trilogy cases, and was seriously undermined in fact in *Lucas* (1992), and in philosophy in *Dolan* (1994). To these we now turn.

IV. PROPERTY RIGHTS AFTER LUCAS *AND* DOLAN

After the sea change represented by the second and third of the 1987 "takings trilogy" discussed above in Part III, there needed to be an appropriate vehicle for the Court to set out its views of property rights and takings in the 1990s. This the Court got in *Lucas v. South Carolina Coastal Council*.[120] This "rare" total takings case sets out in footnotes and text what the Court now perceives as the law of takings. Only a strong statement of property rights jurisprudence generally was missing — and this came two years later in the land development conditions sequel to the *Nollan* case, *Dolan v. City of Tigard*.[121] By the mid-1990s, the Court had returned private property rights to the pantheon of civil rights guarantees contained in

117. *See id*. at 501–02.
118. *Id*. at 501.
119. *Keystone*, 480 U.S. at 501.
120. 505 U.S. 1003 (1992).
121. 512 U.S. 374 (1994).

the First Amendment and set out a clear rule for total takings. It had also signalled strongly what criteria it would examine in deciding partial takings cases (a subject it has not closely examined since *Penn Central* in 1978). All that remains is to survey what lower federal courts and state courts are doing with these new directions. As we shall see in Part V, the treatment of these Court decisions, particularly by state courts, is not uniform, and there is some confusion over when to apply which test.

A. *Lucas* and Takings

In *Lucas*, the Court was presented with an ideal vehicle in which to set out criteria for deciding takings cases. This it did, with remarkable clarity: with only two exceptions (discussed below), a regulation "takes" property when the landowner is left with no economically beneficial use of the land.[122]

Ultimately, that's what happened to David Lucas.[123] After developing a waterfront residential project, Lucas purchased the remaining two lots on his own account, intending to build upscale single-family residences on them.[124] However, before he could commence construction, the South Carolina Coastal Council moved the beach line (seaward of which construction was prohibited) so that the Lucas lots were now in a construction-free zone.[125] Both the original line, the new line, and the coastal protection statute by which authority the Council acted were designed to further a host of health, safety, but primarily welfare purposes largely unique to coastal areas.[126] Figuring predominantly in the list of public purposes was the protection of habitat, plant animal and marine species, dunes, natural environment and the tourist industry.[127]

Lucas claimed the moving of the line, together with the development restrictions imposed by the statute and its regulations, took his property without compensation by denying him a permit to con-

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122. *See Lucas*, 505 U.S. at 1019. For collective comment on *Dolan* and *Lucas*, see TAKINGS: LAND DEVELOPMENT CONDITIONS AND REGULATORY TAKINGS AFTER *DOLAN* AND *LUCAS* (David L. Callies ed., 1996).

123. *See generally* DAVID LUCAS, LUCAS VS. THE GREEN MACHINE (1995) (providing the historical narrative of this landmark case).

124. *See Lucas*, 505 U.S. at 1006–08.

125. *See id.* at 1007–09.

126. *See id*.

127. *See id.* at 1010.

struct anything but walkways and permitting no uses but camping and walking on the two lots.[128] The South Carolina Supreme Court upheld the statute largely on the grounds of the paramount governmental purposes set out in the Beachfront Management Act (the *Keystone* standard) and Lucas appealed.[129]

After disposing of a ripeness barrier, the Court addressed the merits of the claim.[130] First, it surveyed the history of takings, concluding that the test used by a number of courts — including the South Carolina Supreme Court — "harmful or noxious use" — is the same as advancing a legitimate state interest.[131] Of course, if that is true, then the *Keystone* standard, as analyzed above, will save a total taking regulation.[132] This is precisely the standard the Court now wants to change. Recall that the *Keystone* Court said that regulations preventing unusually harmful activities would never be takings regardless of the extent to which they deprived the landowner of use and value. Dubbed the "insulation doctrine" by some commentators, a regulation that protects certain unusually important public interests, or prevents unusually objectionable harms, can never be a regulatory taking.[133] Arguably this was the basis for the South Carolina Supreme Court's decision denying Lucas compensation. Of course, such a concept virtually destroys *Pennsylvania Coal*. It is this "insulation" concept which *Lucas* rejects. However, it does so as a holding only in the case of a total taking. Whether it does so also as a context in which to decide the more frequent partial takings cases is another matter, as appears below.

The rule which the Court announces is a narrow one: a regulation that removes all productive or economically beneficial use from a parcel of land is a taking requiring compensation under the Fifth Amendment.[134] It is a taking regardless of how or when the property was acquired, and — of course — regardless of the public purpose or state interest which generated the regulation, which is the classic

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128. *See id*. at 1007–10.
129. *See id*. at 1009–10.
130. *See Lucas*, 505 U.S. at 1010–14.
131. *Id*. at 1014–24.
132. *See supra* notes 101–19 and accompanying text.
133. *See* GRANT S. NELSON ET AL., CONTEMPORARY PROPERTY 1060 (1996).
134. *See Lucas*, 505 U.S. at 1016–19. Note this is not the same as rendering the lots or parcels *valueless*, as some commentators would have it. *See, e.g.*, MELTZ, MERRIAM & FRANK, *supra* note 16, at 140, 218.

definition of a per se rule. For too long, according to the Court, police power regulations have primarily conferred "public benefits."[135] For this the *public* must clearly pay, rather than the landowner upon whom the burden of such regulation falls.

Unless the landowner had no right to economically use his property in the first place: "Where the State seeks to sustain regulation that deprives land of all economically beneficial use, we think it may resist compensation only if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with."[136]

Herein lie the *Lucas* exceptions to the per se rule of total takings: the Court requires compensation for taking of all economically beneficial use unless there can be identified "background principles of nuisance and property law that prohibit the uses [the landowner] now intends in the circumstances in which the property is presently found."[137] Therefore:

1. If the common law of the state would allow neighbors or the state to prohibit the two houses that Lucas wants to construct because they are either public or private nuisances, then the state can prohibit them under the coastal-zone law without providing compensation. This result occurs because such nuisance uses are always unlawful and are never part of a landowner's rights, so prohibiting them by statute would not take away any property rights. The Court gives as an example a law that might prohibit a landowner from filling his land to flood his neighbor's land.[138]

2. If the background principles of the state's property law would permit such prohibition of use as the two houses Lucas proposed to construct, then again no compensation is required. Howev-

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135. *See Lucas*, 505 U.S. at 1024.

136. *Id*. at 1027. For a historical argument that much private use of wetlands is not part of such title, see Fred P. Bosselman, *Limitations Inherent in the Title to Wetlands at Common Law*, 15 STAN. ENVTL. L.J. 247 (1996).

137. *Lucas*, 505 U.S. at 1031. Arguing that *only nuisance* is a background principle exception, see MELTZ, MERRIAM & FRANK, *supra* note 16, at 377. For extended commentary on the *Lucas* exceptions, see Louise A. Halper, *Why the Nuisance Knot Can't Undo the Takings Muddle*, 28 IND. L. REV. 329 (1995); Humbach, *supra* note 1; Todd D. Brody, Comment, *Examining the Nuisance Exception to the Takings Clause: Is There Life for Environmental Regulations After* Lucas*?*, 4 FORDHAM ENVTL. L. REP. 287 (1993); J. Bradley Horn, Case Notes, 43 DRAKE L. REV. 227 (1994); Brian D. Lee, Note, 23 SETON HALL L. REV. 1840 (1993).

138. *See Lucas*, 505 U.S. at 1029.

er, the Court did not fully describe these principles, nor did it discuss them except in a nuisance context (see number one above).

In determining whether the proposed use is a public or private nuisance and therefore forbidden without payment of compensation, the following three factors are critical, but *only* within the nuisance context:

> [1.] the degree of harm to public lands and resources, or adjacent private property, posed by the claimant's proposed activities, [2.] the social value of the claimant's activities and their suitability to the locality in question, and [3.] the relative ease with which the alleged harm can be avoided through measures taken by the claimant and the government (or adjacent private landowners).[139]

As noted above, it is arguable that the Court undertook such an extended critique of the "harms/insulation" theory[140] in order to prepare for the infinitely more common partial takings cases.

This conclusion becomes even more logical upon examination of that favorite repository of clues to the future, the Court's footnotes. While largely devoted to answering the blistering barrage directed at the Court by the dissent (for example, the dissent's opening salvo is: "Today the Court launches a missile to kill a mouse,"[141]) the note evinces a clear intention to allow compensation for taking of less than all economic use if and when such a taking is before the Court. At footnote 8, the Court responds to a dissent criticism that compensation for regulatory taking of all economic use is not consistent with lack of compensation for regulatory taking of, say, ninety-five percent of economic use:

> This analysis errs in its assumption that the landowner whose deprivation is one step short of complete is not entitled to compensation. Such an owner might not be able to claim the benefit of our categorical formulation, but, as we have acknowledged time and again, "[t]he economic impact of the regulation on the claimant and . . . the extent to which the regulation has interfered with distinct investment-backed expectations" are keenly relevant to tak-

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139. *Id.* at 1030–31 (citations omitted).
140. *See supra* notes 131–35 and accompanying text.
141. *Lucas*, 505 U.S. at 1036 (Blackmun, J., dissenting).

ings analysis generally.[142]

This "frustration of investment-backed expectations" standard, which the Court chose not to apply in *Lucas* because it characterized the regulatory taking as total, is clearly not rejected. Indeed, one concurring member of the Court (Justice Kennedy) would have applied it.[143] Moreover, in an earlier footnote, the Court had already alluded to the utility of the "reasonable expectations standard," though in a slightly different context — that of deciding how thin to slice property interests (or, alternatively, how many sticks in the Holfeldian bundle) for purposes of deciding whether property has been taken:

> Regrettably, the rhetorical force of our "deprivation of all economically feasible use" rule is greater than its precision, since the rule does not make clear the "property interest" against which the loss of value is to be measured. When, for example, a regulation requires a developer to leave 90% of a rural tract in its natural state, it is unclear whether we would analyze the situation as one in which the owner has been deprived of all economically beneficial use of the burdened portion of the tract, or as one in which the owner has suffered a mere diminution in value of the tract as a whole. [The note then criticizes that portion of the New York state court's decision in *Penn Central Transportation Co. v. New York City*, which suggested nearby property of the owner could be amalgamated with that portion he claimed was unusable in deciding whether a taking by regulation had occurred.] . . .
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> The answer to this difficult question may lie in *how the owner's reasonable expectations* have been shaped by the State's law of property— *i.e.*, whether and to what degree the State's law has accorded legal recognition and protection to the particular interest in land with respect to which the takings claimant alleges a diminution in (or elimination of) value.[144]

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142. *Id.* at 1019 n.8 (alteration in original) (quoting Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978)).

143. *See id*. at 1034 (Kennedy, J., concurring).

144. *Id*. at 1016 n.7 (emphasis added) (majority opinion). For a different perspective on the "investment-backed expectations" standards, see Daniel R. Mandelker, *Investment-Backed Expectations in Taking Law*, 27 URB. LAW. 215 (1995); Lynda J. Oswald, *Cornering the Quark: Investment-Backed Expectations and Economically Viable Uses in Takings Analysis*, 70 WASH. L. REV. 91 (1995).

B. *Dolan* and Property Rights

Like *Nollan*, the *Dolan* case is about land development conditions such as impact fees, in-lieu fees, and exactions. This is a problematic area because, as dissenting Justices and various commentators have accurately observed, the landowner is often "left" with property which has actually increased in value due to the permission to develop. However, the Court resoundingly affirmed the importance of property rights and the Fifth Amendment.[145]

In *Dolan v. City of Tigard*,[146] the U.S. Supreme Court struck down a municipal building permit condition that the landowner dedicate bike path and greenway/floodplain easements to the city.[147] As the Court pointed out, had Tigard simply required such dedications, it would be required to pay compensation under the Fifth Amendment.[148] Attaching them as building permit conditions required a more sophisticated analysis, closely following *Nollan*,[149] because the police power is implicated rather than the power of eminent domain. In the process, the Court signalled how far local government may go in passing on the cost of public facilities to landowners. The answer: only to the extent that the required dedication is related both in nature and extent to the impact of the proposed development.

The Court essentially adopted a three-part test:

1. Does the permit condition seek to promote a legitimate state interest?
2. Does an essential nexus exist between the legitimate state interest and the permit condition?
3. Does a required degree of connection exist between the

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145. For general comment and analysis of the law following *Nollan* and *Dolan*, see EXACTIONS, IMPACT FEES AND DEDICATIONS: SHAPING LAND-USE DEVELOPMENT AND FUNDING INFRASTRUCTURE IN THE *DOLAN* ERA (Robert H. Freilich & David W. Bushek eds., 1995); Jonathan Davidson & Adam U. Lindgren, *Exactions and Impact Fees —* Nollan/Dolan*: Show Me the Findings!*, 29 URB. LAW. 427 (1997); Jan G. Laitos, *Causation and the Unconstitutional Conditions Doctrine: Why the City of Tigard's Exaction Was a Taking*, 72 DENV. U. L. REV. 893 (1995).

146. 512 U.S. 374 (1994).

147. *See id*. at 379–80.

148. *See id*. at 384.

149. For a suggestion on how this decision radically affected the law, see Vicki Been, *"Exit" As a Constraint on Land Use Exactions: Rethinking the Unconstitutional Conditions Doctrine*, 91 COLUM. L. REV. 473 (1991).

exactions and the projected impact of the development?[150]

The Court disposed of the first two parts quickly and affirmatively. Certainly the prevention of flooding along the creek and the reduction of traffic in the business district "qualify as the type of legitimate public purposes [the Court has] upheld."[151] Moreover, the Court held it was "equally obvious" that a nexus exists between preventing flooding and limiting development within the creek's floodplain, and that "[t]he same may be said for the city's attempt to reduce traffic congestion by providing for alternative means of transportation. . . . [like] a pedestrian/bicycle pathway."[152] So far, so good: the Court found both a public purpose, which the Court assumed without deciding in *Nollan*, and an essential nexus, which the Court decided was lacking in *Nollan*. Regarding the third part of the test, a question remained about whether "the degree of the exactions demanded by the city's permit conditions bears the required relationship to the projected impact of petitioner's proposed development."[153]

The Court said no: The City's "tentative findings" concerning increased stormwater flow from the more intensively developed property, together with its statement that such development was "anticipated to generate additional vehicular traffic thereby increasing congestion" on nearby streets, were simply not "constitutionally sufficient to justify the conditions imposed by the city on petitioner's building permit."[154]

The constitutional problem in both instances is "the loss of [their] ability to exclude," which the Court reminds us is "one of the most essential sticks in the bundle of rights that are . . . characterized as property:"[155]

> We see no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment [free speech, press, religion, association, assembly] or Fourth Amendment [search and seizure], should be relegated to the status of a poor relation in these comparable circumstances.[156]

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150. *See Dolan*, 512 U.S. at 384–86.

151. *Id*. at 387 (citing Agins v. City of Tiburon, 447 U.S. 255, 260–62 (1980)).

152. *Id*. at 387.

153. *Id.* at 388.

154. *Id.* at 388–89.

155. *Id*. at 393.

156. *Dolan*, 512 U.S. at 392. For a critical analysis and commentary on this portion of the *Dolan* opinion, see Alan E. Brownstein, *Constitutional Wish Granting and the*

V. TAKINGS PROGENY: THE STATES AND LOWER FEDERAL COURTS INTERPRET

A survey of state and federal decisions reveals there is considerable variety in the reactions to *Lucas* and *Dolan*, and particularly to the *Lucas* case. The standard for total takings is often confused with the standard for partial takings. In some instances, state courts appear to ignore the holding in *Lucas* altogether. However, there does not yet appear to be the degree of erosion at the state or federal levels that took place in the decades following *Pennsylvania Coal*, resulting in the near-elimination of regulatory takings by the time the U.S. Supreme Court returned to the fray in *Penn Central*. Property rights — and regulatory takings — are clearly being upheld in large measures. It is simply a matter of degree.

A. Total Takings Under *Lucas*

Many state and lower federal courts have easily grasped the "total taking" rule for which the decision in *Lucas* stands. They have, in other words, rejected the notion that private property rights must give way, totally, to a sufficiently strong governmental desire to prevent a public harm. Moreover, many such courts after applying the per se *Lucas* rule and finding that it was not met, have gone on to deal with the issue of partial takings as set out in the *Lucas* footnotes and Justice Kennedy's concurrence, using the "investment-backed expectations" of the landowner rule.

1. Legitimate State Interest

The first inquiry continues to be, of course, whether government has established a legitimate state interest in the challenged regulation.[157] This is true whether one is dealing with a per se challenge under *Lucas* or a more traditional — and more common and difficult — partial takings challenge under the rules of *Penn Central*. Recent

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Property Rights Genie, 13 CONST. COMMENTARY 7 (1996).

157. *See* Craig A. Peterson, *Land Use Regulatory "Takings" Revisited: The New Supreme Court Approaches*, 39 HASTINGS L.J. 335, 351 (1988). For the view that legitimate state interest is no longer a part of regulatory takings analysis, see LAITOS, *supra* note 38, at § 12.04.

decisions continue to emphasize the importance of this initial finding, though sometimes it is made rather late in the decision. Thus, in *Richardson v. City of Honolulu*,[158] the Ninth Circuit Court of Appeals held that the rent control portion of a county land reform act was defective for failure to advance a legitimate state purpose.[159] In *Lanna Overseas Shipping, Inc., v. City of Chicago*,[160] a memorandum opinion of the district court found that although a rezoning affecting plaintiff's business uses of its property did not curtail all economically beneficial use, the court refused to dismiss all counts of the complaint because the ordinance did not recite any public purpose for revoking plaintiff's driveway permit.[161] Again, in *152 Valparaiso Associates v. City of Cotati*,[162] the California Court of Appeals held that a landowner stated a claim for an unconstitutional taking of property by application of a rent control scheme even though they did not allege a loss of all economic value under *Lucas*.[163] The owner had offered to show that the "results produced by the regulatory scheme do not advance a legitimate state interest."[164] Also, in *Manocherian v. Lenox Hill Hospital*,[165] the New York Court of Appeals struck down a statute requiring property owners to provide renewal leases to non-private hospitals based on the primary residency status of the hospital's employee-subtenant, partly because the statute did not advance a legitimate state interest.[166]

2. Taking of All Economically Beneficial Use

The principle rule from *Lucas* is, of course, that when a regulation takes all economically beneficial use from an owner's land, it is a taking under the Fifth Amendment without further investigation, unless the governmental activity falls within the nuisance or background principles exceptions. Other federal (and many state) courts recite this rule over and over again, as appears below.

This is particularly true in the Federal Circuit and U.S. Court of

158. 124 F.3d 1150 (9th Cir. 1997).
159. *See id*. at 1165–66.
160. No. 96-C-3373, 1997 WL 587662 (N.D. Ill. Sept. 18, 1997).
161. *See id*. at **16–17.
162. 65 Cal. Rptr. 2d 551 (Cal. Ct. App. 1997).
163. *See id*. at 554–55.
164. *Id.* at 555.
165. 643 N.E.2d 479 (N.Y. 1994).
166. *See id*. at 480–81, 485.

Federal Claims, though the latter has somehow confused the total takings rule with the investment-backed expectations rule. In the context of single-family residences, the federal court held in *Bowles v. United States*[167] that denial of a § 404 (Clean Water Act) permit by the Army Corps of Engineers, for fill to construct a septic system, constituted a per se taking.[168] Deciding that the lot had "no remaining economically beneficial use after the government action. . . . pursuant to the `total takings' rule announced in Lucas, [the landowner] has suffered a taking and must be compensated."[169] Moreover, the court held that these facts would result in a partial taking even if the court had not already decided that a total taking had occurred:

> Even assuming *arguendo* that the alleged taking in this case is less than total, the court still concludes Bowles has suffered a compensable taking under pre-*Lucas* regulatory takings doctrine. Under the pre-*Lucas* framework the relevant inquiry here would involve considering the economic impact of the regulation on Lot 29 *and* whether Bowles' investment-backed expectations were reasonable at the time he acquired Lot 29.
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> . . . .
>
> Bowles' investment-backed expectations were to build a permanent retirement residence on Lot 29. . . . In this respect the court concludes Bowles' expectations were reasonable.[170]

In a much-discussed decision now before the U.S. Supreme Court, the Ninth Circuit Court of Appeals in *Del Monte Dunes at Monterey, Ltd. v. City of Monterey*[171] held that even if an owner can sell land for more than originally paid for it, a regulation can still take all economically beneficial use from it, resulting in a total taking under the *Lucas* test.[172] There, the landowner brought inverse condemnation and § 1983 claims against the city after being denied development permits despite repeated reductions in density and because of numerous land development conditions upon approvals.[173]

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167. 31 Fed. Cl. 37 (Fed. Cl. 1994).
168. *See id*. at 40.
169. *Id.* at 49 (citation omitted).
170. *Id.* at 49–50 (alteration in original) (footnote omitted).
171. 95 F.3d 1422 (9th Cir. 1996), *cert. granted*, 118 S. Ct. 1359 (1998).
172. *See id*. at 1432.
173. *See id*. at 1425–26.

Correctly observing that to prevail the landowner needed to show either that the city's actions did not substantially advance a legitimate state interest or that the actions denied it economically viable use of its property, the court carefully distinguished between economically viable use and value: "[F]ocusing solely on property values confuses the economically viable use inquiry with the diminution of value inquiry normally applied only where no categorical taking exists. Although the value of the subject property is relevant to the economically viable use inquiry, our focus is primarily on use, not value."[174]

Thus, even though the landowner sold the land to the State of California for $800,000 more than it had paid for it, the court noted that "it is not difficult to conceive of a circumstance in which there are no economically viable uses for a piece of property, but the property owner can sell it to the government at a higher price than what he paid for it."[175] The same Ninth Circuit noted that under *Lucas* "there is a categorical taking when a regulation prohibits all economically beneficial use of land, and no balancing of the other factors commonly analyzed in takings law — reasonable investment-backed expectations and legitimate government interests — would be necessary" in *Dodd v. Hood River County*.[176] However, as discussed below, since the court found such economically beneficial use, it proceeded to analyze the case under the partial-takings rules set out in *Penn Central*,[177] as anticipated in the *Lucas* footnotes.

More recently, in *McQueen v. South Carolina Coastal Council*,[178] the South Carolina Court of Appeals found a per se taking under *Lucas*, when the South Carolina Coastal Council denied plaintiff's permits to bulkhead and backfill two lots he owned in order to prevent further erosion on them.[179] Both of plaintiff's lots were undeveloped and were surrounded by other lots which contained bulkheads.[180] The Council denied plaintiff's permits because the bulkheads would be located within a "tidelands critical area,"[181] a restric-

174. *Id.* at 1433 (citations omitted).
175. *Id.* at 1432.
176. 136 F.3d 1219, 1228 (9th Cir. 1998).
177. *See id*. at 1228–29.
178. 496 S.E.2d 643 (S.C. Ct. App. 1998).
179. *See id*. at 645–50.
180. *See id*. at 645.
181. *See id*.

tion that was not in place when plaintiff originally purchased the property.[182] In holding that the Council's denial of plaintiff's permits amounted to a denial of all economically beneficial use of plaintiff's property requiring compensation, the court reasoned:

> McQueen testified that he is unable to do anything with either lot, including park a boat on one. The only use of the land available to McQueen after the permit denials the Council could show was "[r]ecreational, aesthetic use" that the Council's own expert testified is "really probably not directly recreational." The Council employee conceded that the recreational value to McQueen is "kind of indirect," stating, "I don't think Mr. McQueen would like everybody to come out there to crab or fish on his lots." This use does not truly benefit McQueen. We hold McQueen has suffered a textbook taking.[183]

There are, of course, many post-*Lucas* decisions, noted hereafter, in which courts have applied the "total taking" rule and found the land had some remaining economically beneficial uses. Many of the partial takings cases in the following section were also brought by plaintiffs and petitioners as per se takings. However, when the courts found remaining economic uses of any substance, they found that no such per se taking had occurred, because the property had some economically beneficial use. An example is *Outdoor Systems, Inc. v. City of Mesa*,[184] in which plaintiffs attempted to use *Lucas* to strike down a billboard control ordinance as a taking.[185] As the court observed, because a viable land use would remain, the facts dismally failed the test of loss of all economically beneficial use so "[t]his holding has no relevance to these appeals."[186] More recently, the U.S. Court of Federal Claims applied the *Lucas* rule to find the landowner retained economically beneficial use in *Good v. United States*.[187] Good claimed the Army Corps of Engineers denied his

182. *See id*. at 651 (Connor, J., concurring in part and dissenting in part).

183. *Id.* at 650 (majority opinion) (alteration in original).

184. 997 F.2d 604 (9th Cir. 1993).

185. *See id*. at 617–18.

186. *Id.* at 618; *see also* Front Royal & Warren County Indus. Park Corp. v. Town of Front Royal, 135 F.3d 275, 286 (4th Cir. 1998) (holding that a town's failure to install sewer lines did not deprive plaintiff's land of all economic value when the difference in value of the property without the sewer lines was only $2000, or a mere diminution in value).

187. 39 Fed. Cl. 81, 84 (Fed. Cl. 1997).

dredge and fill permit on Endangered Species Act grounds.[188] While true, the court found the property still had value both for development and for transfer of development rights purposes.[189]

By and large, many state court cases reach the same conclusion.[190] However, those decisions which critically examine *Lucas* have concluded that a fundamental attribute of property now includes the right to make some economically viable use of the land.[191]

Also failing a per se test was the landowner in *Redman v. Ohio Department of Industrial Relations*.[192] There, plaintiff claimed a per se taking under *Lucas* because of the disapproval of a permit to drill two oil and gas wells.[193] Noting that the *Lucas* test was whether a denial of all economically beneficial use of the affected property has occurred, the court observed that two functioning wells were on the property, and that permits for drilling others were merely delayed.[194] Therefore, plaintiff could not say the permit disapproval resulted in the denial of all economically beneficial use of his leases.[195]

As clear as *Lucas* appears to be with respect to total takings, many courts are having an inordinately difficult time applying the standard. One of the most flagrant examples is *Garelick v. Sullivan*,[196] in which the court decided it did not have to follow

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188. *See id*.

189. *See id*.; *see also* International College of Surgeons v. City of Chicago, 153 F.3d 356, 368 (7th Cir. 1998); Stupak-Thrall v. Glickman, 988 F. Supp. 1055, 1064–65 (W.D. Mich. 1997); Centerfold Club, Inc. v. City of St. Petersburg, 969 F. Supp. 1288, 1307–08 (M.D. Fla. 1997).

190. *See*, *e.g.*, Sierra Club v. Department of Forestry & Fire Protection, 26 Cal. Rptr. 2d 338, 344–48 (Cal. Ct. App. 1993) (observing that economic uses remain to loggers on land restricted for environmental protection purposes) (case ordered not published on denial of review).

191. *See*, *e.g.*, Guimont v. Clarke, 854 P.2d 1, 7–10 (Wash. 1993).

192. Nos. 93-APE12-1670, 93-APE12-1671, 1994 WL 485750 (Ohio Ct. App. Sept. 6, 1994).

193. *See id*. at **2, 6–8.

194. *See id*. at *8.

195. *See id*.; *see also* Santini v. Connecticut Hazardous Waste Management Serv., No. CV-94-0538646S, 1998 WL 422166, at **5–7 (Conn. Super. Ct. July 13, 1998); Daddario v. Cape Cod Comm'n, 681 N.E.2d 833, 836–38 (Mass. 1997); Brunelle v. Town of S. Kingstown, 700 A.2d 1075, 1080–83 (R.I. 1997); Alegria v. Keeney, 687 A.2d 1249, 1253 (R.I. 1997); Kraftcheck v. Halliwell, No. 93-6116, 1996 WL 936939, at *5 (R.I. Super. Ct. June 11, 1996); Zealy v. City of Waukesha, 548 N.W.2d 528, 533–34 (Wis. 1996).

196. 987 F.2d 913 (2d Cir. 1993).

Lucas because it was not a majority opinion of the Supreme Court.[197] Less startling but equally erroneous is the decision in *Gazza v. New York State Department of Environmental Conservation*.[198] The court misread the Kennedy concurrence to be a part of the opinion and engrafted the "reasonable investment-backed expectations" standard onto the per se rule to find no takings because of the unreasonableness of these expectations under the circumstances of the case.[199] The court also unaccountably agreed with the court below — that because the single-family lot in the case had "recreational value" the owner was not deprived of all economically beneficial use,[200] despite the virtual rejection of such "salvage" uses as "economic" in the *Lucas* case.

In sum, while more cases follow the *Lucas* standard than not (without necessarily finding a taking, as Justice Scalia predicted in noting the rarity of such total takings), there is some purposeful ignoring of the per se rule by some state and federal courts. Thus, for example, the Sixth Circuit Court of Appeals in *Waste Management, Inc. v. Metropolitan Government*,[201] cites *Lucas* for the proposition that the Court has refused "to lay out a set formula for determining whether a regulatory taking has occurred,"[202] which is precisely the opposite of what the Court has done with respect to total takings. The factors the court then identifies as having "particular significance" are purely partial takings factors from *Penn Central*: character of the governmental action, economic impact of the regulation on the claimant, and interference with the claimant's investment-backed expectations.[203] The *Lucas* majority specifically rejected this test for total takings.[204] Similarly, the Minnesota Court of Appeals misreads the Court's holdings in opining that "[u]nder federal law, a general zoning law does not constitute a taking if it

197. *See id*. at 918.

198. 634 N.Y.S.2d 740 (N.Y. App. Div. 1995), *aff'd*, 679 N.E.2d 1035 (N.Y. 1997). For excellent commentary and analysis of this case in the context of takings generally, see Steven J. Eagle, *The 1997 Regulatory Takings Quartet: Retreating from the "Rule of Law,"* 42 N.Y.L. SCH. L. REV. 345 (1998).

199. *See Gazza*, 634 N.Y.S.2d at 745–46.

200. *See id*. at 746.

201. 130 F.3d 731 (6th Cir. 1997).

202. *Id*. at 737.

203. *See id*.

204. *See* Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1015–17 & n.7, 1030–31 (1992).

`substantially advance[s] legitimate state interests' and does not `den[y] an owner economically viable use of his land.'"[205] While this is a rough approximation of the *Lucas* rule, it ignores the possibility of a partial taking under *Penn Central* and its rules as summarized in *Waste Management* above, and the cases discussed in other parts of the section. Again in *Snohomish County v. Long*,[206] in an unpublished opinion the Washington Court of Appeals opines that "[a] zoning regulation does not effect a taking when imposed to protect the public health and safety."[207] Of course it does if it deprives the owner of all economically beneficial use — unless it falls into the exceptions of nuisance or background principles of state property law.

3. Lucas *Exceptions*

Other cases reasonably find that the prohibited activity fits within one of the two exceptions to the *Lucas* per se rule. Not surprisingly, the most common of the two exceptions is nuisance. Indeed, most of the literature on the exceptions deals with the nuisance exception.[208]

Thus, in *M&J Coal Co. v. United States*,[209] the court held a prohibition of mining was not a taking even though the company had a mining permit, because, under the circumstances of the case, mining would constitute a nuisance and therefore no property right was lost.[210] In *Darack v. Mazrimas*,[211] the court used the nuisance exception to find that denial of use of floodprone property was not a total taking.[212] Also in *Hendler v. United States*,[213] a plume of contaminated groundwater flowing under plaintiff's property "consti-

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205. DeCook v. City of Rochester, No. C8-97-1518, 1998 WL 73050, at *2 (Minn. Ct. App. Feb. 24, 1998) (citing Dolan v. City of Tigard, 512 U.S. 374, 384 (1994), which is quoting Agins v. City of Tiburon, 447 U.S. 255, 260 (1980)).

206. No. 38587-9-I, 1997 WL 405290 (Wash. Ct. App. July 21, 1997).

207. *Id.* at *3 (citing *Dolan*, 512 U.S. at 385).

208. *See*, *e.g.*, Halper, *supra* note 137; Humbach, *supra* note 1; Jamee Jordan Patterson, *California Land Use Regulation Post* Lucas: *The History and Evolution of Nuisance and Public Property Laws Portend Little Impact in California*, 11 UCLA J. ENVTL. L. & POL'Y 175 (1993).

209. 47 F.3d 1148 (Fed. Cir. 1995).

210. *See id*. at 1154.

211. No. CIV.A.95-659, 1996 WL 406270 (Mass. Super. Ct. July 22, 1996).

212. *See id*. at **1, 3 & n.5.

213. 38 Fed. Cl. 611 (Fed. Cl. 1997).

tuted a nuisance that needed to be abated" so that entry by the Environmental Protection Agency onto plaintiff's property to monitor the plume did not amount to a regulatory taking.[214] There, the Environmental Protection Agency had "taken" twenty well easements, each fifty feet by fifty feet square, in order "to monitor and determine the extent of groundwater contamination underlying plaintiffs' property."[215] According to the court, "plaintiffs had a duty to provide access to their property for the abatement of a public nuisance."[216]

Two unpublished opinions further show what courts are doing with the nuisance exception. In *Aztec Minerals Corp. v. Romer*,[217] a mining company claimed a taking by various governmental defendants when they aided the Environmental Protection Agency in moving a waste rock pile and in plugging various "historic" tunnels and shafts, "trespassing" on plaintiff's land by going upon it without plaintiff's permission.[218] In language reminiscent of *Hendler*, the Colorado Court of Appeals held that the agencies were acting pursuant to their police powers to abate a public nuisance,[219] thereby falling within the *Lucas* nuisance exception. The unpublished opinion in *Trobough v. City of Martinsburg*,[220] presents a different situation, altogether unrelated to mining. Plaintiffs owned a four-unit apartment building which, upon inspection, was found to be riddled with major building and housing code violations.[221] Not surprisingly, the City issued an emergency order requiring the apartments be vacated and closing the building until the plaintiffs corrected the code violations.[222] Responding to a claim that this amounted to a total taking of their property by regulation, the court held that the "continued maintenance of an illegal use or public nuisance [was] not a protected property interest," citing *Lucas*.[223]

Courts have also ruled against regulatory takings based on the more nebulous exception of "background principles of state property

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214. *Id*. at 617.
215. *Id*. at 613.
216. *Id*. at 617.
217. 940 P.2d 1025 (Colo. Ct. App. 1996).
218. *See id*. at 1028–29.
219. *See id*. at 1032.
220. No. 96-1607, 1997 WL 425688 (4th Cir. July 30, 1997).
221. *See id*. at *1.
222. *See id*. at *2.
223. *Id*. at *3.

law." For example, in *United States v. 30.54 Acres of Land*,[224] the navigational servitude of the United States was judged to be a preexisting limitation on a landowner's title, preventing the landowner from claiming a taking under the Fifth Amendment when the Army Corps of Engineers denied a permit for a coal loading and tipple facility.[225] Likewise, in *Outdoor Graphics, Inc. v. City of Burlington*,[226] the court declined to decide whether an ordinance that prohibited billboards in residential areas deprived plaintiff's property of all economic value for "even if it did, the City need not compensate Outdoor, under a per se takings theory, since the right to erect a billboard did not inure in Outdoor's title."[227] State courts are generally in accord with this rationale. In *Kim v. City of New York*,[228] plaintiffs argued that they were entitled to compensation when the City placed side fill on a portion of their property abutting a roadway so that the City could maintain lateral-support as it re-graded the road.[229] The Court of Appeals, however, held that "the lateral-support obligation imposed on plaintiffs was a prevailing rule of the State's property law when they acquired their property and, accordingly, encumbered plaintiffs' title and the constituent bundle of rights," so that the City did not take a property interest of plaintiffs for which compensation was due.[230] Similarly, in *Sierra Club v. Department of Forestry & Fire Protection*,[231] the court suggested that "wildlife regulation of some sort has been historically a part of the preexisting law of property."[232]

In a more troubling decision, South Carolina's supreme court used the general "not a part of [the owner's] title to begin with" language from the *Lucas* opinion to shield the application of part of the state's coastal protection statute, again, from current takings jurisprudence.[233] In *Grant v. South Carolina Coastal Council*,[234] the

224. 90 F.3d 790 (3d Cir. 1996).
225. *See id*. at 792–93, 796.
226. 103 F.3d 690 (8th Cir. 1996).
227. *Id.* at 694.
228. 681 N.E.2d 312 (N.Y. 1997).
229. *See id*. at 313.
230. *Id.* at 319.
231. 26 Cal. Rptr. 2d 338 (Cal. Ct. App. 1993) (ordered not published by the California Supreme Court in 1994).
232. *Id.* at 347.
233. Grant v. South Carolina Coastal Council, 461 S.E.2d 388, 391 (S.C. 1995).
234. 461 S.E.2d 388 (S.C. 1995).

Council issued an administrative order finding a landowner violated the Coastal Zone Management Act by filling critical tidelands without a permit.[235] To the claim that this constituted a clear takings under *Lucas*, the court responded that since the landowner knew it was critical tidelands when he purchased the property, his "right to use his property did not alter from when he originally acquired title to it. Accordingly, no taking has occurred."[236] Surely this analysis begs the question. If all government must show is that the landowner acquired property with preexisting regulations attached, regardless of their constitutional soundness, then the right to raise a constitutional takings claim vanishes upon title transfer! The real inquiry is into the nature of the regulation — is it a "true" background principle of state property law, like (perhaps) an element of the public trust doctrine, or a real part of the state's customary law.[237] Along these lines, the U.S. Court of Federal Claims has held that federal statutes per se are *not* background principles of property law for the purposes of the *Lucas* exception in *Forest Properties, Inc. v. United States*.[238]

More to the point raised (and wrongly decided) in *Grant*, the court specifically held that "[S]ection 404's regulatory structure did not serve to divest the plaintiff of its compensable property interest merely because it was in place prior to FPI's acquisition of the lakebottom property."[239] The court went on to hold that, since this was more of a partial takings case anyway, the tripartite test for such partial takings set out in *Penn Central* was more appropriate.[240] After taking issue with the landowner's definition of the "relevant parcel" (the denominator issue discussed below), the need for a 404 Permit was definitely relevant with respect to the owner's legitimate investment-backed expectations.[241]

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235. *See id*. at 389.

236. *Id.* at 391; *see also* M&J Coal Co. v. United States, 47 F.3d 1148, 1153 (Fed. Cir. 1995); Hunziker v. State, 519 N.W.2d 367, 371 (Iowa 1994); Ward v. Harding, 860 S.W.2d 280, 288–89 (Ky. 1993). For a discussion of both positions, see JUERGENSMEYER & ROBERTS, *supra* note 4, § 10.7.B, at 438–40.

237. *See generally* COASTAL STATES ORG., INC., PUTTING THE PUBLIC TRUST DOCTRINE TO WORK (2d ed. 1997); David J. Bederman, *The Curious Resurrection of Custom: Beach Access and Judicial Takings*, 96 COLUM. L. REV. 1375 (1996).

238. 39 Fed. Cl. 56, 70–71 (Fed. Cl. 1997).

239. *Id*. at 72.

240. *See id*.

241. *See id*. at 75–76.

> This well-developed regulatory scheme was firmly in place and being enforced at the time FPI purchased the upland property and the option rights in 1988. Well prior to this time period, the public was clearly on notice that the development of wetland areas was subject to compliance with section 404 of the Clean Water Act. As a sophisticated real estate developer, FPI would be charged with knowledge of this regulatory scheme. Indeed, FPI also had actual knowledge . . . .[242]

In sum, the *Lucas* exceptions will continue to provide government regulators with a way around the per se rule established by the Court. Certainly the nuisance exception is the easier and the more widely-applied of the two. This is perhaps because it is the more easily understood.[243] What precisely is meant by background principles of state property law is not nearly so clear. That the term is synonymous with whatever regulations burdened the owner's title when he acquire the land is clearly not the law. It would render the per se rule short-term and meaningless. A more reasoned approach is to tease out from the welter of law applicable to property — like the public trust doctrine or true custom — what is likely to be truly old, well-known, and of reasonably universal applicability in the state jurisdiction — in other words, a principle of state law that is the background limitation on all private land titles held in the state. Lastly, while a law may fail to make the grade as a background principle in a total takings situation, it may well succeed in frustrating a landowner's investment-backed expectations, making them illegitimate, as in *Forest Properties*.

4. Denominator Issue (Segmentation)

Less conformity exists among courts faced with the denominator issue articulated in footnote 7 of *Lucas*. The principle issue is: what is the extent of the landowner's property interest to be considered in deciding whether the interest allegedly damaged is partially taken?

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242. *Id*. at 77.

243. However, the nuisance exception was not understood by the Washington Court of Appeals, which recently held that a regulation cannot "effect a taking when imposed to protect the public health and safety." Snohomish County v. Long, No. 38587-9-I, 1997 WL 405290, at *3 (Wash. Ct. App. July 21, 1997). In support of this holding, the court did not cite to *Lucas*; it cited to *Dolan* and *Agins*. *See id*.

Both *Florida Rock Industries, Inc. v. United States*[244] and *Loveladies Harbor, Inc. v. United States*[245] discussed the denominator issue in the context of denials of § 404 (Clean Water Act) dredge and fill permits by the Army Corps of Engineers.[246] These courts were willing to follow the rationale of *Lucas* and consider a portion of the plaintiff's entire property in assessing deprivation of all economically beneficial use.[247] For example, out of 250 acres, the court was willing to consider only the devaluation of 12.5 acres for which the Corps denied a permit in *Loveladies*.[248] With the difference being $2.7 million before the permit denial and $12,500 thereafter, the trial court awarded the $2.7 million, which the Federal Circuit affirmed.[249] Similarly, in *East Cape May Associates v. State*,[250] the court held that the denominator of the parcel would not include adjacent property subdivided and sold many years prior to the enactment of the regulations at issue.[251]

Courts have, however, just as easily reached the opposite conclusion. In *Corn v. City of Lauderdale Lakes*,[252] the Eleventh Circuit cited *Penn Central* in rejecting a landowner's claim to the taking of a particular property right, rather than looking at his land as a whole, since he possessed a "full bundle."[253] Similarly, the Tenth Circuit in *Clajon Production Corp. v. Petera*[254] rejected the so-called "single stick" argument in holding that the right to hunt on one's own property could not be separately analyzed as a taking, separate from other property rights and values on the same property, citing *Penn Central* and specifically rejecting *Florida Rock*.[255] In *FIC Homes of Blackstone, Inc. v. Conservation Commission of Blackstone*,[256] the court, also citing *Penn Central*, declared that takings jurisprudence requires a consideration of the parcel as a whole rather than by

244. 18 F.3d 1560 (Fed. Cir. 1994).
245. 28 F.3d 1171 (Fed. Cir. 1994).
246. *See id*. at 1173, 1179–82; *Florida Rock*, 18 F.3d at 1562, 1567–71.
247. *See Loveladies*, 28 F.3d at 1179–82; *Florida Rock*, 18 F.3d at 1568–69.
248. *See Loveladies*, 28 F.3d at 1180–81.
249. *See id*. at 1173–75, 1183.
250. 693 A.2d 114 (N.J. Super. Ct. App. Div. 1997).
251. *See id*. at 124.
252. 95 F.3d 1066 (11th Cir. 1996).
253. *See id*. at 1074.
254. 70 F.3d 1566 (10th Cir. 1995).
255. *See id*. at 1577.
256. 673 N.E.2d 61 (Mass. App. Ct. 1996).

individual segments, and accordingly, appraised the effect of the regulation on plaintiff's property based on all thirty-eight of plaintiff's lots to hold that plaintiff was not completely deprived of all economically beneficial use.[257] Following the same approach, the court in *Karam v. State*[258] considered such factors as the fact that both parcels involved were always bought and sold as a single unit, that plaintiffs bought both parcels under a single contract and sold it as a single unit, and that the parcels were assessed for tax purposes as a single lot.[259]

This application of the "nonsegmentation" principle was followed with a vengeance by the Supreme Court of Michigan in *K&K Construction, Inc. v. Department of Natural Resources*.[260] Here, plaintiffs were denied a permit to fill a portion of their property that was designated as wetlands.[261] Although most of the wetlands were located on one parcel in particular, the property consisted of four parcels in total.[262] Both the trial court and court of appeals only considered the one parcel that was affected by the regulation, and held that the plaintiffs were entitled to compensation since the denial of the permits resulted in a deprivation of plaintiffs' interest in developing their property.[263] The supreme court, however, reversed and remanded, holding that the relevant denominator included all four parcels located on the property.[264] Specifically, the court reasoned: "In this case it is neither realistic nor fair to consider only parcel one for purposes of the taking analysis. Parcels one, two, and four are bound together through their contiguity, the unity of J.F.K.'s ownership interest in all three of these parcels, and plaintiffs' proposed comprehensive development scheme."[265] That these and other cases continue to apply the "denominator" theory in takings cases is prob-

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257. *See id*. at 67.

258. 705 A.2d 1221 (N.J. Super. Ct. App. Div. 1998).

259. *See id*. at 1228; *see also* Daddario v. Cape Cod Comm'n, 681 N.E.2d 833, 837 (Mass. 1997) (holding that "restrictions on a landowner's right to extract minerals . . . is not necessarily a regulatory taking when the property as a whole retains substantial value" (citing Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 496–97 (1987)).

260. 575 N.W.2d 531 (Mich. 1998).

261. *See id*. at 534.

262. *See id*.

263. *See id*.

264. *See id*. at 536, 540.

265. *Id.* at 537.

ably a sufficient response to the post-*Lucas* language in *Concrete Pipe & Products of California, Inc. v. Construction Laborers Pension Trust*,[266] where the Court rejected segmentation of property interests for takings purposes in a non land-use context,[267] though occasionally a judge will read *Concrete Pipe* to reject the argument that there is a denominator issue involved in a nonphysical property rights case.[268]

B. Partial Takings Under the Investment-Backed Expectations Standard

Many courts deciding that the per se takings rule is inapplicable will nevertheless determine whether a partial taking occurred according to the investment-backed expectations rule of *Penn Central*. In *Reahard v. Lee County*,[269] the court actually delayed its decision until after *Lucas* was decided, then set out its own multipart criteria based on the investment-backed expectations standard, though it ultimately found that mere plan designation of property in a resource protection zone fell short of such a taking.[270] Similarly, in *Berrios v. City of Lancaster*,[271] the court cited *Lucas* for the

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266. 508 U.S. 602 (1993).

267. *See id*. at 643.

268. *See*, *e.g.*, Stupak-Thrall v. United States, 89 F.3d 1269, 1295 n.30 (6th Cir. 1996) (Boggs, J., dissenting). While *Concrete Pipe* has been cited several times for the proposition that real property rights must be aggregated for takings analysis purposes, *see, e.g.*, Marshall v. Board of County Comm'rs, 912 F. Supp. 1456, 1472 (D. Wyo. 1996); Villas of Lake Jackson, Ltd. v. Leon County, 906 F. Supp. 1509, 1516 (N.D. Fla. 1995); Broadwater Farms Joint Venture v. United States, 35 Fed. Cl. 232, 239 (Fed. Cl. 1996); Stephenson v. United States, 33 Fed. Cl. 63, 69–70 (Fed. Cl. 1995); Zealy v. City of Waukesha, 548 N.W.2d 528, 532–33 (Wis. 1996), other courts have dismissed the case in a real property context on the ground that "[t]he Ordinance at issue here is not federal economic legislation, and [therefore] the Concrete Pipe rationale does not apply," Guimont v. City of Seattle, 896 P.2d 70, 79 n.10 (Wash. Ct. App. 1995). For the view that *Concrete Pipe* is dispositive, see MELTZ, MERRIAM & FRANK, *supra* note 16, at 146–47. For various theories on resolving the "segmentation" problem, see John. A. Humbach, *"Taking" the Imperial Judiciary Seriously: Segmenting Property Interests and Judicial Revision of Legislative Judgments*, 42 CATH. U. L. REV. 771 (1993); Marc R. Lisker, *Regulatory Takings and the Denominator Problem*, 27 RUTGERS L.J. 663 (1996); Daniel R. Mandelker, *New Property Rights Under the Taking Clause*, 81 MARQ. L. REV. 9 (1997). For sharp and fundamentally philosophical criticism of recent segmentation/partial takings opinions, see Gerald Torres, *Taking and Giving: Police Power, Public Value, and Private Right*, 26 ENVTL. L. 1 (1996).

269. 968 F.2d 1131 (11th Cir. 1992).

270. *See id*. at 1134, 1136–37.

271. 798 F. Supp. 1153 (E.D. Pa. 1992).

proposition that partial takings should be decided under the rule of "frustration of distinct, investment-backed expectations."[272] In *Golden Gate Hotel Ass'n v. City of San Francisco*,[273] the court held that San Francisco's Hotel Conversion Ordinance constituted a taking without compensation.[274] Citing *Lucas*, the court found that while there was too much use left in plaintiff's hotel property to be a total or per se taking, footnote 8 in that case suggested a taking was still possible depending upon "the economic impact of the regulation on the claimant and . . . the extent to which the regulation" interferes with the claimant's "distinct investment-backed expectations."[275] The court found that

> those rights have been deeply trenched upon. Consequently, the economically viable uses of the hotel owners' land have been significantly diminished. Accordingly, although the plaintiff hotel owners are not denied all economically productive uses of their land, the court finds that the Ordinance so deeply trenches on the hotel owners' investment-backed expectations and their classic property rights to use, possess, and exclude as to constitute a deprivation of economically productive use, and thus constitute a taking.[276]

Federal cases since *Lucas* do not always find a partial taking has occurred, of course, but when they do not, clear extenuating circumstances exist. Thus, in *Orange Lake Associates, Inc. v. Kirkpatrick*,[277] the court found that reduction in density on plaintiff's land did not constitute a per se taking because there was economic use left in the property, and reduction in density from twelve dwelling units per acre to two per acre did not constitute a partial taking.[278] The court also appeared to be moved by the "unreasonableness" of the investment-backed expectations of the plain-

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272. *See id*. at 1157.

273. 836 F. Supp. 707 (N.D. Cal. 1993), *vacated on other grounds*, 18 F.3d 1482 (9th Cir. 1994).

274. *See id*. at 708, 710–11.

275. *Id*. at 710 (alteration in original).

276. *Id.* at 710–11; *see also* Broadwater Farms Joint Venture v. United States, 35 Fed. Cl. 232, 240–41 (Fed. Cl. 1996) (remanded to the Court of Federal Claims for evidence and hearing on whether there was a partial taking even though presence of economically beneficial use demonstrated no total taking under *Lucas*).

277. 21 F.3d 1214 (2d Cir. 1994).

278. *See id*. at 1217, 1224–25.

tiff, who arguably had notice of the government plans to reduce the density before plaintiff completed the purchase of the property.[279] The court in *Gamble v. Eau Claire County*,[280] reached a similar conclusion. Citing *Lucas* for the proposition that a rule or regulation that deprives an owner of economic use can be a taking under the Fifth Amendment, the court nevertheless found no taking here, in part because the court was skeptical that the denial of a permit to construct a gasoline service station could result either in a per se or a partial taking.[281] The court also found that the plaintiff had not adequately availed herself of state inverse condemnation remedies and therefore the claim was not ripe.[282]

State courts have also applied the partial taking *Penn Central* rules, finding, for the most part, no taking, generally on the legitimacy of the landowner's investment-backed expectations. Thus, after finding no total taking, the Rhode Island Supreme Court quite correctly then turned to a partial taking analysis under *Penn Central* in *Alegria v. Keeney*.[283] Reviewing first the economic impact of wetlands regulations on the landowner, then the owner's reasonable investment-backed expectations and lastly the character of the governmental action, the court concluded that the landowner lost on all three, particularly having purchased the property with full knowledge of the state's extensive, defensible wetland regulations and lack of evidence that the state had denied any particular development proposal.[284] The same Rhode Island court, in *Brunelle v. Town of South Kingstown*,[285] discussed what constituted interference with reasonable investment-backed expectations and decided that a rezoning did not.[286] The court carefully and correctly noted that such expectations are irrelevant in a total taking claim under *Lucas*, but

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279. *See id*.

280. 5 F.3d 285 (7th Cir. 1993).

281. *See id*. at 285–86.

282. *See id*. at 286; *see also* Dodd v. Hood River County, 136 F.3d 1219, 1230 (9th Cir. 1998) (holding that plaintiffs' investment-backed expectations to build their retirement home in a Forest Use Zone were unreasonable since the regulations were in effect when plaintiffs purchased the property); Good v. United States, 39 Fed. Cl. 81, 112–13 (Fed. Cl. 1997) (holding there was no partial taking because landowner took with full knowledge of ESA restrictions and their potential to thwart the full development of the property).

283. 687 A.2d 1249, 1253–54 (R.I. 1997).

284. *See id*.

285. 700 A.2d 1075 (R.I. 1997).

286. *See id*. at 1081–82.

the landowner could not show that his property lacked economically beneficial use.[287]

C. *Dolan* and Poor Relations

Courts since *Dolan*, both state and federal, appear to have adopted completely both the nexus and proportionality tests which mark that decision. There are, however, continued questions over whether the doctrine applies to any but property dedications and exactions (i.e., not to impact fees) and to legislative as well as administrative or quasi-judicial decisions. Despite the fact that the *Nollan* and *Dolan* decisions involved such dedications, it appears increasingly understood by the courts that the rule is of more universal application. Moreover, there appears to be little doctrinal basis beyond blind deference to legislative decisions to limit its application only to administrative or quasi-judicial acts of government regulators.

1. Legitimate State Interest

The *Nollan*/*Dolan* test has three parts, not two. Before reaching nexus and proportionality, it is first necessary, according to *Dolan*, to assure that the regulation is furthering a legitimate state interest. It is therefore worth reiterating the importance of the materials in the previous discussion with respect to *Lucas* and the importance that government must first establish the legitimacy of the purpose for the exaction, dedication or fee before proceeding to the now traditional analysis set out below.

2. Nexus and Proportionality

An excellent example is the Eighth Circuit decision in *Christopher Lake Development Co. v. St. Louis County*,[288] in which the court applied *Dolan* to strike down a county drainage system require-

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287. *See id*. at 1082; *see also* Daddario v. Cape Cod Comm'n, 681 N.E.2d 833, 836–37 (Mass. 1997); Emond v. Durfee, No. 91-0237, 1996 WL 936873, at *5 (R.I. Super. Ct. Jan. 12, 1996). For the view that a nuisance may be a taking on the ground that to perpetuate one is the equivalent of the taking of an easement, see *Bormann v. Board of Supervisors*, 584 N.W.2d 309 (Iowa 1998) (government insulating of private parties from nuisance claim of taking).

288. 35 F.3d 1269 (8th Cir. 1994).

ment.[289] The county granted the owner of forty-two acres preliminary development approval for two residential communities on the condition that the owner provide a drainage system for an entire watershed.[290] First, the court dealt with the public purpose issue: part one of the *Dolan* test.[291] The court stated that "even assuming the legitimacy of the County's purpose in requiring a drainage system, the application of the Criteria may violate the equal protection clause."[292] Citing *Nollan* for the nexus or second part of the test, the court then opined that although "the County's objective to prevent flooding may be rational, it may not be rational to single out the Partnership to provide the entire drainage system."[293] The court then found such a requirement disproportionate to the drainage problems resulting from the proposed development:

> [F]rom our review of the record, the County has forced the Partnership to bear a burden that should fairly have been allocated throughout the entire watershed area. "A strong public desire to improve the public condition will not warrant achieving the desire by a shorter cut than the constitutional way of paying for the change."[294]

As for a remedy, the court said as follows: "We believe that the Partnership is entitled to recoup the portion of its expenditures in excess of its pro rata share and remand to the district court to determine the details and amounts."[295]

An even more egregious case is *Walz v. Town of Smithtown*[296] from the Second Circuit. There, landowners were denied access to the public water supply when they refused to deed the front fifteen feet of their property to Smithtown for road-widening purposes.[297] Finding a total lack of nexus between water service and road widening, the court found that "[a]s landowners, the Walzes surely had a

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289. *See id*. at 1274–75.
290. *See id*. at 1270–71.
291. *See id*. at 1274.
292. *Id.*
293. *Id.*
294. *Christopher Lake*, 35 F.3d at 1275 (quoting Dolan v. City of Tigard, 512 U.S. 374, 396 (1994)).
295. *Id.* at 1275.
296. 46 F.3d 162 (2d Cir. 1995).
297. *See id*. at 164–65.

right not to be compelled to convey some of their land in order to obtain utility service."[298]

Lack of proportionality between the exaction and the problem it is meant to solve is the basis for other courts to nullify exactions. In *Steel v. Cape Corp.*,[299] a Maryland appellate court held that the denial of a rezoning application based on the inadequacy of school facilities resulted in an unconstitutional regulatory taking, citing *Dolan* and *Nollan*: "While the provision of public facilities is a legitimate concern of the County, the burden of providing adequate schools is disproportionately placed upon Cape Corporation when residential use is denied to them while being granted to its neighbors."[300] Similarly, in *Burton v. Clark County*,[301] a Washington court of appeals held that while a road dedication requirement for a three-lot subdivision met the nexus test, there was no evidence to sustain a finding of rough proportionality.[302] As the court noted in a footnote to the opinion: "[T]he government may not use the permitting process as a vehicle for solving public problems not created or exacerbated by any project."[303]

Going well beyond impact fees is the application of *Dolan* in *Manocherian v. Lenox Hill Hospital*,[304] in which the New York Court of Appeals struck down a rent-stabilization statute in part because it did not advance "a closely and legitimately connected State interest."[305] Citing both the *Dolan* and *Nollan* cases, the court said that

> the Supreme Court refrained from placing any limitations or distinctions or classifications on the application of the "essential nexus" test. This suggests and supports a uniform, clear and reasonably definitive standard of review in takings cases. Indeed, Justice Brennan, in dissent in *Nollan*, expressly attributed to the majority's holding in *Nollan* an impact on *all regulatory takings*

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298. *Id.* at 169 (citing *Dolan*, 512 U.S. at 386–87); *see also* Art Piculell Group v. Clackamas County, 922 P.2d 1227, 1233 (Or. Ct. App. 1996); Nielsen v. Merriam, No. 40106-8-I, 1998 WL 390442, at *2 (Wash. Ct. App. July 13, 1998) (holding that there was no nexus between a county-required easement and any problems created by a proposed subdivision).

299. 677 A.2d 634 (Md. Ct. Spec. App. 1996).

300. *Id.* at 650–52.

301. 958 P.2d 343 (Wash. Ct. App. 1998).

302. *See id*. at 356–57.

303. *Id.* at 354 n.42.

304. 643 N.E.2d 479 (N.Y. 1994).

305. *Id*. at 480.

> *cases*, stating that the Court's "exactitude . . . is inconsistent with our standard for reviewing the rationality of a State's exercise of its police power for the welfare of its citizens."[306]

Even the California Supreme Court's strange decision in *Ehrlich v. City of Culver City*,[307] repeats only the contribution already made in the *Manocherian* case discussed above in terms of basic property rights: *Nollan* and *Dolan* apply beyond physical dedication land development conditions to impact fees,[308] although the court's notion that Culver City's art impact fee is as defensible as a park dedication fee is pure judicial recalcitrance.

Surely the U.S. Supreme Court means, as the dissent in *Dolan* suggests, to apply its nexus and proportionality test to all exactions and impact fees, whether or not part of a generalized scheme memorialized in a impact fee ordinance. As previously discussed in *Manocherian* and *Ehrlich*, courts have read the *Dolan* decision and have ruled as such.[309] Nevertheless, there is considerable judicial divergence over whether the *Nollan*/*Dolan* tests and the so-called "strict scrutiny" some see in their application[310] apply beyond compulsory dedications of land or beyond strictly "adjudicatory" land development conditions of any kind.

3. Beyond Dedications

It is difficult to make out a case for limiting *Nollan*/*Dolan* to dedications only, and as noted in the preceding paragraphs, even the Supreme Court of California does not so limit the doctrine. Indeed, most of the few cases so implying or holding are pre-*Ehrlich*. In

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306. *Id.* at 483 (emphasis added) (alteration in original) (citations omitted) (quoting Nollan v. California Coastal Comm'n, 483 U.S. 825, 842–43 (1987) (Brennan, J., dissenting)).

307. 911 P.2d 429 (Cal. 1996).

308. *See id*. at 433.

309. *See* Curtis v. Town of S. Thomaston, 708 A.2d 657, 660 (Me. 1998) (giving extra weight in applying the *Dolan* nexus/proportionality test to the fact that the requirement of an easement for fire prevention was the product of a legislative determination and not an ad hoc adjudicative decision). *But see* Goss v. City of Little Rock, 151 F.3d 861 (8th Cir. 1998). While finding the highway dedication a taking, the court held the city could avoid *any* takings claims by simply refusing to rezone the subject property without the invalid dedication, pursuing its legitimate interest in declining to rezone property! *See id*. at 863–64.

310. *See* MELTZ, MERRIAM & FRANK, *supra* note 16, at 257.

Clajon Production Corp. v. Petera,[311] the Tenth Circuit comes close to such a holding after noting that both cases "follow" from jurisprudential concern over an individual's being forced to dedicate land to a public use without compensation.[312] It then follows, according to the court, that the doctrine should be limited to "extending the analysis of complete physical occupation cases to those situations in which the government achieves the same end . . . through a conditional permitting procedure."[313] The Supreme Court of Kansas also specifically refused to extend *Nollan/Dolan* from what it perceives to be its limitation to dedication cases in *McCarthy v. City of Leawood*.[314] Finally, a California Court of Appeals held that "heightened scrutiny" standards in takings clause cases have no application to California cases involving development fees, as contrasted with dedication requirements, in *Loyola Marymount University v. Los Angeles Unified School District*.[315] It is an odd interpretation of *Ehrlich* which, on its face, appears to hold just the opposite.

Other courts, on the other hand, have specifically applied *Nollan/Dolan* beyond dedications to monetary exactions. Thus, the Ninth Circuit in *Garneau v. City of Seattle*,[316] specifically applied the doctrine of those cases to other than physical dedications even though it found them inapplicable for other reasons as discussed below.[317] Perhaps the most direct such application comes from the Illinois Supreme Court in *Northern Illinois Home Builders Ass'n v. County of Du Page*,[318] upholding a traffic impact fee statute.[319] The court cited and rested its decision in part on the tests articulated in *Dolan*, as well as Illinois' more strict "specifically and uniquely attributable" test.[320] While noting that the case before it was not appropriate for setting out precise rules, nevertheless an Oregon appellate court held in *Clark v. City of Albany*,[321] that "[t]he fact that *Dolan* itself involved conditions that required a dedication

311. 70 F.3d 1566 (10th Cir. 1995).
312. *See id*. at 1578.
313. *Id.*
314. 894 P.2d 836, 845 (Kan. 1995) (upholding a traffic impact fee ordinance).
315. 53 Cal. Rptr. 2d 424, 435 (Cal. Ct. App. 1996).
316. 147 F.3d 802 (9th Cir. 1998).
317. *See id*. at 809–11.
318. 649 N.E.2d 384 (Ill. 1995).
319. *See id*. at 397.
320. *Id*. at 389–91.
321. 904 P.2d 185 (Or. Ct. App. 1995).

of property interests does not mean that it applies only to conditions of that kind."[322]

4. Legislative Decisions

While the question of extending *Nollan/Dolan* beyond physical exactions appears to be settled, whether to apply the tests from these cases to "legislative" determinations — as well as the contextual meaning of "legislative" — is not so clear. In its broadest context, as noted by Justice Thomas in his dissent from a denial of a petition for certiorari in *Parking Ass'n of Georgia, Inc. v. City of Atlanta*,[323] "The lower courts are in conflict over whether Tigard's test for property regulation should be applied in cases where the alleged taking occurs through an act of the legislature."[324] After citing, inter alia, *Trimen Development Co. v. King County*[325] and the *Manocherian* decision, Justice Thomas observed:

> It is not clear why the existence of a taking should turn on the type of governmental entity responsible for the taking. A city council can take property just as well as a planning commission can. Moreover, the general applicability of the ordinance should not be relevant in a takings analysis. . . . The distinction between sweeping legislative takings and particularized administrative takings appears to be a distinction without a constitutional difference.[326]

Recently, however, many courts have ruled to the contrary, and not applied the *Dolan* test to legislative decisions. In *Home Builders Ass'n v. City of Scottsdale*,[327] the Arizona Supreme Court specifically refused to apply any heightened scrutiny to Scottsdale's water resource development fee, deciding that *Nollan/Dolan* was inapplicable to generally legislative fees of this type.[328] The Fifth Circuit also declined to apply such scrutiny to a challenge to a general zoning

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322. *Id.* at 189.
323. 515 U.S. 1116 (1995).
324. *Id.* at 1117 (Thomas, J., dissenting).
325. 877 P.2d 187 (Wash. 1994).
326. *Id.* at 1117–18.
327. 930 P.2d 993 (Ariz. 1997).
328. *See id*. at 999–1000; *cf*. GST Tucson Lightwave, Inc. v. City of Tucson, 949 P.2d 971, 978–79 (Ariz. Ct. App. 1997) (deciding that *Nollan/Dolan* was inapplicable to a "franchise or license issued by a municipality to use public rights-of-way").

ordinance prohibiting trailer coaches on any lot in the city except in trailer parks, in *Texas Manufactured Housing Ass'n v. City of Nederland*.[329] These cases are, of course, explainable as turning back attempts to apply *Nollan/Dolan* generally to all takings cases.

Other cases are less easy to so explain and more clearly follow the Arizona court in *City of Scottsdale*.[330] In *Arcadia Development Corp. v. City of Bloomington*,[331] a Minnesota court of appeals refused to apply *Nollan/Dolan* to a requirement that "mobile home park owners who close their parks . . . pay relocation costs to park residents," on the ground that as a city-wide ordinance, a legitimate government interest test, rather than a rough proportionality test applied.[332] While not nearly so definite, the Supreme Judicial Court of Maine "assign[ed] weight to the fact that the easement requirement derives from a legislative rule of general applicability and not an ad hoc determination" in *Curtis v. Town of South Thomaston*.[333] It nevertheless did apply a rough proportionality test in determining the fee was a valid exercise of the police power.[334] Moreover, several aforementioned cases applying *Nollan/Dolan* stressed the quasi-judicial nature of the land development condition before them.[335]

On the other hand, some courts share the puzzlement of Justice Thomas as to why the legislative character of the land development condition should affect whether it is an unconstitutional land development condition. Citing Justice Thomas's certiorari petition dissent in *Parking Ass'n of Georgia*,[336] an Illinois appellate court disagreed that a municipality could "skirt its obligation to pay compensation . . . merely by having the Village Board of trustees pass an

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329. 101 F.3d 1095, 1105 (5th Cir. 1996).

330. Subdivision exactions found in a generally applicable subdivision statute have been held to fall outside *Nollan/Dolan*. *See* Marshall v. Board of County Comm'rs, 912 F. Supp. 1456, 1471–74 (D. Wyo. 1996). The decision in *Home Builders Ass'n v. City of Beavercreek*, Nos. 94-CV-0012, 94-CV-0062, 1996 WL 812607, at **17–18 (Ohio Ct. C.P. Feb. 12, 1996), cites and follows *City of Scottsdale*. *Accord* Harris v. City of Wichita, 862 F. Supp. 287, 294 (D. Kan. 1994) (stating that "*Dolan*'s rough proportionality test does not apply to this case").

331. 552 N.W.2d 281 (Minn. Ct. App. 1996).

332. *Id*. at 283, 286.

333. 708 A.2d 657, 660 (Me. 1998).

334. *See id*.

335. *See, e.g.*, Garneau v. City of Seattle, 147 F.3d 802, 811 (9th Cir. 1998); Art Piculell Group v. Clackamas County, 922 P.2d 1227, 1231 (Or. Ct. App. 1996); Burton v. Clark County, 958 P.2d 343, 351–52 (Wash. Ct. App. 1998).

336. 515 U.S. 1116 (1995).

`ordinance' rather than having a planning commission issue a permit."[337] Oregon appellate courts have consistently applied *Nollan/Dolan* to legislative and quasi-judicial exactions alike, whether required by a zoning ordinance or not.[338]

VI. TAKINGS REDUX

Clearly, state (and some lower federal) courts are not hearing (or not wanting to hear) the U.S. Supreme Court. Application of judicial principles to actual cases — especially hard cases — has never been easy. But the principles are not that difficult to discern.

First, a taking of all economically beneficial use (not all use, or all value) requires compensation, whether regulatory or physical. If regulatory, it makes no difference what motivates the regulator. The *Lucas* rule is categorical, or per se. It is what it is. There are only two exceptions to this categorical rule: nuisance, and background principles of state property law. Most of us know what nuisance is. Background principles are not so clear. Some variety of true (not manufactured or suddenly judicially "discovered") public trust and honest, Blackstonian custom will probably do. Statutes probably won't. What the investment-backed expectations were of the owner when the property was acquired is in all probability irrelevant. That's a part of the partial takings analysis.

Second, partial takings depend on the nature of the governmental interest in passing the regulation in question (here, health and safety are more important than welfare), the economic effect on the landowner, and, most important, his or her legitimate, investment-backed expectations. Here, what the landowner knew or should have

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337. Amoco Oil Co. v. Village of Schaumburg, 661 N.E.2d 380, 389–90 (Ill. App. Ct. 1995).

338. *See*, *e.g.*, State v. Altimus, 905 P.2d 258, 259 (Or. Ct. App. 1995); J.C. Reeves Corp. v. Clackamas County, 887 P.2d 360, 365 (Or. Ct. App. 1994) (holding *Nollan/Dolan* applicable "whether [the condition] is legislatively required or a case-specific formulation"); Schultz v. City of Grants Pass, 884 P.2d 569, 572–73 (Or. Ct. App. 1994). Such also is a reasonable implication from the First Circuit's opinion in *City of Portsmouth v. Schlesinger*, 57 F.3d 12, 16 (1st Cir. 1995). *Accord* GST Tucson Lightwave, Inc. v. City of Tucson, 949 P.2d 971, 979 (Ariz. Ct. App. 1997) ("*Dolan* applies to `a city's adjudicative decision to impose a condition tailored to the particular circumstances of an individual case' but not to `a generally applicable legislative decision by the city.'" (quoting Home Builders Ass'n v. City of Scottsdale, 930 P.2d 993, 999 (Ariz. 1997))); Pringle v. City of Wichita, 917 P.2d 1351, 1357 (Kan. Ct. App. 1996); Arcadia Dev. Corp. v. City of Bloomington, 552 N.W.2d 281, 286 (Minn. Ct. App. 1996).

known at the time of purchase is relevant. There is no per se rule with respect to partial takings, as the *Lucas* court made abundantly clear, and *Penn Central* governs. Exactly to what property interest the Court will apply the rule is less certain. The *Lucas* majority is less likely to segment than the *Penn Central* majority, and there are presently more of the former Justices than the latter on the current Court. The Federal Circuit is pretty clear that not much segmentation is going to be allowed. The states are all over the map.

Third, land development conditions — that is, conditions attached to the granting of permits as in *Nollan* and *Dolan* — require a legitimate state interest, nexus and proportionality. These rules extend to exactions beyond physical dedications even though *Nollan* and *Dolan* were land dedication cases. How else explain the *Ehrlich* remand — an impact or "mitigation" fee case — to be decided in light of *Dolan*? The reasoning of the California Supreme Court in that remand is persuasive, up to a point. Why should a common legislative scheme of conditions escape scrutiny if it lacks either nexus or proportionality? An unconnected or disproportionate condition is extortionate, regardless.

It is, of course, possible that these rules will change. In *Eastern Enterprises v. Apfel*,[339] the U.S. Supreme Court sent a lot of mixed

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339. 118 S. Ct. 2131 (1998). Four members of the Court's plurality in this case (which does not involve a land use regulation, dedication, in-lieu fee, or other land development condition of any kind) would apply the Fifth Amendment's takings clause to invalidate the Coal Industry Retiree Health Benefit Act's (Act) allocation of retirement fund liability. *See id*. at 2137. They would apply the *Penn Central* test (though they cite *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979)) consisting of the character of the governmental action, the economic impact of the regulation, and its interference with reasonable investment-backed expectations. *See Apfel*, 118 S. Ct. at 2146, 2149. The four dissentors would apply the due process clause instead (and uphold the law) on the ground that the case involves an ordinary liability to pay money rather than an interest in physical or intellectual property. *See id*. at 2161–63 (Breyer, J., dissenting). It is these interests, they say, to which the Fifth Amendment has exclusively applied. *See id*. at 2161. Justice Kennedy would apply due process and invalidate the Act, rather than apply the Fifth Amendment's takings clause, on the ground that the Act does not take the kind of property to which the Fifth Amendment has traditionally been applied. *See id*. at 2154–55 (Kennedy, J., concurring in the judgment and dissenting in part). However, there are phrases in his opinion ("The Coal Act [does not] depend[] upon any particular property for the operation of its statutory mechanisms," for example) that imply he does not mean to exclude land development conditions from the reach of the Fifth Amendment. *Id*. at 2156. Elsewhere in his opinion, it is clear his concern is the expansion of the Fifth Amendment to "all governmental action." The dissenting portion of his opinion can therefore be easily read simply to object to the considerable extension of Fifth Amendment takings jurisprudence espoused by the majority-plurality. Some commenta-

signals over the application of takings jurisprudence to various interests in property. The Court presently has before it the previously-discussed case of *Del Monte Dunes*.[340] Ostensibly merely a conflict of circuits over matters for a jury versus matters for a judge, the Court could easily signal (or decide) with respect to a host of regulatory takings issues.

That, however, is for another day.

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tors will no doubt also make much of the absence of reference by all the Justices to the "legitimate state interest" prong (some would say presupposition) of traditional regulatory takings analysis and conclude it is no longer part of the equation. Maybe so, maybe not. Let's wait for a land use case before we toss it — or any other parts of the law after *Lucas-Nollan-Dolan* — aside.

340. *See supra* notes 171–75 and accompanying text.