"Taking" the Time to Look Backward

James E. Brookshire

Follow this and additional works at: https://scholarship.law.edu/lawreview

Recommended Citation

This Article is brought to you for free and open access by CUA Law Scholarship Repository. It has been accepted for inclusion in Catholic University Law Review by an authorized editor of CUA Law Scholarship Repository. For more information, please contact edinger@law.edu.
"TAKING" THE TIME TO LOOK BACKWARD

James E. Brookshire*

The laboratory for the evolution of the Takings Clause\(^1\) has principally been the courtroom, where our judicial system balances the government’s assertion of power and the individual’s need for protection on a case-by-case basis. In this judicial laboratory, the essential focus is rightly on the justice of the particular case.\(^2\) Because regulatory takings analysis is decidedly ad hoc, turning on factors like government action, impact, and remaining value in the particular dispute, substantive takings case law is developed case by case, a tapestry woven thread by thread.

There have, no doubt, been times when a thread had to be pulled; all in all, however, the progress has been steady. That is the most important lesson: through many challenges, our society has managed the evolution. With that confidence, we can see that, although debates of great import should be vigorous, the ultimate emphasis is on the underlying principle.

It has always been wise to proceed with caution in attempting to draw lessons from history. Although the particular historian may remain objective and conscientious, the student of history must make his or her own judgment. It is no more appropriate to measure the evolution of a body of law—especially a body of constitutional law—by a single case than it is to judge the merit of a life’s contribution by a single day.

Today’s regulatory takings allegations are a far cry from the relatively routine physical takings claims of the past. They arise in a myriad of settings, including areas such as housing and rent regulation,\(^3\) savings and loan

---

\* The author is Vice-Chair of the Takings Committee of the Court of Federal Claims Bar Association and Treasurer of the Federal Circuit Bar Association. Mr. Brookshire currently serves as Deputy Chief, General Litigation Section, Environment and Natural Resources Division of the United States Department of Justice. The structure and contents of this Article express the author’s own views and are in no way expressive of, or binding upon, the Department of Justice. The author expresses his appreciation to Marc A. Smith and Timothy Dowling for their thoughtful and constructive comments on the Article.

1. U.S. CONST. amend V.

2. In Armstrong v. United States, 364 U.S. 40 (1960), the Court stated that fairness and justice require compensation in order to avoid “forcing some people alone to bear public burdens which . . . should be borne by the public as a whole.” Id. at 49.

regulation, user fees, wetlands protection, mining and minerals, hazardous substances, and recreational trails.

Thus, to understand fully the Supreme Court's Taking Clause jurisprudence, this Article turns to the history of the Clause and traces its evolution. First, this Article describes situations where society faced the fundamental threat raised by war and balanced that concern with the perception of an obligation to compensate. Next, this Article traces the case law developed in response to society's extraordinary commercial growth. Third, this Article focuses on one segment of the Court's land use-oriented takings jurisprudence. There, a shift occurred in takings analysis from questions of due process and the lawfulness of government power to tests that seem, by and large, to assume the governmental authority to face the challenge and focus instead on the issue of compensability.

I. TIMES OF WAR

In times of war, the relationship between the need to have each member of society contribute to the nation's defense and the individual's right to recover for compensable loss is most clearly illustrated. In several early cases outlined below, the United States Supreme Court found cognizable damage where the consumption or destruction of materials provided a resource to our soldiers. In *Mitchell v. Harmony,* the Court found that a wagoneer/
trader was entitled to compensation when, during the Mexican-American War, he was forced to accompany an American military expedition into Mexican territory and his supplies were destroyed.\textsuperscript{11}

Similarly, in \textit{United States v. Russell},\textsuperscript{12} the Court found that the owner of steamboats requisitioned for service during the Civil War was entitled to “full compensation” for such services.\textsuperscript{13} Speaking in terms of contract and taking, the Court reasoned that “[p]rivate rights, under such extreme and imperious circumstances, must give way for the time to the public good, but the government must make full restitution for the sacrifice.”\textsuperscript{14}

Conversely, where action was necessary to avoid the threat of disease to troops, the Court held that the government need not compensate a party for the destruction of buildings occupied in enemy territory. In \textit{Juragua Iron Co. v. United States},\textsuperscript{15} a commander of United States troops during the Spanish-American War ordered the destruction of buildings and their contents in the “enemy country” of Cuba.\textsuperscript{16} The buildings were potentially contaminated with Yellow Fever and posed a health threat to American forces stationed within the structures.\textsuperscript{17} The Court found no application of the Tucker Act\textsuperscript{18} based on the party’s failure to state a claim under implied contract.\textsuperscript{19} Moreover, there was no “convention” that would compel compensation for a destruction related solely to the protection of lives of soldiers actively engaged in war.\textsuperscript{20}

In \textit{United States v. Pacific Railroad},\textsuperscript{21} the Court considered whether the federal government could charge a private railroad company for expenses incurred by the government in constructing railroad bridges later destroyed during the Civil War.\textsuperscript{22} Union forces destroyed at least two bridges to stop

\begin{itemize}
  \item \textsuperscript{11} \textit{Mitchell}, 54 U.S. at 137.
  \item \textsuperscript{12} 80 U.S. (13 Wall.) 623 (1871).
  \item \textsuperscript{13} \textit{Id.} at 631.
  \item \textsuperscript{14} \textit{Id.} at 629.
  \item \textsuperscript{15} 212 U.S. 297 (1909).
  \item \textsuperscript{16} \textit{Id.} at 298-99.
  \item \textsuperscript{17} \textit{Id.} at 301.
  \item \textsuperscript{18} ch. 359, 24 Stat. 505 (1887) (codified as amended at 28 U.S.C. § 1491 (1982)).
  \item \textsuperscript{19} \textit{Juragua Iron}, 212 U.S. at 302. The Court stated that “[m]anifestly, no action can be maintained under [the Tucker Act] unless the United States became bound by implied contract to compensate the plaintiff for the value of the property destroyed.” \textit{Id.} Because the act of destruction might only give rise to a tort claim against the government, specifically excluded from the Tucker Act, “the court would, of course, have no jurisdiction under the act of Congress.” \textit{Id.} at 309.
  \item \textsuperscript{20} \textit{Id.} at 309.
  \item \textsuperscript{21} 120 U.S. 227 (1887). Note that, although alluding to the Takings Clause, the Court states that “the seizure and appropriation of private property under such circumstances by the military authorities may not be within the terms of the [Takings Clause].” \textit{Id.} at 239.
  \item \textsuperscript{22} \textit{Id.} at 228-30.
\end{itemize}
the advance of Confederate troops. Concluding that the railroad could not receive compensation, the Court addressed in dicta the issue of whether the United States would have been required to compensate for the destruction of the railroad bridges. The Court reasoned that "[w]hile the government cannot be charged for injuries to . . . private property caused by military operations of armies in the field . . . the converse of the doctrine is equally true that private parties cannot be charged for works constructed on their lands by the government to further operations of its armies." In United States v. Caltex (Philippines), Inc., United States military authorities ordered the destruction of petroleum facilities in Manila during the Japanese advance following the attack on Pearl Harbor. Although American officials had paid for the petroleum used to aid the defense of Manila and the subsequent retreat, they did not pay for the value of the destroyed terminal facility that otherwise would have fallen into the hands of the enemy. With respect to the issue of compensability, the majority reasoned that the military's purpose was "to the sole objective of destroying property of strategic value to prevent the enemy from using it to wage war the more successfully." Accordingly, the Court denied compensation. The rules of compensability on the "home front" were no less case specific. In United States v. Central Eureka Mining Co., the War Production Board of 1942 ordered non-essential gold mines to cease production for the purpose of conserving materials and manpower for the war effort. In re-

23. Id. at 231.
24. Id. The Court stated:
   Military necessity will justify the destruction of property, but will not compel private parties to erect on their own lands works needed by the government, or to pay for such works when erected by the government. The cost of building and repairing roads and bridges to facilitate the movement of troops, or the transportation of supplies and munitions of war, must, therefore, be borne by the government.

Id. at 239.
25. Id. The Court also stated:
   Whatever would embarrass or impede the advance of the enemy, as the breaking up of roads, or the burning of bridges, or would cripple and defeat him, as destroying his means of subsistence, were lawfully ordered by the commanding general. . . . The safety of the state in such cases overrides all considerations of private loss.

Id. at 234.
27. Id. at 150-51.
28. Id. at 151.
29. Id. at 153.
30. Id. at 156. The Caltex Court relied directly on the reasoning in United States v. Pacific Railroad, 120 U.S. 227 (1887). See also National Bd. of YMCA v. United States, 395 U.S. 85 (1969) (denying compensation where buildings were occupied in the midst of armed conflict and occupied by American soldiers for their protection at the invitation of the owner).
32. Id. at 156.
sponse to the claim that the order constituted a taking of the right to mine gold, the Court recognized that regulation could, in the proper setting, give rise to a taking. In this case, however, the governmental efforts to redirect gold mining operations to more "essential" war efforts were non-compensable. The Court advised:

In the context of war, we have been reluctant to find that degree of regulation which, without saying so, requires compensation to be paid for resulting losses of income. The reasons are plain. War, particularly in modern times, demands the strict regulation of nearly all resources. It makes demands which otherwise would be insufferable. But wartime economic restrictions, temporary in character, are insignificant when compared to the widespread uncompensated loss of life and freedom of action which war traditionally demands.

Notably, the mine owners in Central Eureka expected to redirect their mining equipment from non-essential gold mining to more essential wartime operations. In contrast, in United States v. Pewee Coal Co., the military actually assumed possession and operation of the coal mines when the workers threatened to strike. There, the Court found a taking under the Fifth Amendment, and awarded compensation.

---

33. Id. at 168.
34. Id. at 166. The Court found that the government sought only "to encourage voluntary reallocation of scarce resources from the unessential to the essential," id., by making gold miners available for other work "if they chose to move," id. at 167, and by "conserv[ing] the limited supply of equipment used by the mines." Id. at 169.
35. Id. at 168 (citations omitted).
37. Id. at 115.
38. Id. at 116-17. Cf. United States v. United Mine Workers, 330 U.S. 258, 284-85 (1947) (holding, for the purposes of determining district court jurisdiction to enjoin a labor strike, that the United States seized control of certain bituminous coal mines as fully "as if the Government held full title and ownership").
39. Pewee Coal, 341 U.S. at 117. In determining the level of compensation due, the Court stated:

Where losses resulting from operation of property taken must be borne by the Government, it makes no difference that the losses are caused in whole or in part by compliance with administrative regulations requiring additional wages to be paid. With or without a War Labor Board order, when the Government increased the wages of the miners whom it employed, it thereby incurred the expense. Moreover, it is immaterial that governmental operation resulted in a smaller loss than Pewee would have sustained if there had been no seizure of the mines. Whatever might have been Pewee's losses had it been left free to exercise its own business judgment, the crucial fact is that Government chose to intervene by taking possession and operating control. By doing so, it became proprietor and, in the absence of contrary agreements, was entitled to the benefits and subject to the liabilities which that status involves.

Id. at 118-19.
II. COMMERCIAL REGULATION

Commercial growth in the United States over the past 200 years has been nothing short of extraordinary. It has been a history replete with periods of economic success, economic panic and collapse, and an increasingly regulated structure in which economic benefits are frequently adjusted. As citizens more regularly called upon the government to assume commercial management burdens, we again had occasion to weave threads balancing those burdens with the Takings Clause obligation.

Noble State Bank v. Haskell\(^40\) presented an early police power challenge arising under the Takings Clause. There, the Oklahoma State Banking Board levied a one percent assessment against the Bank’s average daily deposits in order to establish a Depositor’s Guaranty Fund.\(^41\) The fund was to provide full repayment of deposits in the event a bank became insolvent.\(^42\) The Court acknowledged the “logical” proposition that an assessment removed monies from the bank.\(^43\) It found, however, two more compelling—and contrary—propositions.\(^44\)

First, it accepted that “comparatively insignificant” intrusions for a private purpose might be justified by an ulterior public purpose.\(^45\) Second, as the Court stated:

[T]here may be other cases beside the every day one of taxation, in which the share of each party in the benefit of a scheme of mutual protection is sufficient compensation for the correlative burden that it is compelled to assume.\(^46\)

The Court continued:

The power to compel, beforehand, cooperation, and thus, it is believed, to make a failure unlikely and a general panic almost impossible, must be recognized, if government is to do its proper work,

---

\(^40\) 219 U.S. 104, amended, 219 U.S. 575 (1911).
\(^41\) Id. at 109.
\(^42\) Id.
\(^43\) Id.
\(^44\) Id.
\(^45\) Id. at 110 (citing: Bacon v. Walker, 204 U.S. 311, 315 (1907) (finding a state statute restricting grazing of sheep on public lands constitutional); Offield v. New York, N.H. & H. R.R., 203 U.S. 372 (1906) (holding that a state may provide for condemnation of minority shares in a railroad if public interest so requires); Strickley v. Highland Boy Gold Mining Co., 200 U.S. 527, 531 (1906) (involving a statute that permitted the lawful condemnation of an aerial bucket line by a mining corporation); Clark v. Nash, 198 U.S. 361 (1905) (involving a statute that permitted the condemnation by an individual of a ditch to provide water for his land)).
\(^46\) Id. at 111.
unless we can say that the means have no reasonable relation to the end. 47

During the years of the Great Depression, the reality of a society faced with fundamental economic collapse focused squarely on the Takings Clause. Again, the cases were police power challenges. 48 In 1934, Congress's Economy Act 49 denied benefits due individuals under War Risk Insurance policies, directing that "all laws granting or pertaining to yearly renewable term insurance [were] repealed." 50 Policy beneficiaries challenged the Act as effecting takings. 51 In Lynch v. United States, 52 the Court accepted that the policies were motivated by a "benevolent" rather than profit oriented motive. 53 Nonetheless, it viewed the undertakings as "legal obligations of the same dignity as other contracts of the United States." 54 Seeing the legislation as motivated solely by an attempt to lessen government expenditures, the Court invalidated it. 55

In 1935, the Court, in Louisville Joint Stock Land Bank v. Radford, 56 considered the Frazier-Lemke Act, 57 legislation that modified interests of individual mortgagees of farming property in bankruptcy proceedings. 58

47. Id. at 112 (citations omitted). In a wonderful paragraph, Justice Holmes responds to criticism that the Court was on its way to line-drawing:

It is asked whether the State could require all corporations or all grocers to help to guarantee each other's solvency, and where we are going to draw the line. But the last is a futile question, and we will answer the others when they arise. With regard to the police power, as elsewhere in the law, lines are pricked out by the gradual approach and contact of decisions on the opposing sides.

48. See infra part III.A
50. Id. § 17, 48 Stat. at 11.
52. 292 U.S. 571 (1934).
53. Id. at 576. "The policies granted insurance against death or total disability without medical examination . . . the United States bearing the whole expense of administration and the excess mortality and disability cost resulting from the hazards of war." Id.
54. Id.
55. Id. (citing United States v. Central Pac. R.R., 118 U.S. 235 (1886)). Commenting on the power of Congress to reduce fiscal expenditures, the Court stated:

Congress was free to reduce gratuities deemed excessive. But Congress was without power to reduce expenditures by abrogating contractual obligations of the United States. To abrogate contracts, in the attempt to lessen government expenditure, would be not the practice of economy, but an act of repudiation. "The United States are as much bound by their contracts as are individuals. If they repudiate their obligations, it is as much repudiation, with all the wrong and reproach that term implies, as it would be if the repudiator had been a State or a municipality or a citizen."

57. ch. 869, 48 Stat. 1289 (1934).
58. Id. The plaintiff's counsel observed:
Those mortgagees sued to invalidate the Act as an unconstitutional taking.59 Reasoning that the Act took mortgage rights under Kentucky law (e.g., the right to retain the lien, to bid at a judicial sale of the property), the Court concluded that “however great the Nation’s need, private property shall not be thus taken even for a wholly public use without just compensation."60

The Court’s view was not unequivocal. In the same year, it addressed a federal statute reducing the government’s responsibility to meet its obligations in gold.61 The Department of the Treasury refused to pay to the holder of a $10,000 bond ‘‘ ‘payable in United States gold coin of the present standard of value’ ” the value of the bond in gold. Instead, it offered to pay only currency value.62 The holder sought to invalidate the statute on a taking theory. The Court refused.63

That action the Congress was entitled to take by virtue of its authority to deal with gold coin as a medium of exchange. And the restraint thus imposed upon holders of gold coin was incident to the limitations which inhered in their ownership of that coin and gave them no right of action.64

Still, a decision like the 1935 Frazier-Lemke ruling placed the Court’s view of Takings Clause protection in the middle of New Deal efforts to revive the economy. Something had to give. Only two years later, after the Court’s confrontation with President Roosevelt, it reviewed a newly reformulated Frazier-Lemke.65 This time, the result was dramatically different. Analyzing five compensability indicators identified in the 1935 decision, the Court found that the new Act “sought to preserve to the mortgagee all of these rights so far as essential to the enjoyment of his security.”66 The amended Act effected no taking.67

---

59. Id. at 574.
60. Id. at 602. The Court added:
If the public interest requires, and permits, the taking of property of individual mortgagees in order to relieve the necessities of individual mortgagors, resort must be had to proceedings by eminent domain; so that, through taxation, the burden of the relief afforded in the public interest may be borne by the public.

62. Id. at 346-47.
63. Id. at 347.
64. Id. at 356 (citation omitted).
67. Id. at 470.
Some twenty-seven years later, society addressed a different kind of landmark legislation. This time, Congress responded to race-related inequities with the passage of the landmark Civil Rights Act of 1964. The legislation required equal treatment and equal access in enterprises engaged in interstate commerce. Among the challenges raised against Title II of the Act, the legislation's public accommodations provisions, was a theory that its provisions “took” an enterprise's “property right” to choose customers and operate its affairs as it wished. The Court rejected the taking theory, on grounds consistent with a view that expectations in an enterprise affected by the public interest in interstate commerce did not include the “property right” to discriminate.

In 1984, the Court decided a constitutional challenge to the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). In *Ruckelshaus v. Monsanto Company*, the Court described the Federal Environmental Pesticide Control Act of 1972, which “transformed FIFRA... into a comprehensive regulatory statute,” as the product of “mounting public concern about the safety of pesticides and their effect on the environment” and the “growing perception that the existing legislation was not equal to the task of safeguarding the public interest.”

In 1972, Congress added a new regulatory criterion to determine whether the pesticide would cause “unreasonable adverse effects on the environment.” These provisions addressed the use of health, safety, and environmental data provided by pesticide registration applicants. Between 1972 and 1978, FIFRA enabled the applicant to request non-disclosure of trade secret data. In 1978, a new provision authorized, *inter alia*, the disclosure

---

68. 78 Stat. 241, 243.
69. Section 201(a).
70. Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964). The Court in *Heart of Atlanta*, relied on prior Takings Clause decisions for support. See, e.g., United States v. Central Eureka Mining Co., 357 U.S. 155 (1958); Omnia Commercial Co. v. United States, 261 U.S. 502 (1923) (finding that the government requisition of a steel manufacturer's production did not constitute a taking, but “frustrated” customer's purchase contract); Legal Tender Cases, 79 U.S. (12 Wall.) 457, 550 (1871) (stating that the Takings Clause has “never been supposed to have any bearing upon, or to inhibit laws that indirectly work harm and loss to individuals”; a new valuation of gold for legal tender effected no taking).
71. *Heart of Atlanta*, 379 U.S. at 259-61.
74. 7 U.S.C. §§ 136-136y
75. *Ruckelshaus*, 467 U.S. at 991 (citations omitted).
76. *Id.* at 992 (citing the Federal Environmental Pesticide Control Act of 1972, Pub. L. No. 92-516, §§ 3(c)(5)(C)-(D), 86 Stat. 973, 980-981 (1971)).
77. *Id.*
78. *Id.* at 993.
of health, safety, and environmental data, notwithstanding trade secret status.\textsuperscript{79} For that intervening period, and with no emphasis given to the public health and safety thrust of the legislation, the Court found that the statute formed the "basis of a reasonable investment-backed expectation" and that Monsanto\textit{ might} be able to show a taking related to the release of the information.\textsuperscript{80} Given the availability of the Tucker Act\textsuperscript{81} money remedy for any taking by the United States, the Act, as it was challenged in\textit{ Ruckelshaus}, was not unconstitutional.\textsuperscript{82}

In its social support programs, Congress, in the Social Security Amendments of 1983,\textsuperscript{83} repealed a provision of the previous statute (known as the "termination clause") that allowed states to withdraw their employees from the Social Security system upon advance notice to the Secretary of Health and Human Services.\textsuperscript{84} The states were tied to the system by the statute and by related contracts with the federal government.\textsuperscript{85} Congress was concerned that the increasing rate of state withdrawals from the system threatened its integrity.\textsuperscript{86} Various states challenged the amendment as taking rights assured under their federal contracts.\textsuperscript{87}

The Court, in\textit{ Bowen v. Public Agencies Opposed to Social Security Entrapment}\textsuperscript{88} focused on a provision of the original Social Security Act which reserved Congress's "right to alter, amend, or repeal any provision."\textsuperscript{89} From this language, the Court reasoned that Congress had reserved not only the authority to amend the termination section itself, but also the right to modify agreements under the Act.\textsuperscript{90} In the face of the reserved right to

\begin{footnotesize}
\begin{enumerate}
\item \textit{Id.} at 994.
\item \textit{Id.} at 1010-11.
\item Ch. 359, 24 Stat. 505 (1887) (codified as amended at 28 U.S.C. § 1491 (1982)). The Tucker Act grants the Court of Federal Claims jurisdiction "upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any relevant regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort." 28 U.S.C. § 1491(a)(i) (1982).
\item \textit{Ruckelshaus}, 467 U.S. at 1019.
\item \textit{Id.} at 52 (citing 42 U.S.C. § 418(g)(1) (1935)).
\item \textit{Id.} at 53-54 (citing National R.R. Passenger Corp. v. Atchison, T. & S.F. Ry., 470 U.S. 451, 456 (1985) (stating that Congress "expressly reserved" its right to 'repeal, alter, or amend' the Act at any time"); The Sinking-Fund Cases, 99 U.S. 700 (1878) (stating that a
\end{enumerate}
\end{footnotesize}
amend, the Court rejected the view that the "contractual" termination right was a property right protected by the Takings Clause. Indeed, the Court reminded us that "sovereign power, even when unexercised, is an enduring presence" in expectancies and it need not be expressly reserved.

Under another statute, the pension fund employer "withdrawal liability" provisions of the Multiemployer Pension Plan Amendments Act of 1980 required employers withdrawing from a plan's pension pool to pay their proportionate share of its "unfunded vested benefits." Employers faced with this obligation mounted a challenge to the statute by citing the Takings Clause. The Supreme Court, in Connolly v. Pension Benefit Guarantee Corp. considered the Act's withdrawal requirements in a facial Takings Clause challenge. Applying a three-tiered takings analysis, the Court viewed the economic impact as proportional to the employer's experience with the plan, the character of the action as "economic regulation," and the interference with reasonable investment-backed expectations as de minimus—given the early notice to employers that their plans would be regu-

91. Id. at 54-56.
92. Id. at 52 (quoting Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 148 (1982)).
94. Id. §§ 1381, 1391.
95. 475 U.S. 211 (1986).
96. Id. at 221-28.
In this facial challenge to the statute, the Court found no taking.\textsuperscript{98} During the 1992 Term, the Court in \textit{Concrete Pipe & Products, Inc. v. Construction Laborers Pension Trust}\textsuperscript{99} again addressed the "withdrawal penalty" provisions of the Multiemployer Pension Plan Amendments Act of 1980.\textsuperscript{100} Although the decision in \textit{Concrete Pipe} was similar to \textit{Connolly} in that the company withdrawing from the pension plan raised substantive, procedural, and takings challenges, the challenges in \textit{Concrete Pipe} were "as applied" and not "facial" claims arising from the mere enactment of the legislation.\textsuperscript{101} Again, the taking issue focused on the company's "withdrawal" liability.\textsuperscript{102} A collective bargaining Trust Agreement between \textit{Concrete Pipe} and the union which predated enactment of the statute limited the company's obligations to contributions to which it had already agreed.\textsuperscript{103}

\textsuperscript{97} \textit{Id.} Analyzing the Act on the first level of analysis, the Court stated that:

\textit{[T]he Act safeguards the participants in multiemployer pension plans by requiring a withdrawing employer to fund its share of the plan obligations incurred during its association with the plan. This interference with the property rights of an employer arises from a public program that adjusts the benefits and burdens of economic life to promote the common good and, under our cases, does not constitute a taking requiring Government compensation.}


\textit{[t]he assessment of withdrawal liability is not made in a vacuum, however, but directly depends on the relationship between the employer and the plan to which it had made contributions. Moreover, there are a significant number of provisions in the Act that moderate and mitigate the economic impact of an individual employer's liability. There is nothing to show that the withdrawal liability actually imposed on an employer will always be out of proportion to its experience with the plan, and the mere fact that the employer must pay money to comply with the Act is but a necessary consequence of the [Act]'s regulatory scheme.}

\textit{Id.} at 225-26 (footnote omitted). The Court concluded with the consideration of possible interference with reasonable investment-backed expectations. It found that liability under the statutory plan had existed in different forms during prior years, \textit{id.} at 226-27, and stated that

\textit{[p]rudent employers then had more than sufficient notice not only that pension plans were currently regulated, but also that withdrawal itself might trigger additional financial obligations.}

\textit{Id.} at 227.

\textsuperscript{98} \textit{Id.} at 228.

\textsuperscript{99} 113 S. Ct. 2264 (1993).

\textsuperscript{100} 29 U.S.C. §§ 1381, 1391 (Supp. II 1988).

\textsuperscript{101} \textit{Concrete Pipe}, 113 S. Ct. at 2270.

\textsuperscript{102} \textit{Id.} at 2272. The Court noted that:

\textit{An employer's withdrawal liability is its "proportionate share of the plan's 'unfunded vested benefits,'" that is, "the difference between the present value of vested benefits" (benefits that are currently being paid to retirees and that will be paid in the future to covered employees who have already completed some specified period of service, 29 U.S.C. § 1053) "and the current value of the plan's assets. 29 U.S.C. §§ 1381, 1391."}
The Court turned to a three-tiered analysis. First, government action imposing the penalty (notwithstanding the Trust Agreement) did not involve physical invasion or occupancy; instead, the character of the action was the adjustment of the benefits and burdens of economic life.104 Neither did the Court permit Concrete Pipe to bring itself within the “categorical liability” rule.105 The company could not, by arbitrarily narrowing the description of the affected property to the piece allegedly taken, show a total loss of economically viable use.106 The appropriate denominator for the takings analysis was the whole parcel of property in question.107 The Court then focused on the economic impact inquiry. Even assuming Concrete Pipe’s allegation that the penalty would require the payment of forty-six percent of shareholder equity, the company had not shown “its withdrawal liability here to be ‘out of proportion to its experience with the plan.’”108 Moreover, “mere diminution in the value of property, however serious, is insufficient to demonstrate a taking.”109 The Court finally turned to the reasonable expectations inquiry. Pension plans had “long been subject to federal regulation” at the time the company elected to do business in the regulated field.110 Employers subject to the statute already faced contingent liability on their plans of up to thirty percent of net worth.111 The company voluntarily brought itself under the statute by its conduct and could have claimed no reasonable

104. Id. at 2290. The Court used the standard adopted in Connolly v. Pension Benefit Guarantee Corp., 475 U.S. 211 (1986), where the Court stated in the regulation of pension plans “[t]his interference with the property rights of an employer arises from a public program that adjusts the benefits and burdens of economic life to promote the common good and . . . does not constitute a taking.” Id. at 225; see also supra note 99.

105. Concrete Pipe, 113 S. Ct. at 2290. The Court rejected Concrete Pipe’s argument that “the appropriate analytical framework is the one employed in our cases dealing with permanent physical occupation or destruction of economically beneficial use of real property.” Id.

106. Id. The Court criticized Concrete Pipe’s attempt “to shoehorn its claim into this [inappropriate] analysis.” Id. The Court noted its previous rejection of similar attempts to categorize the extent of a taking in Penn Central Transportation Co. v. New York City, 438 U.S. 104, 130-31 (1978), and stated that “[t]o the extent that any portion of property is taken, that portion is always taken in its entirety; the relevant question, however, is whether the property taken is all, or only a portion of the parcel in question.” Concrete Pipe, 113 U.S. at 2290.

107. Id.; see also infra notes 200-01 and accompanying text.

108. Id. at 2291 (quoting Connolly, 475 U.S. at 226).

109. Id.; see also Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 384 (1926) (holding that diminution in value of approximately 75% was insufficient to support a finding of a taking); Hadacheck v. Sebastian, 239 U.S. 143, 143 (1915) (finding reduction in value by 92.5% did not constitute a taking).

110. Concrete Pipe, 113 S. Ct. 2291. The Court noted that “‘those who do business in the regulated field cannot object if the legislative scheme is buttressed by subsequent amendments to achieve the legislative end.’” Id. (quoting FHA v. The Darlington, Inc., 358 U.S. 84, 91 (1958)).

111. Id.
expectation that the penalty ceiling would not be raised.\textsuperscript{112} In short, the Court found no "as applied" taking.

Under the Aid to Families with Dependent Children (AFDC) program,\textsuperscript{113} Congress provided for financial assistance to needy families.\textsuperscript{114} The system measured those benefits by factors such as the number of individuals in the family and family income.\textsuperscript{115} In the Deficit Reduction Act of 1984,\textsuperscript{116} Congress amended the AFDC program to require that calculation of a family's eligibility for financial assistance include support payments received by any family member.\textsuperscript{117} The congressional amendments resulted in reduced benefits for affected families.\textsuperscript{118} In the face of a takings claim, the Court, in \textit{Bowen v. Gilliard},\textsuperscript{119} found no compensable expectancy in receiving gratuitous benefits at a certain level.\textsuperscript{120} The Court saw no substantial economic impact on a child's support funds (citing, for example, an extra $50 contribution which the family receives), no reasonable expectation to continued identical support payments, and no compensable character of the action in a decision to include child support as part of family income.\textsuperscript{121} The Court

\textsuperscript{112} The Court stated:

Because "legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations . . . even though the effect of the legislation is to impose a new duty or liability based on past acts," Concrete Pipe's reliance on ERISA's original limitation of contingent liability to 30\% of net worth is misplaced, there being no reasonable basis to expect that the legislative ceiling would never be lifted.

\textit{Id.} at 2292 (footnote omitted) (quoting \textit{Usery v. Turner Elkhorn Mining Co.}, 428 U.S. 1, 16 (1976), \textit{superseded by statute as stated in} Freeman United Coal Mining Co. v. Office of Worker's Compensation Program, No. 91-1992, 1993 U.S. App. LEXIS 20098 (7th Cir. Aug. 4, 1993)).

\textsuperscript{113} 42 U.S.C. §§ 602, 603 (1982).

\textsuperscript{114} \textit{Id.} § 601. The program is intended to "encourag[e] the care of dependent children in their own homes or in the homes of relatives by enabling each State to furnish financial assistance and rehabilitation and other services." \textit{Id.}

\textsuperscript{115} \textit{Id.} § 603(a).


\textsuperscript{118} \textit{Bowen v. Gilliard}, 483 U.S. 587, 594 & n.6 (1987). Under the amendment, the Court found that:

[U]nder the July 1985 levels of payment in North Carolina, a family of four with no other income would have received $269. A child's support income of $100 would therefore reduce the family's AFDC payment to $169 if that child was included in the filing unit. The family would have a net income of $269. But if the family were permitted to exclude the child from the unit and only claim the somewhat smaller benefit of $246 for a family of three, it could have collected that amount plus the expected child's $100 and have a net income of $346.

\textit{Id.} at 594 n.6.

\textsuperscript{119} 483 U.S. 587 (1987).

\textsuperscript{120} \textit{Id.} at 604 ("Congress is not, by virtue of having instituted a social welfare program, bound to continue it at all, much less at the same benefit level.").

\textsuperscript{121} \textit{Id.} at 608-09.
held, therefore, that the 1984 Act did not effect a taking without just compensation.\textsuperscript{122}

III. LAND USE REGULATION

While the land use cases discussed below are by no means exhaustive, they highlight three threads of takings jurisprudence, each reflecting an analytical framework invoked by the Court. Two of the threads discussed here are also evident in the takings analysis of other types of governmental action—the due process inquiry and the current three-tier framework.\textsuperscript{123} The reach of the remaining thread—the categorical taking—is not yet clear. Over time, the courtroom laboratory will weave the answer to that question as it has others—on a case-by-case basis.

A. Police Power and Due Process “Taking”

In the cases discussed below, the Court viewed the Takings Clause as a limitation on the power of government to act in the first instance, a constraint on the lawfulness of an exercise of the police power.

In \textit{Fertilizing Co. v. Hyde Park},\textsuperscript{124} the company and the Illinois legislature had negotiated a franchise under which the company could conduct a fertilizer operation within the Hyde Park village limits.\textsuperscript{125} After issuance of the franchise, the village passed an ordinance that prohibited transportation of offal and animal waste through the village of Hyde Park, attaching criminal penalties to such transportation.\textsuperscript{126} A railroad engineer and railroad employees were subsequently prosecuted for violating the ordinance.\textsuperscript{127} The resulting interruption of supplies, in the view of the company, frustrated the primary purpose of the state-granted franchise—fertilizer manufacturing.\textsuperscript{128} The company claimed that its charter, granted by the state legislature, protected it against enforcement of the Hyde Park ordinance.\textsuperscript{129} Accordingly, the company unsuccessfully brought an action seeking to enjoin further enforcement of those provisions.\textsuperscript{130}

Presented with state court dismissal of the action, the Supreme Court reasoned that lawful exercise of the police power rested “upon the fundamental principle that every one shall so use his own as not to wrong and injure

\textsuperscript{122} \textit{Id.} at 609.
\textsuperscript{123} See infra part III.B.1.
\textsuperscript{124} 97 U.S. 659, 667 (1878).
\textsuperscript{125} \textit{Id.} at 663.
\textsuperscript{126} \textit{Id.} at 665.
\textsuperscript{127} \textit{Id.}
\textsuperscript{128} \textit{Id.}
\textsuperscript{129} \textit{Id.} at 666.
\textsuperscript{130} \textit{Id.}
another. To regulate and abate nuisances is one of [the police power's] ordi-
nary functions."131 The lawfulness and non-compensability of the "interfer-
ence" in Fertilizer Co. was also informed by two additional factors. First,
the property interest at issue was a "franchise," a charter issued by legisla-
tive authority.132 Second, the company, consistent with its franchise and
notwithstanding the statute's restriction, could permissibly relocate outside
the village's jurisdiction and continue its business.133 The ordinance was
therefore held to be a lawful exercise of Hyde Park's police power.134

Today's debates over one significant takings issue, the relationship be-
tween society's obligation to protect against threats to public health and
safety and the protection of just compensation, frequently begin with Mugler
v. Kansas.135 In Mugler, the state of Kansas prohibited the sale of intoxicat-
ing liquors by constitutional amendment.136 A subsequent statute also de-
\fi ned places in which liquors were sold without permit as common nuisances
subject to closure.137 Under the implementing legislation, Kansas indicted
and convicted Mugler for the manufacture (at a plant which predated the
Kansas law) and sale of intoxicating liquors without a permit.138 On appeal
to the United States Supreme Court, Mugler contended that enforcement of
the legislation was invalid because it violated his protections under the Con-
stitution, including the assurance of "compensation . . . for the diminution in
the value of their property, resulting from such prohibitory enactments."139
The Court rejected Mugler's contention, concluding that the state's regula-
tion of liquor was "fairly adapted" to its ends and was not "under the guise
merely of police regulations . . . aiming to deprive the citizen of his constitu-
tional rights."140

131. Id. at 667.
132. Id. at 670.
133. Id. The Court concluded that
\ldots [.t]here is a class of nuisances designated 'legalized.' These are cases which rest
for their sanction upon the intent of the law under which they are created, the para-
mount power of the legislature, the principle of 'the greatest good of the greatest
number,' and the importance of the public benefit and convenience involved in their
continuance . . . This case is not within that category.

Id.
134. Id.
136. Id. at 655.
137. Id.
138. Id. at 656.
139. Id. at 664.
140. Id. at 662. The Court continued to reason that:
The power which the States have of prohibiting such use by individuals of their prop-
erty as will be prejudicial to the health, the morals, or the safety of the public, is
not—and, consistently with the existence and safety of organized society, cannot
be—burdened with the condition that the State must compensate such individual
In a similar context, the Court, in *Sligh v. Kirkwood*,141 addressed a case where the plaintiff in error was charged with violating a Florida statute making it unlawful to sell, offer for sale, ship, or deliver for shipment citrus fruits unfit for consumption.142 Alleging that the statute was an unconstitutional exercise of state power in the realm of interstate commerce, the plaintiff filed for a writ of habeas corpus.143 Focusing on the importance of the citrus industry to Florida and on the public health and safety risks of shipping immature fruit, the Court sustained the state's exercise of its police power.144

Similarly, in *Reinman v. City of Little Rock*,145 the Court addressed whether a prohibition by the City of Little Rock, Arkansas, of a pre-existing livery stable within the city limits was a lawful exercise of the state's police power.146 The Court accepted the local government's prerogative to declare "in particular circumstances and in particular localities a livery stable" to be "a nuisance in fact and in law."147 The Court moved on to consider whether the regulation was an "unreasonable and arbitrary" exercise of state power in view of the allegedly large expense for removal of existing buildings and the otherwise lawful conduct of the existing business.148

In its takings analysis, the Court found ambiguity in the record. The stable owner's allegations were denied by an answer, and trial was on the com-

---

owners for pecuniary losses they may sustain, by reasons of their not being permitted, by a noxious use of their property, to inflict injury upon the community.

*Id.* at 669.
141. 237 U.S. 52 (1915).
142. *Id.* at 57.
143. *Id.* at 58-59.
144. *Id.* at 61-62. The Court noted:

It was competent for the legislature to find that it was essential for the success of that industry that its reputation be preserved in other States wherein such fruits find their most extensive market. ... The protection of the State's reputation in foreign markets, with the consequent beneficial effect upon a great home industry, may have been within the legislative intent, and it certainly could not be said that this legislation has no reasonable relation to the accomplishment of that purpose.

*Id.* The opinion does not allude to a takings inquiry but is, as we will see, at least referenced in a significant later opinion on takings. *See infra* note 176 and accompanying text.
146. *Id.* at 177.
147. *Id.* at 176.
148. *Id.* at 177. The Court stated:

While such regulations are subject to judicial scrutiny upon fundamental grounds, yet a considerable latitude of discretion must be awarded to the law-making power; and so long as the regulation in question is not shown to be clearly unreasonable and arbitrary, and operates uniformly upon all persons similarly situated in the particular district, the district itself not appearing to have been arbitrarily selected, it cannot be judicially declared that there is a deprivation of property without due process if law, or a denial of the equal protection of the laws, within the meaning of the Fourteenth Amendment. *Id.* (citations omitted).
In its answer, the city alleged that the business was conducted in a careless manner, caused offensive odors, and was productive of disease. The state supreme court included no discussion of its factual rationale. Invoking "general principles," the United States Supreme Court inferred that the state court adopted "such a basis of fact as would most clearly sustain its judgment." In essence, the Court assumed the facts as stated in the answer, presumably concluding that conduct potentially "productive of disease" was a lawful topic for police power exercise, notwithstanding the high costs associated with its prevention.

In Hadacheck v. Sebastian, a landowner's brickyard operation predated a city ordinance prohibiting the manufacture of bricks within the city limits. The surrounding residential neighborhood had become seriously "incommoded" by the yard owner's brick manufacturing enterprise. Continuing to operate the facility after passage of the ordinance, the yard owner was convicted of a misdemeanor for violation of the city ordinance. The Court rejected the brick manufacturer's defense that the exercise of the police power was defective because it violated the Equal Protection Clause and would effect an uncompensated loss of the use of property. Deferring to the state supreme court's findings on the reasonableness of the regulation,

149. Id. at 178-80.
150. Id. at 178.
151. Id. at 178-79.
152. Id. at 180. The Court invoked the Judiciary Act of 1789, ch 20, 1 Stat. 86 (1789), and noted that subsequent amendments omitted language restricting the Court to the record. Id. at 179. The Court noted that "because of [the amendments] it has since been held that this court is not so closely restricted as before to the face of the record to ascertain what was decided in the state court, and may examine the opinion . . . so far as may be useful in determining that question." Reinman, 237 U.S. at 179.
154. Id. at 180.
155. 239 U.S. 394 (1915).
156. Id. at 404-05.
157. Id. at 409.
158. Id. at 404-05.
159. Id. at 405, 412. The Court stated:
It is to be remembered that we are dealing with one of the most essential powers of government, one that is the least limitable. It may, indeed, seem harsh in its exercise, usually is on some individual, but the imperative necessity for its existence precludes any limitation upon it when not exerted arbitrarily. A vested interest cannot be asserted against it because of conditions once obtaining. To so hold would preclude development and fix a city forever in its primitive conditions. There must be progress, and if in its march private interests are in the way they must yield to the good of the community.
Id. at 410 (citation omitted).
the Court found that the significant reduction in value was not a compensa-
table interference with the owner's expectations.\textsuperscript{160}

In \textit{Northwestern Laundry v. Des Moines},\textsuperscript{161} the Court reviewed dismissal
of a complaint seeking injunctive relief against an ordinance passed by the
City of Des Moines.\textsuperscript{162} The ordinance established a process for the prohibi-
tion, as a "public nuisance," of dense smoke in certain parts of the city.\textsuperscript{163} The Court sustained the ordinance ("short of a merely arbitrary enact-
ment") against constitutional objections.\textsuperscript{164}

Against the backdrop of the cases discussed above, modern regulatory
takings discussions usually begin with \textit{Pennsylvania Coal Co. v. Mahon}.\textsuperscript{165}
In \textit{Pennsylvania Coal}, Justice Holmes advised that "while property may be
regulated to a certain extent, if regulation goes too far it will be recognized
as a taking."\textsuperscript{166} \textit{Pennsylvania Coal} raised the validity, as a constitutional
exercise of the police power, of Pennsylvania's Kohler Act.\textsuperscript{167} The Act
sought to regulate subsurface coal mining in order to avoid surface subsi-
dence and damage.\textsuperscript{168} Justice Holmes concluded that the statute sought to
benefit one private house and therefore lacked the requisite "public interest"
sufficient to "warrant so extensive a destruction of the defendant's constitu-
tionally protected rights."\textsuperscript{169} In his view, the Act purported to abolish the

\textsuperscript{160. Id. at 405.}
\textsuperscript{161. 239 U.S. 486 (1916).}
\textsuperscript{162. Id. at 489-90.}
\textsuperscript{163. Id.}
\textsuperscript{164. Id. at 492. Moreover, the Court stated: "Nor is there any valid Federal constitutional
objection in the fact that the regulation may require the discontinuance of the use of property
or subject the occupant to large expense in complying with the terms of the law or ordinance."
\textit{Id.} (citing Reinman v. City of Little Rock, 237 U.S. 171 (1915); \textit{Hadacheck}, 239 U.S. at 394;
Chicago & Alton R.R. v. Tranbarger, 238 U.S. 67 (1915) (holding that a state statute requiring
railroads to maintain water drainage in ditches along right of ways across private property did
not constitute a taking)).
\textsuperscript{165. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922).}
\textsuperscript{166. Id. at 415. The Court reasoned that:

Government hardly could go on if to some extent values incident to property could
not be diminished without paying for every such change in the general law. As long
recognized, some values are enjoyed under an implied limitation and must yield to
the police power. But obviously the implied limitation must have its limits, or the
contract and due process clauses are gone. One fact for consideration in determining
such limits is the extent of the diminution. When it reaches a certain magnitude, in
most if not in all cases there must be an exercise of eminent domain and compensa-
tion to sustain the act. So the question depends upon the particular facts. The great-
est weight is given to the judgment of the legislature, but it always is open to
interested parties to contend that the legislature has gone beyond its constitutional
power.
\textit{Id.} at 413.
\textsuperscript{167. Id. at 398.}
\textsuperscript{168. Id. at 412-13.}
\textsuperscript{169. Id. at 414.}
reserved right to mine, and, therefore, could not be sustained as a valid exercise of the police power.170

Four years later, in Village of Euclid v. Ambler Realty Co.,171 the Court considered a facial challenge to a local zoning ordinance that forbade construction businesses and apartment houses in a residential area.172 Evaluating the "lawfulness" of this exercise of the police power, the Court reasoned that the law of nuisances would inform the inquiry.173 The Court found a reasonable relationship between the health and safety objective of the zoning regulation and its impact.174 Accordingly, it sustained the ordinance against a Takings Clause challenge.175

One of the most celebrated Takings Clause discussions arises from the case of Miller v. Schoene.176 In Miller, the state of Virginia was forced to enact statutory measures in the face of a severe agricultural threat.177 Diseased cedar trees were producing cedar rust that, in turn, threatened nearby apple trees, "one of the principal agricultural pursuits in Virginia."178 In response, the Virginia legislature passed the Cedar Rust Act, a statute which required the destruction of infected cedars but at the same time, made no provision "for the value of the standing cedars or the decrease in the market value of the realty caused by their destruction."179 Under the state process, after a determination by the state entomologist that the trees were the source (or "host plant[s]") of cedar rust and constituted threats to the health of nearby apple orchards, the cedars would be ordered cut down.180 The statute did provide that the owner of the cedars could seek judicial review.181 The state circuit court could "'hear the objections' " and "'pass upon all question involved.'"182 In doing so here, the state court afforded the owners

170. Id. The Court reasoned that:
   What makes the right to mine coal valuable is that it can be exercised with profit.
   To make it commercially impracticable to mine certain coal has very nearly the same
   effect for constitutional purposes as appropriating or destroying it. This we think
   that we are warranted in assuming that the statute does.

171. 272 U.S. 365 (1926).
172. Id. at 379-80.
173. Id. at 387-88.
174. Id. at 395.
175. Id. at 397. The Court acknowledged that a later specific application of the ordinance
   might demonstrate the ordinance to be arbitrary and unreasonable. Id. at 395.
176. 276 U.S. 272 (1928).
177. Id. at 277.
178. Id. at 277, 279.
179. Id. at 277.
180. Id. at 278.
181. Id. at 277-78.
182. Id. at 278.
$100 to cover the cost of removal.183 Under the procedure, the owners were also allowed to retain the felled trees.184 This process, as applied to Miller, did not, in the Court's view, effect a taking without just compensation any more than prior cases.185

Nectow v. City of Cambridge186 dealt with an "as applied" challenge to a local regulation.187 In Nectow, a property owner contended that the city's ordinance deprived him of all "practical" residential use, leaving his land with "comparatively little value."188 The Court invalidated the application of the ordinance, ruling that it did not promote the "health, safety, convenience, and general welfare."189

B. Compensability

1. The Emerging Three-Tier Test

In today's compensation analysis, the takings challenge is more a question of the compensability of the impact of government power on the owner's expectations and less a question of whether the governmental action is a legitimate exercise of power. In that setting, at least one test of compensability—which this Article will refer to as "three-tier" analysis—has gained widespread use.

For instance, in Goldblatt v. Town of Hempstead,190 the Supreme Court sustained an ordinance that prohibited further mining excavation at an existing quarry and required the refill of any excavation below the regulated level.191 The effect of the ordinance was to prohibit completely a use that

183. Id. at 277.
184. Id.
185. Id. at 279-80. The Court reasoned:

It will not do to say that the case is merely one of a conflict of two private interests and that the misfortune of apple growers may not be shifted to cedar owners by ordering the destruction of their property; for it is obvious that there may be, and that here there is, a preponderant public concern in the preservation of the one interest over the other.

Id. at 279 (citing Perley v. North Carolina, 249 U.S. 510 (1919); Bacon v. Walker, 204 U.S. 311 (1907); Missouri, K. & T. Ry. v. May, 194 U.S. 267 (1904)).
186. 277 U.S. 183, 187 (1928).
187. Id. at 185.
188. Id. at 187.
189. Id. at 188. The Court explained:

The governmental power to interfere by zoning regulations with the general rights of the land owner by restricting the character of his use, is not unlimited, and other questions aside, such restriction cannot be imposed if it does not bear a substantial relation to the public health, safety, morals, or general welfare.

Id. (citing City of Euclid v. Ambler Realty Co., 272 U.S. 365, 395 (1926)).
191. Id. at 592.
predated the ordinance by thirty-two years. Using a deferential rational basis police power analysis, the Court was prepared to evaluate the ordinance as "a safety measure." The Court looked to (1) "the nature of the menace" which the ordinance would correct, (2) "the availability and effectiveness of other less drastic . . . steps," and (3) the loss suffered by the ordinance's imposition of a "safety measure." The Court found the record to be "clearly indecisive." In the face of the ambiguous record and in deference to the governmental rationales, the Court found sufficient reasonable basis to sustain the ordinance as a legitimate exercise of the police power.

Sixteen years later a similar inquiry led to the development of the three-tier balancing test used in analyzing most contemporary regulatory takings questions. In *Penn Central Transportation Co. v. New York City,* the Court considered the character of the governmental action, its economic impact, and the extent to which it interfered with distinct, investment-backed expectations. As to the character of the governmental action, the Court found that the New York Landmarks Preservation Law at issue required preservation of building exteriors and was "substantially related" to the promotion of public health, safety, and general welfare. The Court went on to measure the diminution resulting from the legislation's economic impact against the property's value as a whole, concluding that the law did not interfere with *Penn Central*’s "primary expectation concerning the use" of the property, did not preclude development, and did not otherwise interfere with existing uses. The Court held that the law "not only permit[ted] reasonable beneficial use of the landmark site but also afford[ed] . . . opportunities

192. *Id.* at 591-92.
193. *Id.* at 595.
194. *Id.*
195. *Id.* The Court stated:

A careful examination of the record reveals a dearth of relevant evidence on these points. One fair inference arising from the evidence is that since a few holes had been burrowed under the fence surrounding the lake it might be attractive and dangerous to children. But there was no indication whether the lake as it stood was an actual danger to the public or whether deepening the lake would increase the danger. In terms of dollars or some other objective standard, there was no showing of how much, if anything, the imposition of the ordinance would cost the appellants.

*Id.*

198. *Id.* at 130-31.
199. *Id.* at 138.
200. *Id.* at 136-37.
further to enhance not only the Terminal site proper but also other properties.”\textsuperscript{201}

The following year, in \textit{Kaiser Aetna v. United States},\textsuperscript{202} the Court confronted an assertion by the Army Corps of Engineers of federal jurisdiction under Section 10 of the Rivers and Harbors Act.\textsuperscript{203} That provision prohibited the unauthorized construction of obstructions in the “navigable capacity of any of the waters of the United States.”\textsuperscript{204} The developer initially requested a Section 10 permit and was advised by the Corps that one was unnecessary.\textsuperscript{205} The developer subsequently expended significant resources in developing a private pond in Hawaii.\textsuperscript{206} When the developer eventually sought to connect the pond to navigable waters, the Corps required a permit \textit{and} public access to the pond.\textsuperscript{207} Referencing the three-tiered test, the Court characterized the action as an attempt to “create a public right of access to the improved pond” and stressed that the right to exclude others was a central right of ownership.\textsuperscript{208} In the Court’s view, the action resulted in, essentially, an “actual physical invasion of the privately owned marina.”\textsuperscript{209}

In \textit{Agins v. City of Tiburon},\textsuperscript{210} frequently cited for its ripeness ruling, the Court also made a reference that has become important to the development and reconciliation of two lines of taking analysis. In \textit{Agins}, the Court summarized its takings tests as allowing for the conclusion that a taking exists in

\begin{itemize}
\item\textsuperscript{201} Id. at 138.
\item\textsuperscript{202} 444 U.S. 164, 178 (1979).
\item\textsuperscript{203} 33 U.S.C. § 403 (1988).
\item\textsuperscript{204} Id.
\item\textsuperscript{205} \textit{Kaiser Aetna}, 444 U.S. at 147.
\item\textsuperscript{206} Id.
\item\textsuperscript{207} Id. at 168.
\item\textsuperscript{208} Id. at 178. The Court noted:
\begin{quote}
We have not the slightest doubt that the Government could have refused to allow such dredging on the ground that it would have impaired navigation in the bay, or could have conditioned its approval of the dredging on the petitioners’ agreement to comply with various measures that it deemed appropriate for the promotion of navigation. But what petitioners now have is a body of water that was private property under Hawaiian law, linked to navigable water by a channel dredged by them with the consent of the Government. While the consent of individual officials representing the United States cannot “estop” the United States, it can lead to the fruition of a number of expectancies embodied in the concept of “property”—expectancies that, if sufficiently important, the Government must condemn and pay for before it takes over the management of the landowner’s property. 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.
\end{quote}
\item\textsuperscript{209} Id. at 179-80 (citation and footnote omitted).
\item\textsuperscript{209} Id. at 180.
\item\textsuperscript{210} \textit{Agins v. City of Tiburon}, 447 U.S. 255 (1980).
\end{itemize}
either of two instances: “If the ordinance does not substantially advance legitimate state interests, or [if it] denies an owner economically viable use of his land.”211

In 1977, Congress addressed the topic of surface mining in the Surface Mining Control and Reclamation Act of 1977 (SMCRA),212 which required steep slope mine operators, inter alia, to reclaim those slopes after mining by returning them to their approximate original contours.213 The Act also prohibited surface mining outright in certain areas—for example, in national forests and national parks—except for those interests that could establish themselves as “preexisting,” or valid existing, rights (VERs).214 In a broad spectrum challenge raised against SMCRA, the Court, in Hodel v. Virginia Surface Mining & Reclamation Ass’n,215 also considered a facial taking claim against the Section 522(e) restrictions contained in 30 U.S.C. § 1272(e).216 It concluded that the “mere enactment” of the legislation did not deprive the mineral owners of “economically viable use.”217 In sum, economic impact effecting a “mere diminution” in value was insufficient to require compensation under the Takings Clause.218

Some sixty-five years after Pennsylvania Coal Co. v. Mahon,219 the Court revisited surface mining in Pennsylvania in the context of a takings challenge. In Keystone Bituminous Coal Ass’n v. DeBenedictis,220 the Court employed a three-tier analysis, balancing the economic impact, the interference with reasonable investment-backed expectations, and the character of the governmental action.221 In analyzing the character of the governmental ac-

---

211. Id. at 260 (citations omitted). The Agins language hinted at two separate ways of establishing takings liability. The first of the two tests arose in Nollan v. California Coastal Commission, 483 U.S. 825, 834 (1987).


214. Id. § 1272(e).


216. Id. at 268.

217. Id. at 297.

218. Id.


221. Id. at 485-93.
tion, the Court focused on the public nuisance purposes of the new legislation, distinguishing what Justice Holmes viewed as the “private” purpose of protecting one house.222

Emphasizing the importance of the character of the governmental action, the Court expressed a “hesitance to find a taking when the State merely restrains uses of property that are tantamount to public nuisances,”223 holding that this view was “consistent with the notion of ‘reciprocity of advantage’ that Justice Holmes referred to in Pennsylvania Coal.”224 The Court explained:

Under our system of government, one of the State’s primary ways of preserving the public weal is restricting the uses individuals can make of their property. While each of us is burdened somewhat by such restrictions, we, in turn, benefit greatly from the restrictions that are placed on others.225

The Keystone Court then focused on the three-tier balancing analysis. In contrast to Holmes’s finding in Pennsylvania Coal, the Court in Keystone did not find a loss of economically viable use; the economic impact from mere enactment of the state legislation was minimal.226 Finally, the Court found that the record failed to show interference with the landowner’s investment-

222. Id. at 487-91. The Court distinguished the basis for its holding in Pennsylvania Coal:

    Thus, the Subsidence Act differs from the Kohler Act [discussed in Pennsylvania Coal] in critical and dispositive respects. With regard to the Kohler Act, the Court believed that the Commonwealth had acted only to ensure against damage to some private landowners’ homes. Justice Holmes stated that if the private individuals needed support for their structures they should not have “take[n] the risk of acquiring only surface rights.” Pennsylvania Coal, 260 U.S. at 416. Here, by contrast, the Commonwealth is acting to protect the public interest in health, the environment, and the fiscal integrity of the area. That private individuals erred in taking a risk cannot estop the Commonwealth from exercising its police power to abate activity akin to a public nuisance. The Subsistence Act is a prime example that “circumstances may so change in time . . . as to clothe with such a [public] interest what at other times . . . would be a matter of purely private concern.”

    Id. at 487-88 (alteration in original) (quoting Block v. Hirsh, 256 U.S. 135, 155 (1921)).


224. Id. The Court added that “[t]he special status of this type of state action can also be understood on the single theory that since no individual has a right to use his property so as to create a nuisance or otherwise harm others, the state has not ‘taken’ anything when it asserts its power to enjoin the nuisance activity.” Id. at 491 n.20.

225. Id. (citing Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 144-50 (1978) (Rehnquist, J., dissenting); California Reduction Co. v. Sanitary Reduction Works, 199 U.S. 306, 320 (1905) (holding that the exclusive privilege to dispose of garbage did not take, for compensation purposes, the householders’ interest in the garbage)).

226. Id. at 495-96. The Court noted that “petitioners have never claimed that their mining operations, or even any specific mines, have been unprofitable since the Subsidence Act was passed. Nor is there evidence that mining in any specific location affected by the 50% rule has been unprofitable.” Id. at 496.
backed expectations.\textsuperscript{227} As a result, the Court implicitly sustained the exercise of the police power (in contrast to \textit{Pennsylvania Coal}) and then proceeded to find no facial taking under the three-tier inquiry.\textsuperscript{228}

2. \textit{The Categorical Taking}

In 1992, the Supreme Court formulated yet another regulatory taking test. This thread of takings jurisprudence addressed the infrequent situation in which the property owner suffers a loss of all economic value.

In \textit{Lucas v. South Carolina Coastal Council},\textsuperscript{229} the Court explored the relationship between legislation addressing beach erosion (and related concerns) and the expectations of beach property owners.\textsuperscript{230} \textit{Lucas} concerned two beachfront lots, Lots 22 and 24, on the Isle of Palms in South Carolina. Between 1957 and 1963, these tracts were in fact under water.\textsuperscript{231} Between 1963 and 1973, the shoreline was 100 to 150 feet landward of the effected property's seaward line.\textsuperscript{232} In 1973, stable vegetation extended about one-half of the property's landward distance.\textsuperscript{233}

In 1977, South Carolina passed the Coastal Zone Management Act.\textsuperscript{234} The enactment required individuals wishing to develop property in designated "critical areas" for uses other than those existing on the date of enactment (September 28, 1977) to receive a state permit.\textsuperscript{235} In 1978, Lucas, who would be a contractor, manager, and part owner of the "Wild Dunes" development on the Isle of Palms, took up residence on the Isle.\textsuperscript{236}

Paying $975,000 in 1986, Lucas purchased Lots 22 and 24, two of the remaining Wild Dunes lots.\textsuperscript{237} He intended to build a single-family residence on each, one for speculation and one for occupancy.\textsuperscript{238} Lots 22 and

\begin{itemize}
\item \textsuperscript{227} \textit{Id.} at 498-502. The petitioners pointed to the states 50% rule that required them to leave unmined approximately 27 million tons of coal as evidence in support of the taking. The Court rejected the petitioner's contention, stating that "[t]he 27 million tons of coal do not constitute a separate segment of property for takings law purposes." \textit{Id.} The Court concluded that "[w]hen the coal that must remain beneath the ground is viewed in the context of any reasonable unit of petitioners' coal mining operations and financial-backed operations, it is plain that petitioners have not come close to satisfying their burden of proving that they have been denied the economically viable use of their property." \textit{Id.} at 499.
\item \textsuperscript{228} \textit{Id.} at 493-502.
\item \textsuperscript{229} 112 S. Ct. 2886 (1992).
\item \textsuperscript{230} \textit{Id.} at 2889.
\item \textsuperscript{231} \textit{Id.} at 2905 (Blackmun, J., dissenting).
\item \textsuperscript{232} \textit{Id.}
\item \textsuperscript{233} \textit{Id.}
\item \textsuperscript{234} S.C. \textsc{Code} \textsc{Ann.} § 48-39-10 (Law. Co-op. 1987).
\item \textsuperscript{235} \textit{Id.} § 48-39-130(A).
\item \textsuperscript{236} \textit{Lucas}, 112 S. Ct. at 2905 (Blackmun, J., dissenting).
\item \textsuperscript{237} \textit{Id.}
\item \textsuperscript{238} \textit{Id.}
\end{itemize}
24 did not fall within the 1977 Act's "critical areas." As a result, Lucas was not required to secure a South Carolina Coastal Council permit at the time he purchased the lots. Finally, the lots adjoining those purchased by Lucas already had houses built on them.

In March, 1987, a specially-appointed Blue Ribbon Committee concluded that South Carolina's beaches were critically eroding and proposed further land use restrictions. In response, the state legislature passed the Beachfront Management Act on July 1, 1988. Lots 22 and 24 were located along an "inlet erosion zone," defined by the 1988 Act as "a segment of shoreline along or adjacent to tidal inlets which is influenced directly by the inlet and its associated shoals." By definition, the area was not "stabilized by jetties, terminal groins, or other structures." Although the 1988 Act retained the same restrictions within "critical areas," it expanded the areas subject to that designation—including the area between the mean high water and a "setback" line based on the "best available scientific and historical data." Under the Act, the setback line for such an area was located at a point forty times the distance of the annual erosion rate landward of the crest of an ideal oceanfront dune.

The Act prohibited occupiable improvements seaward of a line located twenty feet landward of the setback, or baseline. Certain uninhabitable improvements such as "wooden walkways no larger in width than six feet" and "small wooden decks no larger than one hundred forty-four square feet" were permissible. The Act and location of the setback line landward of Lots 22 and 24 effectively precluded any permanent habitable structures on those parcels. Lucas filed suit in state court, accepting the validity of the South Carolina legislature's findings of purpose for the Act but contending that the prohibition against improvements effected an uncompensated taking. The state trial court concluded that the Act had taken all economic value from the two tracts, thereby "depriv[ing] Lucas of any reasonable economic use of the lots . . . eliminat[ing] the unrestricted right of use, and

239. Id. at 2889 (opinion of Scalia, J.).
240. Id.
241. Id. at 2905 (Blackmun, J., dissenting).
243. Id. § 48-39-270(7).
244. Id. § 48-39-280(A)(2).
245. Id. § 48-39-280(A).
246. Id.
250. Id. at 2890.
render[ing] them valueless,' holding that just compensation in the amount of $1,232.387.50 was due.\textsuperscript{251}

On appeal, the South Carolina Supreme Court focused on Lucas's concession of validity of the legislative findings.\textsuperscript{252} In the absence of an attack on those findings, the state court viewed itself as bound by them.\textsuperscript{253} Citing the \textit{Mugler} line of cases, the court pointed to the state legislature's findings that the restrictions avoided public harm.\textsuperscript{254} Accordingly, the court reasoned that because the government regulation precluded a public harm, it did not effect a taking.\textsuperscript{255} The United States Supreme Court granted certiorari.\textsuperscript{256}

The Court began with the observation that, prior to Justice Holmes's ruling in \textit{Pennsylvania Coal}, the Takings Clause "was generally thought" to reach only a "direct appropriation of property,"\textsuperscript{257} or the "functional equivalent of a 'practical ouster of [the owner's] possession.'"\textsuperscript{258} Concerns over the "natural tendency of human nature," led Justice Holmes to his thesis that "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."\textsuperscript{259} The Court then turned to its first significant ruling—the articulation of categorical taking liability. It pointed to "two discrete categories of regulatory action [viewed] as compensable without case-specific inquiry into the public interest advanced in support of the restraint."\textsuperscript{260} The first category involved "regulations that compel the property owner to suffer a physical 'invasion' of his property."\textsuperscript{261} For permanent physical invasions, the Court voiced reaffirmation of its premise that compensation is due, irrespective of the "weighty public pur-

\textsuperscript{251.} \textit{Id.} (quoting App. to Pet. for Cert. at 37, \textit{Lucas} (No. 91-453)).
\textsuperscript{253.} \textit{Id.} at 898.
\textsuperscript{254.} \textit{Id.} at 899-902.
\textsuperscript{255.} \textit{Id.} at 902. The South Carolina Supreme Court observed:
\[
\ldots \text{[M]erely because the State acts within its police powers does not end the inquiry. Nevertheless, the fact remains that the Supreme Court has time and again held that when a State merely regulates use, and acts to prevent a serious public harm, there is no "taking" for which compensation is due. It is therefore the way the police power is exercised that is of critical import. Were we to adopt Lucas' argument, whether the State acts pursuant to its police power would be wholly irrelevant.}
\]
\textit{Id.} at 899-900 (citation omitted).
\textsuperscript{257.} \textit{Lucas}, 112 S. Ct. at 2892 (citing \textit{Legal Tender Cases}, 79 U.S. (12 Wall.) 457, 550 (1871)).
\textsuperscript{258.} \textit{Id.} (quoting \textit{Transportation Co. v. Chicago}, 99 U.S. 635, 642 (1879)).
\textsuperscript{259.} \textit{Pennsylvania Coal Co. v. Mahon}, 260 U.S. 393, 415 (1922).
\textsuperscript{260.} \textit{Lucas}, 112 S. Ct. at 2893.
\textsuperscript{261.} \textit{Id.}
pose behind [the invasion]" or how "minute the intrusion" might be. The second "discrete" category arose from the Court's historical considerations of the Takings Clause. The Court reaffirmed the statement made "on numerous occasions" that compensation is due "where regulation denies all economically beneficial or productive use of land." The Court expressed an "abiding concern for the productive use of, and economic investment in, land."

The Court highlighted two reinforcing premises for this rule. First, "when no productive or economically beneficial use of land [was] permitted" and when this "relatively rare situation[ ]" of deprivations of "all economically beneficial uses" occurred, the assumption that the legislature was simply "‘adjusting the benefits and burdens of economic life’" was unwarranted. Second, the majority reasoned that a loss of all beneficial use raised a "heightened risk that private property [was] being pressed into some form of public service under the guise of mitigating serious public harm." The Court concluded that "when the owner of real property has been called upon to sacrifice all economically beneficial uses in the name of

---

262. Id. (citing Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982)); see also United States v. Causby, 328 U.S. 256, 265 & n.10 (1946) (holding that a physical invasion of airspace constituted a taking).


264. Id. at 2893-94.

265. Id. at 2893 (discussing Agins v. City of Tiburon, 447 U.S. 255, 260 (1980) (discussed supra text accompanying notes 210-211)).

Justice Scalia takes time to address what he believes to be Justice Blackmun's mistaken characterization of the Court's prior takings cases. Id. at 2893 n.6. Justice Blackmun comments:

- The Court has indicated that proof that a regulation does not deny an owner economic use of his property is sufficient to defeat a facial taking challenge. But the conclusion that a regulation is not on its face a taking because it allows the landowner some economic use of property is a far cry from the proposition that denial of such use is sufficient to establish a taking claim regardless of any other consideration.


---

266. Id. at 2895 n.8.

267. Id. at 2894.

268. Id.


270. Id. at 2895. The Court noted that "'[t]he many statutes on the books, both state and federal, that provide for the use of eminent domain to impose servitude on private scenic lands
the common good, that is, to leave his property economically idle, he has suffered a taking."

The majority also pointed to the rule that would govern instances of less than total loss. In such situations, the now established three-tier inquiry would apply. There, the inquiry would focus on the "economic impact of the regulation on the claimant and... the extent to which the regulation has interfered with distinct investment-backed expectations." 

The state court decision below reasoned that Lucas's decision not to challenge the legislative findings of the Beachfront Management Act meant that Lucas, in essence, conceded them. As a result, it found the *Mugler* line of cases, "sustaining against Due Process and Takings Clause challenges the State's use of its 'police powers' to enjoin a property owner from activities akin to public nuisances," to be applicable. The Supreme Court rejected the South Carolina court's reasoning, placing a context and construction on the *Mugler* line. The Court explained that "'[harmful or noxious use'] analysis was... simply the progenitor of our more contemporary statements that 'land-use regulation does not effect a taking if it "substantially advance[s] legitimate state interests."'" 

Because none of the earlier cases involved situations in which the regulation "wholly eliminated the value of the claimant's land," the Court reasoned that "it becomes self-evident that noxious-use logic cannot serve as a

---

271. *Id.* at 2895.
272. *Id.* at 2895 n.8.
273. *Id.*
274. *Id.* (quoting *Penn Central*, 483 U.S. at 124). The Court added: "It is true that in at least some cases the landowner with 95% loss will get nothing while the landowner with total loss will recover in full. But that occasional result is no more strange than the gross disparity between the landowner whose premises are taken for a highway (who recovers in full) and the landowner whose property is reduced to 5% of its former value by the highway (who recovers nothing). Takings law is full of these "all-or-nothing" situations.

*Id.* at 2895 n.8.
277. *Id.* at 2897. "The harmful or noxious uses principle was the Court's early attempt to describe in theoretical terms why government may, consistent with the Takings Clause, affect property values by regulation without incurring an obligation to compensate—a reality we nowadays acknowledge explicitly with respect to the full scope of the State's police power." *Id.* (citations omitted).
279. *Id.* at 2899.
Looking Backward

The touchstone to distinguish regulatory takings—which require compensation—from regulatory deprivations that do not require compensation.\textsuperscript{280} As such, a noxious use analysis cannot be used to sidestep "our categorical rule that total regulatory takings must be compensated."\textsuperscript{281}

The Court's discussion in \textit{Lucas} does not mean, however, that the health and safety inquiry has become irrelevant in takings analysis. To the contrary, although the Court rejects the argument that "title is somehow held subject to the 'implied limitation' that the State may subsequently eliminate all economically valuable use,"\textsuperscript{282} it nonetheless recognizes that "the property owner necessarily expects the uses of his property to be restricted, from time to time, by various measures newly enacted by the State in legitimate exercise of its police powers."\textsuperscript{283} Similarly, the state's "traditionally high degree of control over commercial dealings" would make an owner aware that "new regulation might even render his property economically worthless."\textsuperscript{284}

Looking to the practice in permanent physical occupation cases, the Court recognized that, in that situation, it "would permit the government to assert a permanent easement that was a pre-existing limitation upon the landowner's title."\textsuperscript{285} From this analogy, it drew the new framework: "Any limitation so severe [i.e., prohibiting all economically beneficial use of land] cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership."\textsuperscript{286}

\textsuperscript{280} \textit{Id.}
\textsuperscript{281} \textit{Id.} The Court noted:

The South Carolina Supreme Court's approach would essentially nullify \textit{Mahon}'s affirmation of limits to the noncompensation exercise of the police power. Our cases provide no support for this: None of them that employed the logic of "harmful use" prevention to sustain a regulation involved an allegation that the regulation wholly eliminated the value of the claimant's land.

\textit{Id.; see also} \textit{Goldblatt v. Hempstead}, 369 U.S. 590 (1962) (holding limitations on mining rights to be within the police power and therefore not effecting a taking); \textit{Hadacheck v. Sebastian}, 239 U.S. 394 (1915) (holding a city ordinance prohibiting certain brick manufacturing to be within the legitimate exercise of the police power); \textit{Reinman v. City of Little Rock}, 237 U.S. 171 (1915) (affirming state court's determination that ordinance prohibiting operation of stable within city limits was a valid exercise of the police power); \textit{Plymouth Coal Co. v. Pennsylvania}, 232 U.S. 531 (1914) (finding state's regulation of coal mining to be within the legitimate exercise of the police power); \textit{Mugler v. Kansas}, 123 U.S. 623 (1887) (holding that state's prohibitions on manufacture and distribution of alcoholic beverages to be within the police power).

\textsuperscript{282} \textit{Id.} at 2900.
\textsuperscript{283} \textit{Id.} at 2899.
\textsuperscript{284} \textit{Id.}
\textsuperscript{285} \textit{Id.} at 2900.
\textsuperscript{286} \textit{Id.} The Court defined "otherwise" as "litigation absolving the State . . . of liability for the destruction of 'real and personal property, in cases of actual necessity, to prevent the
Any new law or decree would avoid compensability, at least, if it duplicated "the result that could have been achieved in the courts—by adjacent landowners (or other uniquely affected persons) under the State's law of private nuisance, or by the State under its complementary power to abate nuisances that affect the public generally, or otherwise." 287

Among the objects of this "background principles" inquiry would be the degree of harm to public lands and resources or adjacent private property posed by the use, the social value of the activity and its suitability to the location in question, and the ease of mitigating or avoiding the alleged harm. 288 Although longstanding use may indicate a common law endorsement, new knowledge of harm may make that which was previously permissible forbidden. 289 For this case, however, "[i]t seems unlikely that common law principles" would have forbidden construction of a house. 290 The state would be required to "identify background principles of nuisance and property law that prohibit the uses [Lucas] now intends in the circumstances in which the property is presently found." 291 With the Supreme Court's decision in Lucas, we come, at least for our purposes, to the Court's current state of work on the takings tapestry.

287. Id. at 2900 n.16 (quoting Bowditch v. City of Boston, 101 U.S. 16, 18-19 (1880)).

288. Id. The state may act to deny compensation when the owner's action falls into a category of previously-restricted activities. Id. at 2900-01.

The use of the [ ] properties for what are now expressly prohibited purposes was always unlawful, and (subject to other constitutional limitations) it was open to the State at any point to make the implication of those background principles of nuisance and property law explicit. In light of our traditional resort to "existing rules or understandings that stem from an independent source such as state law" to define the range of interests that qualify for protection as "property" under the Fifth (and Fourteenth) amendments, this recognition that the Takings Clause does not require compensation when an owner is barred from putting land to a use that is proscribed by those "existing rules or understandings" is surely unexceptional. When, however, a regulation that declares "off limits" all economically productive or beneficial uses of land goes beyond what the relevant background principles dictate, compensation must be paid to sustain it.

Id. at 2901 (citations and footnote omitted) (quoting Board of Regents of State Colleges v. Roth, 408 U.S. 564, 577 (1972)).

289. Id. at 2901.

290. Id.

291. Id. at 2901-02. The news media recently reported that South Carolina and Lucas reached a settlement on the remanded case. According to reports, the state agreed to buy the two lots for $425,000 each, and pay legal fees, back interest, and other related costs. WASH. POST, July 17, 1993, at E1.
IV. CONCLUSION

Whatever one’s view of the proper role of the Takings Clause, this look backward offers two lessons. First, it is to be expected that the relationship of the majority’s prerogative to rule and the Clause’s protections will be probed at significant moments in our societal growth. Second, as demonstrated by cases in each of the three areas discussed in this Article, the Supreme Court effectively—even pragmatically—found the relationship between that prerogative and those protections. No single case has had the significance of being responsible for governing this constitutional inquiry for long periods. Instead, the dimension of the Clause’s protection has, as Justice Holmes put it, been “pricked out” over time.\(^2\) The genius of the system lies in that lesson. That is a point for which it is worth taking the time to look backward.
