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THE SUPREME COURT'S TRILOGY OF REGULATORY TAKINGS: **KEYSTONE, GLENDALE AND NOLLAN**

INTRODUCTION

The concept of property in our society involves a tension between two competing societal values. As a society, we value private property ownership and the ability of an individual to own, use and enjoy property in the way he or she chooses.¹ This private interest, however, is not absolute and may be limited by a competing social interest in the property.² This social interest in property is typically asserted by the government.³ Asserting public rights may require that an individual modify his private rights where the two sets of interests clash.

The government acts as the advocate of societal rights and asserts the social interest in property through two methods. First, by exercising its power of eminent domain, the government may appropriate private property for public projects.⁴ Second, through the exercise of its police power, the government can regulate individual conduct which may prove harmful to society.⁵ Developing regulations which allow for a high degree of individual freedom while adequately protecting the social interest in property involves a delicate balance between

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¹ L. BECKER, PROPERTY RIGHTS: PHILOSOPHIC FOUNDATIONS 19 (1977). The concept of property ownership involves the notion of a bundle of rights and certain limitations. The bundle of rights includes the right to: possess, exclude others, use, manage, and the income or profits generated. Ownership also includes the power to consume, waste, modify, sell, or alienate the property, immunity from expropriation by another or the state, and the power to transmit by gift or devise. Ownership is limited by the term of tenure, i.e. life, a duty not to use the property to harm others, a liability to execution, and a liability to abandonment. *Id.*

² The social interest is illustrated by limitations which are placed on individual property rights. Specifically, the duty not to use the property to harm others and the property's liability to execution reflect the interest that the public in general may assert against private property. *Id.*

³ Penn Cent. Transp. Co. v. New York City, 438 U.S. 104 (1978) (sustaining New York Landmark Preservation Act which controlled landmark owner's ability to modify landmark structure); Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926) (sustaining zoning ordinance which regulated location of trades, industries, housing, lot sizes and structure heights); Buchanan v. Warley, 245 U.S. 60, 74 (1917) (state's authority to pass laws in an exercise of police power, and to promote public health, safety and welfare, is broad and has been affirmed in numerous recent court decisions).

⁴ For a discussion of eminent domain principles see *infra* notes 58-64 and accompanying text.

⁵ For a discussion of the nature of the government's police power see *infra* notes 72-83 and accompanying text.
these competing interests in property. Achieving this balance has proved particularly difficult for courts when the challenged government action takes the form of a land use regulation.

Land use regulation has been characterized as both an act of eminent domain and an exercise of the government's police power. How a regulation is characterized has a serious impact upon the degree of protection given private property rights in the face of government action. If characterized as an act of eminent domain, a private property owner is guaranteed just compensation for his loss. However, if the government regulation is characterized as an exercise of the police power, the land owner is entitled to have the regulation invalidated only if it proves unreasonable or arbitrary. Although the fundamental tension between the competing public and private interests is inherent in the exercise of both powers, the police power has proven a highly effective vehicle for the promotion of the social interest in property. Conversely, when the government action has been classified as an exercise of its eminent domain power, the judiciary has been highly protective of private interests.

The Supreme Court's treatment of the regulatory takings issue has been less than definitive. The conflicting characterization of land use regulation has
caused much confusion. While declaring that a regulation may constitute a taking under principles of eminent domain, indicating that the just compensation requirement would automatically be triggered, the Court has developed a due process analysis which incorporates a deferential posture toward government regulation and fails to mandate just compensation. Moreover, in those cases where the compensation requirement has been triggered, the Court has not adequately addressed the issue of how to determine the amount of compensation which should be paid to a land owner aggrieved by land use regulation.

This Comment will identify the relevant concepts involved in the area of regulatory takings and review the case law that has developed. The Comment will then present a discussion of the analysis and impact of the Supreme Court's most recent holdings dealing with this issue: Keystone Bituminous Coal Association v. DeBenedictis; First English Evangelical Lutheran Church of Glendale v. County of Los Angeles; and Nollan v. California Coastal Commission. Finally, this Comment will identify the weaknesses in the Court's analyses in light of the social policies implicated by regulatory takings.

I. UNDERLYING CONCEPTS

A. Philosophical Foundations

The concept of property ownership in our society is based on a set of legally defined and enforceable relationships. These relationships exist between an individual and society, or an individual and the state as the representative of society, and define each party's respective rights with regard to property. Ownership is thought to encompass a "bundle" of these rights. The right to use the property, the right to manage the property, and the right to exclude others are a few of the "sticks" in the "bundle." Although the rights of use, possession, and management suggest a superior claim by one individual as against the claims of society or its individual members, the superior claim is not without limitations. Indeed, individual rights can be modified or abrogated by the assertion of competing rights on which society places a higher value.
Typically, the government is the arbiter of the competing public and private property interests. Through regulations and ordinances the government limits the landowner’s action with respect to his property. The government action is justified as an assertion of societal rights. Furthermore, when public need for private property arises, the government may exercise its eminent domain power and physically take the property.

There are two major philosophical theories regarding the appropriate scope of governmental powers with respect to private property. These theories represent two points on a continuum for which absolute private ownership and absolute social ownership serve as the extreme poles. John Locke’s dominion theory of limited government represents the point on the continuum where private rights take preeminence over social rights. Thomas Hobbes’ social

24. There are mechanisms through which private parties regulate the behavior of property owners in relation to their property. Restrictive covenants enable private parties to balance the interest of an individual against the interests of a particular social group. The restrictive covenant acts as a mechanism to control the acts of individual property owners for the benefit of the group. This mechanism is frequently employed in residential development plans. The developer includes the covenant in the contract for sale and the covenant is legally enforceable against the individual homeowner by the residential group or the developer. Stoebuck, Running Covenants: An Analytical Primer, 52 WASH. L. REV. 861, 907-18 (1977).


26. Nectow v. City of Cambridge, 277 U.S. 183, 188 (1928) (governmental power to interfere with property rights by zoning regulation is not unlimited; such restrictions cannot be imposed if not justified by need to protect public health, safety, morals and welfare); Village of Euclid, 272 U.S. at 387 (land use regulations and ordinances “must find their justification in some aspect of the police power, asserted for the public welfare”); Hadacheck v. Sebastian, 239 U.S. 394, 410-14 (1915) (upholding ordinance which prohibited maintenance of petitioner’s business because ordinance was enacted to protect health, safety and comfort of community).

27. See, e.g., Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229 (1983) (Court upheld state’s exercise of eminent domain power to break up concentration of land in small portion of population and redistribute title among general populace); United States v. Jones, 109 U.S. 513, 518 (1883) (eminent domain is power to take private property for public use); Poletown Neighborhood Council v. Detroit, 410 Mich. 894, 304 N.W.2d 455 (1981) (Detroit justified in condemning community residents’ land through eminent domain power in order to transfer title to General Motors Corporation because of public need for community’s economic revitalization).


29. See Oakes, supra note 18, at 584. Under Locke’s theory, property is an aspect of an individual’s personality and, as such, something which he possesses exclusive of the rights of others. Therefore, the government is obligated to pay a high degree of deference to private property ownership. See also Becker, supra note 1, at 8 (under Locke’s theory, property rights are not derived from the sovereign and, therefore, the sovereign must respect private rights of ownership).
view is at the other end of the continuum and requires a total subjugation of private rights to the social interest.\textsuperscript{30}

1. The dominion theory

Under John Locke's philosophy of limited government, an individual surrenders certain rights to the sovereign to allow the sovereign to maintain social order.\textsuperscript{31} Locke believed that social order benefits all members of society because it establishes a stable and secure environment in which man can pursue individual fulfillment.\textsuperscript{32} However, just as ownership rights are not absolute, under this philosophy, an individual does not absolutely surrender his property rights to the sovereign. A sovereign may impair individual rights only to the extent necessary to effect its order-keeping function.\textsuperscript{33} Because a sovereign derives its power from society, its needs must be justified and defined in reference to the needs of the members of society.\textsuperscript{34} Thus, the scope of the sovereign's power is restricted, and the sovereign may not enhance its own position at the expense of an individual or the general populace.\textsuperscript{35} The concept of limited sovereign power is designed to protect against tyranny.\textsuperscript{36} In the context of property law, this philosophical view is reflected in the "dominion" theory of property rights.\textsuperscript{37}

The "dominion" theory of property traces its roots to Lockean philosophy and reflects the view that the sovereign's power in relation to private property rights is highly limited in scope.\textsuperscript{38} Society endows the sovereign with the power to impair individual rights only when necessary to preserve order. This premise suggests a hierarchy in which an individual's property rights typically take

\textsuperscript{30.} BECKER, supra note 1, at 8.

\textsuperscript{31.} J. LOCKE, OF CIVIL GOVERNMENT, ch. 1 § 3 (1690). For a critique of the Lockean philosophy of government and the government's relationship to private property rights, see generally BECKER, supra note 1, at 170-75; R. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 7-17 (Harv. Univ. Press 1985).

\textsuperscript{32.} EPSTEIN, supra note 31, at 12-13.

\textsuperscript{33.} According to Locke, the state as sovereign does not have the power to create new rights for itself to take property merely because it desires to do so. The government's powers are only as extensive as its objective of protecting the members of society demands. Governmental power is "but the joint power of every member of society given up to that person or assembly, which is legislator . . . ." Locke, supra note 31, § 135. Therefore, a sovereign's powers do not exceed those of the collective members of society. "Every transaction between the state and the individual can thus be understood as a transaction between private individuals, some of whom have the mantle of sovereignty while others do not." EPSTEIN, supra note 31, at 13.

\textsuperscript{34.} See supra note 33.

\textsuperscript{35.} Under Locke's theory, the government is precluded from taking gains for itself because every exercise of power is justified by societal needs and, theoretically, the benefits of the action are distributed among the members of society and no excess gain is retained by the government. EPSTEIN, supra note 31, at 10.

\textsuperscript{36.} Lockean theory holds that a government which retains no excess wealth or power for itself will not have the means to assert monopoly power. Id.

\textsuperscript{37.} Oakes, supra note 18, at 584.

\textsuperscript{38.} Id.
precedence over the government’s power to interfere with those property rights. Under this theory, the exercise of government power carries with it a difficult burden of justification. Indeed, under this view property rights are characterized as "civil rights" and are thought to deserve the same degree of legal protection as other "personal liberties."  

2. Social view

At the other end of the spectrum is the anti-property rights theory or the Hobbesian philosophy. According to Thomas Hobbes, the individual must surrender all personal liberty and property rights to the sovereign in exchange for the maintenance of social order. Hobbes believed that without a highly structured society man would deteriorate into a state of perpetual war where survival is the only right. One of the stronger arguments supporting an anti-property theory is that state enforcement of individual property rights perpetuates inequality. Inequality occurs because those individuals with the most "liberty" or "property" also have the economic means with which to keep these advantages for themselves and their heirs. This exclusive possession is protected by the sovereign through the legal and economic systems of the society. Those who have no property rights have no rights to pass on and no rights requiring legal protection. The potential problem with this system is

39. Under the dominion theory, property rights are characterized as civil rights. This suggests that the role of the sovereign is that of the protector of the individual and the individual's ability to assert his civil rights. An individual's property rights fall into this category and are, under this theory, deserving of as high a degree of legal protection as other civil rights receive. See Oakes, supra note 18, at 586; Pilon, supra note 28, at 170.

40. Justice Stewart in Lynch v. Household Fin. Corp., 405 U.S. 538 (1972), stated that "[p]roperty does not have rights, people have rights ... a fundamental interdependence exists between the personal rights to liberty and the personal right to property. Neither could have meaning without the other. That rights in property are basic civil rights has long been recognized." Id. at 552.

41. Thomas Hobbes, like John Locke, saw the government's principal function as that of creating and maintaining social order. If man was left to his natural state, Hobbes believed society would deteriorate into a state of war. This state of chaos would be caused by man's natural selfishness and aggressiveness. Unlike Locke, Hobbes believed that nothing less than a total surrender of individual rights would ensure stability. T. Hobbes, LEVIATHAN ch. 13 (1651). For a discussion of the political theory of Hobbes and other "anti-property" theories see Becker, supra note 1, at 88-98; Epstein, supra note 31, at 7-18; Pilon, supra note 28, at 175-78.


43. Id.

44. Becker, supra note 1, at 96.

45. Id.

46. Id.

47. Id. A similar "anti-property" argument is one which Becker labels the concept of "social disutility," which concerns inequitable distribution of wealth and the social, as opposed to the individual, impact of this distribution. Essentially, this is the focus of the Hobbes philosophy. In addition to the individual and social ramifications of inequitable property distribution, Becker
that the sovereign's conduct is unconstrained. The desire to avoid revolution is the only incentive for limiting its power, and therefore, the potential for tyrannical behavior by the sovereign is great.

The "social" view of property rights reflects the Hobbesian philosophy. Under this theory, the government has a broad scope of power relative to private property. Property owned by individuals is thought to be held in a "public trust" for the benefit of society. Society is the ultimate beneficiary and the landowner is the trustee whose actions are limited by the needs and desires of the beneficiary. In addition to maintaining the social order, the government, on behalf of society, may interfere with private property rights for a wide variety of reasons. This theory supports a hierarchy where "social welfare" takes precedence over private rights. Accordingly, private property interests are afforded little legal protection.

B. Methods For Government Assertion Of The Social Right To Property

There are two ways in which a government entity can assert social rights over private property: through the exercise of its eminent domain power; or, through the exercise of its police power. Under our constitutional framework, cites two other anti-property arguments.

1. A system of private property ownership is self-defeating where a finite quantum of property exists and is held by a certain group of owners. Other individuals will be foreclosed from ownership. This result contradicts the system of property rights which ensure an individual the fruits of his labor. Under this system if an individual works and produces something, that thing becomes the laborer's property. Where another owns the property which another produces, the individual is not necessarily guaranteed his rights of ownership. For example when a farm worker produces vegetables, these vegetables belong to the farmer, the ultimate property owner, and not to the worker. The system breaks down because the worker is precluded under the theory from obtaining what is rightfully his under the theory.

2. Private ownership produces vicious character traits such as greed and possessiveness. Plato was an advocate of this argument.

BECKER, supra note 1, at ch. 8.

48. EPSTEIN, supra note 31, at 8. The government, given broad unchecked powers, "will act like any other monopolist whose conduct is left unconstrained. His laws and rules will expropriate most of the benefits of political union by allowing each individual member only the minimum inducement to remain quiescent." Id.

49. See Oakes, supra note 18, at 586. The advocates of this theory have advanced different justifications for their support. Oakes discussed the Jeffersonian adaptation, which focused on promoting individual social and economic equality as an end in itself. Becker discussed Plato's theory that private property ownership adversely effects character. BECKER, supra note 1, at 96. However, the premise of the argument is that all property is subject to the superior claim of the collective society in order to obtain social stability. HOBES, supra note 41, at ch. 13.

50. Oakes, supra note 18, at 587.

51. Id.

52. Id.

53. PILON, supra note 28, at 175-76.

54. See infra notes 58-71 and accompanying text.

55. See infra notes 72-83 and accompanying text.
the fifth amendment's just compensation clause limits and defines the scope of the government's eminent domain power. The government's exercise of its police power is constrained by the fifth amendment's substantive due process clause.

1. Eminent domain

The concept of eminent domain applies when a government entity seeks to appropriate private property for public use. The government's power to exercise eminent domain is not explicitly granted in the United States Constitution, but has been held to be an inherent attribute of sovereignty. Nevertheless, the fifth amendment limits a government's exercise of this power in two ways. First, property may be appropriated only when justified by a public use. Second, just compensation must be paid to the individual landowner for property that is taken. To acquire property, a government entity typically institutes a condemnation proceeding in which "just compensation," generally measured by the market value of the property, is calculated and paid to the property owner. When a government entity initiates condemnation proceedings the legal issues implicated by the fifth amendment are relatively clear. A tangible taking of property has occurred and compensation is mandated.

58. The text of the fifth amendment provides "nor shall private property be taken for public use without just compensation." U.S. CONST. amend. V. This clause has been held to incorporate the requirements of public use and just compensation. See Kohl v. United States, 91 U.S. 367, 372-73 (1875) (requirements of just compensation and public purpose implied in fifth amendment). These requirements have been held applicable to the states through the due process clause of the fourteenth amendment. Chicago, Burlington & Quincy R.R. v. Chicago, 166 U.S. 226, 239 (1897).
59. 1 P. NICHOLS, supra note 56, § 1.14.
60. See supra note 10.
61. The fifth amendment's just compensation clause provides: "nor shall private property be taken for public use without just compensation." U.S. CONST. amend. V.
63. Olson v. United States, 292 U.S. 246, 255 (1934) (full and just equivalent required by constitution generally held to be market value of property at time of taking). For an extensive discussion on valuation methods see 1 L. ORGEL, VALUATION UNDER THE LAW OF EMINENT DOMAIN, § 11-127 (2d ed. 1953).
64. See supra note 58. For further discussion of the principles of eminent domain see EPSTEIN, supra note 31 (book extensively covers the concepts of government and property and their relationship to one another); 1 P. NICHOLS, supra note 56, § 1.1-4.4; Pilon, supra note 28, at 185-95.
2. **Inverse condemnation**

In cases where the government takes property without instituting a condemnation proceeding, the property owner has a cause of action under the fifth amendment. This is called an action in inverse condemnation and is available because the fifth amendment is held to be self-executing. When a government entity has taken private property for public use without instituting a condemnation proceeding, the inverse condemnation cause of action provides for just compensation as a remedy.

Inverse condemnation was first applied in cases where government action resulted in physical invasion of private property. Courts have had no difficulty applying the requirements of the fifth amendment to these factual scenarios because physical interference with private property by the government has historically implicated the just compensation clause. The doctrine has since expanded and courts now recognize that other types of government action may implicate this cause of action. The inverse condemnation cause of action is applied where government action destroys or impairs access to and from property.

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66. Clarke, 445 U.S. at 257; 3 P. Nichols, *supra* note 56, § 8.1[2] (when private property has been taken or damaged for public use, the self-executing nature of fifth amendment just compensation clause provides a basis for action, regardless of whether government has instituted condemnation proceedings).

67. 2 P. Nichols, *supra* note 56, § 6.21 (discussing nature and origins of inverse condemnation remedy).

68. Pumpelly v. Green Bay Co., 80 U.S. 166 (13 Wall. 1871) (flooding of land caused by government constituted a taking for which inverse condemnation action was applicable); Sinnickson v. Johnson, 17 N.J.L. 129 (1839) (action to recover for damages from flooding of land caused by state authorized erection of dam).

69. 3 P. Nichols, *supra* note 56, § 8.1[4]. Nichols traces the evolution of the inverse condemnation remedy. Inverse condemnation originated as a remedy for government action which physically interfered with private property for public use but where condemnation proceedings were not initiated by the government entity. *Id.* The remedy was initially limited to those cases where the interference directly implicated the traditional notion of the extent of the eminent domain powers of the government. *Id.* The remedy has since been expanded to encompass situations where the impaired property interest is not one which the government could have initiated condemnation proceedings to acquire. *Id.* The cases which hold that government interference with ingress and egress may implicate an action in inverse condemnation illustrate the development. The property interest destroyed, the ability to access property, is not one that a government entity would acquire through condemnation proceedings. *Id.* Even those cases requiring the payment of compensation which depart the farthest from the eminent domain model, still involve some sort of physical interference with property. *Id.*

intention of depressing the value of property in contemplation of appropriation also gives rise to an action in inverse condemnation. 71

3. Police power

Unlike the physical appropriation of private property for public use, land use regulation typically is characterized as an exercise of the government’s police power and not as an exercise of the government’s eminent domain power. 72 The government exercises its police power in order to advance the public welfare. 73 The concepts and policies involved in police power actions parallel those implicated by the eminent domain power. In both exercises of power the government is acting on behalf of society and a genuine public purpose is required as justification for the action. 74 However, if government action is characterized as an exercise of its police power, the action traditionally has been subject to review under the substantive due process clause as opposed to the just compensation clause invoked by courts where the action is one in eminent domain. 75

The due process clause of the fifth amendment provides that no person shall “be deprived of life, liberty or property, without due process of law.” 76 Analysis under due process, like that under the just compensation clause, seeks to balance public and private interests. A valid exercise of the police power will incorporate a proper balance of these interests. 77 Under the due process analysis


72. The extent to which government may regulate private property is an issue which has been addressed in terms of the scope of police power. Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 387 (1926) ("The ordinance now under review, and all similar laws and regulations, must find their justification in some aspect of the police power, asserted for the public welfare."); Mugler v. Kansas, 123 U.S. 623 (1887) (police power and eminent domain powers are different in kind and a regulation may never constitute a taking); R. Cunningham, W. Stoebuck & D. Whitman, THE LAW OF PROPERTY § 9.2 (1984) (state governments regulate land use pursuant to police power and may delegate power to local governments); Dowling, supra note 28, at 365 (police power concept encompasses classic conflict between private and social interest in property).

73. See supra note 3.

74. See supra note 58 for a discussion of the fifth amendment requirement of a public purpose in order to justify a taking. Similarly, the police power is defined in terms of public purpose. "The concept of the public welfare is broad and inclusive. . . . It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled." Berman v. Parker, 348 U.S. 26, 33 (1954) (citation omitted).

75. Hadacheck v. Sebastian, 239 U.S. 394 (1915) (ordinance evaluated under substantive due process and equal protection); Mugler v. Kansas, 12 U.S. 623 (1887) (oppressive regulation must be challenged through substantive due process and may never constitute a taking).

76. U.S. Const. amend. V.

77. Lawton v. Steele, 152 U.S. 133 (1894). Lawton set out the classic substantive due process
a regulation will be considered valid where it seeks to provide a public benefit and is implemented in such a way as to logically achieve this objective without causing excessive deprivation to individuals. In practice, this test has focused on the public benefit and, once a public benefit is found, a property owner must abide by the regulation despite the degree of oppressiveness. Because the due process analysis focuses on a showing of a public benefit and gives little weight to the negative impact on the individual property owner, this doctrine tends to be highly protective of the public interest in property.

Ironically, the two different types of governmental actions which seek to accomplish similar goals and are restrained by similar policies are subject to scrutiny under two distinct sets of legal criteria. Where the government exercises its eminent domain power to physically appropriate property pursuant to a public purpose, just compensation is mandated. The judiciary historically has guaranteed just compensation to the landowner under a physical interference scenario. However, the courts treat regulatory actions quite differently. They have not afforded landowners the same protection against land use regulation as they have against physical appropriation.

4. American legal history

The Supreme Court has attempted to balance the public and private property interests implicated in land use regulation by a number of different methods.

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79. See, e.g., Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 389 (1926) (upheld zoning ordinance as neither unreasonable nor arbitrary, "although some industries of an innocent character might fall within the proscribed class"); Mugler, 123 U.S. 623 (found that benefit to public welfare justified government action despite fact that action totally deprived property owner of business).

80. See supra note 58.


82. See supra note 78.

83. The results of cases adjudicated under the substantive due process clause and the takings clause differ. In Mugler, even though the regulation caused a total destruction of the plaintiff's business, it was found to be a proper exercise of police power, and therefore, no compensation was due. 123 U.S. 623 (1887). In an eminent domain scenario, the government initiates condemnation proceedings to physically take property and compensation is mandated by the fifth amendment of the constitution. Kohl v. United States, 91 U.S. 367, 372-73 (1875).

84. See supra text accompanying notes 54-83.
The degree of judicial protection of property rights, reflecting popular attitude, has shifted throughout history. Early in this country's history, the Supreme Court struggled to find some authority with which to challenge state legislation that adversely affected private property. The Constitution provided limited restraints on state power, yet, the states were responsible for promulgating most of the regulations which impaired private property rights. The Court initially found some assistance in the contract clause of the United States Constitution. Two early cases, Fletcher v. Peck and The Trustees of Dartmouth College v. Woodward, illustrate the Court's reliance on the sanctity of contract to protect individual rights from state impairment. However, this tool's application was limited to situations where a contract was found to exist. Shortly thereafter, the notion of state police power, justified by the necessity of protecting the public welfare, developed in the United States. This ever-broadening concept further limited the court's ability to maintain control over the states. However, with the adoption of the Civil War Amendments in the 1860's the Court obtained a new method of control through substantive due process.
Initially, the Court was reluctant to actively invoke the new amendments and distanced itself from post-war political sentiment. Over time, however, due to the growth of industry and the proliferation of state legislation regulating industry, the Court found it necessary to mediate the conflict between state government and industry. Applying substantive due process standards, the Court reviewed state regulation of land use under a subjective "reasonableness" criterion. A regulation reasonably calculated to achieve a public purpose satisfied this test. The presiding judge was given discretion to define "reasonableness." This mode of protection against state impairment of property interests continued into the early twentieth century.

During the rise of the substantive due process doctrine, the notion that a land use regulation could constitute a taking pursuant to eminent domain principles was introduced. Justice Holmes' opinion in Pennsylvania Coal v. Mahon was the genesis of this concept and the subsequent confusion that dominates the Court's treatment of land use regulation. The notion that a land use regulation could constitute a taking never fully developed as a legal theory and this intensified the Court's confused approach to land use regulation. This lack of development, due in part to the political changes that occurred in the 1930's, triggered a period of judicial passivity.

A dramatic shift in the Court's approach to controlling economic regulation occurred in response to President Roosevelt's court packing plan. During the depression, President Roosevelt developed a scheme for intensive government regulation of industry. Anticipating the Court's negative reaction to his plans, the President threatened to disrupt the entire structure of the Court and undermine its power by placing nine additional justices on the Court. In response, the Court adopted a nonactivist stance with regard to economic regulation and, as a result, private property rights succumbed to state regu-

94. See Slaughter-House Cases, 83 U.S. 36 (16 Wall. 1872). In Slaughter-House, the Court refused to construe the post war amendments as having any purpose beyond establishing the freedom of the newly-made free man and protecting him from oppression. The Court was also reluctant to upset the balance of federal-state relations by interpreting and applying the post-war amendments as an open ended grant of federal power. R. Rotunda, supra note 85, at § 15.2. See also Munn v. Illinois, 94 U.S. 113 (1876) (upheld state's power to regulate grain storage industry because of public interest).

95. R. Rotunda, supra note 85, § 15.2. See also Lochner v. New York, 198 U.S. 45 (1905) (struck down state law limiting number of hours per week that bakery employee could work as infringement on freedom of contract); Allgeyer v. Louisiana, 165 U.S. 578 (1897) (Court held that state statute which nullified insurance policies if the insurance company had not complied with state law was invalid because it deprived the insured of liberty without due process of law).

96. R. Rotunda, supra note 85, at § 15.3.
98. Id.
99. R. Rotunda, supra note 85, at §§ 15.4, 15.12.
100. Id. at §§ 15.3, 15.4.
101. Id. at 15.3.
102. Id.
The general trend of intensive state land use regulation and judicial deference in the economic regulatory sphere continues and reflects the current judicial approach to land use regulation. The next section will present the two relevant constitutional doctrines applicable to land use regulation, the takings doctrine and the substantive due process doctrine. The section will then explore the principal tests under each doctrine which are designed to discover an imbalance between the public and private interests in property. These two doctrines represent the foundations of judicial analysis regarding land use regulation and are the roots of the confusion in this area of the law.

II. DOCTRINAL FOUNDATIONS

A. Substantive Due Process

The case of Mugler v. Kansas is the quintessential substantive due process case in the area of land use regulation. The state of Kansas enacted a regulation that prohibited Mugler, the owner of a beer brewery, from the manufacture,
distribution and sale of alcoholic beverages. Having no alternative use for the property, the owner brought suit asserting that the government action constituted a taking. The Court held that the government action was a valid exercise of the state's police power and, therefore, could not constitute a taking of property for which compensation was due. The Court stated that when justified by a public interest, a prohibition on the uses to which a parcel of property may be put would never implicate the takings clause.

The Court suggested that a landowner had a potential cause of action based on an improper exercise of the police power under a substantive due process analysis. The Court noted that the legislature might enact a statute which had no real or substantial relation to the public interest upon which it was justified. In that case, the statute could be invalidated as an improper exercise of the state's police power. However, if the exercise of police power was valid, a property owner could never recover despite the amount of loss he incurred as a result of the regulation. Thus, the Court viewed the difference between the police power and the eminent domain power as one in "kind" and not one of "degree."

Subsequent cases clarified the substantive due process analysis in its application to land use regulation. The classic test is laid out in Lawton v. Steele. The three part test which evolved required that: 1) the state show that the interests of the public generally, as distinguished from those of specific parties, require such interference; 2) the means employed must be reasonably necessary to accomplish the purpose; and, 3) the means not be unduly oppressive on the individual property owner. The "reasonableness" standard used in this test indicates that the Lawton Court applied a minimum degree of scrutiny. The use of this "reasonableness" standard has resulted in great judicial deference to regulatory entities.

B. The Taking Theory

The theory that a land use regulation may constitute a de facto taking was first articulated in Pennsylvania Coal v. Mahon. Pennsylvania Coal involved the Kohler Act (the "Act"), which prohibited "the mining of
anthracite coal in such a way as to cause the subsidence of, among other things, any structure used as a human habitation . . . .” 117 The plaintiff had purchased a home and the surface rights to the land on which the home sat.118 The coal company retained the right to mine the coal underneath.119 In this contractual arrangement, the homeowner assumed the risk of subsidence of the land on which his home sat.120 Years after the agreement, the Kohler Act came into effect and the homeowner brought suit to enjoin the coal company from further mining under his home.121 The coal company claimed that the Act was unconstitutional because it deprived the company of its property rights and interfered with its freedom to contract.122

In his analysis, Justice Holmes applied a balancing test which used the same factors the Court had applied in the substantive due process cases.123 However, Justice Holmes gave less weight to the public purpose factor and focused instead on the degree of loss element.124 Holmes analyzed the “public use” factor and concluded that the injury implicated by the statute was “not common or public” and, therefore, could not be justified for safety reasons.125 The critical factor in his analysis was the extent of the diminution in value of the property rights of the coal company.126 The Court held that

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117. Id. at 412-13.
118. Id. at 412.
119. Id.
120. Id.
121. Id.
122. Id. at 394-95.
123. Id. at 413-14. The Court evaluated the regulation in terms of its public purpose and the extent of the diminution in value of the property. Id. at 414-16. However, the Court focused on the diminution in value, which the Mugler Court termed the “oppressiveness of the means” and held that despite a public purpose, if the diminution in value was found to be great, a taking would be found. Id. The Court in Pennsylvania Coal stated that “[t]he general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.” Id. at 415.
124. “We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change.” 260 U.S. at 416.
125. Id. at 413. Holmes stated that the conflict was between two private interests and that the public interest was minimal. He rejected the notion that the public interest in safety could justify the statute. The statute could satisfy public safety by requiring notice to those adversely affected by subsidence. Id. at 414.
Holmes’ treatment of the substantive due process analytical factors was the origin of the confusion in this area of law. Holmes stated that where a landowner’s loss is great, the regulation causing the deprivation will be deemed a taking despite the existence of a public purpose. Id. at 415. While the analysis suggested a disregard of the public purpose factor where the degree of loss was excessive, the case could be interpreted as a substantive due process case where the public purpose failed to justify the regulation. However, in his factual analysis, Holmes found a “limited” public purpose. Id. at 413.
126. The Court stated that to determine the proper limits of the police power “[o]ne fact for consideration in determining such limits is the extent of the diminution. When it reaches a certain magnitude, in most if not all cases there must be an exercise of eminent domain and compensation to sustain the act.” 260 U.S. at 413. See also Stoebuck, supra note 57, at 1064.
"while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking" and invalidated the Act. The Court also stated that the distinction between the eminent domain power and the police power was one of "degree" and not one in "kind."

Justice Holmes' opinion in Pennsylvania Coal created confusion in two ways. First, the Court held that when diminution in property value, due to regulation, "reaches a certain magnitude, in most if not all cases there must be an exercise of eminent domain and compensation to sustain the act." However, the Court did not provide a clear standard to determine when a regulation becomes a taking. Second, after stating that the regulation constituted a taking for which compensation must be paid, the Court simply invalidated the regulation without deciding whether compensation was due for the interim period in which the coal company was unable to mine and deprived of the use of its property. If the Act constituted a taking, it would logically follow that a temporary taking occurred during the interim period and, therefore, compensation was owed to the property owner.

The confusion in this area of the law stems not only from the unreconciled doctrines of substantive due process and eminent domain, but also from internal inconsistencies within the takings analysis applied by Justice Holmes. From this confusion evolved an assortment of related tests. These tests illustrate the Court's attempts to formulate criteria to determine where a regulation ends and a taking begins.

C. Related Tests

1. Noxious use

The noxious use test is a variation on the themes of substantive due process and the law of nuisance. The test is premised on the substantive due

(stating that "[i]ndeed, Holmes in [Pennsylvania Coal Co. v.] Mahon seems to have been concerned largely with the coal company's loss of value.").

127. 260 U.S. at 415.
128. Id. at 416.
129. Id. at 413.
130. Id. at 416. If the case is interpreted as one in which the public purpose was insufficient to justify government exercise of police power, invalidation as a remedy is doctrinally consistent. See Fred F. French Investing Co. v. City of New York, 39 N.Y.2d 587, 350 N.E.2d 381, 385 N.Y.S.2d 9, appeal dismissed, 429 U.S. 990 (1976). In the Fred French case, the court rejected the notion that police power action could constitute a taking. The court dealt with the language of Pennsylvania Coal by characterizing that language as a metaphor:

The metaphor should not be confused with the reality. Close examination of the cases reveals that in none of them, anymore 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, and the cases were decided under that rubric.

131. See Stoebuck, supra note 57, at 1061-62.
process concept that an exercise of police power which seeks to promote public health, safety, and welfare is a valid government act and does not require compensation despite the degree of deprivation. By declaring a particular use of land inimical to the public health and welfare, the regulation is thought to create a nuisance at law. Courts typically apply a substantive due process analysis, modified by a presumption of reasonableness, when they find that a harmful use exists.

Courts have applied a low level of scrutiny to legislation which regulates a noxious use. In Goldblatt v. Hempstead, the Court reviewed a regulation which prohibited a sand and gravel company from excavating below the water table. The plaintiffs contended that the ordinance prevented them from continuing their business and constituted a taking of property. The Court's analysis was extremely deferential to the regulating entity. While stating that "[a] careful examination of the record reveals a dearth of relevant evidence . . ." supporting the existence of the menace which the regulation is thought to abate, and finding no indication that the plaintiff's activities created an actual danger to the public, the Court upheld the ordinance. The Court held that the sand and gravel company had not demonstrated that the ordinance was unreasonable, excessive or unduly burdensome and, therefore, the ordinance should stand. Under the Goldblatt analysis, where a regulating body can identify a "harmful" use of land as the object of the restriction, courts have come close to finding the regulation valid per se.

2. "Too Far" test

Pennsylvania Coal serves as precedent for the "too far" test. Under this test, the distinction between a regulation which constitutes an exercise of the

The noxious-use test is a false test of whether a taking has occurred. It is in fact a test of whether the regulatory measure addresses a problem that the government might legitimately try to solve. That is, the test actually focuses on whether the regulatory measure was lacking in substantive due process.

132. Id. at 1062.
133. The Court in Reinman v. Little Rock, 237 U.S. 171 (1915), held that a livery stable, while not a nuisance per se, could legitimately be declared a nuisance in fact and in law, where the existence of the business adversely affected the public. Id. at 176. See also Hadacheck v. Sebastian, 239 U.S. 394 (1915) (held brickyard, which was not a nuisance per se, was nonetheless a nuisance at law where legislation found brickyard inimical to public health).
134. See Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962). The Court in Hempstead upheld the ordinance although it found that the town had not produced any evidence which indicated the plaintiff's use of their land posed any actual danger to the public. Id. at 595.
135. "Traditionally the courts have given great weight to regulations designed to protect public safety and public welfare, and to prevent nuisances." 2 P. Nichols, supra note 56, § 6.16[2].
137. Id. at 591.
138. Id. at 595.
139. Id.
140. Id. at 596.
police power and a regulation which constitutes a taking is one of degree. The test effectively focuses on only one factor: the degree to which the regulation interferes with property rights. The test measures the degree of interference by the diminution in property values. Thus, a regulation which destroys a substantial portion of an individual's property rights is considered a taking under the Pennsylvania Coal test.

There are two major difficulties in applying the "too far" test. First there is no standard to determine exactly what "too far" means. While many

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141. See supra note 123.

142. The Court stated that "[t]he protection of private property in the Fifth Amendment presupposes that it is wanted for public use, but provides that it shall not be taken for such use without compensation." 260 U.S. at 415. A strong public interest was found insufficient "to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." Id. at 416. The Court found the determinative factor to be the degree of interference. See supra note 123.

143. The diminution in value standard is most often used by courts to determine compensability. L. Berger, A Policy Analysis of the Taking Problem, 49 N.Y.U. L. Rev. 165, 175-76 (1974). See City of Austin v. Teague, 570 S.W.2d 389, 394 (Tex. 1978) (loss of rentals is appropriate measure of damages). For a discussion of other methods which the courts use to calculate an unacceptable degree of interference, see generally Stoebuck, supra note 57, at 1062-65 (in determining at what point a regulation constitutes a taking, courts have employed a variety of terms, such as "prevention of all feasible uses," and "unreasonable," and have looked to the extent of diminution in monetary value).

144. See supra note 116-130 & accompanying text.

145. Determining at what point loss, due to zoning regulations, is so great as to constitute a taking is an issue which has caused courts much consternation. Professor Anderson states:

No basis for precise prediction can be found in the dollars-and-cents evidence reported by the courts in the constitutional cases. Examination of approximately 50 cases in which the courts mentioned proof of the value of the subject land if used for a permitted purpose, as compared with its value if used for a proposed purpose outlawed by the ordinance, revealed that about half of the ordinances were approved and half were found unconstitutional. Moreover, the loss of use value in the cases where the ordinances were upheld was about the same as the loss proved in the cases where an opposite result was reached.

R. ANDERSON, AMERICAN LAW OF ZONING § 2.23 at 101 (1968).

Professor Berger discusses the problem of determining the point at which the loss of value becomes substantial enough to constitute a taking:

Do we look at what [a property owner] paid for the parcel or at its current market value? If current market value, do we consider the impact of the control itself upon that value? Since [the property owner] had actually sold off more than two-thirds of his frontage before the lawsuit began, how should the sales transaction alter the investment base? If [the property owner] has already recouped his original outlay, does he have any investment base in the remainder? Easy answers do not leap to mind.


The Court in Goldblatt v. Hempstead, 369 U.S. 590 (1962), stated:

There is no set formula to determine where a regulation ends and a taking begins. Although a comparison of values before and after is relevant, see Pennsylvania Coal Co. v. Mahon [260 U.S. 393 (1922)], it is by no means conclusive, see Hadacheck v. Sebastian, [239 U.S. 394 (1915)], where a diminution in value from
courts announce the proposition that "if a regulation goes too far it will be recognized as a taking." 146 Few courts have found that a taking actually existed under the particular set of facts before them. 147 Furthermore, the "too far" test has been applied in a logically inconsistent manner. 148 The test is based on the premise that a regulation which substantially interferes with an individual's property rights will constitute a taking by the governmental entity. 149 The fifth and fourteenth amendments require a governmental entity to provide just compensation for property it takes. 150 However, many courts applying the "too far" test have found a taking but have failed to require that compensation be paid to the property owner. 151

3. Enterprise/arbitral distinction

The enterprise/arbitral theory, identified by Professor Joseph Sax, 152 focuses on the function of government action to determine a line of demarcation between a land use regulation which places an acceptable burden on a landowner and one which constitutes a taking. 153 According to this doctrine, governments perform essentially two functions, enterprise and arbitral. 154 A

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$800,000 to $60,000 was upheld.

Id. at 594.

146. 260 U.S. at 415. See Kaiser Aetna v. United States, 444 U.S. 164 (1979) (Congress has authority to assure public access to marina but action may go so far as to amount to a taking); Goldblatt v. Town of Hempstead, 369 U.S. 590-94 (1962) (governmental action in form of a regulation may be so onerous as to result in a taking).

147. See Pruneyard Shopping Center v. Robins, 447 U.S. 74, 83-85 (1980) (right to exclude not so essential to economic value of property that its loss constituted a taking). In Andrus v. Allard, 444 U.S. 51, 67 (1979), the Court found that although a regulation prevented the most profitable use of the plaintiff's property, it did not constitute a taking. The Court stated that regulations are burdens to be borne to secure advantages of living in civilized society. Id. at 66-68. See also Penn Cent. Transp. Co. v. New York, 438 U.S. 104, 138 (1978) (no taking occurred because ordinance advanced general welfare and did not prohibit reasonable beneficial use of property); Goldblatt v. Town of Hempstead, 369 U.S. 590, 596 (1962) (because ordinance not shown to be unreasonable, no taking occurred).

148. See Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922) (Court found that a taking had occurred, but did not compensate; invalidation of statute was remedy); Davis v. Pima County, 121 Ariz. App. 343, 590 P.2d 459 (1978) (while appellants may have established "taking" they are not entitled to monetary damages; judicial remedy is undoing of wrongful legislation), cert. denied, 442 U.S. 942 (1979); McShane v. City of Faribault, 292 N.W.2d 253 (Minn. 1980) (zoning ordinance which resulted in substantial decline in value of property constituted a "taking," proper remedy was to enjoin enforcement of ordinance and allow city to decide whether to withdraw ordinance or proceed in eminent domain).

149. See supra note 125-26.

150. U.S. CONST. amend. V. The fifth amendment is made applicable to the states through the fourteenth amendment. See Chicago, Burlington & Quincy R.R., Co. v. Chicago, 166 U.S. 226, 239 (1897).

151. See supra note 148.


153. Id. at 61-64.

154. Id. at 62-63.
government entity that interferes with property pursuant to its enterprise function seeks to acquire resources for its own needs.\textsuperscript{155} In this situation the government acts to enhance its own “resource position,”\textsuperscript{156} for example, taking land to build a road. The government acts in its arbitral capacity when it functions as a mediator of disputes among citizens.\textsuperscript{157} A land use regulation which prohibits a noxious use of property falls into this latter category because the government is acting on behalf of one citizen who has been adversely affected by another citizen’s activity.\textsuperscript{158}

The enterprise/arbitral doctrine dictates that the government must compensate a landowner who has incurred economic loss when that loss is occasioned by the government acting in its enterprise capacity.\textsuperscript{159} Conversely, when the government acts in its arbitral capacity, no compensation is due to the landowner.\textsuperscript{160} The rationale underlying the distinction is that potential monetary liability would act as a disincentive for arbitrary exercises of government power.\textsuperscript{161} The theory maintains that a governmental entity will generally act tyrannically when acting in its own interest and, therefore, a deterrent is necessary.\textsuperscript{162} However, because the government will be less

\textsuperscript{155} Id. at 63.
\textsuperscript{156} Id.
\textsuperscript{157} Id. at 62.
\textsuperscript{158} See Lutheran Church in Am. v. City of New York, 35 N.Y.2d 121, 128-29, 316 N.E.2d 305, 310, 339 N.Y.S.2d 7, 14 (1974) (where government enjoins one individual property owner’s noxious use of his property for benefit of public, government is acting in its arbitral capacity).
\textsuperscript{159} Sax, supra note 152, at 63.
\textsuperscript{160} Id.
\textsuperscript{161} Id. at 64.
\textsuperscript{162} Sax cites three dangers that are posed when the government acts in its enterprise capacity.

1) The Risk of Discrimination: When the government acts to acquire resources for its own account, like any buyer, it has the power to control the bargain. Yet unlike the typical buyer, the government is unrestrained by the usual market forces which have the effect of tempering the demands a typical buyer makes upon a given seller. By dictating the terms upon which it will act, “the official procurement process often provides a particularly apt opportunity for rewarding the faithful or punishing the opposition.” Sax, supra note 153, at 64. The requirement of compensation would give some protection to the particular person or entity who might be singled out for imposition of a burden.

2) The Risk of Excessive Zeal: The government typically “acts as a judge in its own case.” Id. at 65. This power and immunity from scrutiny may create a situation where the government acts overzealously in acquiring resources for its own account. This power could cause injustice to the individual or entity from whom the property is acquired and can be somewhat mitigated by the compensation requirement. Id.

3) The Scope of Exposure to Risk: “Property owners in competition with one another are each subject to similar duties and to the demands of each other individually or in concert; the physical community more or less defines the scope of the risk, and each member of the community is similarly situated” with respect to the duties he owes and the risks to which he is exposed. Id. at 66. The fact that each of the similarly situated landowners is subject to the same duties and liabilities tends to insure a degree of fair play. When a government entity enters a community and intends to build a dam or road, it has no physical existence in the community and it is not held to the same duties as other property owners and is not subjected to the same risk. The government entity need not be concerned with its continued existence in
inclined to act tyrannically when its own interests are not at stake, monetary compensation is not required when the government acts in its arbitral capacity

Although the Supreme Court has not made extensive use of the enterprise/arbitral theory, there are a few cases in which the Court has applied this distinction in its analysis. In United States v. Causby, the owner of a chicken farm, over which the United States Army and Navy conducted aircraft training exercises, brought suit to enjoin the exercises. The flights agitated the chickens and caused the chickens to inflict injury on themselves. As a result, the owner incurred serious economic loss.

The Court focused its analysis on the nature of the government's action and characterized it in two ways. First, the Court indicated that the government action carried a physical invasion element. A fundamental concept of property law provides that a landowner may exercise rights with the community and, therefore, has no incentive to restrain its action. The government is exposed to limited risk, while the property owner is exposed to increased risk, the limitations of which have not been defined by the community. Therefore, when the government acts to acquire, it must at least be held to a compensation risk. The Supreme Court's regulatory taking analysis has developed around its substantive due process analysis. Compare Goldblatt v. Town of Hempstead, 369 U.S. 590, 592-96 (1962) (applied Lawton test and found that ordinance which is valid exercise of police power is not unconstitutional even if it deprives property of its most beneficial use) and Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 395 (1926) (applied substantive due process analysis and found that to declare ordinance unconstitutional it must be found arbitrary or unreasonable and undated to public welfare) and Mugler v. Kansas, 123 U.S. 623, 668-74 (1887) (applied three part substantive due process test) with Penn Cent. Transp. Co. v. New York, 438 U.S. 104 (1978) (applied modified substantive due process analysis to determine whether a taking had occurred) and Keystone Bituminous Coal Ass'n v. De Benedictis, 107 Sup. Ct. 1232 (1987) (applied modified substantive due process analysis to taking question). However, the Court has occasionally incorporated the enterprise/arbitral concept into a case. See United States v. Causby, 328 U.S. 256 (1946). This concept has appeared in a number of state court decisions. Fred F. French Investing Co. v. City of New York, 39 N.Y.2d 587, 330 N.E.2d 381, 385 N.Y.S.2d 5 (1976) (made distinction between government acting in enterprise capacity and government acting in arbitral capacity and held no compensation due when government acts pursuant to arbitral capacity). See also In re Charles v. Diamond, 41 N.Y.2d 318, 360 N.E.2d 1295, 392 N.Y.S.2d 594 (1977); Maple Leaf Investors, Inc. v. Department of Ecology, 88 Wash. 2d. 726, 565 P.2d 1162 (1977); Lutheran Church in Am. v. City of New York, 35 N.Y.2d 121, 316 N.E.2d 305, 359 N.Y.S.2d 7 (1974).

The Supreme Court noted that:

[A]irspace is a public highway. Yet it is obvious that if the landowner is to have full enjoyment of the land, he must have exclusive control of the immediate reaches of the enveloping atmosphere. . . . The landowner owns at least as much of the space above the ground as he can occupy or use in connection with the land.

See infra notes 170 & 174.

The Supreme Court noted that:

Id. at 264.
respect to the space above and below his property. The Court recognized that by effectively acquiring an easement without compensating the owner, the military's flights physically invaded a portion of the plaintiff's property interest. The opinion also addressed the fact that the government utilized the airspace for its own benefit. The Court found that the government was acting in its enterprise capacity. In essence, the Court found that the government acted in accordance with its eminent domain power, taking property rights to enhance its own resource position. The Court held that this constituted a governmental taking.

The enterprise/arbitral distinction is similar to the substantive due process concept because, under both theories, the difference in the government's eminent domain power and the government's police power is one in "kind" and not one of "degree." Based on the enterprise/arbitral distinction, the government will never be required to compensate an individual landowner when it acts to enhance the health, safety or welfare of the populace. In this situation the government acts pursuant to its arbitral capacity or police power. However, when it acts to enhance its own "resource position" and interferes with individual property rights for its own benefit, it must compensate the owner. This simply restates the Mugler doctrine: a valid exercise

171. Blackstone's definition of property rights includes the right to that air space which is a reasonable distance above the property in possession. 2 W. Blackstone, Commentaries 17. (R.I. Burn rev. ed. 1978) (9th ed. 1783). Blackstone quotes Sir Edward Coke in his definition of property:

"Land" says Sir Edward Coke, comprehendent, in its legal signification, any ground, soil, or earth whatsoever, as arable, meadows, pastures, woods, moors, waters, marshes, surzes and heath. It legally includeth also all cattles, houses, and other buildings: for they consist saith he, of two things; land, which is the foundation, and structure thereupon . . . . Land hath also, in it's legal signification, an indefinite extent, upwards as well as downwards. Cutus est sol em, ejus est usque ad coelum, is the maxim of the law, upwards; therefore no man may erect any building, or the like to overhang another's land. . . .

Id. at 18. See also Butler v. Frontier Tel. Co., 186 N.Y. 486, 491-92, 79 N.E. 716, 718 (1906) (The court stated "[A]n owner is entitled to the absolute and undisturbed possession of every part of his premises, including the space above, as much as a mine beneath.").

172. 328 U.S. at 267.

173. The Supreme Court stated "[i]n this case, . . . the damages were not merely consequential. They were the product of a direct invasion of [the owner's] domain." Id. at 265-66.

174. Id. at 262, n.7.

175. Although the Supreme Court did not expressly use the enterprise/arbitral distinction, in its analysis the Court discussed the government's exercise of dominion over the airspace for its own use. Causby, 328 U.S. 256 (1946). Compare this Court's treatment of the government's affirmative use of the airspace here with its treatment of a restriction on the use of airspace in Penn Central.

176. 3 P. Nichols, supra note 56, § 8.1[4].

177. Professor Stoebuck explains that under the enterprise/arbitral distinction "the compensation question turns not upon the intensity of government regulation, but upon which of two possible purposes that regulation serves." Stoebuck, supra note 57, at 1076.

178. Sax, supra note 152, at 63.
of police power will never require an award of monetary compensation. As long as a land use regulation is justified as being in the interest of the public and, therefore, characterized as the government arbitrating between competing groups of citizens, compensation need not be awarded and the individual landowner must bear the burden of the public benefit.

D. The Compensation Issue

The Court's inability to provide a decisive and consistent answer to the question of when and if a valid land use regulation constitutes a taking has created inconsistencies in the Court's treatment of related issues. The Supreme Court has addressed the compensation issue as a question distinct from the taking issue. Upon finding a regulatory taking, courts have typically allowed the government either to repeal the regulation or to exercise its power of eminent domain to purchase the property interest. While these remedies address the landowner's post trial loss in a satisfactory manner, Courts have failed to provide a remedy for the landowner's interim loss. If the regulation is found to constitute a taking, the regulation has worked its interference from the time of enactment. Theoretically, it would follow that the landowner must be compensated for the period of time that the regulation worked a taking; that is, from the date of enactment until the regulation was repealed or the property interest was purchased. The Court struggled, unsuccessfully, with this issue in the four cases discussed below.

180. Given the dictates of the fifth amendment's just compensation clause, it would seem that once a regulation is deemed a taking, compensation would be mandated. This, however, is not what the Court has done. The Court in Pennsylvania Coal found a taking and enjoined the enforcement of the regulation, but did not award compensation. 260 U.S. 393 (1922). More recently, in Kaiser Aetna, the Court again found a taking, enjoined enforcement of the government action, but provided no compensation for the period of time that the government action worked a taking on the property. Kaiser Aetna v. United States, 414 U.S. 164 (1979). Similarly, many state courts which recognize regulatory takings are reluctant to award compensation for the period of time between the enactment of the regulation and its judicial invalidation. Id. See, e.g., Davis v. Pima County, 121 Ariz. App. 343, 590 P.2d 459 (1978) (while appellants may have established "taking" they are not entitled to monetary damages; judicial remedy is undoing of wrongful legislation), cert. denied, 442 U.S. 942 (1979); Mallman Dev. Corp. v. City of Hollywood, 286 So. 2d 614 (Fla. Dist. Ct. App. 1973) (where zoning ordinance determined to be unreasonable, remedy is to declare ordinance invalid), cert. denied, 419 U.S. 844 (1974); McShane v. City of Faribault, 292 N.W.2d 253 (Minn. 1980) (zoning ordinance which resulted in substantial decline in value of property constituted a "taking," proper remedy is to enjoin enforcement of ordinance while city decides whether to withdraw ordinance or proceed in eminent domain); Fred F. French Investing Co. v. New York City, 39 N.Y.2d 587, 350 N.E.2d 381, 385 N.Y.S.2d 5, appeal dismissed, 429 U.S. 990 (1976) (compensation mandated when state appropriates property for public use; where deprivation is in form of a regulation no compensation need be paid, regardless of degree of deprivation).

For an in-depth discussion on the issue of remedies in the area of regulatory takings see Mandelker, Land Use Takings: The Compensation Issue, 8 Hastings Const. L.Q. 491 (1981).
The first case, *Agins v. City of Tiburon*, involved the challenge of a California zoning ordinance which limited the development of a five acre tract to a maximum of five single family residences. The plaintiff sued on an inverse condemnation theory claiming that the zoning ordinance constituted a fifth amendment taking. The California Supreme Court held that no taking had occurred because the zoning ordinance did not deprive the plaintiff of the entire use of his land. The California court addressed the plaintiff’s use of the inverse condemnation theory and held that although the property owner could challenge the constitutionality of the ordinance and request redress in the form of declaratory relief or mandamus, he could not make use of the inverse condemnation theory. Essentially, the court held that evaluation under the due process doctrine was appropriate but evaluation under the taking doctrine was not.

The plaintiff appealed to the United States Supreme Court, claiming that California could not constitutionally preclude an inverse condemnation action and thereby limit the available remedy to declaratory relief. The Supreme Court affirmed the California court’s finding that no taking had occurred and announced that it was unnecessary to consider the issue of proper remedies given the status of the case.

In 1981, *San Diego Gas and Electric Co. v. City of San Diego* came before the Supreme Court. The plaintiff owned a 412 acre parcel which, when purchased, was zoned for industrial and agricultural use. The city subsequently rezoned nearly 214 of the 412 acres pursuant to an open space plan. The plaintiff claimed that the “only beneficial use of the property was an industrial park, a use that would be inconsistent with the open space designation” and, therefore, the rezoning constituted a taking. The plaintiff sued under an inverse condemnation theory claiming the open space plan worked a taking and alternatively sought mandamus and declaratory relief. The California courts held that the plaintiff could not recover compensation because the complaint addressed an overzealous exercise of the police power by the city. Such a violation was actionable under the substantive due process clause for which mandamus or declaratory relief were the available remedies. The appellate court held that the plaintiff would have to retry the

183. Id. at 258.
184. Id. at 259.
186. 447 U.S. at 259.
187. Id.
189. Id. at 624.
190. Id. There was some dispute as to how much land was rezoned. Id. at 624 n.2-4.
191. Id. at 626.
192. Id. San Diego Gas & Electric Company requested $6,150,000 in compensation. Id.
193. The Superior Court for the County of San Diego found a taking and allowed damages of over $3,000,000. 450 U.S. at 627. The Appellate Court affirmed. Id. The Supreme Court
In its review of *San Diego Gas*, the United States Supreme Court again failed to reach the merits of the compensation issue. Since the California court's adjudication of the case was found not to constitute a final judgment, the Supreme Court dismissed the case for lack of jurisdiction. However, Justice Brennan contended that the finality requirement was met and analyzed the compensation question in his dissent. The essence of Justice Brennan's dissent is embodied in the Court's *Glendale* analysis.

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194. Id. at 630.
195. The Supreme Court found that the decision failed to constitute a final judgment for purposes of 28 U.S.C. § 1257. 450 U.S. at 633. Section 1257 dictates that the Court may review only "final judgments or decrees rendered by the highest court of a state in which a decision could be had." Title 28 U.S.C. § 1257 (1982). The Court held that the judgment was not final because the Court of Appeals had held that before a remedy could be considered, the case would have to be retried to determine unresolved factual issues as to whether any remedy was available. 450 U.S. at 433.
196. Justice Brennan's dissent foreshadowed the Court's holding in *Glendale*. Justice Brennan believed that the Court mischaracterized the California court's holding and viewed the decision as ripe for review. 450 U.S. at 637 (Brennan, J., dissenting). Justice Brennan interpreted the state court opinion as holding that a government's exercise of its police power can never constitute a compensable taking, *id.* at 639, but must be reviewed under the due process clause. Id. at 641 n.4. Justice Brennan stated:

> It is not merely linguistic coincidence that the California Supreme Court in *Agins* never analyzed the Tiburon zoning ordinance to determine whether a Fifth Amendment 'taking' without just compensation had occurred. Instead, the court noted that 'a zoning ordinance may be unconstitutional and subject to invalidation only when its effect is to deprive the landowner of substantially all reasonable use of his property.'

> *Id.* at 641 n.4 (emphasis in original). Justice Brennan interpreted the California court's position as flatly contradicting the precedent of the Supreme Court and cited *Pennsylvania Coal* for the proposition that a land use regulation may constitute a compensable taking. *Id.* at 649.

After establishing that a land use regulation could constitute a taking, Justice Brennan addressed the issue of compensation. He reasoned that because the fifth amendment mandates compensation when a taking occurs, the government entity which promulgates a regulation that works a taking must pay compensation from the point in time the regulation was enacted until the regulation is rescinded or amended. *Id.* at 653. Under this analysis, the regulation is deemed to have worked a temporary taking for the period of time it was in effect.

197. See *infra* text accompanying notes 275-93. Although Justice Rehnquist concurred in the majority's dismissal of *San Diego Gas*, he stated that "[i]f I were satisfied that this appeal was from a final judgment or decree of the California Court of Appeals, . . . I would have little difficulty in agreeing with much of what is said in the dissenting opinion of Justice Brennan." 450 U.S. at 633-34 (Rehnquist, J., dissenting). Justice Rehnquist adopted Justice Brennan's analysis almost in its entirety in his *Glendale* majority opinion.
The opportunity for resolving the compensation issue presented itself to the Court two more times.\(^{198}\) The Supreme Court dismissed both cases without addressing the issue. In *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*,\(^ {199}\) the Court held that the case was not ripe for review for two reasons. First, the Court found that the plaintiff had not sought a variance to the zoning ordinance. Therefore, he had not exhausted all administrative remedies.\(^ {200}\) Additionally, the Court found that the plaintiff had not shown that state law failed to provide an adequate remedy for an excessive regulation.\(^ {201}\) Similarly, the Court held that the fourth case, *MacDonald Sommer & Frates v. Yolo County*, did not meet the procedural criteria for review and thus the court never reached the issue of compensation.\(^ {202}\)

III. THE SUPREME COURT'S RECENT PATTERNS

A. *Penn Central Transportation Co. v. New York City*

The Court attempted to reconcile the two major doctrines of *Mugler v. Kansas* and *Pennsylvania Coal v. Mahon* in the case of *Penn Central Transportation Company v. New York City*.\(^ {203}\) In the *Penn Central* opinion, the Court repudiated the *Mugler* holding that an exercise of the police power can *never* constitute a taking. By declaring that an oppressive regulation

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200. Id. at 186. The Court stated that a claim brought under the fifth amendment's just compensation clause is not ripe until the "entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue." *Id.* The plaintiff may have been able to obtain a variance which would have allowed for development according to its plan. *Id.* at 188.
201. 473 U.S. at 194 n.13. The Court stated that because the fifth amendment prohibits a taking without an award of just compensation, no violation of the constitution occurs until just compensation is denied by the state. Here, the plaintiff had not shown that the state provided adequate procedures or remedies for his alleged deprivation. *Id.* at 197. The Court went on to cite state cases where state statutes had been interpreted as providing for an inverse condemnation action when a regulation works a taking. *Id.* at 196.
202. 106 S. Ct. 2561 (1986) (because plaintiff failed to submit all subdivision proposals to planning commission, there was no final position on how regulations would be applied to plaintiff's land).
203. 438 U.S. 104 (1978). The Court reviewed the history of the regulatory taking issue and concluded that "this Court, quite simply, has been unable to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons." *Id.* at 124. The Court, however, identified two factors which consistently appear in the cases: 1) the economic impact of the regulation on the claimant re: the extent to which the regulation has interfered with the claimant's property rights; and, 2) the character of the government action. The Court then proceeded to develop and apply its newly created test. *Id.*
may constitute a taking, the Court seemingly adopted the Pennsylvania Coal standard. However, the Court's analysis incorporated the Mugler factor which allows justification for an oppressive regulation, provided the regulation is enacted to serve a public purpose. Incorporation of the concepts of both Mugler and Pennsylvania Coal into a single set of criteria resulted in intensified confusion. The Court's first major attempt at reconciliation resulted in an opinion which one commentator described as wavering "between the taking, equal protection and due process doctrines."

Penn Central involved a challenge to the New York City Landmark Preservation Act by the owners of the Penn Central terminal. Penn Central terminal had been designated an historic landmark subject to certain restrictions on its use which were enumerated in the Landmark Preservation Act. Pursuant to the requirements of the Act, the plaintiffs submitted a plan to the Landmark Commission for building an office tower over the terminal. The plan was rejected by the Landmark Commission on the grounds that the office tower would "overwhelm" the terminal and destroy a major portion of its aesthetic value. The terminal owners filed suit in the New York Supreme Court on the ground that the Landmark Preservation Act, as applied to their property, constituted a taking without just compensation and deprived them of their property without due process of law.

Justice Brennan, writing for the majority, declared that the Court had been "unable to develop any 'set formula'" to determine when a land use regulation amounts to a taking and then proceeded to develop an analysis which borrowed concepts from both Pennsylvania Coal and Mugler. Justice

204. The Court indicated that a taking would be found more readily when the government interfered with private property in a physical way. Nonetheless, the Court conceded that a taking may be found in the regulatory context. Id. at 124.

205. The Court noted that when a regulation promoted public health, safety or welfare, the Court had historically upheld such regulation, even though it prohibited the most beneficial use of the property. Id. at 125.

206. This opinion created confusion because the Mugler and Pennsylvania Coal doctrines are at odds with each other. Mugler holds that a regulation will never constitute a taking because the power of eminent domain and the police power are government powers which are different in kind. See supra notes 106-15 and accompanying text. Pennsylvania Coal, however, holds that the eminent domain power and the police power are merely different in the degrees of their application. "The Supreme Court's lengthy majority and dissenting opinions in Penn Central compound rather than disentangle the doctrinal imbroglio over when a taking occurs." Stoebuck, supra note 57, at 1069.

207. Mandelker, supra note 180, at 500.

208. 438 U.S. at 107.

209. Under the prevailing New York City Landmarks Preservation Law, N.Y.C. ADMIN. CODE, ch. 8-A, § 205-1.0 (1976), once a structure is designated a landmark an owner has a duty to keep the exterior features of the building in good repair and the Landmark Preservation Commission must approve any plan to alter the exterior of the building. 438 U.S. at 111-12.


211. Id. at 118.

212. Id. at 119.

213. Id. at 124.
REGULATORY TAKINGS

Brennan observed that previous decisions reflected "ad-hoc, factual inquiries" and identified two significant factors in those inquiries. The first factor, the economic impact of the regulation, required an evaluation of the degree to which a particular regulation interfered with a property interest. The second factor, the character of the government action, focused on whether the government action could be characterized as a physical invasion, and whether it was enacted to promote the public welfare.

The economic impact factor incorporates notions of both Mugler and Pennsylvania Coal, and reflects the "oppressiveness of the means" factor of Mugler. The degree of the regulation's economic oppressiveness plays a negligible role under a Mugler analysis. If a regulation is a valid exercise of the police power, in that it serves a public purpose, the oppressiveness of the regulation will not tilt the scale in favor of finding a taking.

In Pennsylvania Coal, however, the degree of interference was the focus of the analysis while the nature of the government action played a subordinate role. Under the Pennsylvania Coal analysis, a legitimate public purpose will not justify a regulation which deprives a landowner of a significant value in his property. The Penn Central Court attempted to find a middle ground for the interference factor, giving it more weight than a Mugler analysis would, but at the same time not allowing it to dominate the inquiry, as was the case in Pennsylvania Coal.

The second factor, the character of government action, clearly echoes the public purpose element of Mugler. Under the Mugler analysis, a regulation enacted to promote the public welfare never constitutes a taking. The nature of the government action was, therefore, outcome determinative. Under the Court's analysis in Penn Central, the Landmark Act restrictions were found to play a substantial role in promoting the public interest in the city's aesthetic value. This finding played a central role in the Court's holding that no taking had occurred. Unlike Mugler, however, the Court...
viewed the nature of the government action as one factor in its analysis and also evaluated the economic deprivation the regulation caused or was likely to cause. The Court then balanced both factors in reaching its final determination.225

At first glance, the Court's language in *Penn Central* suggests an attempt to strike a balance between *Mugler* and *Pennsylvania Coal*.226 However, a closer look at the opinion reveals that the Court's restructured analysis continued to favor the social interest in property. The *Penn Central* Court appeared to require a major degree of economic deprivation before it would find that the property owner's "investment backed expectations" were subject to unacceptable interference.227 Furthermore, the Court focused on the lost property rights as a percentage of the entire parcel of property rather than considering each lost property right as a unit unto itself.228 The Court's treatment and application of these factors resulted in an analysis which continued to defer to the social interest in property when a land use regulation was at issue.

In evaluating the degree of interference with the property owner's "investment backed expectations," the Court found that the Landmark Act did not interfere with the present uses of the property and that the owner was able to obtain a reasonable return on its investment.229 The Court, therefore, concluded that the degree of interference with the owner's property rights did not rise to the level of a taking. However, in the final footnote of the opinion, the Court indicated that if the circumstances changed and the terminal ceased to be economically viable, some relief would be available.230

The ability of the property owner to prove that a regulatory taking has occurred is restricted by the *Penn Central* Court's analysis of the degree of interference involved. First, the Court indicated that as long as the landowner's economic situation remained the same, no taking could be found.231 Since the terminal owner realized a reasonable rate of return, the regulation had no impact on the property's present uses.232 Second, the Court's final footnote implies that the Court will require a great degree of deprivation before a regulation will be deemed to have worked a taking.233 The Court's suggestion that the point where a taking may be found is where property

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225. In fact, in the majority's final footnote the Court emphasized that the holding was based on the particular facts and circumstances involved. The Court further indicated that if circumstances changed, and the property ceased to be economically viable, the plaintiff could potentially obtain relief at that time. *Id.* at 138 n.36.
226. See *supra* notes 203-08 and accompanying text.
227. See *infra* notes 233-35 and accompanying text.
228. See *infra* notes 234-35 and accompanying text.
229. 438 U.S. at 136.
230. *Id.* at 138 n.36.
231. *Id.* at 136.
232. *Id.*
233. *Id.* at 138 (court indicated that if "circumstances have so changed that the terminal ceases to be 'economically viable' the plaintiff may have cause of action").
ceases to be "economically viable" implies that a property owner will be required to show a total loss of economic value to establish a taking.

The Penn Central Court's focus on the lost rights as they relate to the entire parcel of property serves to further restrict the ability of the property owner to recover. The Court stated that the degree of interference is determined by focusing on the property as a whole rather than on the airspace above the terminal as a separate segment.\(^{234}\) The Court concluded that in relation to the entire property, the loss of airspace rights did not constitute an unacceptable degree of deprivation.\(^{235}\) The result of this "property as a whole" evaluation is to weaken the impact of the deprivation element in relation to the government action element. Thus, a landowner must now be deprived of a major portion of his property before the Court will consider the deprivation severe enough to counter-balance a finding that the regulation was enacted pursuant to a legitimate public purpose.

**B. Keystone Bituminous Coal Association v. DeBenedictis**

The Court in *Keystone Bituminous Coal Association v. DeBenedictis*\(^{236}\) addressed the taking question once again. *Keystone* involved a challenge to the Pennsylvania Subsidence Act by an association of coal companies.\(^{237}\) The Pennsylvania Act prohibited the mining of more than 50 percent of the coal in areas where subsidence due to mining operations could cause damage to pre-existing public buildings, dwellings, and cemeteries.\(^{238}\) The plaintiffs filed suit in federal district court to enjoin the Pennsylvania Department of Environmental Resources from enforcing the Subsidence Act.\(^{239}\) The coal association alleged that their inability to mine the coal in the areas specified by the Subsidence Act constituted an uncompensated taking prohibited by the fifth amendment just compensation clause.\(^{240}\)

\(^{234}\) *Id.* at 131-32.
\(^{235}\) *Id.* at 136-37.
\(^{237}\) Bituminous Mine Subsidence and Land Conservation Act, 52 PA. STAT. ANN., Tit. 52 1406.1 § 4 (Purdon Supp. 1986). Section 4 provides:

In order to guard the health, safety and general welfare of the public, no owner, operator, lessor, lessee, or general manager, superintendent or other person in charge of or having supervision over any bituminous coal mine shall mine bituminous coal so as to cause damage as a result of the caving-in, collapse or subsidence of the following surface structures in place on April 27, 1966, overlying or in the proximity of the mine:

1. Any public building or any noncommercial structure customarily used by the public . . . .
2. Any dwelling used for human habitation; and
3. Any cemetery or public burial ground . . . .

Tit. 52 § 4 (quoted in 107 S. Ct. at 1237 n.6).
\(^{238}\) 107 S. Ct. at 1238.
\(^{239}\) *Id.*
\(^{240}\) *Id.* at 1239.
The *Keystone* plaintiffs argued that the State of Pennsylvania recognized three estates in land: the "mineral estate," the "surface estate," and the "support estate." The mining companies generally acquired the support estate along with the mineral estate when negotiating acquisitions. The other party to the transaction obtained only the surface estate and typically waived the right to any damages which might occur due to mining operations. The plaintiff argued that by prohibiting all coal mining in certain areas, the Subsidence Act constituted a taking of their support estate.

The plaintiffs framed their taking argument around the *Pennsylvania Coal* doctrine. The district court, however, did not find a taking and distinguished *Pennsylvania Coal*. The court held that the Subsidence Act was a proper exercise of the state's police power, and was enacted to promote the welfare of the state's general populace. The district court distinguished *Pennsylvania Coal*, stating that the majority in *Pennsylvania Coal* had found that no public interest was served by the Kohler Act they had reviewed and, therefore, there was no justification for the state's interference with the individual property rights in that instance. The court of appeals affirmed, holding that the Subsidence Act was justified as a legitimate exercise of the police power.

The Supreme Court granted certiorari in *Keystone* and applied its *Penn Central* analysis. The analysis focused on the nature of the government

241. *Id.* at 1238. This unique approach to property ownership developed in Pennsylvania between 1890 and 1920. At that time, the coal industry dominated the state economy and was given a great deal of freedom in its actions. By severing title in this manner, coal companies were able to mine the coal underground and profit from the sale of surface title which might otherwise have gone unused. *Id.* at 1238-39.
242. 107 S. Ct. at 1238.
243. *Id.* at 1239.
244. *Id.*
245. The petitioners argued that *Pennsylvania Coal* controlled the case and structured their claims according to those involved in *Pennsylvania Coal*. They argued that the Act's impact on their support estate was so severe as to work a taking. 107 S. Ct. at 1239. This argument emphasizes the "degree of interference" factor which was similarly focused on in *Pennsylvania Coal*. Additionally, the petitioner in *Keystone* contended that the Subsidence Act impaired contractual agreements whereby the surface owners had waived their ability to impose liability on the coal companies for surface damage. *Id.* at 1251. A similar argument was made in *Pennsylvania Coal*. The petitioners claimed the Kohler Act impaired the obligation of the contract between the parties and worked a taking of their property. 260 U.S. at 394-95.
246. 107 S. Ct. at 1242.
247. *Id.*
248. 771 F.2d 707, 715 (3rd Cir. 1985) (*Pennsylvania Subsidence Act is legitimate means of protecting environmental and economic well being of Commonwealth*).
250. The takings analysis revolved around the two factors the Court used in *Penn Central*: the character of the government action and the diminution of value and investment backed expectations. 107 S. Ct. at 1242. As in *Penn Central*, the Court refused to view the portion of the petitioner's property which was interfered with as a unit unto itself. The Court chose instead to view the loss as a percentage of the entire property. *Id.*
action and the degree of interference with existing property rights and investment backed expectations. The Keystone Court, in analyzing the nature of the government action, found a public purpose in the Subsidence Act and distinguished Pennsylvania Coal on that basis. The Court found that the Pennsylvania legislature enacted the Subsidence Act to promote important public interests in conservation, safety and economic well being, whereas the regulation in Pennsylvania Coal was enacted to serve private interests. The majority adopted the lower courts’ views that the Kohler Act in Pennsylvania Coal was distinguishable from the present Subsidence Act. Noting that the state’s police power was being used to “abate activity akin to a public nuisance,” the Court incorporated language from the noxious use line of cases and found this public purpose to be solid justification for upholding the Subsidence Act.

The second step of the analysis focused on the degree of interference generated by the Subsidence Act. The Court first noted that the claim was a facial challenge to the statute and not a claim of specific injury. Because the coal companies had not alleged an actual injury, the burden of proving a taking was more difficult to satisfy. The Court began its analysis by noting that the plaintiff had not shown that the Subsidence Act made mining in general impracticable. The plaintiff had submitted statistics from 13 of the mines that the companies operated. These statistics showed that the percentage of coal required by statute to be left in place ranged from less than 1 percent to 9.4 percent. The majority refused to view this coal as a separate unit of property for purposes of quantifying loss. The Court quoted Penn Central:

‘Taking’ jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of

251. 107 S. Ct. at 1242.
252. Id.
253. Id. (citing Pa. Ann. Stat., Tit. 52, § 1406.2 (Purdon Supp. 1986)).
254. Id.
255. Id. at 1243.
256. Id. at 1246.
257. The petitioners appealed the Court of Appeals’ decision on the ground that the enactment of the statute constituted a taking per se. They did not base their claim on the actual damage that the statute would cause their particular property. Id. at 1246. The petitioners explained that assessing the impact of the statute on their property would require expensive and complex proof that they were not prepared to present. Id. The Court stated that, particularly on cases raising the taking issue, facial attacks on statutes were disfavored. The Court required petitioners to show that the regulation denied them economically viable use of their land. 107 S. Ct. at 1247.
258. Id. at 1246-47.
259. Id. at 1248 n.24.
260. Id.
the action and on the nature of the interference with rights in the parcel as a whole...261

The Court found that this loss of coal neither made it commercially impracticable to mine, nor interfered with the reasonable investment backed expectations of the coal companies and, therefore, did not constitute a taking.262

The Keystone Court briefly addressed the plaintiff's argument that the Subsidence Act destroyed the value of the plaintiff's support estate.263 The Court refused to view the support estate as a separate property interest.264 The support estate was characterized as merely a percentage of the plaintiff's property interest and, as such, the loss of this segment was deemed insignificant.265

Chief Justice Rehnquist's dissent argued that the majority opinion gave undue weight to the nature of the government action through a faulty reading of Pennsylvania Coal.266 The dissent stated that the Kohler Act in Pennsylvania Coal had a public interest objective, since it was promulgated "as remedial legislation, designed to cure existing evils and abuses."267 Nonetheless, under the Pennsylvania Coal analysis, the public nature of the Kohler Act was "insufficient to release the government from the compensation requirement."268 Therefore, in Pennsylvania Coal, the existence of a public purpose did not excuse the government from its actions and a taking was found. Chief Justice Rehnquist reasoned that "[t]he protection of private property in the Fifth Amendment presupposes that it is wanted for public use, but provides that it shall not be taken for such use without compensation."269

In his dissent, the Chief Justice argued that the Keystone Court erred in focusing on the lost property as a percentage of the whole.270 Rather than

262. Id. at 1249.
263. Id. at 1250.
264. Id.
265. Id.
266. Justice Rehnquist stated: The Court first determines that this case is different from Pennsylvania Coal because "[t]he Commonwealth of Pennsylvania has acted to arrest what it perceives to be a significant threat to the common welfare." In my view, reliance on this factor represents both a misreading of Pennsylvania Coal and a misunderstanding of our precedents.
107 S. Ct. at 1254 (Rehnquist, J., dissenting) (quoting Pennsylvania Coal, 260 U.S. at 415 (emphasis added)).
267. Id. at 1255 (Rehnquist, J., dissenting) (quoting Kohler Act of 1921, PA. STAT. ANN. tit. 52 § 661 (Purdon 1954)).
268. Id. at 1255.
269. Id. (quoting Pennsylvania Coal, 260 U.S. at 415 (emphasis added)).
270. "This conclusion cannot be based on the view that the interests are too insignificant to warrant protection by the Fifth Amendment, for it is beyond cavil that government appropriation of 'relatively small amounts of private property for its own use' requires just compensation." Keystone, 107 S. Ct. at 1258 (Rehnquist, J., dissenting) (quoting 107 S. Ct. at 1250 n.27).
viewing the loss as two percent of the entire coal available to the companies, the dissent argued that the two percent should be viewed as a 27 ton loss.\textsuperscript{271} To focus on the loss as a percentage of the whole had the effect of watering down the degree of loss element. The Chief Justice contended that the Court's view turned on the fact that the taking at issue was regulatory and that its view was inconsistent with the traditional principles of eminent domain.\textsuperscript{272} According to Chief Justice Rehnquist, in cases where the government physically invades a portion of private property, compensation is required for that portion.\textsuperscript{273} However, under the majority's analysis, the Court will not find a regulatory interference to be a taking unless the property owner has suffered a major degree of loss in relation to the entire property interest.\textsuperscript{274}

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

Several months after the Keystone decision, the Court addressed the compensation issue in First English Evangelical Lutheran Church of Glendale v. County of Los Angeles.\textsuperscript{275} The plaintiff in Glendale was a religious organization which owned 21 acres in a canyon in the Los Angeles National Forest. This parcel was situated along the Middle Fork Creek, a natural drainage channel for a watershed owned by the National Forest Service.\textsuperscript{276} In 1978, a flood destroyed the camp that the church maintained for handicapped children.\textsuperscript{277} A storm dropped 11 inches of rain into the watershed area above the canyon and caused the creek to flood.\textsuperscript{278} A forest fire on the hills upstream from the camp some months before had also increased the potential for flooding in the camp area.\textsuperscript{279} After the flood, the county of Los Angeles enacted an ordinance which prohibited the construction of any buildings on the plaintiff's land.\textsuperscript{280}

\textsuperscript{271} Id. at 1259 (Rehnquist, J., dissenting).
\textsuperscript{272} "[T]he Court's refusal to recognize the coal in the ground as a separate segment of property for takings purposes is based on the fact that the alleged taking is 'regulatory,'" rather than a physical intrusion." Id. at 1258 (Rehnquist, J., dissenting).
\textsuperscript{273} Id. at 1258 (Rehnquist, J., dissenting).
\textsuperscript{274} The Court indicated that to satisfy the regulatory taking criteria, the coal companies' operations would have to become unprofitable. "The test to be applied in considering this facial challenge is fairly straightforward. A statute regulating the uses that can be made of property effects a taking if it 'denies an owner economically viable use of his land . . . .'" 107 S. Ct. at 1247. (quoting Agins v. Tiburon, 447 U.S. 255, 260 (1980)).
\textsuperscript{275} 107 S. Ct. 2378 (1987).
\textsuperscript{276} Id. at 2381.
\textsuperscript{277} Id.
\textsuperscript{278} Id.
\textsuperscript{279} Id.
\textsuperscript{280} The County adopted Interim Ordinance No. 11,855 in January, 1979. "A person shall not construct, reconstruct, place or enlarge any building or structure, any portion of which is, or will be, located within the outer boundary lines of the interim flood protection area located in Mill Creek Canyon . . . ." 107 S. Ct. at 2381-82.
The church brought an inverse condemnation action in the California Superior Court, alleging that the ordinance denied the church all use of its property and that this deprivation constituted a regulatory taking for which just compensation was due. The trial court granted the defendant's motion to strike that portion of plaintiff's complaint which asserted that a regulatory taking had occurred. The court relied on Agins for the proposition that, in California, a landowner may not maintain an inverse condemnation suit based upon regulatory action. After an unsuccessful appeal, the California Supreme Court relied on its holding in Agins and denied review.

The United States Supreme Court granted certiorari to consider at what point compensation is due when a regulation works a taking of private property. The Court had never determined whether the government must compensate a landowner for the period of time between the regulation's enactment and the judicial pronouncement that a taking has occurred. The Court assumed a taking had occurred and declined to evaluate whether the ordinance worked a taking of the plaintiff's property because that issue was not presented to the Court.

The Court's opinion relied on Pennsylvania Coal. The Court stated the general rule that "government action that works a taking of property rights necessarily implicates the 'constitutional obligation to pay just compensation.'" The Court then held that a regulation which is found to constitute a taking of private property works a taking from the day the regulation is enacted. The Court reasoned that once a court declares a regulation to be a taking, the regulating body may amend or discontinue its regulation, or exercise its power of eminent domain. However, the Court found that the regulation had worked a taking for the period of time the regulation was in effect. Further, the majority found that temporary takings were not different in kind from permanent takings, and that the constitution mandates compensation for both. The Court found that merely to invalidate an ordinance which works a taking of private property is a constitutionally insufficient remedy. The opinion closed with Justice Holmes' famous quote

281. Id. at 2382.
282. Id.
283. Id. (citing Agins v. Tiburon, 24 Cal. 3d at 275-77).
284. 107 S. Ct. at 2383.
285. Id.
286. In referring to the California court's reliance on Agins in holding that the remedy for a regulatory interference was limited to non-monetary relief, the Court stated that "[t]he disposition of the case on these grounds isolates the remedial question for our consideration." Id. at 2384.
287. The Glendale Court recognized the Pennsylvania Coal doctrine that "[t]he general rule at least is, that while property may be regulated to a certain extent, if 'regulation goes too far it will be recognized as a taking.'" Id. at 2386.
288. 107 S. Ct. at 2386 (quoting Armstrong v. United States, 364 U.S. 40, 49 (1960)).
289. Id. at 2389.
290. Id.
291. Id. at 2388.
from Pennsylvania Coal that "a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change."  

The Court finally addressed an issue which had long loomed unanswered in the background of condemnation and property law. Although the holding is more protective of private property rights than any land use case since Pennsylvania Coal, the Court made only a tentative step in that direction. The Court's holding is limited both by the express language of the opinion and by the takings analysis which the Court applies to regulation cases.

The Court expressly limited its holding to cases in which the regulation deprives a landowner of "all use" of his property. This limitation rejects the notion that destruction of something less than total value might constitute a compensable taking. Conceivably, a regulation could diminish the value of a landowner's parcel of property by 80 percent and the regulating entity would not be required to compensate the property owner. This express limitation imposes a heavy burden on property owners seeking redress for loss incurred due to oppressive regulations.

The Glendale Court's holding is further limited by the Court's analysis in Keystone. In order to justify an award of just compensation, a Court must first find that a taking exists. Under Keystone, the Court will most likely not find a taking where the regulation is imbued with a public purpose. The Keystone Court's emphasis on the public purpose element and its emasculation of the degree of interference factor create substantial obstacles for a landowner who seeks to establish a taking. Application of the Keystone analysis provides the courts with a method for avoiding the compensation requirement. Although compensation is required upon the finding of a taking, courts will rarely find a taking under the criteria the Court has established.

D. Nollan v. California Coastal Commission

In the same term as Glendale, the Court reviewed a second case which presented the takings issue in a regulatory situation. In Nollan v. California Coastal Commission, the plaintiffs owned a parcel of beachfront property in Ventura, California. The Nollans decided to tear down a bungalow which had fallen into disrepair and build a new structure on the property. They applied for a coastal development permit as required by the California Coastal Commission (the "Commission"). The Commission granted the building permit subject to the condition that the Nollans allow the portion of their property bordering the ocean to be used as a public easement.

292. Id. at 2389 (quoting Pennsylvania Coal v. Mahon, 260 U.S. at 416).
293. 107 S. Ct. at 2389.
295. Id. at 3143.
296. Id.
The Commission reasoned that the new house would block the view of the beach. Therefore, the Commission conditioned the construction permit on the Nollans' grant of an easement, which would offset the public burden the new building would create.

The Nollans unsuccessfully attempted to have the condition waived through the Commission's administrative procedures. They brought an action in the California Superior Court claiming the requirement of an easement constituted a taking without compensation in violation of the fifth amendment. The California Superior Court found for the plaintiffs on statutory grounds. The Commission appealed. The court of appeals held that the condition was permissible because the easement requirement was "sufficiently related to burdens created by the project to be constitutional" and that the condition did not deprive the owners of all reasonable use of the property.

However, the United States Supreme Court held that imposition of the easement constituted an attempt by the Commission to take property without providing just compensation. The Court stated that if the government had simply required the plaintiffs to grant a public easement, the requirement would constitute a physical invasion and a taking which required compensation. In this case, however, the grant was a condition to a building permit, designed to offset the burden the new structure would create. The Court framed the issues as whether the easement was a reasonable condition to the land use permit and whether the condition was justified by a "public interest."

The Nollan Court identified the public interest as psychological access to the public beaches. The Court stated that the objective embodied in the permit condition was a legitimate exercise of the Commission's police power. The Court listed conditions which would logically serve the Commission's objective, such as height and width restrictions on the new house or even a viewing spot on the property for passers-by. These conditions could be attached to the permit and would create no constitutional problems because they would serve to alleviate the psychological barrier that the house would erect. Here, however, the Court found no legitimate nexus between the condition and the objective the Commission attempted to achieve.

297. Id.
298. Id.
299. The Commission found that the new house would block ocean view and create a psychological barrier to the public beaches and the coastline. 107 S. Ct. at 3143-44.
300. Id. at 3144.
301. Id. (citing 177 Cal. App. 3d at 723).
302. Id. at 3150.
303. Id. at 3145.
304. 107 S. Ct. at 3146.
305. Id.
306. Id. at 3147.
307. Id. at 3147-48.
308. Id. at 3148.
309. 107 S. Ct. at 3149.
Court stated that the requirement of lateral access across the plaintiffs' property for people already on the beach would do nothing to alleviate the psychological barrier to others not on the beach. The Court concluded that the condition was an attempt by the Commission to acquire an easement for public use and would not alleviate the "burdens" that the Nollans' new house would create. The Court suggested that the Commission exercise its power of eminent domain to achieve its goal.

IV. IMPACT

A. Legal/Analytical

The Supreme Court's recent decisions demonstrate a shift in position from one of extreme deference to state and local regulatory entities to one of increased protection for the private property owner from destructive government regulatory schemes. While this increased protection is extremely limited, Glendale and Nollan nonetheless demonstrate the Court's attempt to shift direction. In Glendale, the Court declared that if a government regulation constitutes a taking of "all use" of an individual's property, compensation is mandated from the time an ordinance is enacted. This holding precludes a regulatory entity from simply invalidating a regulation that is found to constitute a taking. Glendale puts regulatory agencies on notice that courts will provide legal protection for landowners and that the unchecked freedom to regulate that these entities previously enjoyed has been somewhat diminished. In addition, Nollan's holding that a governmental entity's conditions on a building permit must be more than rationally related to the public benefit the condition is thought to promote, indicates that the Court is more inclined to scrutinize a regulation's relationship to the alleged public purpose. Incorporating the language from Keystone, that a regulation must substantially advance the public purpose, Justice Scalia's opinion in Nollan adds substance to this standard by warning that the Court will now carefully scrutinize the government's preferred means of achieving its objective.

Glendale's compensation guarantee and Nollan's increased scrutiny suggest that the Court is moving toward more serious protection of property rights. However, a composite view of the three recent cases reveals that this move-

310. Id.
311. Id. at 3150.
312. Id.
313. Glendale, 107 S. Ct. at 2389.
314. Justice Scalia stated:

[O]ur cases describe the condition for abridgement of property rights through the police power as a 'substantial advancing' of a legitimate State interest. We are inclined to be particularly careful about the adjective where the actual conveyance of property is made a condition to the lifting of a land use restriction, since in that context there is heightened risk that the purpose is avoidance of the compensation requirement, rather than the stated police power objective.

107 S. Ct. at 3150.
The Keystone takings analysis is the most obvious restriction on a property owner’s ability to obtain monetary compensation pursuant to the just compensation clause. The Keystone Court applied the takings analysis used in Penn Central which resulted in substantial deference to the regulatory entity. The determinative issue for the Penn Central Court was the public benefit brought about through the regulations designed to preserve the historic terminal. Similarly, the Keystone Court focused on the regulatory purpose. The Pennsylvania Subsidence Act was enacted to promote the public interest in environmental protection. The Court’s finding of a public purpose was sufficient to justify interference with property rights and preclude an award of monetary compensation to the property owner. The Keystone case indicates that the Court continues to tolerate a substantial degree of deprivation to a property owner provided that the government entity can articulate a public purpose for the regulation. This analysis draws on the substantive due process analysis, results in deference to the regulating entity, and suggests that the Court is unwilling to expand its view of what constitutes a taking which requires compensation in the sphere of land use regulation.

The Nollan opinion requires a substantial nexus between the permit condition and a legitimate public interest. This opinion provides a potential glimmer of hope to property owners seeking compensatory relief from oppressive regulation. If broadly construed, the Nollan case will require a regulating entity to establish that its regulatory scheme achieves the articulated objectives. The Court will no longer merely apply a cursory review. Under the heightened scrutiny of Nollan, the government carries a greater burden in order to salvage a challenged regulation. While this change in approach is welcome, it does not cure all the defects in the Court’s treatment of oppressive regulations.

Even if Nollan is given its broadest interpretation, the taking analysis employed by the Court will continue to result in substantial deference to the regulating entity. Although the Court suggests that a more careful scrutiny will be employed in reviewing the relationship of the means to the governmental objective, the taking analysis employed by the Court still erects a substantial obstacle to property owners seeking compensation. The Court has not addressed the issue of what constitutes a legitimate public purpose. Relevant case law indicates that even the weakest public objective justification will satisfy the Court’s scrutiny. Nollan is a case in point. The Court had no difficulty accepting “psychological access to the beach” as a public purpose sufficient to justify some sort of deprivation of property rights. While the Court held that the government’s acquisition of an easement along

315. See supra notes 250-74 and accompanying text.
316. See supra note 256-65 and accompanying text.
317. 107 S. Ct. at 3149.
the shoreline would not achieve the government’s goal, the opinion indicated that the appropriation of a viewing spot on the Nollan’s property just might.\textsuperscript{318} It appears that the Court applied an intermediate level of scrutiny to the means the government implemented to achieve its goal and little or no scrutiny to the legitimacy of the government’s objective.

If narrowly interpreted, the \textit{Nollan} case could be construed as a physical invasion case and would add little to the regulatory taking jurisprudence.\textsuperscript{319} The \textit{Nollan} case involved the government’s attempt to acquire a legally recognized and tangible property interest, an easement, from the property owner. The regulations in \textit{Keystone} and \textit{Glendale} were different in that they restricted the property owner’s use of his property and made no attempt to acquire a legally recognized and, more importantly, physical property interest as in \textit{Nollan}. The \textit{Nollan} opinion referred to the concept of physical invasion throughout the case.\textsuperscript{320} and its application could conceivably be limited to cases in which the government entity attempts to physically appropriate a parcel of property in order to achieve its objective.

The Court in \textit{Nollan} stated that if the government had desired to take an easement outright, as opposed to justifying the easement as a means to alleviate a burden created by the property owner’s intended structure, the government would have been required to award compensation.\textsuperscript{321} The Court distinguished \textit{Nollan} from a pure eminent domain action because the easement was a condition for the building permit and was designed to counterbalance the adverse effects the new building would have on the public.\textsuperscript{322} However, it is the aspect of physical invasion which appears to be the Court’s main concern throughout the opinion. As a result, it is likely the holding turned on the physical nature of the government’s attempted interference. If \textit{Nollan} is interpreted in this way, it adds little to the takings issue, as the Court has never demonstrated a reluctance to apply the inverse condemnation remedy to cases involving physical invasion. \textit{Kaiser Aetna}\textsuperscript{323} and \textit{Causby}\textsuperscript{324} illustrate the Court’s willingness to find a taking where the contested government regulation manifests itself in the form of physical interference with property rights.

\textsuperscript{318} The Court noted that a “broad range of governmental purposes” satisfy the requirement of a legitimate government interest and assumed “without deciding” that the “psychological access” justification qualified. \textit{Id.} at 3147-48.

\textsuperscript{319} While this article was being written the Supreme Court of North Dakota distinguished \textit{Nollan} on this basis. See \textit{Grand Forks-Trail Water Users, Inc. v. Hjelle}, 413 N.W.2d 344, 348 (S. Ct. N.D. 1987) (distinguishing \textit{Nollan} on ground that \textit{Nollan} involved a permanent physical occupation while the instant case involved a true regulation).

\textsuperscript{320} \textit{107 U.S.} at 3145-48.

\textsuperscript{321} The Court first noted that the situation involved an attempt to obtain an easement on petitioner’s property. The Court stated that “California is free to advance its ‘comprehensive program,’ if it wishes, by using its power of eminent domain for this ‘public purpose’ . . . but if it wants an easement across the Nollans’ property, it must pay for it.” \textit{Nollan}, at 3150.

\textsuperscript{322} \textit{Id.} at 3143.

\textsuperscript{323} \textit{See supra} note 104.

\textsuperscript{324} \textit{See supra} notes 165-75 and accompanying text.
The Glendale Court further limited the Court’s movement toward a greater degree of protection for private property. In order to apply the Glendale compensation requirement, a landowner must prove that a taking occurred which deprived him of “all use” of his land. This is an extremely heavy burden for a property owner to satisfy. The Court will first apply the Keystone/Nollan takings analysis and, if the regulation serves a legitimate public purpose and substantially furthers that purpose, the inquiry will end. However, even if no legitimate purpose exists, compensation may still be denied if the landowner fails to demonstrate that the regulation has curtailed all use of his property. Under this analysis, a landowner could conceivably incur a substantial loss in the value of his property, and not be compensated for this loss as long as he could put his property to “some” use.

B. Practical Impact

The impact of these cases on the day-to-day functioning of government regulatory entities and private property holders will be minimal. The recent cases will unquestionably cause little consternation among government regulatory entities. Similarly, the practical impact will be less than might initially be anticipated. While land use commissions will now be subject to liability in situations which previously never implicated monetary compensation, specifically, where a regulation deprives an owner of all use of his property, the Court’s analysis nonetheless fails to provide adequate protection for property owners who have suffered less than total destruction of their property interests. The Court’s holdings should temper some of the most destructive regulatory schemes. Nonetheless, given the limited situations in which government entities will be subject to liability, the Court’s holdings will effect neither the overwhelming majority of the regulatory schemes currently in force nor those contemplated.

The Court has provided three loopholes for regulatory entities: 1) the public purpose loophole; 2) the “all use” loophole; and, 3) the narrow range of protected property rights loophole. Consequently, regulatory commissions will generally have little trouble avoiding liability. The first loophole, the public purpose justification, will uphold the regulation as long as the regulation is found to promote some public purpose. Glendale suggested that the existence of a public purpose could limit the application of its holding. In the second loophole, the Court required total destruction of the property owner’s ability to make use of his property before compensation was awarded. Thus, if property is subjected to a regulation which precluded the owner from making use of the property in the manner he intended, no compensation will be required as long as some use can be made of the property.

The third loophole is found in the fact that the Court’s holdings protect only a limited range of property rights. Physical possession has always been
protected. However, the Court seems unwilling to protect some of the less
tangible property rights in any meaningful way. Use, enjoyment, and expec-
tation interests have continually been excluded from the Court’s protection.
Although the Court has indicated a willingness to protect against a total
destruction of use, many regulations which cause substantial impairment of
use and enjoyment will still withstand judicial scrutiny. The expectation
interest in property is not given serious protection as illustrated by Penn
Central and Agins. In both cases, the property owners were precluded
from using their property in the way that they had anticipated. In the face
of such limitations many property owners will be forced to sell the property.
Given the restrictions on the use to which the property may be put and the
history of intrusive regulation in the area, most prospective buyers will be
reluctant to invest. At the very least, the original owner will be forced to
adjust the selling price and absorb a loss as a result of the restriction.
Certainly, a government can never completely destroy a property owner’s
ability to alienate his property without providing some sort of redress, but
the Court’s analysis allows for situations where this right or ability can be
seriously impaired.

It is apparent from the foregoing discussion that the protection provided
property owners is limited. The three loopholes the Court provides for
government entities also define the scope of risk a property owner must
assume relative to regulation. Given the limited range of property rights
which are protected, a property owner must assume the risk of severe
impairment of certain property interests. While the property owner’s rights
of use and enjoyment are protected to a certain degree, he must incur a
total loss of use to invoke the compensation requirement. Finally, if the
government can provide a public purpose justification, the private property
owner may be required to suffer the burden of that regulation without
compensation.

C. Scholarly Critique

The judiciary has yet to develop a satisfactory definition of when govern-
ment action in the form of a regulation constitutes a taking. Many scholars
have commented on this issue and many judicial tests have been proposed.
It is beyond the scope of this Comment to provide a presentation of these
various works, but there are some central concerns which run through many
of these commentaries. The following section will examine two fundamental
problems with the Court’s regulatory taking analysis in light of the concerns
identified by the commentators.

326. See supra notes 227-33 and accompanying text.
327. See supra note 82-87 and accompanying text.
328. For an overview of the regulatory takings area and a discussion of proposed judicial
tests, see Stoebuck, supra note 57, at 1070-80.
329. See generally Berger, supra note 145; Costonis, “Fair” Compensation and the Accom-
The Court has consistently applied a limited notion of property rights in its regulatory takings analysis. Traditionally, the Court found a taking only where the government action resulted in a physical invasion of private property. This restricted notion of property rights is wholly at odds with the American legal concept of private property ownership. Private property ownership is thought to encompass a bundle of rights. Included in the bundle are the rights of use, management and possession. It follows logically that government interference with or modification of any of these rights could constitute a taking. There is no basis for drawing a distinction between government activity which interferes with property in a physical manner and government activity which interferes with property rights in a less tangible manner. A property owner’s ability to use and enjoy his property can be just as drastically impaired by a regulation as by physical interference. While it is true that the Court’s taking analysis has evolved and thus the Court now recognizes that some types of non-physical interference may constitute a taking, the Court has selected a few types of intrusion for special protection while leaving the balance of these less tangible rights unprotected. In the case of Penn Central, the Court reasoned that because the regulation did not adversely affect the existing structures there was no taking. The right to use the airspace and the right to develop the property were not deemed worthy of protection. According to Richard Epstein, one of the preeminent scholars in this area, “[t]he air rights over the existing building were property just as much as the air rights already occupied by the existing structure.”

A second concern of the scholars is the Court’s failure to develop a logical distinction between the police power and eminent domain power. The Court’s current criteria to determine whether a taking has occurred focuses on the existence of a public purpose and the degree of interference the regulation has engendered.

See supra note 68 and accompanying text.

See supra note 1.

See supra notes 69-71 and accompanying text.

See supra notes 229-34 and accompanying text.

See supra note 31, at 64.

It has been said of police power that: “the state takes property by eminent domain because it is useful to the public, and under the police power because it is harmful. . . . From this results the difference . . . that the former recognises (sic) a right to compensation, while the latter on principle does not.” E. Freund, The Police Power 546-47 (1904).

See supra text accompanying notes 236-74.
The "degree of interference" factor creates results inconsistent with those produced by an eminent domain analysis. Where the government physically invades property, compensation is mandated regardless of the extent of the interference. Partial physical takings trigger the compensation remedy in the same manner as does the taking of an entire parcel. If the Constitution protects even a small encroachment upon private property under a physical invasion scenario, the Constitution should also protect a small encroachment in a regulatory taking scenario. The Constitution has never distinguished between proper and improper government conduct on the basis of the extent of interference.

The fifth amendment, as applied to the government's exercise of its eminent domain power, incorporates two components. The government may take a private property interest only where it is justified by a public purpose and then only if it awards just compensation to the property owner for his deprivation. Under the Supreme Court's regulatory taking analysis, the existence of a public purpose serves to validate the regulation, as a public purpose validates a taking. However, under the regulatory taking analysis, this finding of a public purpose allows the government to avoid rather than award compensation.

V. CONCLUSION

The Supreme Court's recent trio of cases demonstrate the Court's desire to provide more protection for private property rights in the face of land use regulation. However, the Court's taking analysis fails to focus adequately on the underlying policies of the fifth amendment. The amendment explicitly states that "private property shall not be taken for public use without just compensation." The Constitution does not distinguish between government action which physically interferes with property rights and government action which interferes with property in a less tangible way. Similarly, the Constitution does not condition the award of compensation on the degree of interference. The Constitution does, however, indicate that the taking of property for a public use will trigger the requirement of compensation. The language of the amendment suggests that government action which affirmatively benefits the public requires the government to compensate the property owner. The private individual should not be required to bear solely the burden of the public benefit.

Land use regulation is necessary in a society whose population and industrial centers are constantly shifting. As the lines between industrial and

337. U.S. CONST. amend. V.
339. See supra note 58.
residential areas are constantly being redrawn, the government must work to accommodate and balance the competing interests of the various societal groups. It is undisputed that the government needs a certain amount of flexibility to reach this goal. However, as regulation increases, the equitable distribution of the burdens these regulations create becomes imperative. The Court's recent holdings recognize and attempt to deal with this problem by requiring redress in the worst case scenarios. However, the majority of cases fall outside the worst case scenario realm and are, therefore, not addressed. These are the cases on which the legal scholars and the judiciary should focus in their attempts to develop an analysis which will provide for a more equitable distribution of the burden of land use regulation. Perhaps the most significant aspect of the Court's recent holdings is the apparent willingness of the Court to finally address and deal with the problem of destructive land use regulation in a realistic manner. These holdings suggest that the Court is willing to scrutinize land use regulation more closely and might be willing to expand its protection for private property owners faced with destructive regulation.

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