

**How Far is Too Far? (And How Do We Decide?)  
The Inconsistencies and Contradictions in United States  
Supreme Court Takings Jurisprudence**

An honors thesis for the Department of Political Science

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## Chapter I: Introduction

Laws and regulations are in a constant state of adjustment owing to society's ongoing search for balance between pursuit of the common good and protection of the maximum individual liberty possible. During the life and progress of a community and its debate surrounding the best allotment of land for public uses, conflicts are inevitable and concessions must be made on the part of individuals, despite longstanding respect for private property rights aptly expressed in a statement borrowed from English law that "every man's house is his castle."<sup>1</sup> The Constitution acknowledges this right to property and places a limit on the burden a single landowner must carry for the benefit of the public in the Fifth Amendment that reads, "nor shall private property be taken for public use, without just compensation."<sup>2</sup> The "takings clause," as it is known, is used in eminent domain disputes and, beginning around the turn of the century, has been applied to disputes surrounding government land regulations that do not deprive individuals of ownership, but restrict the use in such a way as to infringe upon the owner's economic benefit drawn from the land. Such overstepping of government regulation was recognized in a landmark Supreme Court case from 1922 in which Justice Holmes wrote in his majority opinion, striking down a legislative act that prohibited coal mining, "if a regulation goes too far it will be recognized as a taking."<sup>3</sup> These so-called regulatory takings and their presentation before the Supreme Court over the last 100 years have since led to the creation of a confusing and often contradictory set of decisions in which the Court fails to clearly identify a takings definition and limits of regulation.

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<sup>1</sup> *Semayne's Case*, 5 Co. Rep. 91a, 77 Eng. Rep. 194 (K.B.).

<sup>2</sup> "Bill of Rights Transcript." *National Archives and Records Administration*. Web. 16 Apr. 2011. <http://archives.gov>

<sup>3</sup> 260 U.S. 393 (1922).

Within the same *Pennsylvania Coal v. Mahon* opinion Holmes maintains a theme of making vague statements about takings decisions, leaving us to wonder, how far is too far? Holmes makes no movement towards suggesting how one might answer this question, acknowledging that its resolution “depends upon the particular facts” of the case at hand.<sup>4</sup> Here, Holmes affirms that takings claims present a unique legal challenge because of how varied their details can be, and leaves the “too far” measurement to the discretion of future judges. The problem with this approach is that it inherently encourages conflict and inconsistency between decisions by leaving a very wide berth for interpretation while simultaneously offering very little in the way of additional guidance. In fact, the ambiguous wording used would cause turbulence and inconsistency in interpretations of Court takings jurisprudence over the next century, as even the fundamental legal identity of a taking has yet to be resolved.

The *Mahon* decision found that the act of legislation overstepped its Constitutional bounds, but sixty years later, when *Keystone Bituminous Coal Association v. DeBenedictis* was brought before the Court, a strikingly similar act to be a legitimate use of the police powers.<sup>5</sup> Were these both arbitrary decisions? What explanation would account for the reversal? Similarly, in reading other landmark opinions, we might question what qualifies as a “comprehensive plan” in *Penn Central Transportation Co v. New York City*;<sup>6</sup> or what Justice Pitney means by writing “it is the character of the invasion, not the amount of damage resulting from it” in *U.S. v. Cress*;<sup>7</sup> or what value the 1917 character test hold in light of the 1922 *Mahon* “diminution of value” test.

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<sup>4</sup> *Id.* at 413.

<sup>5</sup> 480 U.S. 470 (1987) at 472.

<sup>6</sup> 438 U.S. 104 (1978) at 132.

<sup>7</sup> 328 U.S. 256 (1917) at 328.

Each of these cases, regardless of the facts of the case or the test applied, evaluated, or established within, serves as one attempt to answer, or aid in answering, the larger question of how far is too far. Given the lack of precision in that statement, the wide variation between cases, and the subjectivity of weighing a public benefit against private property rights, nearly ninety years post *Mahon* and we are still watching the Court struggle with establishing a consistent doctrine and clarifying its priorities, definitions, and standards for these cases. The decision in *Penn Central* summarizes this problem quite well in its characterization of the Court's consideration of "ad hoc, factual inquiries."<sup>8</sup> What remains to be resolved, then, is what causes the Court to settle its decision on one side or the other. How does the Court decide to weigh the chicken farmer's right to property against the military's need to run practice flights in *Cress*? Why does the public's right to overtake the station's right to build and increase in economic value in *Penn Central*? What is the basis for deciding whether government has gone "too far"?

Moreover, does the analysis of law involve consideration of impact? While the Court's Constitutionally prescribed duty is to examine nothing other than the precise legal question before it, there are many (many) scholarly attempts to explain which so-called 'extralegal' factors influence Supreme Court decision-making. The goal of this thesis is twofold: first, to describe the history of the Court's handling of regulatory takings cases, highlighting the main inconsistencies between rulings, with the second goal being to tackle finding an explanation for those inconsistencies, going beyond a legal analysis of the justices' explanations for breaking with precedent and using the language of its opinions in an attempt to find indications of the Court's consideration of the decisions' impact when deciding takings cases. While a specific thought process, such as consideration of a decision's future impact, cannot be proven to have been part of the Justices' deliberations, this thesis will look for instances in the opinions that

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<sup>8</sup> 438 U.S. 104 (1978) at 123.

reference impact, searching for why and in what context the justices discuss it in their opinions and what role it serves them, and assessing what type of impact is considered (whether practical or legal). This process will not be able to determine what justices include in their thoughts before handing down a decision, but will look for what role impact plays in the expression of that decision through the opinions, and will suggest that impact is a factor in the deciding.

## Chapter II: What Sways Judicial Decision Making?

How do justices reach a decision in the absence of detailed legal instruction or clear precedent? What is it that tips the scale for one person's right over another's? Court decisions often rely on precedent to add legitimacy and strength to their rulings and to create and refine doctrines. The Supreme Court's rulings that involve regulatory takings stand out in this regard. It is not that the decisions do not make *any* use of precedent, in fact the opinions are quite full of references to prior cases as is typical of Court decisions, but rather they do so in an inconsistent way. One of the trademarks of the history of takings jurisprudence, as will become evident during the ensuing overview of the significant cases, is the bench's choice to sporadically break with precedent, demonstrating a lack of clarity and consensus both between and within many of the Courts.

Takings cases were selected for this study covering Supreme Court behavior because there has been little in the way of clear legal guidance to direct Court decisions on this topic, leaving much discretion to the justices. This ambiguity of the law begins with the Constitution's succinct takings clause, the components of which have sparked great disagreement over the phrases *public use* and *just compensation*, contentious constructions on in their own right and not to be dealt with here. Additionally, there exists the already referenced spotty record of adherence to precedent and together, these qualities have given justices frequent leeway over the last century to invent new tests and approaches for deciding these cases. Furthermore, lots of vaguely worded decisions, another hallmark of takings cases, has made establishing, defining, and maintaining precedent quite difficult, and contributed to the overall state of confusion in takings jurisprudence. In nearly one hundred years of handing down takings decisions, the Court has yet

to establish a comprehensive definition of a taking as well as a universal means by which to identify one.

Finally, takings cases are an odd problem for a legal system that desires to create a tidy string of case law as their details can and do vary from a chicken farmer's production loss to the preservation of historic New York City buildings. It is therefore understandable that there exists difficulty in rendering a one size fits all doctrine. Yet even cases with closely similar facts, as we will see in the cases of two coal companies, have yielded differing opinions from the Court. Its jurisprudence has led critics to refer to it as a muddle and even the Court itself to describe its decisions as "ad hoc". These cases and the subsequent decisions offered by the Court present an opportunity to examine the factors outside of legal theory that impact decision-making. The fundamental conflict at the heart of takings claims is at what point the personal right to private property overtakes the public's right to the pursuit of a common good via the legislature's police powers. These are two highly prized and protected rights, creating a moral conflict for a legal institution.

### *Explaining Court Reasoning*

For the purposes of this investigation into Supreme Court behavior, the theories regarding the factors that influence Court decision-making can be divided into two general categories of theory: that of strict legal analysis opposite those that account for the plethora of outside factors that may influence the former. The latter of these idea camps is large and further divides into various subcategories. Regarding the potential impact of a decision and the use of this in the justices' deliberations, significant attention is paid to both internal factors from the justices themselves and their past experiences, as well as outside forces acting on the judiciary during the

deliberation process. Despite the many works searching for the right explanation of extralegal factors, there exists a gap in the literature. Explicit discussions, or even mere mentions, of the use of impact by justices in arriving at and issuing a decision are omitted.

### *The Argument of the Legalists*

George and Epstein provide a useful comparison of the so-called legal and extralegal models of judicial decision making.<sup>9</sup> Among the legalists, there are a few variations in interpretation of how the court either does or should apply legal rules to the handing down of decisions. Levi focuses on the necessity for establishing legal consistencies, identifying commonalities between cases in terms of the legal questions posed, and the influence of these patterns over subsequent decisions.<sup>10</sup> George and Epstein focus on Levi's jurisprudence analysis as the predominant viewpoint of early to mid 19th Century legalist theory, along with the scholars who agreed with this model such as Murphy and Cushman.<sup>11</sup>

Precedent is, of course, a critical component in all legal arguments and decisions. It is a foundation on which to build doctrines and to clarify and define an entire society's position on justice. Creating and maintaining legal precedents provides for a tidy set of prepared explanations as well as a united voice, replacing a single court's decision with the voice of generations of judges. Understandably, when this precedent does not exist, or contradicts itself, as has often been the case over the course of takings law history, the legal community is left in the chaos and potential of undefined territory. Concurrently, as has become well established per many authors, the strict legalist model does not carry much weight on its own anymore and the

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<sup>9</sup> George, Tracey E., and Lee Epstein. "On the Nature of Supreme Court Decision Making." *The American Political Science Review* 86.2 (1992): 323-37. <http://www.jstor.org/stable/1964223>.

<sup>10</sup> Levi, Edward Hirsch. *An Introduction to Legal Reasoning*. Chicago: Univ. of Chicago, 1978. <http://www.books.google.com>.

<sup>11</sup> George and Epstein, 324.

hunt is on for additional influences on the Court. There has therefore emerged a string of theories, some complementary and some contradictory, that seek to explain part of the process of reaching a judicial decision.

### *Making Room for Extralegal Factors*

While the Court's constitutionally prescribed duty is to examine nothing other than the precise legal question before it, following the guidance of precedent and rational decision making to reach a decision, there are many scholarly attempts to explain where this process becomes affected by external influences. It is a widely accepted concession that "the lesson of American jurisprudence [is that the legal system] has its limits and that a degree of discretion is inevitable."<sup>12</sup> This "degree of discretion" is precisely what this thesis seeks to identify using the context of regulatory takings.

On the more extreme end of theories that embrace the idea of judicial discretion and the role of extralegal factors would be those that reject legal method entirely. Hutcheson, for example, supports the justice's use of "his own intuition and imagination" to the extent that decisions become the product of "an irrational, intuitive, or emotional hunch" that somehow leads to the handing down of a "good (just) decision."<sup>13</sup> Most legal theories do not take the role of extralegal factors so far as to deem them the sole influence on what end up being irrational judgments. Nevertheless, they do allow for the idea that legal theory cannot explain nor account for all judicial decisions as some require justices to draw upon opinions or intuitions outside of legal in order to reach a fair judgment between competing interests. This distinction between

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<sup>12</sup> Golding, M.P., "Principled Decision-Making and the Supreme Court." *Columbia Law Review* 63 (1963): 43.  
<sup>13</sup> ek. *Methods of Legal Reasoning*. Dordrecht: Springer, 2006. Print. 1.

strict adherence to legal reasoning and the point at which a justice's own moral persuasion enters the decision making process is the distinction between moral philosophy and legal reasoning.<sup>14</sup>

A version of this theory less drastic than Hutcheson's is that of Oliver Wendell Holmes, Jr., associate justice of the Supreme Court during the early decades of the 20th century. Holmes provides a valuable insight into the judicial process from his position as a judge in Massachusetts (but prior to serving on the Supreme Court bench) in *The Path of the Law*.<sup>15</sup> In a long discussion surrounding the legal process and its place in contemporary society, Holmes addresses several of his observations including those regarding the intersection of moral philosophy and legal rulings. Firstly, Holmes places morality above the law as being a more powerful constraint on human behavior in general, and then quite thoroughly states his belief that, deeper than logical legal reasoning, there is "an inarticulate and unconscious judgment...[at the] very root and nerve of the whole proceeding."<sup>16</sup>

Under one interpretation, Holmes is arguing that "constitutional interpretation does not occur within a vacuum of values" and that the Supreme Court "cannot avoid taking these values into account."<sup>17</sup> For Holmes, when these values are placed in competition with one another before the Court, the final decision must, to some degree, be the result of an arbitrary weighing of the values in question and a reflection of the particular Court's (or justice's) opinion regarding the most just resolution.<sup>18</sup> There of course then inspires the question of what tips the balance for the Court in such a case. This view of the Court's decision making process has implications for the study of regulatory takings cases due to the aforementioned inherent values conflict that lies within them.

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<sup>14</sup> Golding, 38.

<sup>15</sup> Holmes, Oliver Wendell. "The Path of the Law," *Harvard Law Review* (1897). <http://www.jrank.org>

<sup>16</sup> Holmes, n. pag.

<sup>17</sup> Golding, 48.

<sup>18</sup> Golding, 49.

Furthermore, Holmes found a relationship between the evolution of values (that to him are fluid) and the evolution of legal thought, arguing, similarly to his previous point, that logic is not only not the only factor present in judicial decisions, but that it also is not the only force in the development of the law.<sup>19</sup> While not explicitly stated in this work, Holmes seems to be expressing the sentiment that the collective experience of society is a factor in development of legal logic. This attitude is similarly expressed by proponents of extralegal theories that account for the role of changing public opinion in altering the Court's attitude over time and will be revisited in the takings cases whose decisions illustrate this process.

Access to Holmes's views on U.S. jurisprudence, especially in the context of the Supreme Court and the intermingling of values and logic is important in understanding the Court's overall processes and especially its approach to takings. Holmes served a prominent role in crafting several landmark Supreme Court decisions, including several of the earliest takings cases. Knowing his views on resolving the competition of values on either side of a case might explain what tipped the balance in both the opinions that he authored as well as in several decisions after his time. Additionally, Court justices rarely, if ever, discuss their views regarding how their decisions are made and opinions are crafted and, while Holmes put his opinions into writing before joining the bench, this work provides a rare insight into one justice's take on the impact of personal as well as societal values, a reality that many judges might choose not to admit.

Beyond Holmes's view on moral philosophy's intermingling with legal logic - and written six decades later - is Dahl's closely similar argument that cases at times appear before the Court for which the legal process is simply "inadequate," and justices must resort to political

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<sup>19</sup> Holmes, n. pag.

judgments.<sup>20</sup> Dahl bluntly acknowledges that the Constitution's periodically vague wording as well as the reality that case law is sometimes lacking in suitable precedent not only allows for but in fact requires extralegal factors to enter into certain judgments, convert the Court into a political institution.<sup>21</sup> Dahl's argument is particularly relevant to an evaluation of takings jurisprudence given the lack of direction found in the Constitution regarding this matter, the lack of suitable and clear legal precedent, and the weak record of adherence to the precedent that does exist. The parallels between takings jurisprudence and Dahl's argument in support of the existence of extralegal influences contribute handily to an examination of the factors at play in reaching takings decisions. Dahl's work subsequently gave way to a broad collection of judicial decision making theories, most prominently the attitudinal model of Supreme Court behavior promoted by Segal.<sup>22</sup> Some of these theories regarding the extralegal factors that seep into the judicial decisions follow.

#### *A Note on Obiter Dicta*

If certain cases are decided by judicial reactions to moral questions when the process of legal theory and logic do not render a decision, what causes the justices to support one value over another? In order to determine these factors that affect the results of takings cases, the insights provided by Court opinions and dissents offer the best hints in the way of the obiter dicta contained therein. Simply put, obiter dicta are "additional arguments."<sup>23</sup> These phrases and statements, also known as "by the way statements," have no judicial holding, but will be the

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<sup>20</sup> Dahl, Robert A. "Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker." *Role of the Supreme Court Symposium*, No.1 (1957). 281.

<sup>21</sup> *Id.*

<sup>22</sup> Rosenberg, Ronald H. "The Non-Impact of the United States Supreme Court Regulatory Takings Cases on the State Courts: Does the Supreme Court Really Matter?" (1995). Faculty Publications. Paper 513. <http://scholarship.law.wm.edu/facpubs/513>.

<sup>23</sup> Plug, Jose. "Indicators of obiter dicta. A pragma-dialectical analysis of textual clues for the reconstruction of legal argumentation." *Artificial Intelligence and Law*, 8:3, 2000. 190.

clues for identifying what motivations caused the Court to land on one side of a takings dispute over the other.<sup>24</sup>

### *Extralegal Theory*

A much greater amount of scholarly literature exists on the roles of extralegal factors in judicial decision-making and the theories that attempt to identify the dominant members of that group. One of the first to identify and grapple with the reality that judicial decisions are based on more than legal analysis, laying the foundations for further discussion, was Pound who advocated for a “realist jurisprudence,” also termed “sociological jurisprudence,” that pays heed to the debate between the legal question at hand and the court’s inclination to act according to what it “feels it ought to do.”<sup>25</sup> George and Epstein list Pound as a kind of catalyst for the rise of extralegal theories on judicial decision making, citing also the *Muller v. Oregon*, 208 U.S. 412 (1908), case for which Justice Brandeis wrote a brief that extensively covered the related sociological data.<sup>26</sup> These works were soon followed by a surge of theories in the 20th century that look toward a variety of nonlegal influences on judicial decision making.

Extralegal theories usually cluster under specific umbrellas by theme, categorized primarily within the respective impacts of personal values, public opinion, and external politics at the time of the decision, as well as among a few less widely discussed factors such as the importance of the litigants’ approach, the court’s relationship with other branches of government, or the court’s practice of choosing cases with policy implications in mind. There remain,

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<sup>24</sup> Scofield, Robert G. “The Distinction between Judicial Dicta and Obiter Dicta.” *Los Angeles Lawyer*, Chapman University School of Law: Oct. 2002, 17.

<sup>25</sup> Pound, Roscoe. 1931. “The Call for a Realist Jurisprudence.” *Harvard Law Review* 44:697-711. 700.

<sup>26</sup> George and Epstein, 324.

however, no major bodies of work dedicated to whether or not a decision's impact will influence either the handling of a case or its outcome.

### *Ideology and Attitude*

The theory that argues that personal ideology frames a justice's decision making was given its launch with Frank's assertion that personal ideology, as framed by values first formed during childhood and developed throughout a justice's life, are so cemented that they cannot be removed from playing a role in the analysis of a case.<sup>27</sup> This idea is aggressively advocated for by Segal and Spaeth in several studies that build upon one another.<sup>28</sup> Their work follows the Court over several decades and through the appointments of new justices, concluding that ideological positions are the best indicators of how a member of the bench will vote, and that, consequently, the Court's behavior shifts over time as justices come and go.<sup>29</sup> This strand of theory is particularly applicable to the Court's process of evaluating takings claims as the kind of judgment necessary in those cases is highly subjective and, by virtue of also requiring judgment on the public good and the fundamental role of government, is therefore also based on the personal philosophies on the bench at the time.

Despite the confident declarations by Segal and Spaeth, other authors, such as Songer and Lindquist, disagree with the previous conclusions regarding the extent to which ideology impacts judicial decisions.<sup>30</sup> The latter two use a review of Supreme Court death penalty cases to test ideology versus precedent, reaching the settlement that, while ideology does factor into a

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<sup>27</sup> *Id.*

<sup>28</sup> Segal, Jeffrey A., Harold J. Spaeth, Lee Epstein, and Charles M. Cameron. "Ideological Values and the Votes of U.S. Supreme Court Justices Revisited." *The Journal of Politics* 57.3 (Aug 1995): 812-23. <http://www.jstor.org>.

<sup>29</sup> *Id.*

<sup>30</sup> Songer, Donald R., and Stefanie A. Lindquist. "Not the Whole Story: The Impact of Justices' Values on Supreme Court Decision Making." *American Journal of Political Science* 40.4 (Nov 1996): 1049-063. <http://www.jstor.org>.

justice's decisions, it does so within the constraints of the legal precedent in place.<sup>31</sup> This finding pushes back against the swing towards ideology theory as the front runner and revives the role of jurisprudence, although one could argue that its ability to explain or predict Court decisions hinges on the type of case or subject matter at hand, and may very well not be consistently reliable. There are many such disagreements over the role of ideology and judicial attitude. This strain of thought is one of the most debated and discussed among the extralegal theories. As it gained momentum and developed into various theories within behavioralism, subdivisions, such as the impact of differing judicial role conceptions, sprouted and continue to evolve.<sup>32</sup>

While no authors explicitly include whether or not justices consider the potential impact of a decision in their discussions of judicial attitudes towards cases, a degree of impact consideration can be inferred. If personal values and ideologies play a role in these decisions, then surely some justices must count preventing or precipitating certain real world implications among their values and therefore within their deliberations. Justice Breyer's quote, included in Baum's comparison of law versus ideology, indicates his general belief in impact consideration saying, "If you see the result is going to make people's lives worse, you'd better go back and rethink it."<sup>33</sup> Indeed, Baum then concludes that justices search for the legal interpretation to a case that most closely suites their own ideologies.<sup>34</sup>

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<sup>31</sup> *Id.*

<sup>32</sup> George and Epstein, 325.

<sup>33</sup> Baum, Lawrence. *The Supreme Court*. Washington, D.C.: CQ, 2007. Print. 115.

<sup>34</sup> Baum, 115.

*The Public, Politics, and the Court*

The aforementioned ideology and behavioralism theories attempt to explain judicial decisions using internal influences that are dependent on particular justices. In contrast, theories of public opinion and the influence of the nation's politics seek to answer many of the same questions about Court behavior through an analysis of external forces. These factors of national public opinion and politics, the second of which draws from both national political mood as well as from political relationships between the branches of government.

Drobak and North discuss in detail what individual judges bring to the bench and suggest "the dynamic nature of the world" as a cause for the shortcomings of legal systems, specifically pointing out that the invention of new problems and new solutions hinders an ability to be widely and consistently relevant.<sup>35</sup> Their work even criticizes precedents and their tendency to "narrow the range of potential outcomes."<sup>36</sup> Their work then lists the slew of hidden factors resting beneath the surface of straightforward legal interpretation and echoes a bit of Songer and Lindquist's work, concluding that many outside factors do influence the judges, but they do so within the constraints of statutes, precedent, and collegial and political pressure (whether formal or informal).<sup>37</sup>

Mishler and Sheehan explain the evolution of these factors' position in the discussion, and attribute their beginnings to Dahl who both notes a tendency of the Court to adhere to the public preference more often than not, and also tie this pattern to presidential appointment

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<sup>35</sup> Drobak, John N. and Douglass C. North. "Understanding Judicial Decision-Making: The Importance of Constraints on Non-Rational Deliberations". *Journal of Law and Policy*, 26.131 (2008): 134.

<http://www.heinonline.org>.

<sup>36</sup> *Id.* at 134.

<sup>37</sup> *Id.* at 149-150.

power.<sup>38</sup> Mishler and Sheehan further develop this theory of Court responsiveness by offering that justices respect their institution's dependence on public confidence for its legitimacy, and in this way find motivation to not drift too far from popular preference.<sup>39</sup> They reiterate the point with a list of cases in which the Court held an unpopular viewpoint and subsequently changed its opinion prior to voting on a decision due to public and political pressure.<sup>40</sup> McGuire and Stimson forward this theory, explaining that public opinion affects outcomes not only through the election of politicians and subsequent appointment of like minded judges, but during the hearings of specific cases as well, tentatively finding that the Court sides with the minority interests "only when public opinion supports such outcomes."<sup>41</sup>

Although not discussed by Mishler, *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), is the landmark decision finding a legal basis for the adoption and enforcement of municipal zoning regulations. At the time the case was decided, racist sentiments were rising in the country in response to immigration and, as argued by several, the *Euclid* decision reflected that tension.<sup>42</sup>

### *Court Attitude and Regulatory Takings*

Literature that specifically addresses the Supreme Court's handling of regulatory takings cases is varied and contain a recurring picture of an institution that has struggled to find its footing within the topic concerned, leading one author to describe its approach as "muddled," a

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<sup>38</sup> Mishler, William and Reginald S. Sheehan. "The Supreme Court as a Counter-majoritarian Institution? The Impact of Public Opinion on Supreme Court Decisions." *American Political Science Review*, 87.1 (March 1993): 87-101. <http://www.jstor.org>

<sup>39</sup> *Id.* at 89.

<sup>40</sup> *Id.*

<sup>41</sup> McGuire, Kevin T. and James A. Stimson. "The Least Dangerous Branch Revisited: New Evidence on Supreme Court Responsiveness to Public Preferences". *The Journal of Politics*, 66.4 (2004): 1020.

<sup>42</sup> Hall, Eliza. "Divide and Sprawl, Decline and Fall: A Comparative Critique of Euclidean Zoning". *University of Pittsburgh Law Review*, 68.915 (2007): 915-952. <http://www.jstor.org>.

comment repeated by many.<sup>43</sup> In the same vein, the authors recognize the difficulty in deciding, studying, and systematizing takings cases given their inherently vague and individualized nature that does not lend itself to an easy application of rules or guidelines. This telltale characteristic is captured by Caldwell who pegs land use disputes as “primarily problems of basic human values and beliefs rather than problems of law.”<sup>44</sup> Drobak and North later reiterate this sentiment in their description of judicial decision-making philosophies, noting that, “in regulatory takings cases, a judge must determine the outcome by balancing the harm to the aggrieved party against the benefit to society, usually when harm and benefit cannot be quantified.”<sup>45</sup>

Aside from the contingent of theorists whose work analyzes the original intent of the takings clause in the context of the Constitution, the framers’ intent, and the colonial and British property law, Rose, one of the earlier authors to address the problems not only with takings jurisprudence but with the literature and work that address it, summarizes the problem quite well with:

A number of property theorists have addressed this vexing issue, but they have yet to agree on the proper disposition. Instead, commentators propose test after test to define “takings,” while courts continue to reach ad hoc determinations rather than principled resolutions.<sup>46</sup>

Rose chooses to focus on a thorough re-hash and critique of just one case, *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), one of the earliest of its kind, and important

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<sup>43</sup> Schleicher, Tara J. “A Tale of Two Courts: Differences Between Oregon’s Approach and the United States Supreme Court’s Approach to Fifth Amendment Takings Claims”. *Willamette Law Review*, 31.817 (1995): 817-849. <http://www.heinonline.org>.

<sup>44</sup> Caldwell, Lynton K. “Land and the Law: Problems in Legal Philosophy”. *University of Illinois Law Review*, 1986.2 (1986): 319-335. <http://www.heinonline.org>.

<sup>45</sup> Drobak and North, 131-152.

<sup>46</sup> Rose, Carol M. “Mahon Reconstructed: Why the Takings Issue is Still a Muddle”. *Southern California Law Review*, 57.561 (1984): 562.

because it established the “diminution of property” test, beginning the practice of creating various tests for identifying a taking occurrence.<sup>47</sup> After discussing its shortcomings as a test and the problems with applying it elsewhere, Rose analyzes the legal highlights of *Pennsylvania Coal* before offering several explanations for the respective stances taken during the case, arguing that the dispute’s core really centered around the best way to manage a monopoly and/or the transference of costs during a transitional time in mining history<sup>48</sup>. The final conclusion yet again echoes the fundamental disagreement reflected in takings cases, placing the blame on the divide in traditional property rhetoric, framed in Rose’s argument as “wealth versus virtue.”<sup>49</sup>

Following Rose, there is a class of authors who likewise tackle one case or one test, tracing the history and creation, and explaining and critiquing its usefulness. Gibbons, for example, explains the nuts and bolts of the decision from *Palazzolo v. Rhode Island*, 533 U.S. 636, including the “per se” and balancing tests as drawn from prior cases, as well as the role that traditional property law theory plays in the justices’ proposals of a remedy, and offering a mild critique of that remedy.<sup>50</sup> Others choose a more aggressive approach, such as Sallet who pins the Court as unsuccessful in fleshing out the details of remedies for these claims, particularly in terms of the compensation due.<sup>51</sup> Sallet reviews four cases in which takings were evaluated by the Court for a compensation verdict, and argues that the Court avoided addressing the issue entirely by declining to declare each case a taking - incorrectly by Sallet’s evaluation - thereby

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<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at 569-579.

<sup>49</sup> *Id.* at 587.

<sup>50</sup> Gibbons, Max. “Of Windfalls and Property Rights: Palazzolo and the Regulatory Takings Notice Debate”. *UCLA Law Review*, 50.1259 (2003): 1259-1301.

<sup>51</sup> Sallet, Jonathan B. “Regulatory ‘Takings’ and Just Compensation: The Supreme Court’s Search for a Solution Continues”. *The Urban Lawyer*, 18.3 (1986): 635-657. <http://www.heinonline.org>.

eliminating the need to decide just compensation.<sup>52</sup> Sallet’s analysis and subsequent complaint that the Court decided “four cases without once reaching the issue for which review was granted” reflects the aforementioned difficult nature of takings cases that demand a different role from the Court than it was prepared to fill at the time.<sup>53</sup>

One decade later, we encounter a more optimistic analysis of the Court’s handling of takings cases, likely due to the long opinion in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978), that sought to more clearly summarize the Court’s stance on takings thus far. Schleicher concedes that the Court stumbled through an unclear majority opinion in its early *Pennsylvania Coal Co v. Mahon* from 1922, leading to several decades of ensuing uncertainty of interpretation.<sup>54</sup> The author suggests, however, that the Court has recovered and has established a suitable pattern for handing cases through the application of both a due process and a takings test.<sup>55</sup> In the same year, Rosenberg’s writing reflects many of the same sentiments of Schleicher’s assertion that the Court has found its footing, yet still harkens back to the characteristics of takings cases, once again mentioning the “ambiguity, contextual application, [and] balancing of multiple factors” necessary to reach a decision, a reality with which courts at all levels continue to grapple.<sup>56</sup>

While a significant amount of scholarly work includes details of the facts of each case and the events that took place in the run-up to receiving cert. and their place in the official legal opinion, the facts included are often those that are directly and obviously involved in the who/what/where, with few investigators searching for potentially hidden external influence. One such work, whose author, Fischel, claims to be the first to

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<sup>52</sup> *Id.* at 656.

<sup>53</sup> *Id.* at 655.

<sup>54</sup> Schleicher, 819.

<sup>55</sup> *Id.* at 819, 825.

<sup>56</sup> Rosenberg (1995), 535.

investigate the case so thoroughly, finds that *Mahon* had a plethora of economic and political forces converging on the Pennsylvania legislature and the Court at the time the decision was made.<sup>57</sup> Besides looking into the straightforward particulars of the case, Fischel also went beyond the information provided by briefs and conducted interviews throughout the region in which mine subsidence had been a problem, unearthing social pressures, the opinions of civic organizations, political relationships, coal companies' concern for reputation, and the 1922 coal strike that, in his view, contributed to the granting of cert. in the first place and the decision that was later made.<sup>58</sup>

An additional component of takings literature includes an analysis of the importance of establishing a clear and consistent doctrine due to the Supreme Court's role as the country's highest court. In a survey of takings jurisprudence from 1978 to 1998, Callies notes that "applying [the Court's rules] is still pretty tough," and that several courts, specifically Fifth Circuit and state courts in Arizona and Minnesota "specifically refused" to make use of a SCOTUS principle, while others did but expressed disapproval in it, as did the Supreme Judicial Court of Maine.<sup>59</sup> Pollack takes the impact of the Court all the way to the local level, finding that, after the *Dolan* and *Nollan* cases, only a minority followed line with the Supreme Court and changed their takings behavior in accordance with the new rulings.<sup>60</sup> And finally, Rosenberg reiterates the hesitance of state courts to apply the *Nollan* decision, finding that only one state supreme court in seven years applied *Nollan* in a takings ruling, and, while other rulings

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<sup>57</sup> Fischel, William A. *Regulatory Takings: Law, Economics, and Politics*. Harvard UP. Cambridge, MA: 1995.

<sup>58</sup> Fischel, 44-46.

<sup>59</sup> Callies, David L. "Regulatory Takings and the Supreme Court: How Perspectives on Property Rights Have Changed From Penn Central to Dolan, and What State and Federal Courts Are Doing About It". *Stetson Law Review* XXVIII (1999): 526, 575.

<sup>60</sup> Pollack, Daniel. "Have the U.S. Supreme Court's 5th Amendment Takings Decisions Changed Land Use Planning in California?" *California Research Bureau, California State Library* (March 2000): 6.

were applied at the state level more frequently, there remains a disconnect between what the Supreme Court hands down and what the lower courts implement.<sup>61</sup> The findings here point to the legal world's frustration and the importance of clarifying and legitimizing the Supreme Court's leadership in creating a national takings doctrine.

Overall, academic coverage of takings jurisprudence incorporates an overwhelmingly negative tone and tends to focus on narrow time periods, examining one case or a cluster of cases from the same era, with analysis centering around either the legal reasoning presented or in some instances the practical and legal implications of rulings. This work looks across the entirety of takings cases presented to the Court over a 100 year period, selecting for discussion those that sought to establish new methods for assessing takings cases or demonstrated the evolution of the Court's handling of such cases. Speaking to the second segment of this thesis, while there has been a great deal of work surrounding extra legal factors that influence decision making, none discuss impact consideration, an influence that this thesis seeks to find. Arguably, impact consideration has not previously been treated independently because it can be included under ideology, an umbrella of opinions and personal decision making tendencies. From here, this thesis discusses takings jurisprudence in the United States and analyzes the major contradictions and developments therein.

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<sup>61</sup> Rosenberg (1995), 541.

### Chapter III: Establishing Takings Tests

#### *The Beginning of Takings Doctrine*

The first decade of takings jurisprudence sets the tone for the Court's struggle with such cases and establishes the characteristics that will be seen time and again throughout the course of the ensuing century, namely a conflict between private rights and the public good and inconsistent use of precedent. While government takings of private property had previously been conducted under the name of eminent domain under which the government obtained the property rights to the land in question, the definition was expanded to include takings of the value of property, regardless of whether the deed changed hands, at the beginning of the 20th century.

One case often credited as being the first to address this issue and bring regulatory takings into the Supreme Court arena is that of *Hadacheck v. Sebastian*, 239 U.S. 394 (1915).<sup>62</sup> The case brought involves a brick maker in protest of a city ordinance prohibiting that industry's operations from occurring within the parameters of a designated city district.<sup>63</sup> *Hadacheck* provides a clear and simple illustration of the basic conflict at the heart of takings cases that forces the Court to search for some moral persuasion to sway its decision.

The Court, in its unanimous decision in upholding the city ordinance, acknowledges the competition of rights present before it and the fact that, in this conflict between the individual business owner and the community, the decision in favor of the latter "[seems] harsh in its exercise" on the former.<sup>64</sup> Nevertheless, the Court chooses a

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<sup>62</sup> Rosenberg, Ronald H. *Environment, Property, and the Law: Federal and State Case Decisions & Journal Articles*. New York: Garland Pub., 1997. 12.

<sup>63</sup> 239 U.S. 394 (1915).

<sup>64</sup> *Id.* at 410.

side in this conflict, including several statements in its opinion that present the Court's motives quite clearly. In a very telling statement, the Court declares that "there must be progress, and if in its march private interests are in the way, they must yield to the good of the community."<sup>65</sup> In this extra explanatory statement, the Court makes obvious the factor that tipped the balance in weighing both rights in this case. The concept of "progress" does not possess a unanimously agreed upon definition in the country nor does it enjoy specific Constitutional protections. The Court uses no explicit Constitutional basis for choosing to promote this value. Instead, this is a moral judgment on the part of the Court to first allow for the legal promotion of progress under the police powers and second, to deem this specific legislative act to be in pursuit of the Court's definitional idea of progress.

In the interest of promoting this moral judgment regarding progress, the Court follows the legal tradition of judicial deference and sides with the legislature, describing its decision to "accord good faith to the municipality."<sup>66</sup> In the opinion of this Court, the legislature had acted within its rights to declare brick making, with its pollution and noise externalities, a nuisance to the community, and liable to regulation under the police powers. The opinion further explains that an activity that is not normally considered a nuisance may be deemed one by the legislature.<sup>67</sup> In the eyes of the Court in this instance, the government's efforts in good faith to protect the public should be respected. What's more, the Court does not simply announce its legal decision to defer to the legislature, but includes the statement regarding progress, providing evidence of the moral decision behind the opinion.

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<sup>65</sup> *Id.*

<sup>66</sup> *Id.* at 395.

<sup>67</sup> *Id.*

The *Hadacheck* decision carefully picks through each aspect of the complaint brought, explaining various other reasons for denying the petitioner's request and further revealing the Court's attitude towards the elements of this case. Regarding the discussion of whether the brick manufacturing business qualified as a nuisance to the community, the Court received conflicting opinions from either side as to the accuracy of this claim. On the one hand, it was asserted that this specific business had not received a single complaint regarding health or environmental impacts in seven years, yet it was conversely argued that the plant caused health disruptions "from time to time" in the neighboring community.<sup>68</sup> The real or potential impact that this business might have on its surroundings is significant enough in the eyes of the Court to command primary attention in reaching a decision. The opinion states its concurrence with the lower court's decision to view the case "from the standpoint of the offensive effects of the operation....and not from the deprivation [of property]."<sup>69</sup> The Court so strongly prefers efforts towards progress (in the context of limiting offensive industries) over this case's private business that its entire frame through which it views the scenario is one that sides with the interests of the former.

Finally, the *Hadacheck* decision thinks toward future legislative actions when refuting the petitioner's claim that this ordinance was arbitrarily created. The Court even speculates that the legislature might prohibit other similar businesses within this territory in the future.<sup>70</sup> This statement, more hypothetical than legal, hints that the Court has considered the passage of future ordinances in its decision that the ordinance in question was not arbitrary

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<sup>68</sup> *Id* at 406, 408.

<sup>69</sup> *Id* at 411.

<sup>70</sup> *Id.* at 413.

### *The Character of the Invasion*

Just two years after *Hadacheck* the Court establishes another factor for deciding takings cases by again focusing on the reasoning for and intent behind the government action, as opposed to the injury inflicted. The difference in this subsequent case, however, is that the government is found to be in the wrong based upon a new manner of examining takings cases introduced by Justice Pitney.

Just as *Hadacheck* did, *U.S. v. Cress*, 328 U.S. 256 (1917), encapsulates the classic takings conflict between private rights and public benefits and demonstrates a jostling between the competing interests. The case concerns the State of Kentucky's construction of various dams and locks along the Cumberland and Kentucky rivers, and the complaints of landowners along the tributaries to those rivers.<sup>71</sup> While not situated along the larger rivers that the government sought to control, the properties in question experienced periodic flooding due to the overflow of the tributaries caused by the government construction on the larger rivers.<sup>72</sup> *Cress* presents as a conflict between the public's right to use the country's water resources (as expressed via the government's right to control them through dam construction) versus the private property rights of the owners along the banks of the tributaries.

While on the one hand the Court here recognizes the longstanding and legally valid practice of allowing Federal and State government the right to regulate the "navigable waters" of the country so as to make possible the "exercise of the public right of navigation," the Court

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<sup>71</sup> 328 U.S. 256 (1946) at 318.

<sup>72</sup> *Id.*

finds that a taking has occurred, as that practice and public right “has its limits.”<sup>73</sup> The Court’s job then is to determine and explain where these limits lie.

In so doing, the *Cress* decision skates over an aspect of takings cases that would develop into an oft used judicial test in determining the presence of a taking. The decision addresses the government’s complaint that the overflow of water only caused a “partial injury” and does not qualify as a taking as the overflow “depreciated [the land’s] value only to the extent of one half.”<sup>74</sup> Despite the government’s claim that the property owners retained some value of their land, the Court ruled this to be a taking worthy of compensation. This type of consideration will come up again in later cases and will become its own test in takings case law.

As the extent of damages test had not yet been established by the Court at the time of *Cress* (and, in fact, the recently decided *Hadacheck* case ruled against the landowner despite complaints that his business had therefore been rendered useless),<sup>75</sup> the Court did not find the damages suffered by the landowners to be controlling. What the Court found in *Cress* to be most convincing was what later became known as the character test, writing in the decision that “it is the character of the invasion, not the amount of damage resulting from it, so long as the damage is substantial, that determines the question whether it is a taking.”<sup>76</sup> The decision rules that dams constructed by the government that cause occasional flooding on private property do, in fact, constitute a taking, regardless of the amount of damage inflicted.<sup>77</sup>

*Cress* and its “character test” introduce a rather vague sounding means by which to measure takings claims, and the decision does not give much explicit guidance for which characters of invasion are worthy of compensation. We can assume that part of the character of

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<sup>73</sup> *Id* at 320.

<sup>74</sup> *Id* at 327.

<sup>75</sup> 239 U.S. 394 (1915) at 405.

<sup>76</sup> 328 U.S. 256 (1946) at 328.

<sup>77</sup> *Id.*

this case that prompts the majority to consider it a taking is the “permanent condition” of the government’s actions.<sup>78</sup> While the actual flooding caused by backwater from the dams was intermittent and not a continual state, the threat of future and frequent flooding remained a permanent risk to the property, permitting Fifth Amendment compensation rights under the logic of this opinion.<sup>79</sup> It then follows that a precedent that could be drawn from this decision is that an act of government with permanent implications for the landowner carries additional weight towards being ruled a taking. The *Cress* decision, in fact, views this instance of periodic overflows as “a permanent liability” containing “no difference of kind” than a permanent condition, and both types of invasions ought to be treated as takings.<sup>80</sup> In the deciding of this case, the Court realizes that it is not simply ruling on injuries the landowners have suffered in the lead-up to the case’s presentation at Court, but rather on the understanding that these injuries will continue into the future and that the landowners deserve compensation for all affronts to their property, both past and future.

Despite Justice Pitney’s description of the permanency quality at play in his *Cress* opinion, his statement regarding “the character of the invasion” remains vague, leaves much room for interpretation, and invites readers to wonder what other types of “character” might indicate a taking as well. Furthermore, the clause requiring the damage be “substantial” opens the decision to questions as to what qualifies as such. The decision provides no additional information as to how to determine this status, leaving that as an issue with which future courts will grapple.

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<sup>78</sup> *Id.* at 328.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

### *The Intent of the Invasion*

A subsequent case considered five years after *Cress* offers another angle to this “character test”. The Court’s opinion in *Portsmouth Harbor Land and Hotel Co. v. U.S.*, 260 U.S. 327 (1922), builds on the character test by raising the issue of government intent.<sup>81</sup> Justice Holmes, writing for the majority, brings the case history into the discussion, highlighting the conflict that played out in which the government repeatedly fired guns over the hotel’s property resulting in multiple prior lawsuits in which the presence of a taking was denied.<sup>82</sup> In prior suits the landowner, in this case a hotel business, unsuccessfully sought compensation for the takings that it alleged had occurred when a fort maintained by the U.S. military fired cannons across its grounds, frightening away visitors and damaging business.<sup>83</sup> By 1922 when the latest case was brought, the Court had clearly experienced a change of opinion, finding the government culpable of a taking.

Holmes seems to have two points in mind when rehashing the case’s history in his majority opinion with the first point being to include the government’s intent as a factor in determining a takings claim. He spells out the opinion quite clearly that, “if the United States, with the admitted intent to fire across the claimants’ land at will, should fire a single shot or put a fire control upon the land, it well might be that the taking of a right would be complete.”<sup>84</sup> Despite this clear statement that intent most certainly affects whether a government action qualifies as a taking, Holmes does not cite *Cress* in his opinion, passing up the opportunity to both reaffirm the establishment of a character test in takings doctrine and to approve the inclusion of intent under that umbrella.

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<sup>81</sup> 260 U.S. 327 (1922).

<sup>82</sup> *Id.* at 328. The prior cases were *Peabody v. United States*, 231 U.S. 530 (1913) and *Portsmouth Harbor Land and Hotel Co. v. United States*, 250 U.S. 1 (1919).

<sup>83</sup> *Id.* at 137.

<sup>84</sup> *Id.* at 329.

Oddly, however, the *Portsmouth* opinion does not find the issue of intent to be controlling in its determination that a taking has occurred. Holmes nevertheless devotes significant space in this short opinion to a discussion of under what circumstances the government's intent, specifically the "admitted intent," would qualify its actions as a taking.<sup>85</sup> This discussion builds upon a reference in one of the prior *Portsmouth* cases that, while it did not rule that a taking had occurred, found that, if the government had carried out its actions not solely due to wartime necessity but "with the purpose and effect of subordinating the strip of land," then a taking could be ruled.<sup>86</sup> Because the issue of intent is not given as the reason for the Court's decision in *Portsmouth*, it is unclear why Holmes includes this assessment in his opinion. In fact, the matter of the government's intent in constructing the fort and firing shots across the land in question remains merely alleged, even in the eyes of the majority opinion.<sup>87</sup> The dissenting opinion furthermore responds to the majority's discussion of intent with claims that the firing episodes in question were due to a misunderstanding of the officers.<sup>88</sup> Both the majority and dissenting opinions devote space to speculation on the government's intent in firing the fort's cannons, despite not drawing a conclusion on what that intent was, nor using intent as the decisive factor in either argument. Why both sides did this is unclear, although perhaps they wrote with the purpose of adding government intent to the growing takings jurisprudence for reference in future cases, although neither indicates a reason for their speculation.

It appears, therefore, that reason for the turnabout of opinion in *Portsmouth* after the prior rulings in several similar cases that did not find the presence of a taking, is given not to any alleged intent, but rather to the repetitive nature of the invasion. This argument is clearly laid out

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<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Id.* at 330.

<sup>88</sup> *Id.* at 333.

in the first paragraph of the decision in which the “cumulative effect” of the government actions is highlighted as the turning point for this case.<sup>89</sup> As in *Cress*, this case’s majority opinion once again makes reference to the extent of damages suffered, an element of takings decisions that will later become an established test. It is in this *Portsmouth* opinion that Holmes introduces what will later be seen as his preferred method for deciding takings cases - the amount of damage incurred. Holmes writes that, even when intent is absent, and “while a single act may not be enough, a continuance of them in sufficient number and for a sufficient time may prove it.”<sup>90</sup>

Despite both opinions referencing the importance of considering the damages incurred, the two view this quality of takings cases very differently. Holmes does not cite *Cress*, no doubt because that case does not see damage incurred as the primary method by which to determine takings claims whereas, for Holmes, the compounded nature of the successive invasions becomes the basis for his reason for deciding in favor of the hotel company. Holmes’s choice to focus on the extent of the invasion in this opinion foreshadows his future decisions.

A theme of Supreme Court takings decisions is a lack of continuity shown through contradictory opinions, and these cases from the early decades of the 20th century start our takings jurisprudence down that path. Holmes’s statements that the sum of acts not previously deemed enough to constitute a taking, once added to continued injuries, “leads to a different result,” and that “every successive trespass adds to the force of the evidence” might create quite a disagreement with Pitney, recalling that his *Cress* opinion favors character over extent of damage.<sup>91</sup> The two justices do manage to write opinions similar to each other only in that each includes a consequential yet vague statement. Pitney’s “character of the invasion” and Holmes’ “sufficient number [of injurious acts] for a sufficient time” both include terms that are solely

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<sup>89</sup> *Id.* at 136.

<sup>90</sup> *Id.* at 329-330.

<sup>91</sup> *Id.*

lacking in precise definition, frustrating future interpreters of these decisions. Here, Holmes might have taken the opportunity to address the inconsistencies between his opinion and Pitney's to perhaps acknowledge the latter's use of the term "character" and to explain why the extent of the damage trumps in the takings decision. Furthermore, Holmes does not provide any indication as to what might qualify as "sufficient number" or "sufficient time" despite using those terms to explain his reasoning.

### *The Extent of the Invasion*

Seven days after his *Portsmouth* prelude, Holmes seized the opportunity to champion his preference for consideration of the extent of damages inflicted by government regulation. In his majority opinion for *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), the case touted as the formal installation of regulatory takings as a Constitutional violation, Holmes explains the Court's ruling that the legislature's prohibition of coal mining qualifies as a taking due to the extent of the damages incurred by the coal company at the hands of the regulatory act.<sup>92</sup> This case was argued similarly to that of *Hadacheck*, with both legislatures arguing that their acts protected the community from a harmful public nuisance, and both businesses claiming a taking due to the significant loss of profitability incurred. In *Mahon*, the business bringing the suit was a coal company that had been barred from mining the coal beneath homes to the extent that land subsidence and building damage would occur, despite the coal company owning the deed to all of the coal beneath the surface of the land.<sup>93</sup> After losing its claim of a taking in the Pennsylvania

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<sup>92</sup> 260 U.S. 393 (1922).

<sup>93</sup> *Id.* at 412.

courts, the coal company won its case when the Supreme Court reversed, ruling that the legislative act was an overstepping of the police powers.<sup>94</sup>

Justice Holmes wrote the majority opinion, using the case to build upon the still new and fledgling takings case law in the country and to further his construction of takings precedent. The opinion first acknowledges the difficulty in establishing any sort of consistent rule for deciding takings cases, a sentiment echoed in the dissent with the statement, “values are relative.”<sup>95</sup> While Holmes allows that “greatest weight is given to the judgment of the legislature,” he also notes that this privilege of the legislature “must have its limits” in the interest of protecting Constitutional rights for all.<sup>96</sup> Holmes then notes that this “question depends upon the particular facts” of each case, a statement that accurately expresses the history of takings case law and that has become one of the frequently referenced hallmarks of the Court’s takings decisions.<sup>97</sup>

The section of the opinion that addresses the particular case at hand is short and sides with the coal company, seeing the case as a question of distinguishing public from private interests.<sup>98</sup> While Holmes acknowledges the commonly employed practice of judicial deference to the legislature in matters of promoting public welfare, he nevertheless clearly states that that practice does not apply here, as “this is the case of a single private house” seeking protection from the damaging effects of mining, and that those effects are “not a public nuisance” as “the damage is not common or public.”<sup>99</sup> The overall attitude of the opinion follows that the individual landowners, and not the state, bear the responsibility for protecting individual homes against subsidence damage or coping with this impact should it occur. This sentiment is based on

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<sup>94</sup> *Id.*

<sup>95</sup> *Id.* at 419.

<sup>96</sup> *Id.* at 413.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

the “timely notice” that the company gave to the particular landowners involved in the case regarding its intent to mine.<sup>100</sup> Furthermore, the Court emphasizes the landowners’ role and responsibility in understanding the bounds of the deeds to which they agreed, calling them “short sighted” in their acquisition solely of surface rights, thus leaving their land vulnerable to the effects of subsurface exploitation.<sup>101</sup> The Court, in this opinion, expresses an outlook that emphasizes individual responsibility over a protective legislature.

A significant factor in this case that held sway in pulling the Court’s decision in favor of the particular business interest is that the coal company suffered extensive damages due to the legislature’s behavior. The opinion refers to this loss in multiple lines, bluntly stating that “the extent of the taking is great” and that the legislation would “abolish” the company’s “very valuable estate” held in its right to the coal beneath the surface.<sup>102</sup> It is in this opinion that Holmes establishes the previously mentioned extent of damages test, finding that “one fact for consideration in determining [police power] limits is the extent of the diminution. When it reaches a certain magnitude,” it may be found that compensation is required.<sup>103</sup> It is here that Holmes begins what became the “diminution of value test”, indicating that a taking is decided to be so dependent on the amount of economic loss sustained by the injured party.<sup>104</sup>

This Holmes opinion does not end at the rendering of a decision regarding the particular facts of this case, but rather goes well beyond the legal question at hand, anticipating future takings questions being presented before the Court and planning for the impact of this case on jurisprudence. Holmes, to a degree, attempts to use the *Mahon* decision to establish a takings doctrine that will serve as a guide for future decisions, saying, “It seems, therefore, to be our

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<sup>100</sup> *Id.* at 414.

<sup>101</sup> *Id.* at 415.

<sup>102</sup> *Id.* at 414.

<sup>103</sup> *Id.* at 413.

<sup>104</sup> Rose, 562.

duty to go farther in the statement of our opinion, in order that it may be known at once, and that further suits should not be brought in vain.”<sup>105</sup> Holmes also expresses concern regarding the future impact of both the *Mahon* decision as well as any other similar cases that may arise in the future, saying that the danger of decisions that assume a “seemingly absolute protection” of the police power is that “the natural tendency of human nature is to extend the qualification more and more until at last private property disappears.”<sup>106</sup> Holmes uses the *Mahon* decision to not only advise future courts as to appropriate ways of dealing with these cases, but also to warn against what he sees is the danger of incorrect rulings.

Holmes further oversteps the bounds of what is required for judgment in the *Mahon* case, weighing in on other takings related decisions in an attempt to further clarify his position regarding when legislature’s interventions without compensation are and are not appropriate. The opinion makes reference to several prior cases from the early years of the 1900s that gave leeway to the government in its imposition of regulations.<sup>107</sup> The purpose of bringing up these cases that are neither necessary nor used by Holmes in the previous section of the opinion when he handed down the decision for the particular question involved in *Mahon* is to further explain his thoughts regarding the applications of the Fifth and Fourteenth amendments, making sure to note in this section that the legislation enacted during a time of war was believed by the Court to have been necessary and appropriate for the unique emergency conditions of that time.<sup>108</sup>

While Holmes takes proactive steps in addressing the takings question, handing down a decision for *Mahon* as well as providing advice for how takings claims should be handled in a judicial setting, the opinion nevertheless maintains the theme of making vague statements, in a

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<sup>105</sup> 260 U.S. 393 (1922) at 414.

<sup>106</sup> *Id.* at 415.

<sup>107</sup> *Id.* at 416.

<sup>108</sup> *Id.*

manner similar to the *Cress* and *Portsmouth* decisions. It is here that Holmes offers his frustrating statement, “if regulation goes too far it will be recognized as a taking,” and admits that the question of how far is too far is “a question of degree” that cannot be reached through universally applicable rules.<sup>109</sup>

Holmes again, as in the *Portsmouth* decision, focuses on the value of the damage without addressing previously raised issues such as Pitney’s character argument. This is made particularly frustrating and puzzling by Holmes’ acknowledgment that diminution is “one fact for consideration in determining such limits,” indicating that other such “facts” exist, yet he makes no effort to identify them.<sup>110</sup> While the decision uses its preference for the newly established diminution of value test to hold that a taking has occurred, a ruling that sets it apart from previous takings cases,<sup>111</sup> there exist gaps in the explanation for what moves Holmes to reject the judicial deference argued for by Brandeis’s dissent.

### *Pennsylvania’s Coal, Again*

Despite Holmes’ effort to establish a takings doctrine, subsequent cases show that a new case placed before a Court with different Justices can result in a completely different decision. The *Keystone Bituminous Coal Association v. DeBenedictis*, 480 U.S. 470 (1987), decision clearly highlights the challenge that takings cases bring to the Court and the manner in which “particular facts” interrupt any adherence to or affirmation of precedent.<sup>112</sup> Fortunately, and unlike Holmes’s resolution not to explain his differences with Pitney regarding their respective

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<sup>109</sup> *Id.*

<sup>110</sup> *Id.* at 419.

<sup>111</sup> Gold, Andrew S. “Regulatory Takings and Original Intent: The Direct, Physical Takings Thesis ‘Goes Too Far.’” *American University Law Review* 49 (1999): 235; despite previous cases that indicate takings have occurred, Mahon receives the distinction for establishing a new takings doctrine due to its contrast to Hadacheck.

<sup>112</sup> 480 U.S. 470 (1987).

*Portsmouth* and *Cress* decisions, the *Keystone* decision mentions *Mahon* quite frequently and addresses its application in the new context, helping to explain why that case does not hold.

The facts of *Keystone* mirror those of *Mahon* quite closely. An act of the Pennsylvania legislature prohibited the mining of coal found beneath preexisting structures so as to prevent the dangers of subsidence, despite the company involved having obtained waivers for mining from the surface owners.<sup>113</sup> It seems logical, then, that the counsel to the coal company in *Keystone* would follow those arguments made by Pennsylvania Coal Co. some sixty years earlier. In fact, the *Keystone* appellees do base the bulk of their argument on the taking found in the prior case, and so it is this case with which the majority opinion, ruling in favor of the legislature, contends.<sup>114</sup>

While using arguments from a previous Supreme Court case that was decided in one's favor would presumably provide the best chance for yielding a similarly positive result, the usage of the PA Coal Company's arguments end up being a detriment to *Keystone*'s interests, as the Court finds that "the two factors there considered relevant - the Commonwealth's interest in enacting the law and the extent of the alleged taking - here support the Act's constitutionality."<sup>115</sup> This case therefore easily demonstrates, as Justice Stevens references in his *Keystone* opinion, how significantly the "particular facts" mentioned by Holmes can alter an outcome. Stevens, borrowing from Holmes, uses the phrase "particular facts" multiple times in his decision to help validate the Court's reasons for ruling against the coal company in this instance.<sup>116</sup>

This Court pays particular attention to the facts of the *Keystone* case that relate to the danger posed to the public due to mining. In the first section of the opinion, the majority

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<sup>113</sup> *Id.* at 472.

<sup>114</sup> *Id.* at 473.

<sup>115</sup> *Id.* at 471.

<sup>116</sup> *Id.* at 474.

describes the various economic and physical dangers to subsidence, including environmental problems as well.<sup>117</sup> The *Keystone* decision therefore rests in part on the character test, choosing judicial deference and finding that “the character of the governmental action involved here leans heavily against finding a taking” because the legislature “has acted to arrest what it perceives to be a significant threat to the common welfare.”<sup>118</sup> In the eyes of this Court, the statute represented a legitimate exercise of the state’s police powers, whereas the act contested in 1927 did not.

Where these two cases differ, and consequently why they were handed quite opposing decisions, is a matter of the specific details of the legislative acts brought to question and the two Courts’ perceptions of what the basic motivations were on the part of the government. The *Keystone* decision investigates government motivation by extensively following the use of the character test throughout several prior cases, repeatedly recognizing that “the nature of the State’s interest” is a crucial piece in these rulings.<sup>119</sup> What distinguishes the findings of the two Courts is found in the details of the legislative acts brought into question. The specifics of the act from the *Mahon* case, as pointed out by the *Keystone* opinion, caused the Court to view the legislation as designed “only to ensure against damage to some private landowners’ homes,” with the Court’s opinion, articulated by Justice Holmes, very much opposed to such preferential treatment.<sup>120</sup> This Court view contrasts with that from *Keystone* in which the act in question was approved by the District Court, the Court of Appeals, and also the U.S. Supreme Court as a legitimate use of police powers to protect public interests.<sup>121</sup>

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<sup>117</sup> *Id.* at 475.

<sup>118</sup> *Id.* at 509.

<sup>119</sup> *Id.* at 487.

<sup>120</sup> *Id.*

<sup>121</sup> *Id.* at 476.

*Keystone* borrows a statement from another case of the Mahon era to help further explain why these cases came to such different decisions. The *Keystone* opinion applies the reasoning found in *Block v. Hirsh*, 256 U.S. 135 (1921), that “circumstances may so change in time...as to clothe with such a [public] interest what at other times...would be a matter of purely private concern.”<sup>122</sup> This statement reaffirms the importance of considering the “particular facts” of a case, banishing any idea that there are hard and fast rules for application in these cases. Moreover, the idea that changing conditions may also change a decision is congruent with the legislative history present within the *Keystone* case. The opinion notes that there had been a substantial amount of “federal, state, and local regulation in recent decades” to combat the threats posed by mining subsidence.<sup>123</sup> Perhaps the compounding effect of legislative acts surrounding this issue swayed the *Keystone* Court in favor of judicial deference.

Additionally, although not as significant a factor as the issue of intent, the *Keystone* decision pays heed to a second previously seen consideration in takings cases - the amount of economic value taken. The Court finds that, as the act only forbids the mining of 50% of total subsurface coal, and the company has profited from mining operations on other parcels, the injury is not significant enough to warrant a taking.<sup>124</sup> We will see this angle of analysis become more common in takings decisions in a move towards requiring a near total loss in economic value before categorizing a legislative act as a taking.

### *What Keystone Leaves*

The *Keystone* case is valuable in making sense of the country’s evolving relationship with and approach to regulatory takings in that it contributes to the settlement of three qualities at

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<sup>122</sup> *Id.* at 488.

<sup>123</sup> *Id.* at 475.

<sup>124</sup> *Id.* at 496.

play when they are brought to court. First, the decision's break with *Mahon*'s previous ruling in favor of the coal company reiterates the importance of considering each case's "particular facts" and shows that, while two similar cases may ultimately yield decisions that contrast on the surface, this does not have to indicate a significant ideological conflict and rejection of precedent. Second, the decision affirms that the character and extent of damage tests are important factors in ruling whether a taking has occurred. Resting its entire argument on these two factors indicates that the *Keystone* Court believes them to be critical factors in takings decisions, sufficient to stand alone in finding that a taking has not occurred.

Finally, *Keystone* establishes that a case must be a taking in its own right, and not decided one merely because it resembles the characteristics of a similar case. This again reflects the "particular facts" component of resolving takings cases. In writing for the majority, Stephens uses that component show that an act of government is not a taking merely because it puts in place a restriction that causes economic injury to a party. Stephens draws a distinction between the two cases, deciding that the "character of [the *Keystone*] governmental action leans heavily against finding a taking."<sup>125</sup> Stephens further clarifies that the "operative provisions of a statute, not just its stated purpose" are critical in the character assessment.<sup>126</sup> In this case, the government had passed what the Court finds to be an appropriate way to remedy coal induced subsidence, thereby passing a thorough character evaluation.

Despite providing an interpretation of the *Mahon* decision that works to clarify its ruling and provide a precedent for following Pitney's character and Holmes' particular facts recommendations, *Keystone* also highlights several problems in past and current takings jurisprudence. The majority opinion sticks closely to *Mahon*, using the two qualifications

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<sup>125</sup> *Id.* at 471.

<sup>126</sup> *Id.* at footnote 16.

employed in that decision to show how they do not constitute a taking in the *Keystone* context. The Court follows this method because the lawyers for the appellees based their claim on the *Mahon* decision, although given previous instances of failure to reference prior cases as *Portsmouth's* avoidance of *Cress*, one would hope that the Court might discuss its agreements and its points of contention with prior cases whether or not one of the parties involved required it in their argument.

Another question reiterated by *Keystone* that was previously raised by *Mahon* is the weight of precedent in Supreme Court takings jurisprudence. If takings decisions rely on the facts and conditions of each case, then what value can precedent really play? In *Keystone's* case history, the Court of Appeals rejected the coal company's claim that *Mahon* was a controlling agent, ruling against the company's interests.<sup>127</sup> This event could be indicative of the weight of the "particular facts" quality of takings cases and their ability to trump precedent and guide a lower court to move away from a prior Supreme Court decision (a move that was then validated by a new Court). In fact, Rehnquist's dissent, in which he is joined by three other justices, argues that the *Keystone* Court "attempts to undermine the authority of Justice Holmes' opinion" and should not "so readily dismiss the precedential value of [the Holmes] opinion."<sup>128</sup> In this opening to the dissent Rehnquist presents the fundamental disagreement between the majority and the minority in *Keystone* and the former's argument that the Holmes advisory opinion is not holding. This precarious and contentious position of takings precedents is present throughout the Court's history, revealed in various other inconsistencies and outright reversals in Court decisions.

Finally, because this decision rests entirely on the factors used in *Mahon*, we can assume that *Keystone* affirms the validity of employing those two factors in determining a takings claim,

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<sup>127</sup> *Id.* at 480.

<sup>128</sup> *Id.* at 507.

but it does not address whether these are (or should be) the only considerations. This leaves the door open for other cases and courts to establish new factors depending on the requirements of future cases.

### *Control of the Sky*

Coal disputes aside, the Court has also been challenged to apply its previously employed tests to other types of alleged takings claims. The *U.S. v. Causby*, 328 U.S. 256 (1946), decision holds that the government's use of a property owner's airspace constitutes a taking, and relies on reasoning from *Cress* to do so, revisiting the character issue and wrestling again with the provision of a takings definition.<sup>129</sup>

*Causby* involves the plight of a chicken farmer in North Carolina whose business happened to exist within close proximity of an airport used by U.S. military aircraft in connection with the country's participation in World War II.<sup>130</sup> Due to the frequency of use of the airport and the military nature of the aircraft used, the airport's operations caused a disturbance of the farmer's property by noise so severe as to frighten the chickens to the extent that production declined and the business became no longer profitable.<sup>131</sup> The *Causby* Court finds that, while the airspace of the U.S. is generally considered to be "a public highway" to be controlled by Congress, in this instance the government sponsored flights invaded the airspace immediately connected to the farmer's land, causing an invasion of property and requiring compensation.<sup>132</sup>

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<sup>129</sup> 28 U.S. 256 (1946).

<sup>130</sup> *Id.* at 259.

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

The *Causby* opinion, authored by Douglas, opens with a curious statement whose purpose in the text is not clear. The statement reads, “this is a case of first impression.”<sup>133</sup> There follows no explanation as to what Douglas intended by that statement. The purpose might have been to indicate how clear the decision was to Douglas, that upon first glance the facts so obviously pointed to a taking, in which case we might infer that whatever aspects of the case were found to be controlling in *Causby* are so significant as to bear great importance in other cases. In a completely different manner, the statement might indicate a complete *lack* of clarity in whether the facts point to a taking or not, requiring a judgment to be made based on the initial knee-jerk reaction of a Justice, an interpretation reminiscent of Holmes’s “inarticulate and unconscious judgment” mention from his argument in *The Path of the Law*.<sup>134</sup>

Moving into the body of the opinion, Douglas pays heed to the indisputable and “common sense” public nature of airspace, and modernity’s necessitation that it remains free from the binds and interference of private ownership.<sup>135</sup> Nevertheless, Douglas writes that the Court has found cause to exempt the *Causby* case from this principle. Just as *Keystone* did, this opinion finds the nature of the alleged invasion to be the controlling fact, with Douglas very clearly expressing the Court’s aversion to the extent of damages test, saying “that here enjoyment and use of the land are not completely destroyed. But that does not seem to us to be controlling.”<sup>136</sup> In a succinct sentence the Court dismisses Holmes’s preferred damages test, focusing instead on the nature of the government’s behavior. In so doing, the majority finds the type of invasion in *Causby* to be closely similar to that in *Portsmouth*, deeming both “the product

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<sup>133</sup> *Id.* at 258.

<sup>134</sup> Holmes, n. pag.

<sup>135</sup> *Id.* at 261.

<sup>136</sup> *Id.* at 262.

of a direct invasion.”<sup>137</sup> Douglas’s opinion quotes Pitney’s “character of the invasion” qualification from *Cress*, using it as justification for its finding that the government’s use of the airspace over private property in a disruptive manner does constitute a taking worthy of compensation.<sup>138</sup>

Douglas and *Causby* make an effort to shed some light on how the courts should approach evaluating an alleged taking’s character, even beyond asking that it be a “direct invasion” on its own. Douglas’ opinion does this by way of critiquing the lower court’s handling of its ruling for this case.<sup>139</sup> The complaint focuses quite specifically on the findings of the Court of Claims and its failure to closely review and discuss all aspects of the government run flights in terms of “frequency of flight, permissible altitude, or type of airplane,” nor in discussing the permanent nature of the economic damage sustained.<sup>140</sup> Douglas describes these elements, and detailed descriptions of the facts of a case in general, as “essential.”<sup>141</sup> Without referencing it, the *Causby* decision recalls the importance of a case’s particular facts as found in *Mahon*, and provides frequency and permanency as the beginnings of a basis for using the facts to evaluate character.

While the *Causby* decision follows *Portsmouth*’s precedent, it curiously does not mention *Mahon*. The *Mahon* decision, which at the time of *Causby* was a landmark takings cases, introduced “diminution of value” as a test. *Causby*’s avoidance of addressing this reveals a conflict, one seen in previous decisions, over the Court’s preference for one type of test or qualification over others. In this case, the majority’s reasoning relies on classifying the government’s action as overstepping the bounds it is permitted by the Fifth Amendment on the

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<sup>137</sup> *Id.* at 265.

<sup>138</sup> *Id.* at 266.

<sup>139</sup> *Id.* at 267.

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

basis of an abstract character assessment.<sup>142</sup> The opposing test, championed by *Mahon* previously and later by *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), stresses the amount of economic damage done to the landholder as the Court's primary concern in takings rulings.<sup>143</sup> The *Causby* Court does not move to resolve, or even address the issue of competing tests nor to explain why it believes character to be the more important quality, choosing to build upon the older 1917 *Cress* decision while passing over the 1922 *Mahon*.

In addition to its relevance regarding establishing the tests for regulatory takings and the Court's overall approach to these cases, the *Causby* decision indicates that the authors considered its future impact, and were careful not to set a precedent that would hamper the development of air travel - the tricky and intriguing quality of *Causby* being that it involves a domain not considered during the crafting of the Constitution. With this decision, the majority clearly states that "flights over private land are not a taking" and that the Court will "not determine at this time what those precise limits [of airspace in the public domain] are."<sup>144</sup> The Court here seems to be adding a disclaimer of sorts, not wanting its opinion to make suits against invasion of airspace easy nor commonplace, and similarly unwilling to be the authority in setting the bounds for those potential cases.

Furthermore, Justice Black's dissenting opinion pays great attention to this issue of future developments, both regarding the setting of legal precedent as well as the practical implications of airspace controls, framing nearly its entire content around these two issues. The dissent is more explicit about this concern than the majority opinion, outright stating that "the effect of the Court's decision is to limit... possible future adjustments through legislation and regulation

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<sup>142</sup> *Id.* at 264.

<sup>143</sup> 505 U.S. 1003 (1992).

<sup>144</sup> 28 U.S. 256 (1946) at 266.

which might become necessary with the growth of air transportation.”<sup>145</sup> Black extends this complaint regarding the impact that he believes the decision is sure to have, likening the situation in *Causby* to the noise disruption that highways cause to express the degree to which the Court has overstepped its bounds. To Black, this decision is based on too broad an interpretation of the Constitution’s protection of private property from government invasion, even when that invasion ultimately advances the public welfare.

The early decades of the Court’s attempts to manage the regulatory takings issue, especially in regard to urban development, are characterized by cases with straightforward conflicts between government and business interests. Although the Court contradicts itself along the way, these early cases allow it to work through the principles at play and begin to experiment with ways of framing the conflict and creating tests to determine the regulations’ constitutionality. Anticipating future similar cases, the *Mahon* Court seeks to explain its preference for ensuring that individual rights are not trampled by the government, but, like other decisions from the time, its definition of a taking is far from precise and future decisions such as *Causby* do not even mention *Mahon*. The Court’s attention to later cases will continue to show an inconsistent use of precedent and will similarly include a case that attempts to establish a takings doctrine and is intended for use by future Courts.

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<sup>145</sup> *Id.* at 269-270.

## Chapter IV: Court Attempts at Clarification

### *Penn Central Explains the Process*

Following the flurry of takings decisions in the early portion of the 20th century, there exists a gap in Supreme Court takings jurisprudence during much of the middle of that century.<sup>146</sup> A search for another significant case to break the nearly “half a century of silence” lags on until the 1970s and the landmark *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978).<sup>147</sup> This unexplained break is interrupted in 1978 by an attempt to set a takings doctrine that encompasses many of the issues raised, disagreed on, and left as questions in prior cases.

The *Penn Central* decision first addresses the case before it, handing down a ruling upholding the legitimacy of historic preservation laws, before addressing the state of takings case law thus far. The case involved the Constitutionality of a legislative motion, carried out by the Landmarks Preservation Commission, to protect the historic aesthetic and character of the Grand Central Station train terminal in Manhattan.<sup>148</sup> Penn Central Transportation Co., the owner of the terminal, had been denied permission to further develop the parcel of land vertically by way of constructing an office building above the terminal due to its designation as a historic landmark.<sup>149</sup> Penn Central charged that this prohibition was an arbitrary and undue burden constituting a taking without compensation, but the Court disagreed.<sup>150</sup>

The issue at stake in *Penn Central* is whether New York City’s Landmarks Preservation Law, enforced by the related Commission, is unconstitutional in its requirements that a private business and landowner be solely responsible for maintaining a designated historic landmark.

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<sup>146</sup> Callies, 524.

<sup>147</sup> Callies, 525.

<sup>148</sup> 438 U.S. 104 (1978) at 110.

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

The ruling of this decision no doubt has implications for the law's application to all other landmarks within its domain, as well as for the prospect of future landmark preservation efforts and conflicts.

The majority opinion, authored by Justice Brennan, frames the question as a competition of values, and makes clear the Court's stance in support of preservation laws, with statements regarding this value judgment sprinkled throughout.<sup>151</sup> The opinion opens with a lengthy expression of the Court's belief that historic or culturally significant buildings and landmarks are beneficial to society at large and ought to be protected from destruction.<sup>152</sup> The Court outlines the reasoning behind the enactment of the preservation law in detail, highlighting its intent to benefit all New Yorkers through support of industry, tourism, and general city pride and aesthetic benefits.<sup>153</sup> These introductory paragraphs espousing the social benefits of these landmarks gives a glimpse into the Court's thoughts on the legitimacy and necessity of preservation efforts, and shows where the majority aligns in this takings case's conflict between public and private interests. Throughout the remainder of the opinion, the Court expresses its regard for the terminal as a "magnificent example" of architecture and also its belief that landmark laws are "substantially related to the promotion of the general welfare."<sup>154</sup> Furthermore, the Court makes known its acceptance of the reality that some private landowners will see their property rights restricted in the pursuit of the public good, the issue at the heart of the case, citing *Hadacheck* and saying, "legislation designed to promote the general welfare commonly burdens some more than others."<sup>155</sup>

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<sup>151</sup> *Id.* at 108.

<sup>152</sup> *Id.*

<sup>153</sup> *Id.* at 110.

<sup>154</sup> *Id.* at 115 and 138.

<sup>155</sup> *Id.* at 133.

Given that judgment of whether preservation laws and the restrictions that they enforce are constitutional or not is framed in this opinion as a question of values, there are few indicators that would explain why this decision fell in favor of one value set than the other. One clue as to what motivated the Justices to weigh in favor of the preservation legislation is the frequent references to other similar laws and found in the decision. The opinion, for example, describes the particular New York law in question as “typical of many urban landmark laws” in its approach to preservation, and in a prior paragraph notes that, “over the past 50 years, all 50 States and over 500 municipalities have enacted laws to encourage or require the preservation of buildings and areas with historic or aesthetic importance.”<sup>156</sup> It seems, from these statements, that the fact that historic preservation is a nationwide movement joined in by other legislative bodies adds legitimacy to the actions of the particular commission and act in question. Furthermore, the Court is unwilling to undermine an entire collection of legislation or precipitate a crumbling of preservation laws, acknowledging that declaring this act a taking would “invalidate not just New York City’s law, but all comparable landmark legislation in the Nation.”<sup>157</sup> Here, the Court displays recognition of how its decision might influence the laws of, and consequently also the landscapes of towns and cities across the country.

An additional clue as to why the Court approves the landmark legislation is found in the first sentence of the opinion. The Court declares that “the question presented is whether a city may, as part of a comprehensive program to preserve historic landmarks and historic districts, place restrictions on the development of individual historic landmarks...without effecting a ‘taking.’”<sup>158</sup> The clause that specifies that this legislation is presented by the city as part of a

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<sup>156</sup> *Id.* at 109 and 107.

<sup>157</sup> *Id.* at 131.

<sup>158</sup> *Id.* at 107.

“comprehensive program” is key, suggesting that the Court is more likely to favor an act from a legislature that has demonstrated an interest in and made an effort to develop a growth strategy.

Turning to the particulars of the *Penn Central* case, Brennan’s opinion squarely addresses one of the major pillars of the company’s argument, the complaint that legislation arbitrarily singles it out to bear the economic responsibility and constraint of preserving the station.<sup>159</sup> The Court, drawing on the knowledge that “31 historic districts and over 400 individual landmarks” are part of the commission’s preservation plan and landmark designation, finds that this is simply not true.<sup>160</sup> The company’s allegation of an arbitrary designation does not stand, and furthermore, the Court does not view the designation and subsequent development restrictions and economic hardship as the significant imposition that is alleged by the company, instead finding special tax and other provisions in the legislation, designed “to ensure that designation does not cause economic hardship,” as well as permission for the transfer of development rights that provide some form of economic remuneration.<sup>161</sup> Moreover, the law “does not interfere in any way with the present uses of the Terminal,” allowing the company to continue to exploit the parcel for profit.<sup>162</sup>

The decision’s next point in rejecting the claim that a taking occurred echoes the finding in *Keystone* by insisting once again that an act of government must truly qualify as a taking in its own right. The Court’s statement that merely “showing that [appellants] have been denied the ability to exploit a property interest that they heretofore had believed was available for development is quite simply untenable.”<sup>163</sup> The statement here indicates the Court’s rejection that merely failing to derive a profit that had previously been anticipated due to government

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<sup>159</sup> *Id.* at 119.

<sup>160</sup> *Id.* at 111.

<sup>161</sup> *Id.* at 112 and 113.

<sup>162</sup> *Id.* at 136.

<sup>163</sup> *Id.* at 130.

intervention does not immediately point to the presence of a taking. This is a clear explanation of what the Court has already expressed and additionally serves as one of the Court's reasons for rejecting the appellants' claim that the building restriction, and concurrent loss of potential economic gain, is a taking of their air rights similar to that in *Causby*.<sup>164</sup>

Another piece in the *Penn Central* decision's explanation for siding with the preservation commission is the detail in the landmarks law that permits landowners to seek judicial review of the commission's decisions, and the company's failure to pursue this route, a fact of the case noted by the decision twice.<sup>165</sup> And finally, the Court speculates briefly on the future development possibilities for the terminal and surrounding area, noting that the company has not brought other proposals before the landmarks commission, and that other types of development plans might be approved in the future.<sup>166</sup>

### *Penn Central Seeks Balance*

Brennan's decision pursues a survey and summarization of the state of takings jurisprudence, dealing honestly with the Court's history of struggling with type of case. The opinion first acknowledges that the most basic component of establishing a takings doctrine, simply providing a means by which to identify that one has occurred in the first place, has proved, in itself "to be a problem of considerable difficulty."<sup>167</sup> *Penn Central* concedes the Court's shortcomings in the area of takings law and addresses the vague and subjective nature of these cases and their related decisions, saying that the "Court, quite simply, has been unable to develop any 'set formula' for determining when 'justice and fairness' require that economic

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<sup>164</sup> *Id.* at 135.

<sup>165</sup> *Id.* at 117 and 118.

<sup>166</sup> *Id.* at 137.

<sup>167</sup> *Id.* at 123.

injuries cause by public action be compensated by the government.”<sup>168</sup> The Court had, on prior occasions, made brief reference to its difficulties with these cases, but the *Penn Central* decision is the first to address the “several factors that have particular significance” that the Court has selected through its admittedly “ad hoc, factual inquiries.”<sup>169</sup> This Court addresses that group of factors under one decision, providing a clearer picture of the Court’s evolving opinions.

*Penn Central* continues with an overview of takings jurisprudence, beginning with *Hadacheck* era cases and addressing the major developments and tests employed over the following decades.<sup>170</sup> The decision glosses over these tests, referencing the extent of diminution and character tests, as well as the physical invasion found in *Causby*, while using the context of the *Penn Central* case to validate the importance of each.<sup>171</sup> The decision declares its intent to rely “both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole.”<sup>172</sup> After the confusing and contradictory opinions that established these tests and clashed over the relative importance of each, the *Penn Central* decision incorporates both with equal weight.

The appellants here used the character test to argue that the prohibition of their construction project above Grand Central Station was arbitrary, and used the extent of damages argument, showing that they sustained a considerable loss of potential economic use of the property.<sup>173</sup> While the decision has already acknowledged that these two factors are central elements in taking decisions and are equally important in judicial decision making, it finds that they do not control in this case. This finding seems to both remind us that each case’s particular

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<sup>168</sup> 438 U.S. 104 (1978) at 123.

<sup>169</sup> *Id.*

<sup>170</sup> *Id.* at 123-128.

<sup>171</sup> *Id.* at 124.

<sup>172</sup> *Id.* at 131.

<sup>173</sup> *Id.*

facts should be evaluated against the established tests, and to affirm that the Court, in the latter half of the 20<sup>th</sup> century, is trending towards consistent denial of takings claims provided at least some economic value of the property remains.

The corresponding dissent by Rehnquist is worthy of review because it demonstrates another dimension to takings cases not addressed by Brennan and provides a good example of how these types of cases can be framed differently, changing the central question. *Penn Central* differs from other takings cases such as *Causby* and *Portsmouth* as the questions addressed there sought a yes or no answer as to whether the government could proceed with a particular behavior. In contrast, the question here is not whether there is a legitimate public interest represented or if the government is in the wrong for wanting to preserve certain landmarks, in fact, the “appellants do not contest that New York City’s objective of preserving structures and areas with special historic, architectural, or cultural significance is an entirely permissible governmental goal.”<sup>174</sup> The issue, as framed by Rehnquist, is “whether the cost associated with ...[landmark preservation] ...must be borne by all of [New York’s] taxpayers or whether it can instead be imposed entirely on the owners of the individual properties,” harkening back to Holmes’s *Mahon* statement that “the question at bottom is upon whom the loss of the changes desired should fall.”<sup>175</sup>

The minority views the landmark legislation as unfairly targeting specific landowners and placing an unfair burden upon them to singlehandedly support a public interest. The argument undertaken here is heavily character based, describing how the designated buildings were “singled out and treated differently” from others, and that the nature of this regulation differs from zoning on the grounds that zoning, although at times guilty of depreciating property values,

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<sup>174</sup> *Id.* at 129.

<sup>175</sup> *Id.* at 139.

produces a “burden [that] is shared relatively evenly.”<sup>176</sup> What Rehnquist finds particularly offensive about the restrictions and peculiarities attached to designated landmarks is the “affirmative duty” placed on the landowners who are required, not only to abide by the commission’s development restrictions, but also to preserve and maintain their respective landmark.<sup>177</sup> As it is evaluated by Rehnquist, this compulsory component to the legislation furthers the argument that the character of the act is overbearing, unfair, and ultimately unconstitutional.

Despite both approving of the character test as applicable in the evaluation of Penn Central, the majority and minority opinions reach very different conclusions regarding the constitutionality of the terminal’s development restrictions. The majority prefers to balance the character test with an investigation of the damages incurred and economically compensatory options offered, and furthermore relies upon the wisdom and behavior of many other legislatures that have enacted closely similar measures. The minority, on the other hand, places preference on the character test, citing the *Cress* opinion that did so as well, and uses it to address how the landowner is affected, as opposed to what the public at large gains.<sup>178</sup>

The minority’s dissent concludes with a reference to the broader context in which the case was brought and offers a statement that almost sounds as though it is hinting at non-legal motivations behind the majority’s decision. The dissent remarks that “the city of New York is in a precarious financial state, and some may believe that the costs of landmark preservation will be more easily borne by corporations [than taxpayers].”<sup>179</sup> There is no way to understand the basis for Rehnquist including this statement, and similarly no way to prove that the financial impact on

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<sup>176</sup> *Id.* at 140 and 147.

<sup>177</sup> *Id.* at 146.

<sup>178</sup> *Id.* at 148.

<sup>179</sup> *Id.* at 152.

the state was a factor, no matter how large or small, in the deliberations over this case.

Nevertheless, the sentence does address the impact that this decision might have on the City, and therefore inspires questions regarding why and to what extent the justices considered this angle of the case.

### *Loretto's Trivial Complaint Establishes a Significant Takings Principle*

No infraction upon constitutionally guaranteed rights, no matter how seemingly trivial, is too insignificant a grievance to be debated and addressed by the Supreme Court. Indeed, a case brought by a disgruntled landlady upset with the cable and attachments running down the side of her building was granted certiorari by the Court, resolved in a split decision, and took a place in the country's takings doctrine. *Loretto v. Teleprompter Manhattan CATV Corp*, 458 U.S. 419 (1982) appears to be a minor, straightforward, and even petty case, but it nevertheless provides an opportunity to once again discuss the competing values at play when pitting private rights against public benefits.<sup>180</sup>

Loretto, the owner of an apartment building that had previously received an installation of service cables by Teleprompter Corp in order to provide cable television service to it and surrounding buildings, accused the corporation of trespassing on the property, due to the continued and permanent presence of the cables, and requested compensation.<sup>181</sup> As in all takings cases, *Loretto* asks the Court to juggle the need to protect the public interest with the individual rights to ownership of real property.

The Court does not dispute that the installation of cables throughout the city by way of placement on residential buildings “serves the legitimate public purpose of ‘rapid development’”

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<sup>180</sup> 458 U.S. 419 (1982).

<sup>181</sup> *Id.* at 421-424.

and is a practically expedient way to distribute television service.<sup>182</sup> What the Court finds controlling in this case, however, is not this promotion of a public benefit, but rather the nature of the invasion as “a permanent physical occupation,” and its status as “a taking without regard to the public interests that it may serve.”<sup>183</sup> The ruling sides with the landowner, on the grounds that the alleged taking was unconstitutional no matter how well intentioned its design and purpose was. With this conclusion, the *Loretto* decision establishes a new test to add to the growing collection of takings tests, the physical invasion test.

The *Loretto* decision builds off of *Penn Central* and its summarization of takings jurisprudence, reviewing the use of both the extent of damages incurred as well as the character of the regulation.<sup>184</sup> *Loretto*'s decision then parts from *Penn Central*, finding a circumstance under which one test carries precedence over the other. When the regulation reaches the point of becoming a “permanent physical occupation,” the character test “not only is an important factor in resolving whether the action works a taking but also is determinative.”<sup>185</sup> The character test is so controlling, in fact, that the extent of the economic damages suffered by the landowner is not used by the Court as a measure for determining a taking in this case at all. Surely *Loretto* did not suffer significant economic loss due to the presence of a few cables and corresponding hardware on the side of her building, in fact the company had been in the practice of awarding \$1 to landlords for permitting the installation.<sup>186</sup> Nevertheless, the installation of permanent cables qualifies as a taking, “even if [the cables] occupy only relatively insubstantial amounts of space and do not seriously interfere with the landowner’s use” of the property.<sup>187</sup>

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<sup>182</sup> *Id.* at 425.

<sup>183</sup> *Id.* at 426.

<sup>184</sup> *Id.*

<sup>185</sup> *Id.*

<sup>186</sup> *Id.* at 425.

<sup>187</sup> *Id.* at 430.

The opinion further emphasizes the primacy of the character test over any discussion of diminution of value, finding that “constitutional protection for the rights of private property cannot be made to depend on the size of the area permanently occupied.”<sup>188</sup> The *Loretto* Court finds the character of the invasion to be controlling, no matter how seemingly minor or insignificant the injury. Where the Court does approve of use of the extent of damages is in determining the amount of compensation to be awarded.<sup>189</sup> The *Loretto* Court is clear about its ranking of the tests, with character being sufficient in identifying that a taking has occurred, and the extent of damages taking a supportive role in determining compensation.

It is the permanency of the invasion that the Court adopts as a takings test. In expressing its reasons for finding the invasion a taking, the Court departs from delivering a judgment solely on the specific case before it and sets about adding permanent physical invasions to the list of takings tests. What the Court finds so offensive about regulations that cause permanent physical invasions of private property is that it removes the landowner’s ability to occupy the land as effectively “as if it had destroyed that amount of ground,” and becomes what is “perhaps the most serious form of invasion.”<sup>190</sup>

As it inserts the permanent physical invasion into the application of the character test, the *Loretto* opinion offers the specific infractions on the landowner’s property rights that create such a grave overstepping and that can be used in future cases to identify and condemn permanent physical takings. These infractions include the landowner’s complete loss of fundamental property rights such as possession, exclusion, and exploitation.<sup>191</sup> The opinion also includes the diminution of value and right to profit that a landowner might suffer due to a permanent

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<sup>188</sup> *Id.* at 437.

<sup>189</sup> *Id.*

<sup>190</sup> *Id.* at 429 and 435.

<sup>191</sup> *Id.* at 435.

invasion.<sup>192</sup> While this was not found to be relevant to *Loretto* as there was little to no economic loss incurred there (and even if there were an economic loss, the parcel's remaining value was significant), the opinion includes this consideration regardless as this section of the opinion serves more to provide advice and precedent for future cases, furthering the Court's purpose of establishing the physical invasion as an indicator of a taking.

While the *Loretto* decision is clear about its opinion that “a physical invasion is a government intrusion of an unusually serious character” and that it should be included under the umbrella of standard takings tests, the decision is careful to specify that it is only advocating for a certain type of physical invasion.<sup>193</sup> Those that are “temporary and limited in nature” would not immediately qualify as a taking, informs the *Loretto* opinion, citing and approving of the judgment in a prior case that held a temporary physical invasion not determinative of a taking.<sup>194</sup>

As seen in other opinions, the Court inserts towards the end of its opinion a note regarding its conclusions' applicability in other cases. Just as the majority opinion in *Causby* was careful to stipulate that its decision was not necessarily holding for all general air travel over private land, the *Loretto* opinion similarly explains that it does not hold in challenges of the State's authority to require cooperation with building codes, “utility connections, mail boxes, smoke detectors, fire extinguishers, and the like.”<sup>195</sup> These utilities and their corresponding regulations are critical to public safety, and the Court is understandably wary of the appearance that it finds them constitutionally questionable, inspiring it to emphasize that this interpretation of its decision would not be correct.

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<sup>192</sup> *Id.*

<sup>193</sup> *Id.* at 434.

<sup>194</sup> *Id.*

<sup>195</sup> *Id.* at 440.

*When a Permit Condition Becomes an Invasion*

*Loretto*'s permanent physical invasion complaint takes a new form in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), where it is extended to include a public access provision.<sup>196</sup> The Nollan family purchased beachfront property on which they began construction of their new home, despite being aware of and in opposition to the condition applied to their permit that required them to allow for a publically accessible footpath to pass across a strip of their land, facilitating the public's use and enjoyment of the beachfront parcel.<sup>197</sup> During the construction process, they contested the Commission's requirement, eventually reaching the Supreme Court whereby that particular condition of the permit was ruled an unconstitutional taking of property.<sup>198</sup>

The Court's immediate reaction in the majority opinion is to reject this attachment of a public access condition to a development permit, calling its status as a taking "so obvious."<sup>199</sup> The condition falls under the category of a permanent physical invasion as described by *Loretto*.<sup>200</sup> While no foreign structure will be erected or otherwise installed nor will any member of the public take up permanent occupation of the strip of land, the condition of the public right to traverse the land would remain in effect always under this permit's qualifications.<sup>201</sup> This required easement permanently deprives the Nollans of their right to exclude, a right regarded as "one of the most essential sticks in the bundle of [property] rights," and therefore becomes an inappropriate and impermissible encroachment on their rights.<sup>202</sup>

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<sup>196</sup> 483 U.S. 825 (1987).

<sup>197</sup> *Id.* at 828.

<sup>198</sup> *Id.*

<sup>199</sup> *Id.* at 831.

<sup>200</sup> *Id.* at 832.

<sup>201</sup> *Id.* at 831.

<sup>202</sup> *Id.*

The majority opinion is prepared to acknowledge the legislature’s right to carry out its constitutionally afforded police powers, and is similarly prepared to hear whether this permit condition constitutes the promotion of a “legitimate state interest.”<sup>203</sup> Scalia’s opinion, like other opinions associated with takings cases, laments the lack of a precise takings definition to determine this “legitimate interest” requirement, as well as the absence of guidelines to determine the “type of connection between the regulation and the state interest.”<sup>204</sup> The lack of precision and definitional value of the opinions of prior cases leaves a great deal of discretion to the Court, a reality of takings jurisprudence with which Scalia and the majority grapple. The unique matter at play in *Nollan* is the distinction between other frequently used permit conditions that ban certain types of development and the requirements of the *Nollan* condition, the latter of which is found to be unconstitutional while the opinion approves of the former.

The Court does not dispute the government’s general desire and right to protect the coastal environment from damages associated with development or to preserve a desired character or aesthetic quality of a particular parcel of land, nor its right to place restrictions on construction in these targeted areas.<sup>205</sup> Therefore, the Court finds that development restrictions such as “a height limitation, a width restriction, or a ban on fences,” for example, would have been consistent with the Commission’s goal to protect beachfront property and with its rights under the police powers.<sup>206</sup>

Where this particular permit deviates from the constitutionally acceptable applications of the police powers is in its failure to connect the government purpose pursued with the conditions employed. Despite the tradition of judicial deference to a local legislative body regarding zoning

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<sup>203</sup> *Id.* at 834.

<sup>204</sup> *Id.* at 835.

<sup>205</sup> *Id.* at 836.

<sup>206</sup> *Id.*

enactments, or in this case, an adjudicative body regarding permit decisions, this Court was not convinced that allowing pedestrians access to the Nollans' land would remedy the impairment of "visual access" to the beach caused by the house.<sup>207</sup> The Court was furthermore not convinced that the Commission's claim of a "psychological barrier" to access caused by the Nollans' house could be addressed and remedied by the permit condition offered.<sup>208</sup> For the majority, the lack of a connection between the permit's requirements and the desire to mitigate whatever damage or overcrowding might be caused by the Nollan home indicates that the regulation here does not provide a "substantial advancing of a legitimate state interest."<sup>209</sup> It is therefore unfair that the Nollan family and their coastal neighbors would have to sacrifice some portion of their land rights in support of the Commission's desire for a public access shoreline.<sup>210</sup> The opinion does not deny that a beach protection endeavor would be beneficial to the public at large, but decides, similarly to the sentiment articulated by Rehnquist's *Penn Central* dissent, that the State will have to pay for the public access strip.<sup>211</sup>

The *Nollan* case is an example of how, without clear boundaries and definitions of feature terms like "legitimate interest," the Court is both free to define and apply them as it deems appropriate in any given case, yet also burdened with navigating the complex layers of opinions that often contain contradictory approaches to the same questions. In *Nollan*, the Court applied and broadened the concept of the permanent physical invasion to include public access easements. Though the *Nollan* opinion does not specifically reference the character test, the decision reached here has its foundation in that test, with the physical invasion reasoning building off of it per the discretion of the justices on the bench at the time.

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<sup>207</sup> *Id.* at 838.

<sup>208</sup> *Id.*

<sup>209</sup> *Id.* at 841.

<sup>210</sup> *Id.*

<sup>211</sup> *Id.* at 842.

### *Revisiting the Extent of Damages*

Many of the takings cases covered here make use of the character test, interpreting and applying it as desired by the Court, but the “total takings” test waited until 1992 to become formally established in our takings tradition in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992). While other cases such as *Mahon*, *Causby*, *Portsmouth*, and *Penn Central* affirm the importance of paying heed to the damages caused the landowner by the government’s regulation, until *Lucas* there remains no attempt to address how much damage is sufficient to prove a taking has occurred and the Court has “never set forth the justification for this rule.”<sup>212</sup> Building off of this history and the ambiguity therein, the *Lucas* majority opinion, authored by Justice Scalia, takes the opportunity brought by the *Lucas* case to rule on when and how the extent of damages can serve as an indicator of a taking.

Similar to *Nollan* and other decisions, *Lucas* involves the attempted regulation of coastal properties and the ensuing conflict between the government and the landowners. David H. Lucas purchased beachfront land on which he intended to construct a residential development for profit.<sup>213</sup> Unfortunately for him, the state government, in the interest of preserving the coastline and economic and aesthetic benefit of the waterfront, subsequently passed an act preventing all residential development on Lucas’s land, precipitating a takings suit.<sup>214</sup>

This case, like *Nollan* before it, is one in which the property owner is not arguing whether the government is wrong in limiting the uses and activities carried out on a particular plot of land, but rather that the preservation strategies employed should represent a shared cost for the

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<sup>212</sup> 505 U.S. 1003 (1992) at 1017.

<sup>213</sup> *Id.* at 1006.

<sup>214</sup> *Id.* at 1007.

public, and not burden any particular landowner.<sup>215</sup> Given this frame, the case lends itself to an investigation into the damages that have fallen onto Lucas, and an interpretation and application of the affiliated precedent. The opinion complains that Mahon “offered little insight” into identifying what it had termed a regulation that goes “too far,” and works within the very broad framework of Holmes’s comments to share what it believes to be the appropriate use of the diminution of value in a takings ruling.<sup>216</sup>

In surveying the evolution of takings opinions, *Lucas* finds that the Court’s character-based approach to defining appropriate government regulations has moved from the approval of “harmful or noxious use” prevention as in *Hadacheck* to the promotion of one that “substantially advances legitimate state interests.”<sup>217</sup> These two avenues of regulation description can be broken down into their basic properties of “harm-preventing” and “benefit-conferring,” the selection of which in each case “depends primarily upon one’s evaluation of the worth of competing uses of real estate.”<sup>218</sup> *Lucas* holds what we have seen all along in the history of takings decisions handed down by the Supreme Court, that the cases present a competition of values and, given the wide allowance for judicial discretion in the relevant written law, the resulting opinion depends upon the mood of and particular approach favored by the bench.

The *Lucas* opinion uses this lack of “an objective, value-free basis” to explain why character-based tests “cannot serve as a touchstone to distinguish regulatory ‘takings,’” contradicting other Courts that have promoted the character test and establishing the superiority of a diminution of value test.<sup>219</sup> In favoring this type of test, the opinion surpasses *Mahon* in

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<sup>215</sup> *Id.* at 1009.

<sup>216</sup> *Id.* at 1015.

<sup>217</sup> *Id.* at 1023.

<sup>218</sup> *Id.* at 1025.

<sup>219</sup> *Id.* at 1026.

making precise its use of the extent of damages caused, establishing the “total taking” test.<sup>220</sup> Furthermore, by taking a realistic view of regulations and property ownership, the Court further explains the applications of this test, sharing why a total deprivation must occur. The reason being that an “owner necessarily expects the uses of his property to be restricted, from time to time,” by various regulations.<sup>221</sup> The statement might be of cold comfort to a landowner who has seen his economic gains reduced by a significant, but not complete amount, but it helps to provide precision in the opinion, explaining that a total economic loss is required for the test to prove a constitutional violation. This ruling contrasts quite directly with *Causby*’s approval of compensation for a case in which “enjoyment and use of the land are not completely destroyed,” with the Court stating, “that does not seem to us to be controlling.”<sup>222</sup> Such revisions are not rare in takings cases and, as we have seen, have occurred throughout the entirety of takings jurisprudence.

### *Defining Takings by Defining the Court’s Role*

The tumultuous history of takings case law continues from the early years of the 1900s until the current century. After 100 years the Court still finds itself in a position of contradicting and reversing its prior positions. One such reversal involved *Agins v. City of Tiburon*, 447 U.S. 255 (1980), a case that established a new test, served as precedent for several cases over 25 years, and was then overturned and its main principle removed from the Court’s repertoire.<sup>223</sup> *Agins* was a seemingly simple zoning case but served the Court’s purpose of articulating a new qualification for takings determination.

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<sup>220</sup> *Id.* at 1030.

<sup>221</sup> *Id.* at 1027.

<sup>222</sup> 328 U.S. 256 (1946) at 257.

<sup>223</sup> 447 U.S. 255 (1980).

Despite the common usage and general legal approval of zoning practices, having been championed by *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), some decades prior, the Court agreed to hear *Agins* to once again affirm zoning’s legitimacy. The *Agins* family, much like Lucas, acquired land just prior to the changing of the city’s zoning ordinances, and complained to have subsequently lost all economically beneficial use of their land.<sup>224</sup> The argument brought by the *Agins* family invokes Rehnquist’s *Penn Central* dissent, that a regulation to promote the public interest becomes a taking when it singles out and places a burden on individual landowners.<sup>225</sup> In this short, unanimous, and straightforward opinion, the Court sides with the legislature, drawing directly upon *Euclid*’s decision that zoning laws bear “a substantial relationship to the public welfare” and declaring that the ordinances in *Agins* similarly “substantially advance legitimate governmental goals,” a phrase that would later find its way into cases such as *Keystone* and *Nollan*.<sup>226</sup>

In contrast to the lengthy opinions of most other takings cases, the *Agins* decision is succinct in its explanation for siding with the City of Tiburon. The opinion briefly agrees that urbanization and development inflict certain damages on the community and its environment that negatively impact quality of life, making development controls beneficial and necessary.<sup>227</sup> Furthermore, the Court finds reason to believe that the owners “will share with other owners the benefits and burdens” of the zoning changes, thus mitigating the undue burden complaint, and that they are still eligible to submit a development plan for approval that they might be granted in the future.<sup>228</sup>

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<sup>224</sup> *Id.* at 257.

<sup>225</sup> *Id.* at 260.

<sup>226</sup> *Id.* at 261; 544 U.S. 528 (2005) at 545 and 547.

<sup>227</sup> 447 U.S. 255 (1980) at 261.

<sup>228</sup> *Id.*

As directly as *Agins* establishes the role and application of the legitimate interest test, *Lingle v. Chevron*, 544 U.S. 528 (2005), strikes down a significant portion of the holding. Despite the 25 years that *Agins* enjoyed as a model and frequently cited precedent, there still remained room for a subsequent Court to challenge its validity and completely overturn the test. The case that did this was brought by the Chevron oil company who disputed the constitutionality of a recent Hawaiian state law on the grounds that it caused the company profit losses yet did not reduce retail prices to consumers sufficiently enough to qualify as a regulation that would “substantially advance legitimate state interests” as required by *Agins*, and therefore effected a taking.<sup>229</sup>

The unanimous Court leapt at the opportunity that *Lingle* brought to completely reject a major segment of *Agins*, declaring that the “substantially advances” principle “is not a valid method of discerning whether private property has been ‘taken.’”<sup>230</sup> The *Lingle* opinion, like so many others, returns to the basis for much of takings jurisprudence, the *Mahon* decision, and establishes its intent to “discern how far is ‘too far.’”<sup>231</sup> The *Lingle* case was brought more than 80 years after *Mahon* yet justices are still asking this question and wrestling with the exact definition of a taking. *Lingle* finds the *Agins* test to be entirely out of place and ineffective in the pursuit of identifying takings, given that “government regulation – by definition – involves the adjustment of rights for the public good” and that the test “has no proper place in our takings jurisprudence.”<sup>232</sup>

The *Lingle* Court lists several complaints about the *Agins* opinion, beginning with its “regrettably imprecise” language (although this criticism could apply to quite a few takings

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<sup>229</sup> 544 U.S. 528 (2005) at 531.

<sup>230</sup> *Id.* at 542.

<sup>231</sup> *Id.* at 538.

<sup>232</sup> *Id.* at 540.

opinions), and that it pays no heed to questions of damages caused nor how the burden of those damages has been distributed among the landowners of a community, a critical piece in recognizing a taking.<sup>233</sup> The most serious transgression of the opinion is that it requires the Court to become the determining authority of what is an “effective” and “ineffective” regulation.<sup>234</sup> Increasing the legislative effectiveness of government is not the Court’s role. The *Lingle* opinion outright rejects the idea that courts of any level should be placed in this position or would even be capable of carrying out the role appropriately, strongly preferring judicial deference in this matter.<sup>235</sup> The Court furthermore pays brief reference to potential problems that could emerge from requiring such judgments from the judicial system.<sup>236</sup> The opinion does not rule on whether a taking occurred in this particular case or not, but focuses on the Chevron company’s *Agins*-based argument, rejecting the “substantially advances” test and returning the case to a lower court for a takings ruling.<sup>237</sup>

*Lingle* addresses the reality that, in the 25 years between *Agins* and its reversal, various other takings cases based their arguments and opinions at least in part on the *Agins* decision and “substantially advances” test. Knowing that its holding in *Lingle* could call into question the rulings that occurred during that time, the Court steps far beyond the case before it, commenting on many others and offering its judgments regarding their continued validity, emphasizing that it does not see a conflict here.<sup>238</sup> The opinion details a list of decisions, finding other characteristics in each that would uphold the decision that occurred in order to justify that its ruling in *Lingle* “does not require us to disturb any of our prior holdings.”<sup>239</sup> Finally, the *Lingle* Court looks

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<sup>233</sup> *Id.* at 542.

<sup>234</sup> *Id.* at 543.

<sup>235</sup> *Id.* at 544.

<sup>236</sup> *Id.*

<sup>237</sup> *Id.*

<sup>238</sup> *Id.*

<sup>239</sup> *Id.* at 545.

towards the future of takings claims yet to be disputed. Justice Kennedy’s concurring opinion appears as a disclaimer of sorts in which the Court is careful to note that its ruling “does not foreclose the possibility that a regulation might be so arbitrary or irrational as to violate due process.”<sup>240</sup> Just like similar concluding statements of the sort that we have seen, Kennedy’s indicates that the Court considered the potential for its ruling to cause confusion or undesirable judicial outcomes in the future, and sought a preemptive correction.

This later period in takings jurisprudence shows a progression towards offering more detailed definitions of takings, filing them under specific categories such as “permanent physical invasion.” Despite the specificity achieved in certain areas, as the Court wades through the particular facts of cases from more recent decades, it is once again plagued by an inability to capture and articulate a definition for the limits of regulation overall. The Court’s experience with takings cases has continued to include discontinuity and opinion reversals, leaving a confusing trail for the community of state regulators and lower courts that look to the highest court in the land for Constitutional interpretation and the final word.

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<sup>240</sup> *Id.* at 548.

## Chapter V: Learning From Past Ambiguities

Many ambiguities and contradictions between the Court's opinions, far more than can be discussed in this thesis. The very idea of a character test, a frequently employed qualification as we have seen, implies that its implementation would be inconsistent and would vary based on individual justices' interpretations of what qualifies as an appropriate government action, thereby leaving wide room in the law for decisions to conflict. The Court has therefore developed other criteria to apply to resolving takings claims in its characteristically 'ad hoc' manner. The *Keystone* decision, in blunt contrast to *Mahon*, is compelled to defer to the state's legislature, citing the body's attempts over various decades to enact legislation that would adequately protect public buildings against mining induced subsidence.<sup>241</sup> The state's history in struggling with the subsidence problem seems, in this case, to be an important factor in determining whether or not and act qualifies as a legitimate police power or as a taking. The *Penn Central* decision, like *Keystone*, makes reference to many other similar government acts from other states that protect certain structures identified as historic landmarks.<sup>242</sup> Again, it is the recurring nature of the legislation, whether having attacked the same problem over a number of years, or been enacted in multiple states, that provides a clue as to how the Court determines the outcome.

In a probe for other indications as to why the Court has failed to maintain consistency and what motivates its judgments in a highly subjective and undefined area of the law, the simple reality of a different Court and a different time period may themselves become additional factors. The Holmes Court sided with the private coal company in *Mahon*, restricting the legislature's ability to regulate mining and saying that simply by providing notice to the residents, protection

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<sup>241</sup> *Id.* at 480.

<sup>242</sup> *Id.* at 144.

against public danger due to subsidence could be achieved.<sup>243</sup> Conversely, the *Keystone* Court, a product of a different decade, identified with and supported the government's efforts to take a proactive stance in protecting the public welfare, resulting in a very different ruling. Given that these cases were brought before the Court some sixty years apart, perhaps this is indicative of changing overall attitudes regarding the role of government as protector versus the role of personal responsibility.

The Court has certainly come quite a long way from the nuisance doctrines of the early 1900s as discussed in *Hadacheck*. Its movement into a more proactive role in checking legislative behavior is no doubt well intentioned with the goal of providing protection for the public welfare and guidance for future acts, although even a glance at the history of takings jurisprudence should remind hopeful appellants and their counsel that reliance on precedent may prove fruitless. The problems that can arise (and have, in fact) from the current state of takings jurisprudence are numerous: two Courts might reach different conclusions about the same case, or might both declare a case a taking but for distinctly different reasons, and similarly two cases might both be declared takings but for entirely different reasons. A case might pass one test yet not the others, and the justices seem to vary in their preferences for prioritizing the factors involved.

It is impossible to predict to what extent justices consider the impact of their rulings, either on the communities and parties of the case in question or on society in general, prior to being handed down. Additionally, we cannot tell whether they allow that potential impact to influence the decision. Whether or not a particular Justice is inclined to consider a ruling's impact rests on that Justice's views of Constitutional interpretation and the basic role of the Court itself. The pattern we see is that Justices who fall on the liberal side of the Court, such as

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<sup>243</sup> 260 U.S. 393 (1922) at 414.

Justice Breyer, include in their deliberations a comparison of the contended law's impact against their interpretation of the Constitution's intended impact.<sup>244</sup> This approach fits within the philosophies of the more liberal members of the Court whose preference for Judicial interpretation of the framers' intent translates, in Breyer's opinion, to use of the Constitution's "underlying purpose" in determining whether a law's impact supports that purpose, and therefore whether it should be upheld.<sup>245</sup> The use of intent stands in contrast to the view of strict legalists who are often more conservative and favor literal interpretations of the Constitution's words, leaving a particular law's impact irrelevant to Judicial proceedings. What we furthermore observe is that, at least in a few of the cases considered here, the Justices also consider the *legal* impact that their rulings might have on the reasoning of future Courts. We see this use of qualifying concluding paragraphs more frequently in the more recent decisions, possibly because of the justices' observation of the confusion that the Court's early ambiguous statements created, and a resulting desire on their part to eliminate future questions where possible.

Despite these efforts, the Court, has not been successful in clarifying the legal impact that it intends for its takings decisions and therefore nor has it been able to control that impact and application in the lower courts. By comparing citations of Supreme Court cases in state court decisions, Rosenberg finds that *Nollan*, a decision that struck down government regulation, was only used as precedent in one state supreme court and four appellate courts for that purpose, and that state courts still "overwhelmingly uphold government regulatory and other programs when they are challenged as being inconsistent [with *Nollan*]." <sup>246</sup> Similarly, the decision reached in the

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<sup>244</sup> "Justice Breyer: The Case Against 'Originalists'" Interview by Nina Totenberg. *Morning Edition*. National Public Radio. 30 Sept. 2005. Radio. Transcript.

<sup>245</sup> *Id.*, n. pag.

<sup>246</sup> Rosenberg (1995), 542.

*Lucas* case has only been used to identify a taking in three state cases.<sup>247</sup> Rosenberg's conclusion is that these cases hold a very weak influence over lower cases, especially given the status of each as a "high profile takings case".<sup>248</sup> Rosenberg characterizes the state courts' behavior as the making of "trivial, passing references" to the notable federal decisions and suggests that the decisions influence state decision makers more strongly than state judges, demonstrating the impact that contradictory and unclear Supreme Court decisions can have on the rest of the legal community.<sup>249</sup>

Takings definitions and their remedy prescriptions may never reach a settled point of agreement as they are dependent upon on attitudes towards the role of government and the definition of the public good, factors that are not only subjective but also not consistent across time and circumstance. At their very core, takings claims reflect one of the most basic disagreements in past and current American policy: the continual struggle between balancing the rights of the individual against government's regulation for the public good. Given that the country has a strong commitment to preserving both, takings litigation is destined to remain a point of active contention.

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<sup>247</sup> *Id.* at 545.

<sup>248</sup> *Id.* at 546.

<sup>249</sup> *Id.* at 555.

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