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Notes

TAKINGS 1992: SCALIA'S JURISPRUDENCE AND A FIFTH AMENDMENT DOCTRINE TO AVOID *LOCHNER REDIVIVUS*¹

[A] constitution is not intended to embody a particular economic (or property) theory, whether of paternalism and the organic relation of the citizen to the State or of *laissez faire*. It is made for people of fundamentally different views, and the accident of our finding certain opinions natural and familiar, or novel, and even shocking, ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States. . . .

I think that the word liberty in the Fourteenth Amendment is perverted when it is held to prevent the natural outcome of a dominant opinion, unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law.²

I. INTRODUCTION

Justice Holmes's hoary admonition, made nearly a century ago, has since stood as a warning to the federal judiciary about the impropriety of usurping the constitutional role of Congress and state legislatures by deciding cases based upon judges' ideological predilections. After a prolonged flirtation with *laissez faire*,³ Holmes's position⁴ eventually carried the day, as the Court veered away

1. *Lochner Redivivus*, or *Lochner Revisited*, is a phrase borrowed from Professor Frank I. Michelman's contribution to the 1988 *Columbia Law Review* Symposium on Takings. See Frank I. Michelman, *Takings 1987*, 88 COLUM. L. REV. 1600, 1609 (1988).

2. *Lochner v. New York*, 198 U.S. 45, 75-76 (1902) (Holmes, J., dissenting).

3. In *Lochner* and a series of successive cases, the Court struck down legislation targeted at protecting unskilled laborers from long hours, low wages, and unsafe conditions. See *Adair v. United States*, 208 U.S. 161 (1908) (invalidating federal anti-union discrimination regulation); *Coppage v. Kansas*, 236 U.S. 1 (1915) (invalidating state anti-union discrimination regulation); *Adkins v. Children's Hosp.*, 261 U.S. 525 (1923) (invalidating District of Columbia minimum wage regulation); *Morehead v. New York ex rel. Tipaldo*, 298 U.S. 587 (1936) (invalidating state minimum wage regulation). The Court, operating in part under the Due Process Clauses of the Fifth and Fourteenth Amendments, invalidated regulations on the theory that business and labor should be free to contract without these regulations, even to the detriment of labor. The Court construed

from legislating from the bench⁵ and began applying a more deferential standard to regulatory legislation.⁶

Ironically, another opinion authored by Justice Holmes has allowed the current Supreme Court to stray back into the murky, discredited waters of the

the word liberty in the Due Process Clauses to implicate such a liberty of contract. Although *Lochner* itself was overruled in *Bunting v. Oregon*, 243 U.S. 426 (1917), *Lochner*'s influence continued. The Court's conservative activism lasted until the 1930s, clearing the path for business development, unfettered by the interference of legislators. To distinguish the *Lochner* period's use of due process from the use of due process advocated in this note, the *Lochner* approach will be referred to as economic due process. See John A. Humbach, *Economic Due Process and the Takings Clause*, 4 PACE ENVTL. L. REV. 311 (1987).

4. The position that the Court should not second-guess legislatures also implicates the intent of the constitutional framers. Although the Federalists were concerned with creating an independent federal judiciary, the separation of powers doctrine also embedded in the Constitution, see *infra* note 186, meant that the Court was not intended to be a branch of government that would actively influence national policy in the same manner as the political branches of government. THE FEDERALIST NO. 78, at 465 (Alexander Hamilton) (W. Kendall & G. Carey eds., 1966). Because the federal judiciary would have neither the power of the purse, nor the power of the sword, *id.*, the Court was intended to be a check on coequal branches, as well as state governments, to ensure that government operated within constitutional parameters. See generally THE FEDERALIST NOS. 78-80 (Alexander Hamilton). See also *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803) (judicial review of Congress); *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816) (judicial review of state legislatures); *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264 (1821) (judicial review of state criminal proceedings).

5. Generally, the collapse of economic due process is attributed to *Nebbia v. New York*, 291 U.S. 502 (1934), and *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937). Some commentators have credited this sudden shift away from economic due process to President Franklin Delano Roosevelt's court-packing scheme, whereby older members of the Court would have been supplemented with younger justices, presumably more sympathetic to FDR's New Deal legislation. See generally ROBERT H. JACKSON, *THE STRUGGLE FOR JUDICIAL SUPREMACY* (1941); William E. Leuchtenburg, *The Origins of Franklin D. Roosevelt's "Court Packing" Plan*, 1966 SUP. CT. REV. 347.

6. The deference applied by the Court to legislation under a due process analysis after *West Coast Hotel* illustrates the reasonableness, or minimum rationality, standard. This standard took the teeth out of economic due process analysis and lowered the due process scrutiny given to economic regulation by the Court to the level at which it currently stands. Under the Due Process Clause, legislation is constitutional if "there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it." *Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421, 423 (1952). See also *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 465 (1981) (stating that the constitutional standard is whether the legislature "could have rationally decided" that the regulation would serve the stated public interest). Justice Brennan, dissenting in *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987), cites with favor the "classic statement of the rule": "It must appear, first, that the interests of the public . . . require [government] interference; and second, that the means are reasonably necessary for the accomplishment of the purpose . . ." *Id.* at 843 n.1 (citing *Lawton v. Steele*, 152 U.S. 133 (1894) (pre-*Lochner*)).

Lochner period's higher scrutiny. *Pennsylvania Coal Co. v. Mahon*,⁷ with Holmes writing for the Court, introduced the regulatory takings doctrine.⁸ In *Pennsylvania Coal*, the Court stated that while the government can generally regulate the use of private property, the government can also, in certain cases, push this regulation "too far," at which time the regulation "will be recognized as a taking."⁹ The Court in recent years has resurrected *Pennsylvania Coal* and the regulatory takings doctrine it spawned.¹⁰ More importantly, the holdings

7. 260 U.S. 393 (1922). In *Pennsylvania Coal*, the Court considered the constitutionality of the Kohler Act, a Pennsylvania land-use regulation that required coal companies to refrain from mining below habitable structures. The landowner had sought an injunction in state court to prevent such mining beneath his home, despite the fact that the coal company held legal title to his right of subterranean support.

8. The Fifth Amendment states that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." U.S. CONST. amend. V. The Fourteenth Amendment states that "no State shall deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

The Supreme Court has interpreted the Takings Clause to apply in two different contexts: first, physical-invasion takings—government regulation that actually appropriates private property for public use, *see, e.g.*, *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), and second, regulatory takings—government regulation that deprives a private property owner of some aspect of ownership without physically invading the property, *see, e.g.*, *Nollan*, 483 U.S. at 825. *See infra* notes 53-66 for a discussion of *Loretto* and *infra* notes 84-104 for a discussion of *Nollan*.

Though the issue of what use government may make of condemned property is beyond the scope of this note, the Court had held that as long as the purpose is debatably in the public's interest, the public use requirement of the takings clause is satisfied. *See Berman v. Parker*, 348 U.S. 26 (1954) (Fifth Amendment); *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229 (1984) (Fourteenth Amendment).

9. *Pennsylvania Coal*, 260 U.S. at 415. As generally understood, this passage implicates the government's duty to pay the landowner just compensation for the land taken, under the Takings Clause of the Fifth Amendment if the federal government is the regulator, or under the Fourteenth Amendment's Due Process Clause if a state government is the regulator. *See Chicago Burlington & Quincy R.R. Co. v. Chicago*, 166 U.S. 226 (1897); JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 10.2, at 335 (4th ed. 1991):

The fifth amendment guarantee of just compensation technically has not been incorporated in the fourteenth amendment. Nevertheless, the Court has held that the fourteenth amendment due process guarantee provides the same safeguard against a state's taking of property without just compensation.

Whether this explicit use of due process renders the regulatory takings doctrine, as applied to the states, nugatory is debatable. Clearly, if the Court is using the Due Process Clause to analyze regulatory takings challenges to state legislation, the proper standard of review for state legislation should be rational scrutiny, *see supra* note 6, not Justice Scalia's nexus test, *see infra* notes 84-117.

10. After a considerable break from application of the takings doctrine to the merits of a case, the Court in *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104 (1978), brought the Takings Clause back into vogue. Since then, both the Burger Court and the Rehnquist Court have used the Takings Clause more frequently. *See, e.g.*, *Loretto*, 458 U.S. at 419; *Agins v. City of Tiberon*, 447 U.S. 255 (1980); and *Kaiser-Aetna v. United States*, 444 U.S. 164 (1979) for takings cases in the Burger Court, and *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987); *First*

in the proliferation of new takings decisions forebode a return to the stricter scrutiny of regulatory legislation under the police power,¹¹ not applied since the *Lochner* period ended in 1937.¹²

The Court's return to the stricter scrutiny of *Lochner* in takings jurisprudence is especially apparent in the regulatory takings opinions written by Justice Antonin Scalia.¹³ Most recently in *Lucas v. South Carolina Coastal Council*, Justice Scalia led a six justice majority in invalidating a state environmental protection and public safety law. The *Lucas* decision, when read in the context of Justice Scalia's other takings opinions, demonstrates first, that the current Court will scrutinize more closely than previous Courts the legislative motives behind police power legislation that adversely affects private property interests.¹⁴ Second, as argued in this Note, *Lucas* demonstrates that this Court will apply stricter scrutiny to advance its ideological predilections in favor of real estate development rights.¹⁵

The parallel to the *Lochner* period is startling. Just as *Lochner* and its progeny exalted common law contract rights,¹⁶ untouchable by legislatures, so

English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304 (1987); and *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987) for takings cases in the Rehnquist Court.

11. "Police power" connotes the term generally applied to regulations enacted to promote the health, safety, and welfare of the polity. See *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926). Professor William B. Stoebuck has characterized legislation enacted under the police power as designed to "advance the public interest to some degree." William B. Stoebuck, *Police Power, Takings, and Due Process*, 37 WASH. & LEE L. REV. 1057 (1980). See also Joseph L. Sax, *Takings and the Police Power*, 74 YALE L. J. 36, 36 n.6 (1964) (giving a definition and examples of the police power). An example of a police power enactment would be the Kohler Act in *Pennsylvania Coal*. Other examples would include zoning ordinances and rent control ordinances. See, e.g., *Ambler Realty*, 272 U.S. at 365 (zoning); *Pennell v. City of San Jose*, 485 U.S. 1 (1988) (rent control).

12. See *supra* note 5.

13. Alfred P. Levitt, Comment, *Taking on a New Approach: The Rehnquist-Scalia Approach to Regulatory Takings*, 66 TEMP. L.Q. 197 (1993) (arguing that Scalia has spearheaded an analytical revolution in takings jurisprudence). Scalia wrote the majority opinion in *Nollan*, 483 U.S. at 825 (see *infra* notes 84-104) and a dissenting opinion in *Pennell*, 485 U.S. at 1 (see *infra* notes 105-17). In 1992 he authored the majority opinion in *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886 (1992). This note will focus upon Justice Scalia's approach because he has recently been the Court's most vocal member in the takings arena.

14. Robert H. Freilich & Elizabeth A. Garvin, *Takings after Lucas: Growth Management, Planning, and Regulation Implementation Will Work Better than Before*, 22 STETSON L. REV. 409, 433 (1993) (noting that the tone of the *Lucas* opinion demonstrates an air of open hostility toward government regulation).

15. See *infra* notes 118-65 and accompanying text for a discussion of *Lucas*.

16. In most of the economic due process decisions, the Court flavored its analysis with references to natural law in general, and specifically to the proposition that the Constitution did not limit the rights of the polity to freely contract either to its benefit or detriment. See *supra* note 3 and cases cited therein.

Justice Scalia and the current Court have placed land development rights on a similar pedestal by insisting that stricter scrutiny apply to land use regulations.¹⁷ The problem inherent in emphasizing developmental rights is that the Court may invalidate valuable legislative initiatives that do not afford landowners the most profitable use of their property,¹⁸ although other valuable, non-economic uses for the property may exist.¹⁹ The current Court has taken cognizable steps toward a course of decisions under the Takings Clause that mirrors the *Lochner* bias for economic development.²⁰

In resurrecting *Lochnerian* jurisprudence, the Court has haphazardly stepped around precedent and added unclarity to the already convoluted body of takings jurisprudence.²¹ Justice Scalia's formulation of the test for regulatory takings requires a close nexus: the government must target its regulation at the land that causes the problem which the government attempts to solve.²² Such narrow tailoring may be proper where personal liberties are at stake to protect the exercise of fundamental constitutional rights,²³ but regulation that merely

17. This trend toward stricter scrutiny began in *Nollan*, 483 U.S. at 825 and continued in *Lucas*, 112 S. Ct. at 2886. See *infra* notes 84-104 for a discussion of *Nollan* and notes 118-65 for a discussion of *Lucas*.

18. The current Court has taken Justice Holmes's "too far" rule too far by holding that if a landowner is being blocked by regulation from making the most profitable use of property, then any other use of the property, obviously less profitable, will not be considered valuable at all. See *infra* notes 131-35 and accompanying text. This naturally leads to the determination that if the diminution in value between the property without the regulation and the property encumbered by the regulation is total, that the regulation has indeed gone "too far."

19. See *infra* notes 131-35 for a discussion of alternatives to economic value in the context of the *Lucas* decision.

20. This *Lochnerian* shift under the Takings Clause suffers from the same shortcomings as economic due process. Though advocacy for individual rights from the bench may appear noble, strong arguments exist against the advocacy of economic rights. Judicial legislation violates the separation of powers doctrine, and may even impede the proliferation of legislative initiatives to serve long-term interests of the polity. See *infra* notes 240-42.

21. Legal scholars characterize the Court's approach to takings as a muddled mess. See, e.g., Stoebe, *supra* note 12, at 1059 n.11 (takings law is "as disheveled as a ragpicker's coat"); Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165 (1967) (stating that attempts to formulate static, predictable rules have yielded only ethically unsatisfying rules for takings cases). Even the Court itself has recognized that no "set formula" has been developed to determine when a taking occurs and that whether a taking will be found depends "upon the particular circumstances" of each case, as the Court engages in "essentially ad hoc, factual inquiries." *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978).

22. See *infra* notes 84-117 and accompanying text for a discussion of the development of Scalia's nexus requirement.

23. See *United States v. Carolene Products*, 304 U.S. 144, 152-53 n.4 (1938). See also NOWAK & ROTUNDA, *supra* note 9, at 377-78 ("In sharp contrast to the Court's almost total abandonment of any real scrutiny of economic legislation under substantive due process . . . analysis is its increasingly strict examination of legislation and government actions that affect civil rights or

targets property use should receive a more deferential review.²⁴ Property rights should be subject to more legislative direction without stricter scrutiny in order to afford the legislature sufficient "elbow room"²⁵ to enact new regulations to fit new problems.²⁶

With the Court's takings doctrine in flux, the proposal of a new approach to takings may help to prevent a recurrence of *Lochner's* excesses. The Takings Clause of the Fifth Amendment has never been a proper gauge for analyzing the constitutionality of police power exercises. The Takings Clause only properly prescribes the consequences of a non-compensated exercise of the eminent domain power.²⁷ A deferential due process analysis would more properly

liberties.").

24. See *Carolene Products*, 304 U.S. at 144 (creating a distinction between personal and property rights). See also Norman Karlin, *Back to the Future: From Nollan to Lochner*, 17 SW. U. L. REV. 628, 659-60 (1988) (documenting the development of the personal/property right distinction). Cf. *Cohen v. California*, 403 U.S. 15 (1971) (personal right) (holding that content-based restriction on speech will trigger heightened scrutiny under the First Amendment); *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 256 (1977) (same) (holding that suspect racial classification in ordinance will trigger heightened scrutiny under the Fourteenth Amendment's Equal Protection Clause). According to Justice Brennan, the threshold question of rationality in police power cases is "reasonableness." The regulation may then trigger heightened scrutiny if it is "unduly oppressive upon individuals." See *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 843 n.1 (1987) (Brennan, J., dissenting); see also *supra* note 6 and authorities cited therein.

25. This concept of legislative "elbow room" is analogous to that afforded to publishers after *New York Times v. Sullivan*, 376 U.S. 255 (1964), to avoid chilling protected speech. Legislatures may be chilled in enacting ground-breaking regulations if legislators know that landowners have a right to compensation even if a temporary taking is found. See *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 340-41 (1987) (Stevens, J., dissenting) (cautious local officials may never take necessary regulatory action if temporary takings require compensation); *infra* note 241. This chilling effect is more pronounced under a strict scrutiny regime under which a taking is more likely to be found.

26. A particularly good example of new problems to be addressed by legislatures is environmental protection. Legislatures have limited experience in this area, and as such, are not yet adept at tailoring means to ends. Therefore, environmental protection legislation is not likely to pass strict scrutiny, despite the desperate need for such measures. See *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886 (1992) (regulation protecting coastal zone invalidated).

The fact that environmental legislation does not fall under a traditional category of police power regulations, which would likely receive more deference from the Court, like nuisance abatement or zoning, presents an additional barrier to such legislation under the current Court's regulatory takings analysis. Rather than stunting the growth of potentially valuable legislation, the Court should encourage government's efforts by applying lower scrutiny to all exercises of the police power, both traditional and non-traditional. See also *Nollan*, 483 U.S. at 846 (Brennan, J., dissenting) ("Legislatures . . . , who deal with the situation from a practical standpoint, are better qualified than the courts to determine the necessity, character, and degree of regulation which these new and perplexing conditions require") (quoting *Goreib v. Fox*, 274 U.S. 603 (1927) (upholding ban on developing certain portions of real estate tract)).

27. See *infra* note 239 and accompanying text for a new proposed rule for regulatory takings.

judge regulation of property use.²⁸ Using the Due Process Clause to analyze land use regulation does not imply that the Takings Clause would be read out of the Constitution.²⁹ On the contrary, the Takings Clause should be afforded its original place in the American constitutional scheme³⁰ as a guarantee to private property owners that the government will pay for physical invasions of private property either by the government or by government-authorized trespassers.³¹

The propriety of this proposed rule, which distinguishes between a Takings Clause analysis for physical invasions by the government and a Due Process Clause analysis for mere police power regulations, becomes apparent after reading the pair of 1992 takings cases: *Yee v. City of Escondido*³² and *Lucas v. South Carolina Coastal Council*.³³ The Takings Clause should be invoked only in cases of physical invasion, while the Due Process Clause should gauge the constitutionality of police power regulations affecting property.³⁴

28. Emphasis should be placed on the word "deferential." Deference to legislative judgment distinguishes the pre- and post-*Lochner* constructions of the Due Process Clause. The new takings rule proposed in this note would employ the current deferential construction of the Due Process Clause to regulatory takings. This deference would not only allow legislative "elbow room," but it would also allow the Court to escape from the ad hoc takings determinations in a doctrinal field full of conflicting precedent. Compare *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922) (taking) with *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987) (no taking).

Due process analysis has the advantage of clear and coherent precedent, enabling legislatures to avoid foreseeable constitutional pitfalls when enacting land use regulation. See, e.g., *Munn v. Illinois*, 94 U.S. 113 (1877); *Mugler v. Kansas*, 123 U.S. 623 (1887), discussed *infra* notes 187-99; and more recently *Moore v. City of East Cleveland*, 431 U.S. 494 (1977) (holding that zoning ordinance restricting habitation of extended family in same home invalid under Due Process Clause); *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974) (holding zoning ordinance restricting habitation of non-family members valid); *Goldblatt v. Town of Hempstead*, 369 U.S. 594 (1962) (holding forced closing of gravel mine valid). See also Randall T. Shepard, *Land Use Regulation in the Rehnquist Court: The Fifth Amendment and Judicial Intervention*, 38 CATH. U. L. REV. 847, 869 (1989) (advocating a return to due process analysis).

29. See *infra* note 195 and authorities cited therein.

30. See *infra* notes 171-86 and accompanying text.

31. See *infra* notes 40-73 for a discussion of physical invasion takings.

32. 112 S. Ct. 1522 (1992).

33. 112 S. Ct. 2886 (1992). *Yee* involved a physical invasion takings challenge in which the Court unanimously agreed that no taking had occurred. See *infra* notes 67-73 and accompanying text for a discussion of *Yee*. *Lucas*, a regulatory takings case, carried only a bare majority of five Justices on the Opinion of the Court. See *infra* notes 118-65 for a discussion of *Lucas*. Comparing simply the number of Justices supporting the majority opinion in *Yee* (nine) and *Lucas* (five) leads to the inescapable conclusion that the Court is more divided on the proper resolution of regulatory takings cases. The takings rule proposed in this note would address both the physical invasion and regulatory takings contexts.

34. The rule proposed here would easily comport with most of the Court's takings jurisprudence. Where takings have been found by the Court, the landowner may have also been deprived of due process. See, e.g., *Nectow v. City of Cambridge*, 277 U.S. 183 (1928) (holding that denial of exception to zoning ordinance denied landowner due process). In the Court's most

Part II of this Note will review the development of both the physical invasion takings doctrine and the current test for regulatory takings, Justice Scalia's means/end nexus, to demonstrate that this test signals a return to the economic due process analysis of *Lochner*.³⁵ Part III of this Note will explore the *Lucas* decision to show how the Court has cemented itself into a return to *Lochner*, as well as to show that judicial superlegislation³⁶ is no longer the abstract fear it was in 1987.³⁷ Part IV of this Note will discuss why the text of the Constitution, nineteenth-century police power cases, and Justice Holmes's opinion in *Pennsylvania Coal* all reject current takings jurisprudence and its return to *Lochner*.³⁸ Finally, after showing that no justifications exist for the stricter scrutiny of Justice Scalia's nexus test, Part V of this Note will conclude with a proposed new approach for regulatory takings that uses both the Takings Clause and the Due Process Clause.³⁹

II. CABLEBOXES AND A BEACHFRONT BUNGALOW: THE RECENT EVOLUTION AND BIFURCATION OF TAKINGS JURISPRUDENCE

A. Physical Invasion Takings—Development of the Loretto Rule

The current Court has recognized those regulations "where the government authorizes physical occupation of property (or actually takes title)" as a separate

recent decisions, *Yee* and *Lucas*, the proposed test would change the result only in *Lucas*. The developmental ban in *Lucas* would likely survive due process scrutiny as applied in land use contexts. See, e.g., *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

In *Yee* the Court correctly applied the *Loretto* rule, see *infra* notes 53-66 and accompanying text, and held that the composite effects of the rent control ordinance and the mobile home law did not authorize a permanent physical occupation. If the Court adopted the proposed test, takings challenges would be limited to those contemplated in *Yee*, and cases formerly considered regulatory takings challenges would be analyzed under the Due Process Clause and its deferential review standard.

35. See *infra* notes 87-117 and accompanying text. Professor Frank I. Michelman disagrees with the assertion that Scalia's decision in *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987), implicates a return to *Lochner*. See Michelman, *supra* note 1, at 1609. Michelman attempts to limit *Nollan*'s application to development exactions that allow permanent physical occupations. Accord Douglas W. Kmiec, *The Original Understanding of the Taking Clause Is Neither Weak Nor Obsolete*, 88 COLUM. L. REV. 1630, 1648 (1988) [hereinafter *Original Understanding*] (concluding that *Nollan* is not *Lochner* revisited); Douglas W. Kmiec, *The Coherence of the Natural Law of Property*, 26 VAL. U. L. REV. 367, 377-78 (1991) [hereinafter *Natural Law*] (*Nollan*'s means-ends nexus requirement was accepted judicial standard, while *Lochner*'s superlegislation was not). But see David A. Myers, *Some Observations on the Analysis of Regulatory Takings in the Rehnquist Court*, 23 VAL. U. L. REV. 527 (1988) (contending that uncertainty exists as to when *Nollan*'s higher scrutiny will apply).

36. *Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421, 423 (1952).

37. See *infra* notes 118-65 and accompanying text.

38. See *infra* notes 171-217 and accompanying text.

39. See *infra* notes 243-44 and accompanying text.

category of takings.⁴⁰ In physical invasion takings cases, the Court applies “a clear rule”⁴¹ that requires the government to pay compensation to burdened landowners. The Court has not always authorized compensation under this rule, but government occupation has historically been a consideration for the Court in determining whether a taking has occurred.⁴²

The evolution of the clear, *per se*⁴³ takings rule for physical invasions began with *Kaiser-Aetna v. United States*.⁴⁴ In *Kaiser-Aetna*, a development company challenged as a taking the federal government’s proposed opening, under its regulatory powers, of a private marina to the public.⁴⁵ The Court, with then-Justice Rehnquist writing for the majority, held that the government owed compensation for the taking of essentially a public easement in the marina.⁴⁶ Though Congress did have the power to assure public access,⁴⁷ Congress could not freely authorize public trespass onto what remained private property.⁴⁸ Congress did have an interest in maintaining free access to interstate waters.⁴⁹ However, the mere presence of a public interest in private

40. *Yee v. City of Escondido*, 112 S. Ct. 1522, 1525 (1992).

41. *Id.*

42. Consideration of government-authorized trespasses onto private property has traditionally fallen under the “character of governmental action” test. See *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978). In *Penn Central*, after citing the familiar disclaimer that the Court has no “set formula” for takings analysis, *id.*, the Court, per Justice Brennan, added that among the several factors that the Court employs in takings cases is the character of the governmental action: “A taking may be more readily found when the interference with property can be characterized as a physical invasion by the government . . . than when the inference arises from some public program adjusting the benefits and burdens of economic life to promote the common good.” *Id.* In other words, Justice Brennan devised a rough dichotomy between trespassory or physical invasions and mere regulatory exercises of the police power. The case cited by Brennan for this proposition was *United States v. Causby*, 328 U.S. 256 (1946), in which a landowner alleged that his property, a chicken farm, had been deprived of all viable use due to constant low overflights by government aircraft. The Court agreed with the landowner’s characterization of the government action as trespassory, not regulatory, and ordered compensation.

43. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 433 (1982). A physical invasion does not effect a *per se* taking unless the invasion is permanent. See *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74 (1980) (holding that temporary imposition of demonstrators in shopping mall is not a taking.) For convenience, the terms “*Loretto* rule” and “*per se* taking” will be used interchangeably.

44. 444 U.S. 164 (1979).

45. The district court found that the marina was navigable federal water for the purpose of Congressional regulatory power, but that it was not federally owned water in the sense that its opening to the public required no compensation. 408 F. Supp. 42 (D. Haw. 1976). The Ninth Circuit Court of Appeals reversed this decision and held that the opening of the marina required no compensation. 584 F.2d 378 (9th Cir. 1978).

46. 444 U.S. 164, 178 (1979).

47. *Id.* at 174.

48. *Id.* at 176.

49. *Id.* at 175.

property—an interest that only arose after the landowner had improved the marina and linked it to the ocean—could not transfer private marina control from the landowner to the government and its authorized trespassers, the public.

The Court found a taking because Justice Rehnquist focused the Court's attention upon "one of the most essential sticks in the bundle of rights that are commonly characterized as property—the right to exclude others."⁵⁰ By characterizing the right of the landowner to keep its property free from uninvited public visitors as "a universally held . . . fundamental element" of property ownership,⁵¹ the Court decided that compensation was due for any encroachment by the public on this right of exclusivity, even if sanctioned by the government.⁵²

From the decision in *Kaiser-Aetna*, where physical invasion by the government created a weighty presumption in favor of compensation to protect a landowner's right to exclude, the Court created a *per se* rule for physical invasion takings in *Loretto v. Teleprompter Manhattan CATV Corp.*⁵³ In *Loretto*, a landowner sued a cable television operator, alleging that the installation of a cable box which measured one-third square foot on the landowner's roof, pursuant to state law, constituted a compensable taking.⁵⁴ The Supreme Court reversed the state court decision finding no taking.⁵⁵ Justice Marshall, writing for the majority, began the Court's inquiry by acknowledging that generally, takings decisions relied upon no formal rules.⁵⁶ Marshall, as had Rehnquist in *Kaiser-Aetna*, then turned the Court's attention

50. *Id.* at 176.

51. *See International News Serv. v. Associated Press*, 248 U.S. 215, 250 (1918) (Brandeis, J., dissenting) (exclusivity is an essential element of property ownership) cited by the Court for this proposition.

52. Justice Blackmun dissented on the ground that the Court could only make the decision whether a navigational easement could be imposed without compensation after a balancing of the public and private interests in the marina. *Kaiser-Aetna v. United States*, 444 U.S. 164, 187 (1979). Blackmun felt that Congress's interest in regulating interstate waters outweighed any private exclusionary interest or a desire for compensation after having sacrificed considerable investment in development. *Id.* at 189-90.

53. 458 U.S. 419 (1982).

54. The cable box had been installed pursuant to a state law prohibiting landowners from interfering with cable installation. The state trial court granted summary judgment to the cable operator, and the appellate court affirmed this decision. 422 N.Y.S.2d 550 (A.D. 1979). The New York Court of Appeals held that the statute served a legitimate police power purpose by facilitating the dissemination of an important educational resource, cable television. 423 N.E.2d 320 (N.Y. 1981). Additionally, the state court held that the relatively unobtrusive box had in no appreciable measure adversely affected the landowner's economic interest in the property, and thus the government owed no compensation. *Id.* at 425.

55. *Loretto*, 458 U.S. at 442.

56. *Id.* at 426-27 (citing *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978)).

to the portion of the *Penn Central* opinion that stated that the character of the government action was a consideration to be weighed in a takings analysis, especially if this government action could be characterized as a physical invasion.⁵⁷ Justice Marshall's opinion then created a new category of regulations that always triggers the compensation requirement: "[W]hen the physical intrusion reaches the extreme form of a permanent physical occupation, a taking has occurred."⁵⁸ In such a case, the "character of the governmental action not only is an important factor in resolving whether the action works a taking but also is determinative."⁵⁹

Applying this rule to the facts of *Loretto*, only one result became possible. The state statute prohibited the landowner from removing the cable box from the property. By authorizing, or more properly mandating, this physical invasion by the cable operator, the statute effected a taking. The diminutive size of the box had no bearing upon the decision that a taking had occurred.⁶⁰ The determinative factor remained the characterization of the government-authorized invasion as permanent.⁶¹ Once the government has physically invaded private property permanently, a *per se* taking requiring compensation under *Loretto* has occurred.

The reasoning behind the *Loretto* decision merely extended that of *Kaiser-Aetna*. In *Kaiser-Aetna*, the Court focused upon the right to exclude.⁶² When government regulation impinges upon this right, the Court will more likely find a taking because exclusivity is a fundamental incident of property ownership.⁶³ Though the invasion in *Kaiser-Aetna* could not be characterized as permanent, and thus would not have triggered application of *Loretto*'s *per se* rule,⁶⁴ the difference between the invasion in both cases is a matter of degree. Where the government action in *Kaiser-Aetna* only implicated the right to exclude, the regulation in *Loretto* did not "simply take a single 'strand' from the 'bundle' of property rights: it chop[p]ed through the bundle taking a slice from every strand."⁶⁵ Permanent physical occupation deprives landowners not only of the

57. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982). See also *supra* note 42.

58. *Loretto*, 458 U.S. at 426.

59. *Id.* The physical-invasion takings doctrine eschews the general liberal/conservative characterization of the Court's members. Justice Marshall, usually considered a liberal, found a *per se* taking in *Loretto* while Justice Blackmun, considered a moderate liberal, found no taking.

60. *Loretto*, 458 U.S. at 437. Size, or the extent of the physical invasion, may have some relevance to the amount of compensation to be paid.

61. *Id.* at 434-35.

62. See *supra* notes 44-52 and accompanying text.

63. See *supra* note 51 and accompanying text.

64. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 433 (1982).

65. *Id.* at 435.

right to exclude, but also of the rights to use and dispose of property.⁶⁶

The Court applied the *Loretto* rule most recently in *Yee v. City of Escondido*.⁶⁷ In *Yee*, a mobile home park owner challenged as an unconstitutional taking a municipal rent control ordinance setting a ceiling on rents chargeable to mobile home park tenants.⁶⁸ With Justice O'Connor

66. *Id.* at 435. The Court characterized these rights, as well as the landowner's expectation in exercising these rights, as traditional restraints on government's ability to physically occupy private property, and the rule that resulted from protecting these rights as a traditional rule. *Id.* at 441. *Cf.* *Andrus v. Allard*, 444 U.S. 51 (1979) (holding that retention of rights to possess and transport personal property weighs against finding a taking). Whether this rule that any permanent physical occupation by the government works a taking has the historical pedigree that the Court asserted in *Loretto* remains open to debate. Surely, the Court had never explicitly stated this rule before *Loretto*. Prior cases had merely held that a physical invasion was a factor to be considered in the takings analysis. *See Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978); *supra* note 42.

Even assuming the *per se* takings rule has the support of history, such a history may be a disadvantage, according to Justice Blackmun's dissent in *Loretto*. Creation of a fixed, *per se* takings rule has the tendency to freeze the common law in its nineteenth-century form, leaving no flexibility for governmental interference of any extent. *Loretto*, 458 U.S. at 455. However, reliance on history at the expense of sound judicial doctrine (*see Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886 (1992); *infra* notes 150-55) does not pose a similar problem for the *per se* rule. The line-drawing in *Loretto* serves a useful purpose because the line is concrete and easily identifiable at the moment of physical occupation. This approach also has the support of the framer's intent. *See infra* notes 171-86 and accompanying text. By advancing the cause of certainty in constitutional guarantees, the *per se* rule can only help protect property in its constitutional dimension.

67. 112 S. Ct. 1522 (1992).

68. The rent control ordinance alone did not animate the landowner's physical invasion takings challenge. To provide further protection for mobile home dwellers, the state had also enacted the Mobilehome Residency Law, which prevented mobile home park owners from actually or constructively evicting tenants under certain circumstances. Working together, these regulations both prevented park owners from removing unwanted tenants, and prevented rent increases to remove undesirable tenants or to insulate mobile home parks from the incursion of new undesirable tenants. The landowner challenged only the constitutionality of the rent control ordinance.

In substance, the landowner's takings claim alleged that the combined effect of the regulations forced him to accept potentially unwanted tenants at deflated rents, which violated his right of exclusivity. *See supra* notes 50-52 and accompanying text. Because the rent control ordinance deflated rents collectable from mobile home tenants, and the residency law restricted when park owners could evict these tenants, the landowner alleged not only that his right to exclude had been taken, but also that such forced association between park owners and tenants resulted in a permanent transfer of wealth, in the form of higher rents that new tenants would pay, from park owners to tenants. *Yee*, 112 S. Ct. at 1528. The California Supreme Court denied review of the landowner's claims. 274 Cal. Rptr. 551 (1990).

Yee was not controlled by *Pennell v. City of San Jose*, 485 U.S. 1 (1988); *see infra* notes 105-17; another rent control takings case, because the landowner in *Yee* advanced a physical invasion takings theory before the Court, whereas *Pennell* involved a regulatory takings challenge. Had *Pennell* applied, its precedential value would have been minimal nonetheless. The applicability of one rent control takings case to subsequent rent control cases rests upon the similarity of the underlying ordinances. Because different municipalities address the problem of exorbitant rents in

writing for a unanimous panel, the Court held that the physical invasion rule of *Loretto* only applied when the government required the landowner to acquiesce to a trespass.⁶⁹ Because the government had not chosen the park owner's tenants, the *Loretto* rule could not help the landowner.⁷⁰ Additionally, the mere transfer of wealth from park owner to tenant did not convert a police power regulation into a physical invasion⁷¹ requiring compensation.⁷² Plainly, the Court meant to compensate only real, tangible permanent physical invasion by the government when it promulgated the *Loretto* rule; *Yee* simply applied this rule, finding no taking.⁷³

B. Regulatory Takings—Justice Scalia Builds the New *Lochner*

Yee identified the two distinct classes of takings cases: physical invasion takings and regulatory takings.⁷⁴ The regulatory takings doctrine involves a much more complex inquiry than whether a permanent physical invasion has occurred.⁷⁵ The Court's regulatory takings jurisprudence, which has garnered most of the Court's attention on takings,⁷⁶ remains muddled, at best. At its

different ways, similarities would seem unlikely. Compare the rent control ordinance in *Yee*, 112 S. Ct. at 1522 with the rent control ordinance in *Pennell*, 485 U.S. at 1.

69. *Yee*, 112 S. Ct. at 1528.

70. *Id.* at 1530.

71. *Id.* at 1528-29.

72. The Court prudentially refused to reach the question of whether the cumulative effects of the regulations resulted in a regulatory taking because the landowner had not raised the regulatory taking issue in the state court below. *Id.* at 1531-34.

73. *Yee* assuaged any doubts that the *Loretto* rule would be manipulated by clever landowners trying to fashion a regulatory impact upon their property into a physical invasion. What *Loretto* never made clear, as Justice Blackmun's dissent indicates, see *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 445-51, and *Yee* failed to address, was how the Court would deal with temporary physical invasions. Largely this question seems academic. In the absence of a permanent physical invasion, and therefore without the benefits of the *per se* rule for a landowner, the character of government action factor under *Penn Central*, see *supra* note 42, would still weigh in favor of finding a taking under the Court's takings analysis. The right to exclude emphasized in *Kaiser-Aetna*, see *supra* notes 44-52 and accompanying text, would also militate toward finding a taking. Once a taking is found, whether temporary or permanent, compensation is due from the government. See *First English Evangelical Lutheran Church v. County of Los Angeles*, California, 482 U.S. 304 (1987); *infra* note 241.

74. *Yee v. City of Escondido*, 112 S. Ct. 1522, 1525 (1992).

75. See *Loretto*, 458 U.S. at 419.

76. Of the five takings decisions issued in 1987 and 1992, only one—*Yee*, 112 S. Ct. at 1522—involved a physical invasion takings challenge. The remainder were regulatory takings cases.

The regulatory takings doctrine has elicited spirited commentary from considerable numbers of legal scholars as well. See generally BRUCE ACKERMAN, *PRIVATE PROPERTY AND THE CONSTITUTION* (1977); FRED BOSSELMAN ET AL., *THE TAKING ISSUE* (1973); RICHARD EPSTEIN, *TAKINGS, PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* (1985); Douglas A. Humbach, *A Unifying Theory for the Just-Compensation Cases: Takings, Regulation and Public Use*, 34 RUTGERS L. REV. 243 (1982); Michelman, *supra* note 1; Michelman, *supra* note 21; Andrea L.

worst, the regulatory takings doctrine is a confusing legal briarpatch of disregarded or manipulated precedent,⁷⁷ unsupported rule-making,⁷⁸ and even plain judicial error.⁷⁹ Justice Brennan, in trying to synthesize more than half a century of regulatory takings cases, could not distill coherent standards⁸⁰ and could only offer several vague considerations that the Court had previously examined to determine whether a taking had occurred.⁸¹ Where the Court once cited Justice Holmes's "too far" test⁸² with mantric reverence, Justice Brennan's all-too-candid remark that the Court has no "set formula"⁸³ for deciding takings cases has gradually displaced the Holmes test. Additionally, Brennan's remark exposes the Court's doctrinal difficulties by admitting that the real test for a regulatory taking is no test at all. As a remedy for this lack of direction or doctrine in the takings arena, Justice Scalia has introduced a new takings test, setting the stage for a return to *Lochner*'s strict scrutiny of regulatory legislation.

The case that first raised the specter of *Lochner* was also Scalia's first takings opinion, *Nollan v. California Coastal Commission*.⁸⁴ In *Nollan*, a landowner planned to develop his beachfront property, replacing a small one-story bungalow with a considerably larger two-story home. The state regulatory commission charged with overseeing coastal development found that the proposed development would create a visual and psychological barrier to beach access for passersby. To increase overall public beach access, the commission

Peterson, *The Takings Clause: In Search of Underlying Principles Part I—A Critique of Current Takings Clause Doctrine*, 77 CAL. L. REV. 1301 (1989); Joseph A. Sax, *Takings, Private Property and Public Rights*, 81 YALE L.J. 149 (1971); Sax, *supra* note 11; William B. Stoebuck, *A General Theory of Eminent Domain*, 47 WASH. L. REV. 553 (1971); Stoebuck, *supra* note 11.

77. Compare *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922) with *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987). Similar regulations from the same state yielded opposite findings under the Court's regulatory takings analysis.

78. See *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987); *infra* notes 84-104. The stricter scrutiny proposed by Scalia for regulatory takings analysis had no precedential support.

79. See *Agins v. City of Tiberon*, 447 U.S. 255, 261 (1980) (takings analysis requires a weighing of public and private interests). The balancing of public and private interests is not proper for a takings analysis. If private property has indeed been taken, the presence of even the weightiest public interest will not undo the taking, and therefore will not avoid the compensation requirement. Balancing is proper under the Due Process Clause. See Stoebuck, *supra* note 11, at 1065-66.

80. See *infra* note 81 and accompanying text.

81. These considerations included the impact of the regulation, the degree to which the regulation interferes with investment-backed expectations, the character of the governmental action, average reciprocity of advantage, and the degree to which the regulation seeks to prevent harm to other private property. See *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104 (1978). For an analysis and explanation of Justice Brennan's use of these terms, see generally Myers, *supra* note 35.

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

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

84. 483 U.S. 825 (1987).

conditioned the grant of a permit on the dedication of a lateral easement of public access across the landowner's property, parallel to the shore. The landowner challenged this development condition as unconstitutional.⁸⁵

The Court found that the imposition of the access condition effected an unconstitutional taking.⁸⁶ Justice Scalia, writing for a five justice majority, began the Court's decision by attempting to characterize the condition as a physical invasion. He cited *Loretto*⁸⁷ for the proposition that the easement, by forcing continuous public access, violated the right to exclude,⁸⁸ although the condition allowed no individual members of the public to permanently station themselves on the property.⁸⁹ Seemingly, Justice Scalia found that the easement condition violated the *per se* takings rule,⁹⁰ but he chose not to rest the Court's decision upon *Loretto*'s shoulders.⁹¹

Justice Scalia instead inquired whether the fact that the easement could not have been appropriated directly by the state without compensation rendered the indirect appropriation of the easement through a development condition a taking.⁹² This portion of Justice Scalia's opinion abandoned the apparently dispositive physical invasion aspect of the case and focused upon the regulatory takings doctrine, where he completely altered the Court's analysis. Justice

85. The trial court agreed with the landowner that the commission had not advanced sufficient reasons to show how a lateral easement would remedy the problem of limited visual access, and thus declared the development condition void. *Id.* at 829. The state appellate court reversed the trial court's decision invalidating the development condition, finding that any development condition that debatably contributed to overall public access, albeit indirectly, satisfied the Takings Clause. *Nollan v. California Coastal Comm'n*, 223 Cal. Rptr. 28, 30-31 (1986). Further, the court held that the condition imposed did not deprive the landowner of a reasonable use of his property. *Id.* at 30. The landowner appealed to the United States Supreme Court. *Nollan*, 483 U.S. at 831.

86. *Id.* at 842.

87. 458 U.S. 419 (1982). See also notes 53-66 and accompanying text for a discussion of *Loretto*.

88. *Nollan*, 483 U.S. at 831.

89. *Id.* at 832.

90. *Id.* If not directly violative of *Loretto*'s *per se* rule, at least the condition in *Nollan* would seem to bring the case within the rule of *Kaiser-Aetna v. United States*, 444 U.S. 164 (1979). This rule, essentially a pre-*Loretto* formulation for physical invasion takings, creates a presumption that a taking has occurred if a landowner's right to exclude is impinged. See *supra* notes 44-52 and accompanying text. On the similarity of their respective facts, *Kaiser-Aetna* would seem to dispose of *Nollan*: allowing public navigation in a private marina from time to time is analogous to allowing public passage over private beachfront property from time to time. In neither case was an individual member of the public permanently fixed upon the regulated property, but in both cases the regulation limited the right to exclude.

91. Seemingly Justice Scalia felt that a *per se* taking served as an insufficient basis for decision, and he chose *Nollan* as an opportunity to produce a new takings test. Scalia probably felt that he could not neatly characterize the conditional developmental ban as a physical occupation.

92. *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 831 (1987).

Scalia began by citing *Agins v. City of Tiburon*⁹³ for the innocuous proposition that a regulation does not effect a taking if it "substantially advances" a legitimate state interest and does not "deny the owner an economically viable use of his land."⁹⁴

Where courts had previously focused upon the legitimacy of the asserted state interest, Justice Scalia turned the Court's analysis toward the requirement that the regulation substantially advance this interest.⁹⁵ In footnote three,⁹⁶ Scalia stated that the Court would no longer use a deferential standard requiring only a rational relation between the means and the ends of government regulation⁹⁷ in analyzing regulatory takings challenges. Instead, his opinion

93. 447 U.S. 255 (1980). *Agins* involved a takings challenge to a zoning ordinance in which the Court found that no taking had occurred. Ripeness also weighed against finding a taking; see *infra* note 108.

94. *Id.* at 260. This language is perhaps inapplicable to takings analysis because the "substantially advance" prong comes from the zoning and due process case of *Nectow v. City of Cambridge*, 277 U.S. 183 (1928). *Nectow* does not employ the Takings Clause, and the decision is an anomaly because it invalidated a zoning ordinance in the wake of *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926) (generally upholding zoning as a rational exercise of the police power). Nonetheless, accepting *Nectow* as at least a distant cousin of regulatory takings cases, its standard of judicial review is no higher in substance than that of minimum rationality. See *supra* note 6. See also *Nollan*, 483 U.S. at 844 n.1 (Brennan, J., dissenting) ("Our phraseology [of takings scrutiny] may differ slightly from case to case These minor differences cannot, however, obscure the fact that the inquiry in each case is the same."). Though Justice Brennan used the word "substantially" in *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 127 (1978), his approach to this word differed from that taken by Scalia in *Nollan*.

95. By so altering the Court's inquiry, Scalia relegated the ends of the regulation to the background, while he focused solely in the foreground upon the means used to advance these ends. See *Nollan*, 483 U.S. at 837. This approach raises the specter of economic due process. Many of the members of the *Lochner* Court would have undoubtedly accepted state goals such as ensuring worker safety as noble and worthwhile ends. See *supra* note 3 and cases cited therein. However, these same judges invalidated many such regulations because they felt that business should not have to bear the costs of such regulation, i.e., they questioned the means that the state had contemplated to advance its ends. See *supra* note 3. Presumably, Justice Scalia even would have very little apprehension in recognizing preservation of public beach access as a legitimate state interest. *Nollan*, 483 U.S. at 841. Justice Scalia though, like some of his more conservative predecessors, disagrees with imposing the cost of this regulation through an access condition to the detriment of private development. *Id.* at 841-42.

96. *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 835 n.3 (1987).

97. In *Nollan* itself, Justice Scalia's lean toward heightened scrutiny comes by rejecting, in footnote three, Justice Brennan's suggestion in dissent that the inquiries under the Takings, Due Process, and Equal Protection Clauses are essentially the same. Compare *id.* at 834 n.3 (Scalia, J.) ("our opinions do not establish that these [takings] standards are the same as those applied to due process or equal protection claims") with *id.* at 844 n.1 (Brennan, J., dissenting):

Our consideration of [takings] factors . . . provides an analytical framework for protecting the values underlying the Takings Clause, and other distinctive approaches are utilized to give effect to other constitutional provisions. This is far different, however, from the use of different standards of review to address the threshold issue of

mandated a much more searching inquiry into the substantiality of the relationship between the asserted government interest and the means chosen by the state to serve that interest.⁹⁸

Nollan's most notorious contribution to the regulatory takings doctrine remains not so much the standard of review adopted by Justice Scalia, as his actual application of this standard. The minimal extraction of a lateral passage easement did not pass Justice Scalia's scrutiny. Specifically, Scalia found that the lateral easement did not address the problem identified by the commission with more intense development: reduced visual access to the beach.⁹⁹ The microscopic examination to which Justice Scalia submitted the development condition not only allowed private sector development without restriction, but also advanced with it a nearly fundamental right of private real estate development that the Court had never before recognized.¹⁰⁰

the rationality of government action.

Scalia's new scrutiny is itself questionable, but one of the cases he cites to support it, *see id.* at 834, is Justice Brennan's opinion for the Court in *Penn Central*, 438 U.S. at 127 (1978) ("use restriction may constitute a 'taking' if not reasonably necessary to the effectuation of a substantial government purpose"). Presumably, Brennan did not have the kind of strict scrutiny Scalia propounds in mind when he wrote *Penn Central*. *Penn Central* was exceedingly deferential in reviewing a landmark preservation ordinance and may even be characterized as a case hostile to development rights because the Court there found no taking. Justice Brennan never employed the phrase "substantially advance" to refer to the degree to which the means of achieving this interest must be advanced, *Nollan*, 483 U.S. at 843, i.e., Brennan never intended to require a close causal nexus between the landowner's use and the problem regulated.

98. Justice Scalia added substance to "substantially advance" as used in *Agins*. In other words, he refused to equate "substantially advance" with the classic deferential review standard for takings challenges, and instead equated substantial with nearly compelling. *See infra* note 99.

99. Here Scalia's higher scrutiny manifests itself in practice: "[U]nless the permit condition serves the same governmental purpose as the developmental ban, the building restriction is not a valid regulation of land use but an out-and-out plan of extortion." *Nollan*, 483 U.S. at 837. Scalia requires an unrealistically tight fit between the ends of the regulation (remedying the lack of visual access) and the means advanced in the regulation to solve this problem (permitting condition allowing lateral access to the public). The example of a regulation that would pass this scrutiny, a visual easement from the street to the beach, does not benefit the public to a sufficient degree to make regulation worthwhile. The takings doctrine has never before required such narrow tailoring. *See, e.g., Penn Central*, 438 U.S. 104 (holding that denial of development permit is not a taking in part because developmental rights are transferable to other non-restricted property).

100. *But cf. Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886 (1992), *infra* notes 118-65 and accompanying text. Some legal scholars have attempted to cabin the *Nollan* decision by refusing to equate Justice Scalia's approach in limiting the range of constitutional government activity as a return to *Lochner*. *See Michelman, supra* note 1; *Original Understanding, supra* note 35. These commentators emphasize that although the language of *Nollan* is broad, the holding is narrow. *See also Myers, supra* note 35. Whether these scholars are merely justifying Scalia's opinion or correctly reading *Nollan* is open to debate. Surely, the former seems more likely when *Nollan* could have been decided as a physical invasion case. *See supra* notes 87-91 and accompanying text.

Ironically, Justice Scalia has been hesitant to recognize non-textual rights in other, less

Justice Brennan, in dissent, focused upon the rationality standard for reviewing police power regulations and decried any stricter scrutiny.¹⁰¹ Moreover, he showed that even under heightened scrutiny, the lateral easement condition passed constitutional muster. By characterizing the state interest as increasing overall access—visual, psychological, and physical—of the public to the beach,¹⁰² Brennan found a substantial nexus between the state interest and the developmental condition, between end and means.¹⁰³ Most importantly though, Justice Brennan argued for a more deferential standard of review to provide legislatures with the necessary flexibility to address new problems in an era of increasingly intense development threatening environmentally sensitive areas such as shoreland.¹⁰⁴

The disturbing development of higher scrutiny in *Nollan* became even more apparent in *Pennell v. City of San Jose*.¹⁰⁵ In *Pennell*, a landowner challenged a municipal rent control ordinance as a regulatory taking.¹⁰⁶ The Court, in an

economic, contexts. See, e.g., *Planned Parenthood of S.E. Pa. v. Casey*, 112 S. Ct. 2791 (1992) (Scalia, J., concurring in the judgment in part and dissenting in part) (woman's pre-viability right to terminate pregnancy) and *Michael H. v. Gerald D.*, 491 U.S. 110 (1989) (plurality opinion) (biological father's right to visitation).

101. Justice Brennan even implicates *Lochner*. *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 842 (1987) (Brennan, J., dissenting) ("[T]he Court imposes a standard of precision for the exercise of a State's police power that has been discredited for the better part of this century."). See also *id.* at 846 (Scalia's "narrow conception of rationality has long since been discredited a judicial arrogation of legislative authority").

102. *Id.* at 849-53.

103. Under the factors enunciated in *Penn Central*, Justice Brennan would have found that no taking had occurred; see *supra* note 81. The regulation involved no denial of economically viable use of the property because the landowner could still use the bungalow. *Nollan*, 483 U.S. at 845 n.2. The physical invasion was minimal because part of the easement already rested in the public domain over shoreland. *Id.* at 853. The regulation involved an average reciprocity of advantage because similar easements were required on other beachfront property, giving the landowner a right to walk along beach property other than his own. *Id.* at 856. Finally, investment-backed expectations were not a problem because the landowner purchased the land with knowledge of the condition. *Id.* at 860.

104. *Id.* at 863, 864. Justice Blackmun also advocated this argument in a separate dissent. See *id.* at 865.

105. 485 U.S. 1 (1988).

106. The ordinance provided six objective factors to help determine at what rate landlords must set their rents. *Id.* at 4-5. The ordinance also provided for consideration of a subjective factor, tenant hardship, in determining a reasonable rent. *Id.* The landowner narrowed his constitutional challenge to the subjective factor, arguing that consideration of such a soft variable could give the municipality the opportunity for arbitrary enforcement of the ordinance. *Id.* at 9. This arbitrariness could in turn result in "taking" rent properly assessed under the objective factors. *Id.* The trial court held the ordinance unconstitutional, and the state appellate court affirmed this decision on the grounds that the possibility of arbitrary enforcement made the ordinance unconstitutional. 201 Cal. Rptr. 728 (Cal. Ct. App. 1984). The California Supreme Court reversed. 721 P.2d 1111 (Cal. 1986).

opinion authored by Chief Justice Rehnquist, held that no evidence existed in the record to demonstrate that the rent control ordinance effected a taking.¹⁰⁷ In short, although the Court did not invoke the prudential limitation of ripeness¹⁰⁸ to resist hearing the case on its merits, the decision rested upon an inadequate factual record in which a taking could be found.

The importance of *Pennell* for this Note lies in the dissent of Justice Scalia. Scalia would have found the rent control ordinance to work a taking.¹⁰⁹ Returning to the *Nollan*¹¹⁰ language that a regulation must "substantially advance a legitimate state interest" to avoid a successful takings challenge,¹¹¹ Justice Scalia once again imposed a higher level of scrutiny to a regulation challenged as a taking. Scalia embellished upon his nexus test to require a "cause-and-effect relationship between the property restricted by the regulation and the social evil that the regulation seeks to remedy."¹¹² The thrust of this new language is that government must meet a high standard of judicial review by showing a close fit between the regulation imposed and a need for this regulation caused by the burdened landowner.¹¹³

107. *Pennell*, 485 U.S. at 10. No taking had occurred for the obvious fact that no proprietary interest had been deprived of the landowner. *Id.* Additionally, the Court held that the landowner's facial challenge to the ordinance under the Due Process Clause also failed because fixing rents was a rational exercise of the police power. *Id.* at 12-13. The Court did not hold that any consideration of subjective factors would be impermissible, even on an applied challenge. The issue of the extent to which consideration of subjective factors would result in a taking as applied was therefore reserved by the Court.

108. *See, e.g., Williamson Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 186-87 (1985). In *Williamson*, the Court held that a takings clause claim is not ripe until the government has decided that the regulation actually applies to the landowner's property. *Id.* at 186. *See also Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264 (1981); *Agins v. City of Tiburon*, 447 U.S. 255 (1980).

109. *Pennell*, 485 U.S. at 15.

110. *See supra* notes 93-98 and accompanying text.

111. *Nollan*, 483 U.S. 825, 834 (1987) (quoting *Agins v. City of Tiburon*, 447 U.S. 255 (1980)).

112. *Pennell v. City of San Jose*, 485 U.S. 1, 20 (1989). In other words, the landowner must be the cause of the harmful effects that the regulation is imposed to rectify. In Justice Scalia's opinion, the rent control ordinance did not meet this test because the landowner had not caused the hardship experienced by the tenants.

113. Whether it is termed cause-and-effect, means/ends scrutiny, or a nexus requirement, this intensified review standard lacks precedential support. *Nollan*, 483 U.S. at 844 n.1. The danger of the Court imposing its own judgment upon the wisdom of legislative enactments is equally manifest because the Court conducts its own independent review to determine the extent to which a regulation addresses a given social evil. The possibility for abuse could come from a Court whose members considered a regulation particularly onerous or ideologically wrong. Such a Court would find that the regulation failed to adequately address the problem regulated.

The current Court, or at least Justice Scalia, imposes the burden of proof on the government to justify regulation to the satisfaction of the Court before the regulation will pass constitutional muster. But the burden correctly rests upon the landowner to establish that a regulation effects an

Justice Scalia attempted to justify this cause-and-effect test by referring to the time-honored taking's maxim that "a landowner may not be singled out to bear public burdens . . . that should be borne by the public as a whole."¹¹⁴ But Scalia's citation of this passage is misleading. The whole purpose behind police power legislation is the promotion of the health, safety, and general welfare of the polity.¹¹⁵ This power entails impeding some citizens' rights, and necessarily their property, for the benefit of others.¹¹⁶ By citing *Armstrong v. United States* for the blanket proposition that the Takings Clause affords protection to singled-out and uniquely disadvantaged landowners, Scalia attempted to revive *Lochner's* appeal to the contract liberties of singled-out businesses.¹¹⁷ In any event, a careful reading of *Nollan* and Justice Scalia's

unconstitutional taking. See *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 485 (1987). This is the meaning of the presumption of constitutional validity generally, and properly afforded to police power legislation. See also *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886, 2909 (1992) (Blackmun, J., dissenting).

114. *Pennell*, 485 U.S. at 22 (citing *Armstrong v. United States*, 364 U.S. 40 (1960)). This "guiding principle of the Takings Clause," *Pennell*, 485 U.S. at 23, is often referred to as the equal protection arm of takings jurisprudence. See *Original Understanding*, *supra* note 35, at 1652-53; Note, *Taking a Step Back: A Reconsideration of the Takings Test of Nollan v. California Coastal Commission*, 102 HARV. L. REV. 448, 451 (1988). The argument proceeds that the government, by taking without compensation, unfairly singles out particular landowners, and that these landowners deserve the protection of the Takings Clause. Justice Scalia mentioned this argument in *Nollan*, but failed to develop it fully. *Nollan*, 483 U.S. at 835 n.4. Reading equal protection under the law into the Takings Clause is unpersuasive. An equal protection violation could be addressed sufficiently by the Equal Protection Clause, and the construction given to it by the Court requires strict judicial scrutiny only in the event of deprivation of a group's fundamental rights or suspect classifications under a legislative scheme. See, e.g., *Davis v. Bandemer*, 478 U.S. 109 (1986) (fundamental right to vote) and *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252 (1977) (suspect racial classification).

In opposition to the "equal protection" argument that an individual should not alone bear burdens more properly assigned to society stands Justice Brennan's suggestion that a regulation is valid if it merely adjusts the benefits and burdens of economic life. See *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978).

115. See *supra* note 11 and authorities cited therein.

116. Here, the question of when compensation will be required becomes apparent. In the context of a broad city-wide rent control ordinance, Justice Scalia's argument in favor of finding a compensable taking falls on deaf ears. No landlord is uniquely disadvantaged in comparison to others engaged in the same business, because all landlords have the factor of tenant hardship to potentially lower rents. The fact that a single landlord with more tenants suffering hardship bears more of a burden than other landlords does not, without more, require compensation as a taking. See *Penn Central*, 438 U.S. 104 (1978) (finding no taking when only landowners with parcels designated as landmarks burdened by regulation). Bearing this in mind, the *Armstrong* equal protection argument seems more appropriate in a physical invasion context.

117. Even Justice Scalia would not go this far. In his *Pennell* dissent, he does recognize some instances when an exercise of the police power will survive his scrutiny, e.g., zoning set-back restrictions in residential neighborhoods and emergency price controls. *Pennell v. City of San Jose*, 485 U.S. 1, 20 (1989). He justifies these requirements as "traditional land-use controls." *Id.* But price control measures would also violate the Takings Clause under Scalia's nexus test because

Pennell dissent together in this light leads arguably to the conclusion that Justice Scalia has drastically changed the regulatory takings doctrine. This change continued in 1992, as higher scrutiny became the touchstone of takings jurisprudence.

III. *LUCAS V. SOUTH CAROLINA COASTAL COUNCIL*

Slightly more than two months after the Court denied a physical invasion takings challenge in *Yee*, the Court reentered the takings arena, entertaining a regulatory takings challenge in *Lucas v. South Carolina Coastal Council*.¹¹⁸ *Lucas* addressed the constitutionality of the South Carolina Beachfront Management Act (BMA) against a takings claim brought by a developer, Lucas.¹¹⁹ In a majority opinion authored by Justice Scalia, the Court held that the regulation tentatively¹²⁰ effected a compensable taking. Scalia began his opinion by invoking the familiar *Pennsylvania Coal* formulation of the regulatory

market failures, not exorbitant prices, are the cause of the consumer hardship problem that legislatures attempt to correct with price controls.

Mere historical acceptance does not, without more, measure constitutionality. If these traditional police power exercises can be accepted, then why not less traditional uses of the police power? See *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886 (1992) (developmental ban for beachfront property). Tradition does not justify traditional exercises of the police power. The policies behind the police power—regulation in the interests of health and general welfare—do. See *supra* note 11.

118. 112 S. Ct. 2886 (1992).

119. Lucas had purchased and developed shoreland on one of South Carolina's barrier islands in the late 1970s. As development of the property came to a profitable close, Lucas purchased two additional parcels nearby in 1986 for development of single-family residences. When Lucas made this purchase, these parcels were unencumbered by building restrictions under state environmental protection laws.

However, in 1988, the South Carolina legislature amended its coastal zone legislation with the BMA. The BMA prohibited construction of "occupiable improvements" near a line drawn parallel to the shore by the coastal council. *Id.* at 2889. Unfortunately for Lucas, his two parcels fell within the restricted property. Lucas immediately sought the aid of the courts, contending that although the BMA was a valid exercise of the state's police power, it had completely destroyed his investment in these parcels by prohibiting development. Lucas asserted that the state owed him compensation of \$1.2 million.

The trial court agreed with Lucas, finding that the developmental ban rendered his parcels "valueless." *Id.* at 2890. The South Carolina Supreme Court reversed, holding that in the absence of a challenge to the statute's purpose, which Lucas had already admitted as valid, the legislative findings that development threatened a public resource fended off a successful takings challenge. Relying on *Mugler v. Kansas*, 123 U.S. 623 (1887), discussed *infra* notes 187-99, the state supreme court reasoned that legislation directed at the prevention of public harm, like the BMA, constituted a valid exercise of the police power. As such, the BMA was valid under the Takings Clause even if the property's developmental value had been destroyed. The United States Supreme Court granted certiorari. *Lucas*, 112 S. Ct. at 436.

120. The Court's holding was qualified because the case was remanded to the state courts to determine whether "traditional" state property law allowed such regulation of land use. See *infra* notes 150-55 and accompanying text for a discussion of Justice Scalia's "traditional" rule.

takings doctrine¹²¹ and the equally familiar disclaimer by Justice Brennan that the Court recognizes no "set formula" in its takings decisions.¹²² But quickly enough, Justice Scalia continued his alteration of takings clause jurisprudence by announcing that the Court had formulated *two* categories of *per se* takings¹²³ that did not require a case specific inquiry to find a taking: permanent physical occupation authorized by the government as enunciated in *Loretto*, and the previously unrecognized category of government regulation that "denies all economically beneficial or productive use of land."¹²⁴

Scalia supported his creation of this new and unprecedented class of *per se* takings by referring to a landowner's "reasonable expectations" as "shaped by the state's law of property."¹²⁵ Thus, by merely referring to state property law, the Takings Clause may protect a landowner from regulations that eliminate economic value if the value eliminated inheres to an estate with "a rich tradition of protection at common law."¹²⁶ Such a rule circumvents the normal case-

121. "[I]f a regulation goes too far it will be recognized as a taking." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922). See also *supra* note 9 and accompanying text.

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

123. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), created a *per se* takings rule that the compensation requirement of the Takings Clause is automatically triggered when the government permanently physically invades private property. See *supra* notes 53-66 and accompanying text. Before *Lucas*, this was the only *per se* takings rule ever explicitly recognized by the Court.

124. *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886, 2893 (1992). This second category has never been categorized as a *per se* rule in the history of the Court's takings jurisprudence, although Chief Justice Rehnquist intimated in 1987 that he would create such a rule. See *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 517 (Rehnquist, C.J., dissenting) ("[T]here is no need for further analysis where the government by regulation extinguishes the whole bundle of rights in an identifiable segment of property.").

The formulation of such a rule has always presented difficulties because the destruction of the economic value of property lies in the eyes of the beholder. In other words, total deprivation of economic value depends upon how the relevant property is defined. The Court could characterize destruction of a one-acre lot of a hundred-acre parcel as either a one percent devaluation of the larger tract or a total deprivation of one acre. This definitional problem may account for the difference in the holdings in *Pennsylvania Coal*—where the Court found a total deprivation of a smaller estate, even though the landowner held more property, and *Keystone Bituminous*—where the Court regarded larger holdings as relevant. See also *Andrus v. Allard*, 444 U.S. 51 (1979) (holding that a regulation outlawing sale of endangered bird parts is not a taking because owners still retain right to possess and transport). Certainly, the extent that a regulation diminishes economic value is considered by the Court in the regulatory takings analysis, see, e.g., *Penn Central*, 438 U.S. at 124 (Court will consider the "economic impact of the regulation"), but this consideration never generated a category of automatic takings until *Lucas*. Even Scalia recognizes the problem inherent in such a rule. *Lucas*, 112 S. Ct. at 2894 n.7 ("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.").

125. *Id.*

126. *Id.*

by-case inquiry in takings cases.¹²⁷ Justice Scalia dispensed with this method of takings analysis by stating that when a regulation leaves no economic value in the property, the Court can summarily conclude that the regulation is not a valid exercise of the police power.¹²⁸ When regulation eliminates property's economic value, such regulation carries with it a presumptive purpose of "pressing" private property "into some form of public service under the guise of mitigating serious harm."¹²⁹ Scalia refused to recognize the fact that not only regulation that eliminates economic value may look like the impressment of private property for public service; most valid police power regulation also bears this look.¹³⁰

A more fundamental problem plagues Justice Scalia's new category in that the only value whose elimination bothered the Court in *Lucas* was economic value.¹³¹ The Court even decried regulation that forces landowners to submit to regulations that leave property "economically idle."¹³² With this statement, Scalia revealed his *Lochnerian* design for takings analysis. Land, and property more generally, has more than economic value, but only economic value receives the benefit of the Court's categorical rule.¹³³ Like the *Lochner* Court, the current Court, led by Justice Scalia, exalts economic development at the

127. See *supra* note 81 and accompanying text.

128. *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886, 2894 (1992).

129. *Id.* at 2895.

130. Another example of valid police power regulation that may fall into Justice Scalia's newly created category is zoning laws. Property owners displeased with their parcel's classification would undoubtedly fail with a takings challenge if they alleged a taking on the ground that their property had been impressed into public service. But Justice Scalia's opinion almost goes this far by asserting that an environmental protection regulation, like a zoning ordinance, applied similarly to all coastal property impresses into public service only that land most severely burdened by the neutral regulation.

131. James W. Sanderson & Ann Mesmer, *A Review of Regulatory Takings after Lucas*, 70 DENVER U. L. REV. 497, 505 n.2 (1993).

132. *Lucas*, 112 S. Ct. at 2895.

133. Justice Stevens, in dissent, criticizes the economic-use bias of the majority opinion. *Id.* at 2919 n.3 ("[T]he Court offers no basis for its assumption that the only uses of property cognizable under the Constitution are developmental uses."). Supporting economic productivity is not the proper role of the Court though, especially when this endeavor neglects other values property may have that may lend support to the legislation under attack.

In attempting to refute this assertion of a pro-development bias, Justice Scalia cited *Loretto* for the proposition that non-economic interests are also recognized under the Constitution. Fundamentally though, *Loretto* displays a similar concern for economic interests. Much of the *Loretto* decision turns on the right to exclude and how impairment of this right can have adverse consequences for a landowner in terms of the property's market and resale values. See *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 436 (1982). This economic slant is less troublesome in the context of *Loretto* because exclusivity, not development, is the central concern of the *per se* rule for physical invasions. This distinction between *Loretto* and *Lucas* comports with the intent of the framers in the Takings Clause. See *infra* notes 171-86.

expense of other valuable state interests.¹³⁴ Simply put, by not recognizing other non-economic value in the property, the Court can more easily find a taking and frustrate legislative initiatives.

Even with the development ban, Lucas's property had value: aesthetic and recreational value. In no realistic sense, except perhaps economically,¹³⁵ could the Court state that Lucas had been deprived of all beneficial use of his property. Calling the extinguishment of the right to develop property a complete destruction of property value not only belittled beneficial uses that remained in the property but also implicated a fee interest comprised of only a single stick—developmental rights—not a bundle of rights.

Aside from trivializing the beneficial uses remaining in Lucas's property, Justice Scalia's opinion also trivialized the state's interest in promulgating the BMA. Scalia characterized this statute as an effort to maintain an aesthetically pleasing shoreline.¹³⁶ While this characterization comports with some of the legislative findings,¹³⁷ the legislature also explicitly found that the BMA would "protect life and property by serving as a storm barrier," as well as preventing further property damage caused by erosion due to more intense development.¹³⁸ These findings would seem to put the BMA within the class of traditional police power regulations, like the regulation in *Keystone Bituminous Coal Ass'n v. DeBenedictis*,¹³⁹ that the Court had generally upheld, rather than in a class with the development condition in *Nollan*.¹⁴⁰ The Court obviously disagreed. Although the state supreme court found that the BMA was a valid exercise of the police power, the United States Supreme Court held not only that the state court was mistaken, but also that the route taken by the state court to reach its decision—due process analysis of police power regulations affecting land use—was wrong.

The state supreme court based its holding upon *Mugler v. Kansas*.¹⁴¹ *Mugler* had held that any exercise of the police power was consonant with the Takings Clause and that no exercise of the police power could warrant

134. See *supra* note 3.

135. Even this proposition can be disputed. Though the developmental ban prohibited the construction of occupiable improvements, Lucas's property, if local zoning so allowed, could turn a profit as a seasonal restaurant, a non-residential beach club, or a private nature preserve.

136. *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886, 2896 (1992).

137. *Id.* at 2896 n.10.

138. *Id.*

139. 480 U.S. 470 (1987). In *Keystone Bituminous*, the Court upheld the Subsistence Act, which was designed to prevent coal companies from mining under inhabited structures and thereby endangering life and property.

140. 483 U.S. 825 (1987). See *supra* notes 84-85 and accompanying text.

141. 123 U.S. 623 (1887). See also *infra* notes 187-99 and accompanying text.

compensation. Justice Scalia's opinion characterized *Mugler* as resting upon the noxious use doctrine,¹⁴² which held that exercises of the police power to enjoin nuisance-like activity did not violate the Takings Clause. Then the Court discarded *Mugler* to the dustbin of out-moded legal principles,¹⁴³ and in its wake reintroduced the heightened scrutiny of *Nollan*.¹⁴⁴ Scalia characterized the noxious use doctrine as merely a precursor to the "substantially advances" test of *Agins*,¹⁴⁵ as modified by *Nollan*.¹⁴⁶ Because noxious uses cause the harm addressed by regulation, these cases would pass stricter constitutional scrutiny.¹⁴⁷ The problem with raising this review standard in *Lucas* was that Justice Scalia refused to agree with the state court's finding that the BMA was designed to prevent the harm caused by beachfront development.¹⁴⁸ As such, the state interest in the BMA was not great enough to pass the *Nollan* test.

After eschewing the noxious use doctrine and the harm/benefit distinction,¹⁴⁹ Justice Scalia introduced a modification of the Court's new

142. See, e.g., *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962) (regulation enjoining gravel mining in a residential neighborhood does not cause a compensable taking); *Miller v. Schoene*, 276 U.S. 272 (1928) (state regulation mandating destruction of cedar trees to protect apple trees does not effect a taking). In *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 134 n.30 (1978), Justice Brennan broadened the scope of these cases by asserting that their holdings did not merely allow injunctive relief from harmful land uses, but rather encouraged legislation that adjusted private beneficial activity with public burdens.

143. In other words, *Mugler* joined cases like *Pennoy v. Neff*, 95 U.S. 714 (1877) (invalidating territorial theory of personal jurisdiction), *Plessy v. Ferguson*, 163 U.S. 537 (1896) (holding that separate-but-equal public facilities for minorities satisfies Equal Protection Clause), *Hammer v. Dagenhart*, 247 U.S. 251 (1918) (holding that manufacturing cannot be regulated under Commerce Clause), and of course, the case that Justice Scalia discreetly embraces, *Lochner v. New York*, 198 U.S. 45 (1902) (economic due process).

144. See *supra* notes 84-104 and accompanying text.

145. See *supra* notes 93-94 and accompanying text.

146. *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886, 2897 (1992).

147. See *supra* notes 84-117 for a discussion of stricter scrutiny.

148. The characterization of the BMA as non-harm-preventing is only instructive for the result it yields under the *Nollan* standard. Under *Nollan*, those exercises of the police power formerly understood as harm-preventing will more likely be non-compensable because they pass the means/ends scrutiny. Justice Scalia, throughout much of the *Lucas* opinion, eschews the harm/benefit distinction because the Court could consider any regulation as either harm-preventing or benefit-conferring. *Lucas*, 112 S. Ct. at 2898. The regulation in *Lucas* itself could be termed as either preventing harm to persons and property caused by beach erosion, or as conferring a benefit to the public by preserving beaches. Such a characterization "depends primarily upon one's evaluation of the worth of competing uses of real estate." *Id.* That such a statement came from Justice Scalia is ironic considering his rather myopic view of the valuable use of property. *Id.* at 2895. See *supra* notes 131-35 and accompanying text.

At any rate, Scalia's refusal to follow state legislative findings violates the principle of deference to state lawmakers inherent in the Court's takings jurisprudence. See, e.g., *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987).

149. See *supra* note 142.

categorical rule: Regulations that deprive a landowner of all economically beneficial use avoid a successful takings challenge only if the uses prohibited by the regulations did not attach to the landowner's title under state property law.¹⁵⁰ Newly legislated regulations of property that restrict all economically beneficial uses generally cannot stand in the face of the Takings Clause because such restrictions generally do not derive solely from state property or nuisance law.¹⁵¹ A regulation that completely destroys the economic value of property must merely duplicate the result of nuisance adjudication under state common law.¹⁵² Because Lucas's property would probably not have been burdened by a developmental ban to prevent shoreline erosion at common law, the BMA failed under the Court's new rule.

The Court's holding, with the new categorical rule thus modified, freezes state property rights at common law and constitutionalizes them,¹⁵³ leaving very little room for innovative legislators to regulate property for fear that a regulation would extinguish too much property value, triggering the compensation requirement.¹⁵⁴ This new rule exalts common law property rights and holds them immune from legislative readjustments. A similar rule—not about property rights, but about contract rights—began the *Lochner* era.¹⁵⁵

150. *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886, 2899 (1992).

151. *Id.* at 2900.

152. *Id.*

153. See *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 455 (1982) (Blackmun, J., dissenting) (freezing common law rights as immune from regulatory revision represents a return to *Lochner*; legislatures must be allowed room for "change in response to changes in circumstance") (citing *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 93 (1980) (Marshall, J., concurring)); *supra* note 66. See also *Lucas*, 112 S. Ct. at 2921 (Stevens, J., dissenting):

Arresting the development of the common law is not only a departure from our prior decisions; it is also profoundly unwise. The human condition is one of constant learning and evolution—both moral and practical. Legislatures implement that new learning; in doing so they must often revise the definition of property and the rights of property owners.

Id.

154. This problem is particularly serious in light of the different definitions of property that courts may adopt. See *supra* note 124 and accompanying text. See also *Lucas*, 112 S. Ct. at 2913 (Blackmun, J., dissenting):

[W]hether the owner has been deprived of all economic value of his property will depend on [sic] how "property" is defined. . . . "We have long understood that any land-use regulation can be characterized as the 'total' deprivation of an aptly defined entitlement. . . . Alternatively, the same regulation can always be characterized a 'partial' withdrawal from full, unencumbered ownership of the landholding affected by the regulation"

155. See *supra* note 3 and accompanying text.

Justice Kennedy, concurring in the Court's judgment, would not have gone to this extreme to find a taking: "The takings clause does not require a static body of state property law."¹⁵⁶ Instead, Justice Kennedy recognized that while state property and nuisance principles provide the source of most landowners' expectations when investing, the government still maintains some residual authority to change these expectations.¹⁵⁷ Justice Kennedy would have found a taking on the basis that the BMA frustrated Lucas's reasonable, investment-backed expectations.¹⁵⁸

In dissent, Justice Blackmun disagreed with nearly every point made in the course of Justice Scalia's majority opinion. Justice Blackmun would have characterized the BMA as a statute addressed to preventing personal injuries, as well as property damage,¹⁵⁹ and ultimately would have found that no taking had occurred because the BMA had not totally deprived Lucas's property of economic value. Justice Blackmun went further by stating that the Court had repeatedly upheld regulations that destroy real property interests¹⁶⁰ and had never conditioned state regulation under the police power upon leaving "some residual available use" in the regulated property.¹⁶¹ He also targeted the major weakness of Justice Scalia's opinion. Although Justice Scalia rejected the noxious use doctrine as allegedly susceptible to manipulation,¹⁶² he replaced it with his common law rule that suffered from the same problem on two levels, only one of which Justice Blackmun addressed.

First, the development of state common law involved the same kind of decisions about noxious uses, harms, and benefits that Justice Scalia found so troublesome. As Justice Blackmun phrases this criticism:

There is nothing magical in the reasoning of judges long dead. They determined a harm in the same way as state judges and legislatures do today. If judges in the 18th and 19th centuries can distinguish a harm from a benefit, why not judges in the 20th century, and if judges, why

156. *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886, 2903 (1992).

157. *Id.*

158. *See Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978) (holding that investment-backed expectations are a consideration for the Court's regulatory takings analysis). *Lucas* would seem to fall within the *Penn Central* holding on investment-backed expectations that weighed against finding a taking. In *Penn Central*, the landmark preservation law was enacted after the landowners had already held their property for some time, and in *Lucas* the landowner had similarly held his purchased property before the BMA went into effect.

159. *See also Lucas*, 112 S. Ct. at 2925 (Stevens, J., dissenting).

160. *See Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 489 n.18, and cases cited therein.

161. *Lucas*, 112 S. Ct. at 2912.

162. *Id.* at 2898. *See supra* note 142.

not legislatures?¹⁶³

Second, by the simple choice of the common law as the definitive source of legislative abilities and limitations to enact regulations, Justice Scalia demonstrated his own "evaluation of the worth of competing uses of real estate."¹⁶⁴ At common law, the fee simple was relatively free of regulatory encumbrances. Reliance on the common law as the source for legislative initiatives under the police power limits twentieth-century government to nineteenth-century law when regulation in the public interest may be desperately more necessary today. Justice Scalia advocated from the bench, *sub silentio*, an unregulated fee simple, and therefore developmental rights, at the expense of legislative efficacy, even while he purported to adhere to an expanded view of the police power.¹⁶⁵

In *Nollan*, Justice Scalia invoked the spirit of *Lochner* by reifying an abandoned level of judicial scrutiny for government regulation not impeding fundamental personal rights.¹⁶⁶ In *Lucas*, Justice Scalia embraced the corpse of *Lochner* by legislating *laissez faire* economic development from the bench.

IV. SEEING *LOCHNER*'S GHOST IN SCALIA'S TAKINGS JURISPRUDENCE AND SEEING THE LIGHT IN *MUGLER*: A NEW TAKINGS ANALYSIS PROPOSED

With the threat of *Lochnerian* scrutiny looming over the Supreme Court's regulatory takings doctrine, Justice Scalia has at least given a direction to the Court's confused takings jurisprudence. No longer the "ragpicker's coat"¹⁶⁷ it seemed, the takings mantel once worn by Justice Holmes now resembles the haunting, dusty robe that the Court has not dared to touch since 1937.¹⁶⁸ Is

163. *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886, 2914 (1992). Justice Scalia's opinion in *Lucas* suggests that courts, in applying the common law, are better suited than legislatures, in applying their electoral mandate, to decide when compensation is required. David Coursen, *Lucas v. South Carolina Coastal Council: Indirection in the Evolution of Takings Law*, 22 ENVTL. L. REV. 10778, 10784 (1992). The *Lucas* common law approach is a tautology: no takings occur when the legislature prohibits that which is already prohibited. John A. Humbach, *What's Behind the "Property Rights" Debate?*, 10 PACE ENVTL. L. REV. 21, 32 (1992). N.b., Justice Blackmun in his dissent did not advocate a return to the harm/benefit distinction. Rather he believed that the scope of the police power extended beyond the mere prevention of harms. See *Lucas*, 112 S. Ct. at 2912 n.13.

164. *Lucas*, 112 S. Ct. at 2898.

165. *Id.* at 2897.

166. See *supra* note 23 and accompanying text for a discussion of the role of personal liberties in the modern constitutional scheme and their relation to the proper standard of judicial review.

167. See generally Stoebe, *supra* note 11.

168. See *supra* note 5. The 1937 decision of *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937), is generally considered the death knell of the *Lochner* era.

Lochner's apparent resurrection necessarily wrong?¹⁶⁹ Does strict scrutiny of regulatory legislation really work the evils that Holmes foresaw in his *Lochner* dissent?¹⁷⁰ Are the challenges facing legislatures in the 1990s really so novel and daunting that deference should be given to new legislative initiatives? Emphatically, yes.

A. *The Lessons of History: Judicial Scrutiny of Land Use Regulations—Originalism, the Nineteenth Century, and Justice Holmes*

Strict scrutiny under the Takings Clause is misplaced because judicial arrogance for the legislature was not intended by the framers.¹⁷¹ When the Bill of Rights was proposed, legislatures, especially in the states, exercised broad powers over the property under their domain.¹⁷² The principle of Just Compensation¹⁷³ was veritably unknown to most legislatures. Landowners held their parcels at the will of the sovereign, subject to any regulation the sovereign deemed appropriate.¹⁷⁴ This sacrifice of private property for the advantage of society served as a central tenet of the political ideology in the late eighteenth century.¹⁷⁵ But also central to the American revolutionary struggle and to the foundation of the American constitutional system stood a deep distrust

169. Professor Norman Karlin seems to think *Lochner's* revival is a step in the right direction to provide "corrective justice." See Karlin, *supra* note 24, at 671.

170. See *supra* note 2 and accompanying text.

171. See generally William Michael Treanor, Note, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 YALE L.J. 694 (1985); Sax, *supra* note 11; and Stoebe, *supra* note 11.

172. Treanor, *supra* note 171, at 695. In fact, none of the states even proposed adding the Takings Clause to the original Bill of Rights. Kmiec, *supra* note 35, at 367. This lack of concern regarding compensation evinced by the states may be attributed to either an understanding by the states their regulatory power over property was nearly total, or, as Professor Kmiec posits, a belief by the states that natural law provided sufficient protection of property rights. *Id.*

Kmiec's argument fails to address the fact that only formal exercises of the eminent domain power triggered compensation under the Takings Clause as eventually proposed. Stoebe, *supra* note 11, at 583. Perhaps Kmiec sees the regulatory takings doctrine as a natural law response to the development of the active regulatory state. But if a property right has no basis in history, i.e., if landowners have no historically recognized right to be free from regulatory encumbrances upon their property, even Justice Scalia would hold that the right should not be recognized. See *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886 (1992).

173. It has been written:

The fifth and fourteenth amendments require that a person receive "just compensation" for property that has been taken by the state or federal government. The Supreme Court has said that the constitutional guarantee of just compensation is not a limitation in the power of eminent domain, but only a condition of its exercise.

NOWAK & ROTUNDA, *supra* note 9, § 11.14, at 447 (citing *Long Island Water-Supply Co. v. Brooklyn*, 166 U.S. 685, 689 (1897)).

174. Treanor, *supra* note 171, at 797.

175. *Id.* at 699.

of governmental power and the celebration of the individual.¹⁷⁶

The Constitution's chief architect, James Madison, embodied this desire to protect the individual from the grabbing hands of government.¹⁷⁷ Madison authored the Fifth Amendment, and as originally drafted, the Takings Clause applied only to a "direct physical taking [of an individual's private property] by the federal government."¹⁷⁸ The clause extended only to exercises of the power of eminent domain, in which government formally condemned private property for the greater good of the polity.¹⁷⁹ Even with different language as adopted, the Takings Clause did not contemplate less-noticeable appropriations of property rights. In fact, with the history surrounding the adoption of the Fifth Amendment, the framers would have likely balked at the concept of a regulatory taking.¹⁸⁰ While the government could not physically appropriate private property without compensation, mere regulation of the use of property could not, in any concrete sense, be termed an appropriation for public use, and thus would require no compensation.¹⁸¹ Such regulation was the cost of living under a government of laws.¹⁸²

Of course, the framers would have held beyond a cavil the notion that landowners could not have their property rights changed by legislation arbitrarily, nor could landowners be singled out for property regulation arbitrarily.¹⁸³ To prevent these possibilities of legislative abuse of private property, landowners retained protection from the dual sentinels of the Due Process Clause and, eventually, the Equal Protection Clause.¹⁸⁴ Accepting this

176. *Id.* at 701.

177. *Id.* at 694, 708.

178. Treanor, *supra* note 171, at 711.

179. Professor Joseph L. Sax would characterize the function of the Takings Clause as "preventing arbitrary government action, rather than preserving the economic status quo." Sax, *supra* note 11, at 58.

180. See BOSSELMAN ET AL., *supra* note 76, at 104 (stating that the framers of the Takings Clause were unconcerned with regulatory takings). See also John M. Walker, *Common Law Rules and Land Use Regulations: Lucas and Future Takings Jurisprudence*, 3 SETON HALL CONST. L.J. 1, 5 n.9 (1993).

181. Madison believed that "property" was a creature of positive law. As such, proprietary rights depended upon government enactments for their very existence, despite the recognized need for their protection. See Treanor, *supra* note 171, at 710 n.87, and accompanying text. Presumably, if property rights arose only at the behest of government, the government could change the nature of property rights through regulation without directly altering an individual's entitlement to compensation for these rights if the government physically appropriated private property. See also *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886, 2915 (1992) (Blackmun, J., dissenting) ("[I]ndividual and consequential injuries to property resulting from regulation were excluded from the definition of a taking.").

182. Treanor, *supra* note 171, at 701.

183. See Sax, *supra* note 11, at 58.

184. See *supra* note 8.

original understanding of the Takings Clause and the nearly universal acceptance of land-use regulation by the framers, Justice Scalia's heightened scrutiny in the context of regulatory takings¹⁸⁵ seems like a noble gesture in the name of individualism. However, this approach to takings is clearly misguided and violates the separation of powers doctrine inherent in the Constitution.¹⁸⁶

Case law construing the Fifth Amendment in the nineteenth century applied a deferential due process standard to review land-use regulation,¹⁸⁷ not the heightened scrutiny of the current Court's nexus requirement. In the nineteenth century, as long as an exercise of the police power comported with due process, the regulation passed constitutional muster.¹⁸⁸ The police power served as a mechanism to govern the affairs of citizens toward each other. If in regulating these affairs, the government adversely affected private property, property owners had no recourse in compensation.¹⁸⁹

Much of this broad police power concept derived from the concept of sovereignty; a government had the power to govern its citizens and their property. The police power inhered to the very existence of government.¹⁹⁰ If the government owed compensation for merely exercising its power to govern, the whole idea of organized government would ring very hollow.¹⁹¹ As recognized by the Supreme Court in *Munn v. Illinois*:

Rights of property that have been created by the common law cannot be taken away without due process; but the law itself, as a rule of conduct, may be changed at the will, or even at the whim of the

185. Coming from an adherent of originalism, Justice Scalia's conscious ignorance of the framers' intent seems suspicious. See generally Hon. Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1989) (containing a general discussion of Justice Scalia's views on the framers' intent).

186. The separation of powers doctrine is not expressly stated in the Constitution. Instead, separation of powers is implied by the Vesting Clauses of Articles I, II, and III. See U.S. CONST. art. I, § 1; U.S. CONST. art. II, § 1; U.S. CONST. art. III, § 1.

187. See, e.g., *Mugler v. Kansas*, 123 U.S. 623 (1887); *Munn v. Illinois*, 94 U.S. 113 (1877). Even the later *Legal Tender Cases*, 179 U.S. 457, 551 (1890), held that indirect injury resulting from police power regulations would not trigger the Takings Clause because only direct physical appropriation could become a taking.

188. Patrick C. McGinley, *Regulatory "Takings": The Remarkable Resurrection of Economic Substantive Due Process in Constitutional Law*, 17 ENVTL. L. REV. 10369, 10371-72 (1987).

189. *Munn*, 94 U.S. at 113.

190. McGinley, *supra* note 188, at 10371.

191. Even Justice Holmes recognized this. See *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922) ("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."). The only limits Holmes envisioned for the police power were those dictated by the Due Process Clause. *Id.* See also *infra* notes 201-17.

legislature We know that this is a power which may be abused; but that is no argument against its existence. For protection against abuses by legislatures the people must resort to the polls, not the courts.¹⁹²

Unambiguously, this statement conflicts with the very existence of the regulatory takings doctrine, and weighs even stronger against strict scrutiny for regulatory takings.

Until *Pennsylvania Coal, Mugler v. Kansas*¹⁹³ was regularly cited for the proposition that the government need not compensate landowners for exercises of the police power that adversely affected property value.¹⁹⁴ Regulating property in the public interest did not entail any of the risks of arbitrary seizure of private property from innocent landowners, and thus did not implicate the Takings Clause. The power of legislatures to guard the public interest gave the public no recourse to the courts when this power affected individual property rights. Part of living under the American governmental system entailed encumbrances on the use of public property¹⁹⁵ for the common good.

Eventually, the Court found this view of the police power incompatible with the development of the burgeoning American corporate economy.¹⁹⁶ Instead

192. *Munn v. Illinois*, 94 U.S. 113, 135 (1887).

193. 123 U.S. 623 (1887).

194. In invalidating a state statute that prohibited the sale of liquor and enjoined the operation of businesses manufacturing liquor, the Court held that

[a] prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed an appropriation of property for the public benefit. . . . The power which states have of prohibiting such use by individuals of their property as will be prejudicial to the health, the morals, or the safety of the public, is not—and, consistent with the existence and safety of organized society, cannot be—burdened with the condition that the state must compensate such individual owners for pecuniary losses they may suffer

Id. at 668-69.

195. Some legal scholars argue that *Mugler* threatened to read the Takings Clause out of the Constitution. See, e.g., Nathaniel S. Lawrence, *Means, Motives, and Takings: The Nexus Test of Nollan v. California Coastal Commission*, 12 HARV. ENVTL. L. REV. 231 (1988). This claim exaggerates *Mugler*. *Mugler* still recognized the Takings Clause for what it undoubtedly proposed to do—prevent uncompensated physical appropriation by the government. The difference between exercises of the police power and the taking of private property that *Mugler* recognized was the difference between government as “prohibitor” and government as “proprietor.” Sax, *supra* note 11, at 39.

196. McGinley, *supra* note 188, at 10373 (1987). See also Sax, *supra* note 11, at 40 (noting that as the scope of regulation grew, so did the perceived detrimental effects on previously unrestrained productive use of property); Lawrence, *supra* note 195, at 235 (seeing *Mugler* as a threat to economic development because landowners were not given sufficient consideration). See

of creating a doctrine of regulatory takings to protect private property, the Court abided by the *Mugler* due process approach to limiting the police power.¹⁹⁷ However, the Court heightened the scrutiny under due process when applied to police power regulations. This new due process scrutiny, intended to protect businesses' proprietary interests, no longer deferred to the will of the legislature.¹⁹⁸ With the veil of presumptive legislative validity for police power regulations pierced, the *Lochner* period began.¹⁹⁹ *Lochner's* failing was the intense scrutiny applied by the Court to invalidate legislation under which the public interest asserted by the legislature could not reach the level of protection afforded to private economic rights.²⁰⁰ The return to such scrutiny, albeit in the form of regulatory takings analysis, suffers from the same problems as economic due process analysis: *Lochner* by any other name—even *Nollan* or *Lucas*—still smells as foul.

Even Justice Holmes, in formulating his "too far" test,²⁰¹ did not mean to create the regulatory takings doctrine. Rather, Holmes intended to create a deferential due process alternative to economic due process.²⁰² Well aware of the dangers of economic due process,²⁰³ Holmes was faced with a dilemma in *Pennsylvania Coal*. While he believed in preserving the role of legislatures to enact police power measures,²⁰⁴ he also felt that on the facts before the Court,

generally Steven Siegal, *Understanding the Lochner Era: Lessons from the Controversy over Railroad and Utility Rate Regulation*, 70 VA. L. REV. 187 (1984) (explaining the background of the economic development that yielded the *Lochner* period); Robert A. Williams, *Legal Discourse, Social Vision and the Supreme Court's Land Use Planning Law: The Genealogy of the Lochnerian Recurrence in First English Lutheran Church and Nollan*, 59 U. COLO. L. REV. 427 (1988) (criticizing *Lochner's* social vision of property as a fundamental right).

197. Lawrence, *supra* note 195, at 234-35 (stating that vigorous economic due process replaced more relaxed substantive due process).

198. See *supra* note 3 and cases cited therein.

199. McGinley, *supra* note 188, at 10373. The problem with *Lochner* rested not in the simple fact that the Court employed due process analysis. Due process was, and still is, the proper measure of the constitutional validity of land-use regulations. See *Duke Power Co. v. Carolina Envtl. Study*, 348 U.S. 59, 84 (1978) (Due Process Clause seeks to limit arbitrary government interference with individual property interests, but reviewing courts should give great degree of deference to legislation). See generally Rosalie Berger Levinson, *Protection against Government Abuse of Power: Has the Court Taken the Substance out of Substantive Due Process*, 16 U. DAYTON L. REV. 313 (1991) for a thoughtful examination of current standards under, and a call for the reemergence of, the Due Process Clause.

200. See *supra* note 3.

201. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922). See also *supra* note 9 and accompanying text.

202. Cotton C. Harness, III, *Lucas v. South Carolina Coastal Council: Its Historic Context and Shifting Constitutional Principles*, 10 PACE ENVTL. L. REV. 5, 12 (1992).

203. See *supra* note 2 and accompanying text.

204. McGinley, *supra* note 188, at 10375.

the state legislature had overstepped its bounds.²⁰⁵ To avoid the hypocrisy of criticizing *Lochner*, but nonetheless using due process analysis to invalidate a state law, Holmes phrased the law's invalidation in terms of a "taking."²⁰⁶ But this reference to a taking did not invoke the Takings Clause. Holmes meant that if a regulation went "too far" it would resemble a taking, but would in reality be a violation of the Due Process Clause, not an exercise of the eminent domain power.²⁰⁷

This nearly universal misreading of *Pennsylvania Coal* fails to recognize that Holmes used the term "taking" in a metaphorical, not a Fifth Amendment, sense.²⁰⁸ Legal scholars generally read *Pennsylvania Coal* to propose that the police power and the eminent domain power differ only in degree.²⁰⁹ Scholars appear to understand *Pennsylvania Coal* to hold that when an exercise of the police power goes "too far," a compensable taking occurs because the due process violation melds into a taking claim, triggering the just compensation requirement.²¹⁰

205. *Pennsylvania Coal*, 260 U.S. at 413.

206. *Id.* at 415.

207. See McGinley, *supra* note 188, at 10374. See also Charles Siemon, *Of Regulatory Takings and Other Myths*, 1 J. LAND USE & ENVT'L. L. 105, 110 (1985); Jeffrey T. Haley, Note, *Balancing Private Loss against Public Gain to Test for a Violation of Due Process or a Taking without Just Compensation*, 54 WASH. L. REV. 315, 329 (1979). *Contra generally*, Frank J. Strong, *On Placing Property Due Process Center Stage in Takings Jurisprudence*, 49 OHIO ST. L.J. 591 (1988). Professor Strong posits that Justice Holmes intended to invoke the Takings Clause, and to use the Due Process Clause as a gauge to determine when the government owed compensation, i.e., taking without due process of law. This characterization confuses the two distinct clauses. The Takings Clause serves to compel government payment for exercises of the eminent domain power, while the Due Process Clause, in its substantive element, serves to circumscribe government power by preventing arbitrary government interference generally with fundamental rights, and specifically with property rights.

208. Charles L. Siemon and Wendy L. Larsen, *The Taking Issue Trilogy: The Beginning of the End?*, 33 J. URB. & CONTEMP. L. 169, 199 (1988). The New York Court of Appeals cogently expressed this view in *Fred F. French Inv. Co. v. City of New York*, 350 N.E.2d 381 (N.Y. 1976). In finding that no taking had occurred under a municipal zoning ordinance, the court stated:

True, many cases have equated an invalid exercise of the regulating . . . power, perhaps only metaphorically, with a "taking" or a "confiscation" of property, terminology appropriate to the eminent domain power and the concomitant right to compensation when it is exercised. . . .

The metaphor should not be confused with the reality. Close examination of the cases reveals that in none of them, any more than in the *Pennsylvania Coal* case . . . , was there an actual "taking" under the eminent domain power, despite the use of the terms "taking" or "confiscatory." Instead, in each the gravamen of the constitutional challenge to the regulatory measure was that it was an invalid exercise of the police power under the due process clause

Id. at 385.

209. Siemon, *supra* note 207, at 111.

210. See, e.g., Strong, *supra* note 207.

Justice Holmes did not intend this understanding to proliferate.²¹¹ Instead, he simply meant that when police power regulations went "too far" and deprived landowners of their property's value, the Due Process Clause was violated.²¹² An overly intrusive regulation would make the burden of the regulation on the landowner unfair, and therefore, the legislature could only maintain the legislation by paying the landowner for this unfairness.²¹³ Tellingly, while engaged in his due process *qua* takings inquiry, Holmes did not engage in the searching scrutiny his brethren employed under economic due process. Holmes used rational scrutiny to invalidate the Kohler Act in *Pennsylvania Coal*.²¹⁴

For such universally cited precedent in the regulatory takings arena, *Pennsylvania Coal* has been misinterpreted by the Court and legal scholars alike. Upon closer scrutiny of Justice Holmes's message, Justice Scalia's takings jurisprudence, developed in *Nollan*²¹⁵ and *Lucas*,²¹⁶ looks precisely like the Lochnerian analysis of land-use regulations that Justice Holmes had tried to avoid.²¹⁷

B. The Lessons of Theory: A New Approach to Regulatory Takings from Old Judicial Concepts

The central issue in the debate over the propriety of the current Court's regulatory takings doctrine is nothing less than the role of property in the American constitutional system.²¹⁸ Professor Carol M. Rose characterizes this debate as the fundamental conflict between the two divergent property theories

211. Siemon & Larsen, *supra* note 208, at 199.

212. McGinley, *supra* note 188, at 10375.

213. Sax, *supra* note 11, at 141. The due process violation could be remedied by paying landowners for what they had been deprived under the regulation. McGinley, *supra* note 188, at 10375. This payment, to avoid confusion with payments made by the government under the Takings Clause, should be characterized as payment for a due process violation—almost a legislative fine paid to the landowner to revalidate the regulation.

214. Though Holmes never expressly refers to a review standard, some of his language, as well as the general tenor of the *Pennsylvania Coal* opinion, indicate that Holmes did not require a strict means/end nexus between the Kohler Act and the subsistence problem. See *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 412, 416 (1922).

215. See *supra* notes 84-104 and accompanying text.

216. See *supra* notes 118-65 and accompanying text.

217. See McGinley, *supra* note 188, at 10375: "Given Holmes' serious and deeply rooted objections to the Court's open-ended use of substantive due process to attack police power regulations, it is apparent that the Justice was articulating what he believed to be a viable alternative to Lochnerian analysis" *Id.*

218. See generally Humbach, *supra* note 163, at 21.

that have contributed to American law,²¹⁹ the battle between individual rights in property and civic responsibility through property.²²⁰ The individual rights theory considers private property as the definition, and acquisition of property as evidence, of individual freedom.²²¹ As such, individual-rights-in-property advocates would likely find government regulation of property as unwarranted and even disturbing. If individuals are identified by their property, then regulation of property is regulation of individuals. Government, by prescribing the uses to which private property may be put, essentially defines individuals lives, or at least circumscribes individual rights so severely as to make life little more than what the government dictates.

Further, individual rights adherents would decry the differentiation of personal and proprietary rights²²² under the Constitution, as construed by the Court.²²³ Therefore, they would conclude that personal and property rights should be afforded at least similar constitutional protections through heightened judicial review standards in the Supreme Court. If strict scrutiny guards against infringements upon personal liberties, property regulations should be afforded similar judicial attention.

By setting property on a pedestal free from governmental regulation, the individual rights ideology can be characterized as anti-redistributive. The government should rarely address problems of the property-less, and of the public in general. When absolutely necessary to face these problems, the government should employ revenue legislation, under which the members of the

219. See generally Carol M. Rose, *Mahon Reconstructed: Why the Takings Issue Is Still a Muddle*, 57 S. CAL. L. REV. 561 (1984).

220. The discussion here uses Rose's article as merely a springboard. Though Rose would characterize the conflict as between the Benthamite and the Aristotelian property traditions, between virtue and wealth, see Rose, *supra* note 219, at 587-88, this note will label the conflict as between the role of government in private property as envisaged by two schools of thought prevalent in the early years of the American Constitution: Liberalism—rights in property exist prior to the establishment of the sovereign power and individuals have the right to dispense with their property to advance their own self-interests, and Republicanism—rights in property are held of the sovereign's will by individuals for the benefit of the polity. See generally, Morton J. Horwitz, *Republicanism and Liberalism in American Constitutional Thought*, 29 WM. & MARY L. REV. 57 (1987). These stereotypes as described are exaggerated. Most Americans would accept some ideas from both extremes. The discussion of these stereotypes and their application to the Takings Clause is speculative and serves only pedagogical purposes.

221. See Karlin, *supra* note 24, at 637; Levitt, *supra* note 13, at 199 (stating that property defines the individual's sphere of sovereignty). See also Charles A. Reich, *The New Property*, 73 YALE L.J. 733, 737 (1964).

222. For example, an individual rights supporter might conclude that the right to privacy is relatively worthless without property in which to enjoy this right.

223. This differentiation is generally attributed to *United States v. Carolene Products*, 304 U.S. 144 (1938). See *supra* note 24 and accompanying text.

polity shoulder the burden relatively equally.²²⁴ Individuals should be secure in their property ownership. After all, individuals have individually acquired their property; fairness only dictates that any deprivation of the bounties of the individual effort should be roughly equal among individuals. Simply put, under the individual rights theory, seeing property go to the "taxman," along with the property of everyone else, does not raise the same concerns as seeing property go to the "Congressman" through a regulatory taking in debatably less equitable circumstances.

The individual rights ideology forms the central tenet of *Lochner's* assault on government regulation.²²⁵ Individuals, or corporations, should not be forced to single-handedly bear the costs imposed by overly ambitious legislatures. This discussion of individual rights should start to sound familiar, or at least applicable, to the current Court's regulatory takings jurisprudence. What Justice Scalia is attempting to do with the Takings Clause is exactly what his predecessors on the *Lochner* Court were trying to do with the Due Process Clause. Initially, this approach is appealing, familiar, and perhaps strongly supported by the constitutional doctrine that American government is limited government.²²⁶

224. Alfred P. Levitt, Comment, *Taking on a New Approach: The Rehnquist-Scalia Approach to Regulatory Takings*, 66 TEMP. L.Q. 197, 200 n.5 (1993).

By contrast, the function of the eminent domain power—government seizure of private property for public use—has a distinctly redistributive quality to it. Government acquires, after compensation, private property for the use of both rich and poor. But the benefits of such acquisition flow proportionately greater to the poor who could not afford to buy the condemned property themselves. Additionally, the compensation paid for the property comes from government-imposed revenue measures, the burden of which is borne most heavily by the rich. Treanor, *supra* note 171, at 711 (citing Madison biographer Irving Brant). Yet, although government "adjust[s] the benefits and burdens of economic life," Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978), through eminent domain, fairness also dictates that compensation should be paid to those who directly transfer property to the government for public use. See Michelman, *supra* note 21, at 1184 ("The one incontestable case for compensation . . . seems to occur when the government deliberately brings it about that its agents, or the public at large, 'regularly' use, or 'permanently' occupy, space . . . understood to be under private ownership."); see also *supra* notes 53-66. Even the rich as a class is still comprised of individuals, with individual rights—namely, title—in private property that had been lost to the government, and thus deserve compensation.

225. Though the underlying issue in *Lochner* and its progeny was the ability of corporate interests to maintain wealth in the face of government labor regulation, wealth translates here to property rights.

226. See also Richard A. Epstein, *Takings: Descent and Resurrection*, 1987 SUP. CT. REV. 1, 2-3 (stating that the Takings Clause constrains government in a system of limited powers). This assertion is particularly true of the federal government. The Court has held that federal legislation must be based upon specific powers granted to Congress in the Constitution. See *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819). Cf. U.S. CONST. amend. X: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or the people." A similar limitation on state power, though admittedly not as explicit due to the fact that state government has broader regulatory powers under the police power, appears

The alternative theory that has contributed to American property law is that of civic responsibility through property. Civic responsibility advocates do not equate individuals with their property; rather, individuals equate with their government. As contributors to government, individuals have a duty and an interest in promoting the government's function of providing for the public weal.²²⁷ Under this theory, an individual contributes property for the welfare of others; in exchange for this sacrifice, individuals receive the largesse of the government to which they contributed.²²⁸

Additionally, as contributors to government, individuals can dictate, through their surrogates inside government, what really promotes the public interest and what interests the government should pursue.²²⁹ To civic-responsibility-through-property advocates, the will of the majority through the legislature is paramount in determining whether a regulation is acceptable; if the regulation is rational, burdened landowners should resort to the legislature, not the courts, for change. The civic responsibility theory would find deference to the will of the polity proper for courts reviewing the constitutionality of legislative enactments because the common good is determined by majority will.²³⁰ This discussion should also sound familiar; the American government is partially founded upon such an ideology—the separation of powers.

When such historically respected political doctrines as limited government and separation of powers conflict, as a rhetorical matter, can a "winner" be declared? At first glance, this would seem impossible; after all, a qualified referee in constitutional calculus does not exist. Also, the framers of the Constitution obviously thought no reconciliation was necessary because both theories of individual rights in property and civic responsibility through property—of wealth and virtue—are found in the American governmental system. More importantly, both theories have instructively shaped American property law and takings jurisprudence.²³¹

in the Fourteenth Amendment's Due Process and Equal Protection Clauses. See *supra* note 8.

227. Gregory S. Alexander, *Takings and the Post-Modern Dialectic of Property*, 9 CONST. COMMENTARY 256, 261 (1992) (stating that fulfilling duty to community helps individuals realize full benefits from property).

228. See, e.g., Note, *Taking Back Takings: A Coasean Approach to Regulation*, 106 HARV. L. REV. 914 (1993) (stating that property rights of individuals should be tempered with a communitarian vision).

229. This view comports with the original understanding of the Takings Clause. Property was assumed to be subject to the implied obligation to benefit the community. Harness, *supra* note 202, at 8; Treanor, *supra* note 171, at 699.

230. Harness, *supra* note 202, at 10.

231. Compare *Penn Cent. Transp. Co. v. New York City*, 444 U.S. 85, 104 (1978) (civic responsibility theory behind landmark preservation law) with *Lucas v. California Coastal Council*, 112 S. Ct. 2886 (1992) (individual rights theory defeats development ban).

However, on a fundamental level, the underlying conflict between these two theories must be resolved with constitutional rights at stake. The test applied in regulatory takings cases requires reformulation if the Court is to faithfully apply the correct law and give the underlying constitutional principles of both individual rights and civic responsibility, and their concomitant liberties, lasting power. A takings doctrine that in alternate cases supports one or the other of these theories would distress both camps: a profound victory in one case would mean little, if the next decision could yield an equally profound loss. The current Court has been leaning increasingly toward the individual rights model,²³² but this shift alone does not bear the imprimatur of constitutional validity if it advances individual rights to the neglect of civic responsibility.

The civic responsibility model occupies the higher constitutional ground. The balance struck between individual rights and civic responsibility by the framers of the Takings Clause weighs in favor of civic responsibility.²³³ The framers intended individuals to receive compensation only for physical invasions of private property by the government, not for regulatory limitations of private property's use.²³⁴ Individuals expected that the state would occasionally burden their property by regulation; these burdens were intended to be the cost of organized government to all individuals under the Constitution.²³⁵

Questioning the viability and correctness of seventy years of Supreme Court precedent in regulatory takings is serious business, but questioning its very existence is quite another matter.²³⁶ Though the regulatory takings doctrine may rely on a misinterpretation of precedent,²³⁷ the plethora of cases decided

232. This implication arises from the *Nollan* and *Lucas* decisions. See *supra* notes 84-104 for a discussion of *Nollan* and *supra* notes 118-65 for a discussion of *Lucas*.

233. See *supra* notes 171-86 and accompanying text for a discussion of the framers' intent. See also Treanor, *supra* note 171, at 699.

234. See *supra* notes 171-86 and accompanying text.

235. Structurally, the civic duty model allows the government to regulate property to make the polity normatively better by instilling duty and virtue owed to the state in the minds of citizens, but still gives the Court power to enforce fundamental rights in property when they are denied arbitrarily. This approach helps avoid the necessarily consequent injuries done to property and perhaps the economy generally by many individuals simultaneously exercising their rights. See *Nebbia v. New York*, 291 U.S. 502 (1934) (upholding ceiling on milk prices to prevent individual producers from flooding the market at lower prices). Cf. *Wickard v. Filburn*, 317 U.S. 111 (1942) (holding that Commerce Clause allows regulation of individual agriculture producer when Congress attempts to control aggregate demand for product).

236. See *supra* notes 201-17 and accompanying text for a discussion of *Pennsylvania Coal*. If this reading of *Pennsylvania Coal* is correct, the regulatory takings doctrine should not exist to the extent that Holmes's decision of the Court is considered controlling precedent.

237. See *supra* note 77 and accompanying text.

under it need not be discarded *in toto*.²³⁸ Rather, the application of this doctrine by the current Court should be reevaluated.

The Supreme Court should modify its takings test so that only permanent physical invasions sanctioned by the government are compensable under the Takings Clause, and that regulatory takings are analyzed under the minimum rationality standard of the Due Process Clause. In other words, takings clause jurisprudence should be denuded of all but the *Loretto per se* rule.²³⁹

The incursion of *Lochner* into the current Court's takings doctrine in *Nollan* and *Lucas* suggests policy justifications for this new rule. This new rule would provide much-needed certainty in such a convoluted area of constitutional law. A constitutional law doctrine like takings, in which the Court has no viable standards and issues decisions only after case-by-case inquiry,²⁴⁰ cannot effectively safeguard constitutional rights, nor will it provide sufficient notice to legislatures of which regulations will pass constitutional muster.

A related policy justification lies in the fact that this new rule will afford legislatures flexibility to fashion regulations that meet society's new problems.²⁴¹ Without this flexibility, legislatures may refrain from

238. The assertion that the regulatory takings doctrine should not exist does not mean that the Court would necessarily have to discard all cases already decided under the regulatory takings doctrine. If a regulatory taking was not found in any given case, in all likelihood the regulation at issue would also not offend the Due Process Clause. Only in cases where the Court had found a taking would the proposed due process analysis demand a reexamination of result. Correctly decided, but incorrectly reasoned cases would stand, while incorrectly decided, and incorrectly reasoned, cases would become disfavored. This approach of overhauling a doctrine very dear to the Court, while not overhauling all cases decided under that doctrine, is exactly the approach advocated by Justice Scalia in the dormant commerce clause context. See *Bendix Autolite Corp. v. Midwesco Enter., Inc.*, 486 U.S. 888 (1988) (Scalia, J., concurring) (stating that the Court should abandon its current approach and leave essentially legislative decisions to the legislature, adopting a *future* analysis more appropriate to the Court's role).

239. See *supra* notes 53-66 and accompanying text. The rule proposed here would have substantially the same effect as those proposed in *Sax*, *supra* note 11; *Stoebuck*, *supra* note 11. Unlike those rules, the rule proposed in this note has the advantage of clarity in the due process clause doctrine that would not allow extensive tampering by the Court.

240. See *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978).

241. Marshall Currey Cook, Note, *Lucas v. South Carolina Coastal Council: Low Tide for the Takings Clause*, 44 MERCER L. REV. 1433, 1441 (1993). See also Barry I. Pershkov & Robert F. Housman, *In the Wake of Lucas v. South Carolina Coastal Council: A Critical Look at Six Questions Practitioners Should Be Asking*, 23 ENVTL. L. REP. 10008, 10009 (1993) (concluding that the Court's new addition to the regulatory takings doctrine significantly diminishes legislative discretion to regulate injurious activities).

Such flexibility is particularly necessary in light of the remedy of compensation currently imposed on all takings clause violations. After *First English Evangelical Lutheran Church v. County of Los Angeles*, California, 482 U.S. 304 (1987), the government owes compensation for even temporary takings. For instance, during the pendency of litigation of a successful takings challenge,

promulgating valuable land-use regulations—especially in the urban planning and environmental protection contexts—for fear of unduly straining already strained public coffers if a takings challenge succeeds. Finally, this new rule will avoid Justice Scalia's flirtation with, and precedential proliferation of, the principles behind *Lochner*ian scrutiny of land use regulation. Land use regulation comports with a long tradition of burdening private property. With the new challenges facing federal, state, and local governments, and the property under their domain, majority rule and presumptive legislative validity under the Due Process Clause is more realistic than judicial superlegislation.²⁴²

V. CONCLUSION

"[T]he great office of statutes is to remedy defects in the common law."²⁴³ Land use regulation offers government an effective method for addressing problems not contemplated at common law. By examining land use regulations under heightened scrutiny and limiting the scope of these regulations to restrictions contemplated at common law, the Court has returned to the excesses of the *Lochner* period under the guise of the regulatory takings doctrine. The United States Supreme Court should drastically alter its Fifth Amendment analysis of land-use regulations to provide that compensation under the Takings Clause is due only for permanent physical occupation authorized by the government.²⁴⁴ What are currently termed regulatory takings challenges should be analyzed under the deference afforded to property restrictions under the Due Process Clause. This rule would vindicate once again majority rule and end once again the spread of *Lochner* by Justice Scalia's takings jurisprudence.

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the government may owe the landowner money for the period during which the landowner was burdened by the regulation, even if the government retracts the invalid regulation. Under a due process analysis, subsequent repeal by the government serves as a sufficient remedy if the regulation is found unconstitutional.

242. *Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421, 423 (1952).

243. *Munn v. Illinois*, 94 U.S. 113, 134 (1876).

244. This term the United States Supreme Court granted certiorari on a regulatory takings case. *Dolan v. City of Tigard*, 854 P.2d 437 (Or. 1993), *cert. granted*, 62 U.S.L.W. 3368 (U.S. Nov. 30, 1993). A decision is expected before the Court's summer recess.

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