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THE CURRENT STATUS OF HISTORICAL PRESERVATION LAW IN REGULATORY TAKINGS JURISPRUDENCE: HAS THE *LUCAS* "MISSILE" DISMANTLED PRESERVATION PROGRAMS?

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INTRODUCTION

The Supreme Court's current liberal construction of the Fifth Amendment's Takings Clause is grounded in more than a century of rulings in which the Court often has judged governmental regulation inflicting a burden or harm on private property to be a compensable taking. Yet, to date, the Supreme Court has not formulated an explicit rule to determine the precise point at which governmental regulation becomes a "taking." The dissenting Justices in the Supreme Court's recent decision in *Lucas v. South Carolina Coastal Council*[1] maintained that the Court drafted a new regulatory takings doctrine[2] when it ruled that total regulatory takings require compensation.[3] If, indeed, the Supreme Court has charted a new course in applying the Takings Clause to governmental regulation, the proponents of historical preservation must assess how the new principles relate to preservation laws. However, given the recent decisions of the Supreme Court,[4] which reveal the diversity among members of the Court over the proper application of the Takings Clause to governmental regulation,[5] the position of historical preservation regulation in regulatory takings jurisprudence is confusing at best.[6]

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1. 112 S. Ct. 2886 (1992).

2. *Id.* at 2917. In his dissenting opinion, Justice Blackmun described what he deemed to be the new doctrine as "sweeping," "misguided and unsupported." *Id.* He found "no clear and accepted 'historical compact' or 'understanding of our citizens' justifying" the so-called "new taking doctrine." *Id.* Justice Blackmun contended that the majority in *Lucas* attempted "to package the law of two incompatible eras and peddle it as historical fact." *Id.* The majority, on the other hand, apparently thought its opinion was based on principles that had been "frequently expressed" by the Court in past decisions. *Id.* at 2895.

3. *Id.* at 2899.

4. Dolan v. City of Tigard, 114 S. Ct. 2309 (1994); *Lucas*, 112 S. Ct. 2886 (1992); First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304 (1987).

5. For example, *Dolan* was a 5-4 decision.

6. The Court's recent takings decisions, cited above, raise the issue of whether Penn Central Transportation Co. v. New York City, 438 U.S. 104 (1978), discussed in notes 82-96 and 224-27 and accompanying text, is still good law. In *Lucas*, Justice Scalia, writing for the majority, termed the "calculus" used in *Penn Central* to ex-

As the Court conceded in *Lucas*, its decisions have generally "offered little insight" into when a regulation has gone "too far" and has become a "taking" under the Fifth Amendment.[7] The Court also acknowledged that its application of the Takings Clause to "harm preventing" and "benefit conferring" regulations had been inconsistent in its previous decisions.[8] If the Court has difficulty in applying the Takings Clause to governmental regulation generally, there undoubtedly will be a great deal of perplexity in applying its recent rulings to historical preservation regulation, because the categorization of this form of regulation is itself uncertain.[9]

The *Lucas* Court held that when an owner of property "has been called upon to sacrifice all economically beneficial uses" of his or her property, the owner has suffered a "taking."[10] Apparently, then, there would be a compensable "taking" if historical preservation laws burden private property to the extent that a property owner is denied all economically beneficial or productive use of his or her property. But how does one determine when the property owner has been denied

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amine the diminution in value of private property caused by New York's preservation law to be "extreme" and "unsupportable." 112 S. Ct. at 2894 n.7. Scalia also cited the "uncertainty regarding the composition" of *Penn Central*'s " 'deprivation' fraction," the denominator of which was the claimant's other property holdings in the vicinity, as the reason for, what it termed, "the inconsistent pronouncements of the Court." *Id.*

7. *Id.* at 2893.

8. *Id.* at 2897-98 (commenting that the distinction is often "in the eye of the beholder").

9. In First Covenant Church v. City of Seattle, 840 P.2d 174 (Wash. 1992), the Washington Supreme Court characterized preservation ordinances as furthering cultural and aesthetic interests, but not protecting public health or safety. *Id.* at 185. It held that a city's "interest in preservation of aesthetic and historic structures is not compelling." *Id.* Presumably, in this context, preservation laws do not represent a typical exercise of the police power. On the other hand, numerous other courts have categorized regulations protecting historical properties to be valid exercises of the police power. *See, e.g.*, Maher v. City of New Orleans, 516 F.2d 1051 (5th Cir. 1975), *cert. denied*, 426 U.S. 905 (1976); Figarsky v. Historic Dist. Comm'n, 368 A.2d 163 (Conn. 1976); City of New Orleans v. Levy, 64 So.2d 798 (La. 1953); In re Opinion of Justices to Senate, 128 N.E.2d 557 (Mass. 1955); Town of Deering ex rel. Bittenbender v. Tibbetts, 202 A.2d 232 (N.H. 1964); City of Santa Fe v. Gamble-Skogmo, Inc., 389 P.2d 13 (N.M. 1964); Trustees of Sailors' Snug Harbor v. Platt, 288 N.Y.S.2d 314 (N.Y. App. Div. 1968); Manhattan Club v. Landmarks Preservation Comm'n, 273 N.Y.S.2d 848 (N.Y. Sup. Ct. 1966); A-S-P Assocs. v. City of Raleigh, 258 S.E.2d 444 (N.C. 1979). *But see* Lutheran Church in America v. City of New York, 316 N.E.2d 305, 311 (N.Y. 1974) (holding a portion of a city's landmarks preservation law not to be a valid exercise of the city's police power); State v. Seattle, 615 P.2d 461 (Wash. 1980) (holding that a city's police power did not extend to the designation of state-owned buildings as landmarks).

In Maher v. City of New Orleans, the Fifth Circuit reasoned that the police power includes more "subtle and ephemeral societal interests" than those that are "solely economic or directed at health and safety in their narrowest senses." 516 F.2d at 1060. The opinion continued, "[i]t is within the domain of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled." *Id.* at 1060-61.

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

"all economically beneficial or productive use" of such property? The Court admitted in *Lucas* that the "property interest" against which the loss of value is measured is unclear.[11] In addition, what if the burden to the "property interest," once it is defined, is substantial, but not total? While the Court in *Lucas* did not rule that "substantial" deprivations of use of private property are also compensable takings, the import of its decision clearly advances such an interpretation.

In the Court's most recent takings decision, *Dolan v. City of Tigard*,[12] the Court decided that there must be a "rough proportionality" between a "legitimate state interest" and the governmental restriction in question.[13] This holding supports an inference at least that the Court would rule, in some cases, that "substantial" regulatory deprivations may be compensable takings.

The question arises whether the current decisions of the Supreme Court are novel interpretations of the Takings Clause, which would call into question previous regulatory takings jurisprudence, or whether the Court's present liberal interpretation of the Takings Clause is grounded in history and, therefore, not a threat to preservation laws.

While the Supreme Court's decisions in *Lucas* and *Dolan* were purportedly based upon the Court's takings decisions over a span of "70-odd years,"[14] its findings raise questions whether the Court has indeed adopted a more expansive course in its application of the Takings Clause to governmental regulations—a posture, for example, that will ultimately have a profound impact on historical preservation laws. An increasingly liberal interpretation of the Takings Clause necessitates an increasingly limited endorsement of governmental regulation. Unquestionably, a pronouncement that exercise of the "police power" triggers the Takings Clause, which would then require a governmental entity to assess the cost of every regulation to private interests, leaves doubt that the Takings Clause and a state's police power can continue to coexist without conflict. Some fear that the Supreme Court's liberal interpretation of the Takings Clause could cause governmental

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11. For example, the Court commented:

> When, for example, a regulation requires a developer to leave 90% of a rural tract in its natural state, it is unclear whether we would analyze the situation as one in which the owner has been deprived of all economically beneficial use of the burdened portion of the tract, or as one in which the owner has suffered a mere diminution in value of the tract as a whole.

Id. at 2894 n.7. The Court pointed to the "uncertainty regarding the composition of the denominator" in its "deprivation" fraction as the reason the Court had produced inconsistent pronouncements in takings cases. *Id.*

12. 114 S. Ct. 2309 (1994).

13. *Id.* at 2319-20. The Court concluded that no "precise mathematical calculation is required," but ruled that a governmental entity "must make some sort of individualized determination" that its restriction is related "both in nature and extent to the impact" of the condition. *Id.*

14. *Lucas*, 112 S. Ct. at 2893.

regulation to come to a screeching halt. One important regulatory zone, historical preservation law, is an area of concern.[15]

This Article addresses the conflict between governmental regulation to preserve cultural, architectural, or historical aspects of property and the Takings Clause. Part I of this Article surveys and analyzes Supreme Court decisions spanning more than a century, from Justice Strong's 1879 opinion in *Transportation Co. v. Chicago*[16] to Chief Justice Rehnquist's 1994 opinion in *Dolan v. City of Tigard*,[17] to distill some principles that can be used to ascertain when a governmental regulation becomes a compensable "taking." Part II reviews lower court decisions and addresses historical protection laws as they relate to, or conflict with, the Takings Clause. Part III attempts to formulate some guidelines that preservationists and governmental officials can use in determining if, or when, historical preservation regulation will presently be deemed a compensable taking. This Article concludes that while the Supreme Court's recent takings decisions may constrain historic preservation efforts by requiring compensation in some cases, comprehensive preservation programs, such as zoning regulations, should continue to survive Takings challenges. With respect to those isolated instances in which specific properties are singled out and private use of the property is severely curtailed, a recognition that owners are entitled to compensation may cause private interests to have a more positive, and perhaps a more active, role in the preservation movement.

I. A HISTORY OF THE TAKINGS CLAUSE FROM A SUPREME COURT PERSPECTIVE

Early constitutional theorists believed that the Takings Clause did not embrace governmental regulation of property.[18] The Supreme Court has concluded that the Takings Clause was originally conceived of as reaching only "direct appropriation" of property or the "functional equivalent of a 'practical ouster' of the owner's possession."[19]

15. For example, must courts reconsider their rulings in more recent decisions involving historical preservation laws? *See, e.g.*, Mayes v. City of Dallas, 747 F.2d 323 (5th Cir. 1984) (municipality's regulation of historical private property not a compensable taking); Rector, Wardens, and Members of the Vestry of St. Bartholomew's Church v. City of New York, 914 F.2d 348 (2d Cir. 1990), *cert. denied*, 499 U.S. 905 (1991) (application of city landmark law to historical church not a compensable taking and not a violation of the free exercise of religion clause); First Covenant Church v. City of Seattle, 840 P.2d 174 (Wash. 1992) (application of landmark law to historical church violated church's free exercise of religion).

16. 99 U.S. 635 (1879).

17. 114 S. Ct. 2309 (1994).

18. See discussion in Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2900 (1992).

19. *See* Legal Tender Cases, 12 Wall. 457 (1871). See discussion in *Lucas*, 112 S. Ct. at 2892.

In 1879, in *Transportation Co. v. Chicago*,[20] the Supreme Court acknowledged that in the Magna Carta and in restrictions found in every state constitution, "private property shall not be taken for public use without just compensation being made."[21] But members of the Court also perceived that "acts done in proper exercise of governmental powers and not directly encroaching upon private property" should not be takings "within the meaning of the constitutional provisions."[22]

Thus, in 1887, in *Mugler v. Kansas*,[23] the Court upheld an ordinance effectively prohibiting operation of a previously lawful brewery. Although the effect of the ordinance was to render the brewery valueless as property, the Court did not deem the regulation to be a taking or appropriation of property. The Court explicitly upheld the right of local governments to prohibit uses of property that were "injurious to the health, morals, or safety of a community."[24] The theory evolved that harm-preventing regulation, which, in effect, permitted local governments to prohibit public nuisances, would not be compensable takings. Still, in its 1893 decision in *Monongahela Navigation Co. v. United States*,[25] the Supreme Court cautioned that "constitutional provisions for the security of person and property should be liberally construed," because, according to the Court, a "close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the rights of the citizen."[26]

In *Monongahela*, the Supreme Court declared that the Takings Clause "reaches back" of all "unalienable rights" set forth in the Bill of Rights.[27] According to the Court, the first ten amendments

> are in the nature of a bill of rights and were adopted in order to quiet the apprehension of many that without some declaration of rights the government would assume, and might be held to possess, the power to trespass upon those rights of persons and property which by the Declaration of Independence were affirmed to be unalienable rights.[28]

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20. 99 U.S. 635 (1879).

21. *Id.* at 642.

22. *Id.* In *Transportation Co.*, the city's improvement of its highways had obstructed a stream that caused damage to a landowner's property. The Court ruled that the city was not required to compensate the property owner. However, it also commented that "acts done in the proper exercise of governmental powers, and not directly encroaching upon private property, though their consequences may impair its use, are universally held not to be a taking." *Id.* at 642. The Court pointed out that there was no "physical invasion of the real estate of the private owner," nor a "practical ouster of his possession." *Id.*

23. 123 U.S. 623 (1887).

24. *Id.* at 669. See discussion in Justice Blackmun's dissenting opinion in *Lucas*, 112 S. Ct. at 2910 (Blackmun, J., dissenting).

25. 148 U.S. 312 (1893).

26. *Id.* at 325.

27. *Id.* at 324.

28. *Id.*

The Supreme Court declared that this "natural equity" was incident to the government's exercise of its eminent domain power.[29] The Court unequivocally concluded in *Monongahela* that "the one is so inseparably connected with the other that they may be said to exist, not as separate and distinct principles, but as parts of one and the same principle."[30]

The following year, in *Lawton v. Steele*,[31] the Court determined that a state could "interpose" its authority on behalf of the public only if it appeared that the interests of the public required such interference, the means were reasonably necessary for the accomplishment of that purpose, and the means were not unduly oppressive upon individuals.[32] In 1897, in *Chicago, Burlington & Quincy Railroad Co. v. Chicago*,[33] the Court declared that the Fifth Amendment's just compensation requirement is " 'an affirmance of a great doctrine established by the common law for the protection of private property.' "[34] As the Court then maintained, " 'in a free government, almost all other rights would become worthless if the government possessed an uncontrollable power over the private fortune of every citizen.' "[35]

Even as the Supreme Court announced its position that a governmental taking of property for public use was inseparable from the requirement of just compensation to the property owner, and affirmed that it would liberally construe the requirement of payment of just compensation, governmental regulations enacted to protect the safety of lives and property continued to present a dilemma for the Court. In 1915, in *Hadacheck v. Sebastian*,[36] the Court held that an ordinance prohibiting brickmaking was not unconstitutional even though the plaintiff had alleged that the ordinance rendered his property valueless because it could only be used as a brickyard.[37] The Court reasoned that, as cities progressed, private interests that were "in the way . . . must yield to the good of the community."[38] It later concluded, in

29. *Id.* at 325.
30. *Id.*
31. 152 U.S. 133 (1894).
32. *Id.* at 137.
33. 166 U.S. 226 (1897).
34. *Id.* at 236 (quoting 2 STORY'S COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES *1790).
35. *Id.* The Court in *Chicago* stated that "it is not due process of law if provision be not made for compensation." *Id.* The Court asserted that notice to an owner "to appear in some judicial tribunal and show cause why his property shall not be taken for public use without compensation would be a mockery of justice." *Id.*
36. 239 U.S. 394 (1915).
37. *Id.* at 405. Although not a takings case per se, the Court's opinion in *Hadacheck* is significant in that it follows the earlier *Mugler* decision wherein the Court recognized a nuisance abatement qualification to the Takings Clause. The Court in *Hadacheck* recognized a police power qualification to an otherwise protected property right that evolved into the police power exception to the Takings Clause.
38. *Id.* at 410.

1922, in *Pennsylvania Coal Co. v. Mahon*,[39] that "[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law."[40]

In *Mahon*, the Court maintained it had been "long recognized" that "some values are enjoyed under an implied limitation and must yield to the police power."[41] But the Court also decided the "implied limitation must have its limits or the contract and due process clauses are gone."[42] The Court decided that "[o]ne fact for consideration in determining such limits is the extent of the diminution."[43] According to the Court, when the diminution has reached a "certain magnitude, in most, if not in all cases, there must be an exercise of eminent domain and compensation to sustain the act."[44]

The Court in *Mahon* expressed concern about the "natural tendency of human nature" to extend the police power qualification to otherwise protected private property rights.[45] If this occurred "more and more," private property would, in the Court's view, eventually disappear.[46] However, the Court discounted this possibility, stating that the Constitution prevents such a result.[47] The Court commented, "[w]e are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change."[48] Thus, in and after *Mahon*, the Court had confirmed that the Takings Clause encompassed "regulatory as well as physical deprivations."[49]

Still, early Supreme Court decisions recognized that comprehensive zoning laws were not compensable takings. In 1926, in *Village of Euclid v. Ambler Realty Co.*,[50] the Court noted that problems, relating to a changing, more urban, society, had developed and would require,

39. 260 U.S. 393 (1922).

40. *Id.* at 413.

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.* at 415.

46. *Id.*

47. *Id.* The Court noted the general rule that, while property may be regulated to a certain extent, "if regulation goes too far it will be recognized as a taking." *Id.*

48. *Id.* at 416.

49. Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2900 n.15 (1992); *Id.* at 2917 (Stevens, J., dissenting). However, there is some indication that the Court, as early as 1922 in *Mahon*, determined that a total diminution of a private citizen's property was a compensable taking regardless of the importance of the public purpose for which the property was taken. There, the Court stated that when the diminution in value to private property reaches a certain magnitude, "in most if not all cases, there must be an exercise of eminent domain and compensation to sustain the act." *Mahon*, 260 U.S. at 413.

50. 272 U.S. 365 (1926).

and "continue to require," additional restrictions on use of land.[51] In *Euclid*, the Court asserted that governmental regulations, such as zoning restrictions and traffic restrictions, which would have been rejected as "arbitrary and oppressive" half a century earlier, were justified based on the needs of a changing society.[52] The Court ruled that such regulations must find justification in the government's police power "asserted for the public welfare."[53] The Court recommended that courts consult nuisance law to determine whether the regulations were justifiable.[54]

In 1928, in *Miller v. Schoene*,[55] the Court held that an order to cut down trees to prevent the spread of plant disease was a constitutional exercise of the police power. In so holding, the *Miller* Court ruled that a government's decision to destroy one class of property rather than another, based on which property was more valuable to the public, was permissible.[56] However, in 1933, in *Jacobs v. United States*,[57] the Court ruled that the construction of a dam that caused an increase in the occasional flooding of lands required the federal government to pay just compensation under the Fifth Amendment.[58] Two years later, in *Louisville Joint Stock Land Bank v. Radford*,[59] the Court held that a mortgagee's lien was a property interest within the meaning of the Fifth Amendment, and that when a mortgagee's security interest is taken to relieve "the necessities of individual mortgagors, resort must be had to proceedings by eminent domain; so that, through taxation, the burden of the relief afforded in the public interest may be borne by the public."[60]

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51. *Id.* at 386-87.

52. *Id.* at 387.

53. *Id.*

54. *Id.*

55. 276 U.S. 272 (1928).

56. *Id.* at 280.

57. 290 U.S. 13 (1933).

58. *Id.* at 16. The Court commented that the fact that condemnation proceedings were not instituted, but rather that the owners asserted their rights in a suit, did not change the "essential nature of the claim." *Id.* The Court stated that the "form of the remedy did not qualify the right." *Id.* According to the Court, because the remedy rested upon the Fifth Amendment, statutory recognition was not necessary. The Court noted that such "suits were founded upon the Constitution of the United States." *Id.* The Court also maintained that the amount recoverable was "just compensation, not inadequate compensation." *Id.* The Court opined that "just compensation" was "comprehensive" and "included all the elements." *Id.* at 17. It decided that compensation should include interest when interest or its equivalent should be part of the compensation. *Id.* According to the Court, "interest at a proper rate 'is a good measure by which to ascertain the amount so to be added.' " *Id.* (quoting Seaboard Air Line R. Co. v. United States, 261 U.S. 299, 306 (1923)).

59. 295 U.S. 555 (1935).

60. *Id.* at 602.

In 1945, in *United States v. Willow River Power Co.*,[61] the Court declared that "not all economic interests are 'property rights.' "[62] It ruled that "only those economic advantages are 'rights' which have the law back of them, and only when they are so recognized may the judiciary compel others to forbear from interfering with them or to compensate for their invasion."[63] Even so, the following year, in *United States v. Causby*,[64] the Court decided that military aircraft flying at a low level over private property would constitute a compensable taking if the flights rendered the property uninhabitable.[65]

The Court has also considered wartime takings claims. In 1951, in *United States v. Pewee Coal Co.*,[66] the Court ruled that the government's seizure and operation of a coal mine to prevent a national strike of coal miners constituted a taking.[67] The Court concluded that because there had been an "actual taking of possession, and control," the taking was as clear as if the government had held full title and ownership.[68] But in 1958, in *United States v. Central Eureka Mining Co.*,[69] the Court found that no taking occurred when the government issued a wartime order requiring nonessential gold mines to cease operations to conserve equipment and manpower for use in mines more essential to the war effort. In that case, the Court concluded that the government did not "occupy, use, or in any manner take physical possession of the gold mines or of the equipment connected with them."[70]

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61. 324 U.S. 499 (1945).

62. *Id.* at 502. The claimant's alleged property rights were riparian rights in a flowing stream. The government had completed a dam that created a pool extending upstream beyond the claimant's plant. The dam diminished the claimant's plant capacity to produce electric energy. *Id.* at 501-04.

63. *Id.*

64. 328 U.S. 256 (1946).

65. *Id.* at 261. The Court stated that "[i]f, by reason of the frequency and altitude of flights, [owners] could not use . . . land for any purpose, their loss would be complete." *Id.* According to the Court in *Causby*, it would be as complete as if the [government] had "entered upon the surface of the land and taken exclusive possession of it." *Id.* The Court decided there would be a taking in these circumstances because the owner's "beneficial ownership . . . would be destroyed." *Id.* at 262. The Court determined that the land would have been "appropriated as directly and completely as if it were used for runways themselves." *Id.* The Court asserted that a landowner owns "at least as much of the space above the ground as he can occupy or use in connection with the land." *Id.* at 264. The Court was not concerned that a landowner does not occupy that space. The Court did state, however, that flights over private lands are not takings "unless they are so low and so frequent as to be a direct and immediate interference with the enjoyment and use of land." *Id.* at 266. The Court concluded that the "owner's loss, not the taker's gain," was the measure of the value of the property taken. *Id.* at 261.

66. 341 U.S. 114 (1951).

67. *Id.*

68. *Id.* at 116.

69. 357 U.S. 155 (1958).

70. *Id.* at 165-66. The Court reasoned that the temporary, though severe, restriction on mine usage was justified by the exigency of war.

These early Supreme Court decisions illustrate that, in scrutinizing governmental regulation under the Takings Clause, the Court recognized a distinction between "a permanent physical occupation, a physical invasion short of an occupation, and a regulation that merely restrict[ed] the use of property."[71] As to those regulations which appropriated private property, the Court generally held that the Fifth Amendment required compensation.

In 1960, in *Armstrong v. United States*,[72] the Court determined that materialmen's liens were property interests within the meaning of the Fifth Amendment, and that the Fifth Amendment required the government to pay the lienholder when it destroyed the value of the lienholder's security interest by acquiring that security interest.[73] The Court reasoned that the Fifth Amendment provides a constitutional safety net, declaring, "[t]he Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[74]

However, in 1962, in *Goldblatt v. Town of Hempstead*,[75] the Court reaffirmed that governmental regulation that is a valid exercise of the police power does not constitute a compensable taking.[76] The Court reasoned that a prohibition upon the use of land "for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking . . . for the public benefit."[77] The Court qualified this ruling with the recognition that "governmental action in the form of regulation cannot be so onerous as to constitute a taking which constitutionally requires compensation,"[78] but also noted that there was "no set formula to determine where regulation ends and taking begins."[79]

In *United States v. Fuller*,[80] the Court declared that "[t]he constitutional requirement of just compensation derives as much content from the basic equitable principles of fairness, as it does from technical con-

71. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 430-31 (1982).
72. 364 U.S. 40 (1960).
73. *Id.* at 48-49.
74. *Id.* at 49.
75. 369 U.S. 590 (1962).
76. *Id.* at 593 (citing Mugler v. Kansas, 123 U.S. 623, 668-69 (1887)).
77. *Id.* The Court concluded that the power of a state to prohibit certain uses could not be burdened with a condition that the state be required to compensate owners "for pecuniary losses they may sustain, by reason of their not being permitted, by a noxious use of their property, to inflict injury upon the community." *Id.*
78. *Id.* at 594.
79. *Id.* The Court pointed out that the term "police power" "connotes the time-tested conceptional limit of public encroachment upon private interests." *Id.* It noted that except for a "substitution of the familiar standard of 'reasonableness,' the Court has generally refrained from announcing any specific criteria." *Id.*
80. 409 U.S. 488 (1973).

cepts of property law."[81] This "fairness" factor was a consideration five years later, in 1978, when the Court in *Penn Central Transportation Co. v. New York City*,[82] reviewed, for the first and only time, the application of the Takings Clause to historical preservation laws.

In *Penn Central*, the Court weighed the requirement of "fairness" to a property owner with what it termed "nationwide legislative efforts" to preserve buildings and areas with historic or aesthetic importance.[83] The Court stated that the "question of what constitutes a 'taking' for purposes of the Fifth Amendment has proved to be a problem of considerable difficulty."[84] It noted that while it had "recognized that the 'Fifth Amendment's guarantee . . . [is] designed to bar Government from forcing some people alone to bear public burdens which in all fairness and justice, should be borne by the public as a whole,' "[85] it had been "unable to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons."[86] The Court pointed to zoning laws and ordinances prohibiting "particular contemplated uses of land" where "health, safety, morals, or general welfare" would be promoted.[87] Thus, it concluded that "in a wide variety of contexts, [the] government may execute laws or programs that adversely affect recognized economic values" without its action constituting a taking.[88]

In *Penn Central*, the Supreme Court ruled that New York's landmarks law was not a "taking" when its application had the effect of precluding the Penn Central Transportation Company from building a skyscraper atop Grand Central Terminal. The Court decided that a determination of what constitutes a taking is "essentially" an "ad hoc, factual inquir[y],"[89] but pointed out several factors "that have particular significance."[90]

One important factor the Court listed was "character of the governmental action."[91] The Court also declared that a " 'taking' may more readily be found when interference with property can be characterized as a physical invasion by government."[92] The Court cited the economic impact of the regulation on the property owner and "particularly, the extent to which the regulation has interfered with distinct

81. *Id.* at 490.
82. 438 U.S. 104 (1978).
83. *Id.* at 107-08.
84. *Id.* at 123.
85. *Id.* at 123-24 (quoting Armstrong v. United States, 364 U.S. 40, 49 (1960) (alteration in original).
86. *Id.* (citing Goldblatt v. Town of Hempstead, 369 U.S. 590, 594 (1962)).
87. *Id.* at 125.
88. *Id.* at 124.
89. *Id.*
90. *Id.*
91. *Id.*
92. *Id.*

investment-backed expectations," as relevant considerations.[93] The Court resolved the "fairness" issue by concluding that the New York law did not "interfere in any way with the present uses of the Terminal."[94] The Court decided that designation of the Terminal as a landmark "not only permits but contemplates that [its owners] may continue to use the property precisely as it has been used for the past 65 years."[95] The Court reasoned there was no taking because restrictions on use of the property were "substantially related to the promotion of the general welfare."[96]

Although the Supreme Court ruled in *Goldblatt v. Town of Hempstead*[97] that there is no set formula for determining when governmental regulation constitutes a taking, and ruled in *Penn Central* that the determination is basically an "ad hoc, factual inquiry,"[98] the Court has generally concluded that physical invasions of private property by governmental entities constitute compensable takings.

In 1979, in *Andrus v. Allard*,[99] the Supreme Court addressed the question of whether a prohibition on the sale of eagle feathers was a taking as applied to bird artifacts.[100] The Court determined that a compensable taking had not occurred because governmental regulations prohibiting such sales "do not compel the surrender of the artifacts" and cause no "physical invasion or restraint upon them."[101]

That same year, in *Kaiser Aetna v. United States*,[102] the Court emphasized that physical invasion is a government intrusion of an unusually serious character,[103] and ruled that when a former private pond

93. *Id.*
94. *Id.* at 136.
95. *Id.*
96. *Id.* at 138. The Court concluded that the restrictions permitted "reasonable beneficial use" of the landmark and also afforded property owners opportunities "further to enhance not only the Terminal site property but also other properties." *Id.*
97. 369 U.S. 590, 594 (1962).
98. *Penn Central*, 438 U.S. at 124.
99. 444 U.S. 51 (1979).
100. *Id.* In *Andrus*, the Court reviewed the Eagle Protection Act, 16 U.S.C. § 6681 (1940), and the Migratory Bird Treaty Act, 16 U.S.C. §§ 703-712 (1918), both conservation statutes designed to prevent the destruction of certain species of birds, to determine whether governmental regulation through such statutes was a compensable taking. *Andrus*, 444 U.S. at 65-66. The Eagle Protection Act prohibits the taking, possession, sale, purchase, transport, export, or import of any part of an eagle, and applies whether an eagle is dead or alive. 16 U.S.C. § 668(a). The Migratory Bird Treaty Act makes it unlawful to pursue, capture, kill, purchase, transport, import, or carry any migratory bird that is included in certain treaties with other countries. 16 U.S.C. § 703.
101. *Andrus*, 444 U.S. at 65-66. The Court pointed out that the owners of such feathers could "possess and transport their property" and could "donate or devise the protected birds." It determined that "loss of future profits" was "a slender reed upon which to rest a takings claim." *Id.* at 66. However, the Court's statement is questionable since the Eagle Protection Act also proscribes both possession and transport of any part of an eagle, whether the eagle is dead or alive. 16 U.S.C. § 668(a).
102. 444 U.S. 164 (1979).
103. *Id.* at 180.

became navigable water subject to regulation by the Army Corps of Engineers, the owner of the pond suffered a "taking."[104] The Court was concerned that the government was not just "exercising its regulatory power in a manner that [would] cause an insubstantial devaluation" of private property; rather, the Court reasoned that the government's "imposition of the navigational servitude" would result in an "actual physical invasion of the privately owned marina."[105] The Court stated that "even if the government physically invades only an easement in property, it must nonetheless pay just compensation."[106]

In 1980, the Supreme Court failed to find a compensable taking in two cases because there was not a physical invasion by the government. In *Agins v. City of Tiburon*,[107] the Supreme Court stated that the application of a general zoning law to particular property "effects a taking if the ordinance does not substantially advance legitimate state interests . . . or denies an owner economically viable use of his land."[108] The Court also reiterated its position that "no precise rule determines when property has been taken," but concluded that the question "necessarily requires a weighing of private and public interests."[109] In ruling that the zoning ordinances "substantially advance[d] legitimate governmental goals," the Court found the zoning regulations to be valid exercises of the City's police power to protect its residents from the "ill effects of urbanization."[110] The Court reasoned that zoning regulations do not "extinguish a fundamental attribute of ownership."[111] It also concluded that the "impact of general

104. *Id.* at 178. The Court held that a navigable servitude is "not a blanket exception to the Takings Clause." *Id.* at 172-73. The Court recognized that under the Commerce Clause, Congress could assure the public a free right of access to the pond if it chose, but the Court noted that "whether a statute or regulation went so far as to amount to a 'Taking' is an entirely separate question." *Id.* at 174. The Court declared that the owner of the pond had lost "one of the most essential sticks in the bundle of rights that are commonly characterized as property—the right to exclude others." *Id.* at 176.

105. *Id.* at 180. The Court noted that the pond owner had been charging persons an annual fee to have access to the pond. The Court concluded that the government could not then make the pond into a public aquatic park "without invoking its eminent domain power and paying just compensation." *Id.*

106. *Id.*

107. 447 U.S. 255 (1980).

108. *Id.* at 260 (citations omitted).

109. *Id.* at 260-61. The Court commented that the determination of whether governmental action constitutes a taking is "in essence, a determination that the public at large, rather than a single owner, must bear the burden of an exercise of state power in the public interest." *Id.* at 260. The Court cited its decision in Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 395-97 (1926), for the proposition that zoning laws are "facially constitutional" because they bear "a substantial relationship to the public welfare, and their enactment inflict[s] no irreparable injury upon the landowner." *Agins*, 447 U.S. at 261.

110. *Id.*

111. *Id.*

land-use regulations" do not deny landowners the " 'justice and fairness' guaranteed by the Fifth and Fourteenth Amendments."[112]

In *PruneYard Shopping Center v. Robins*, another 1980 case, the Supreme Court held that the government's protection of the exercise of an individual's free speech rights at a commercial shopping center was not a "taking" of the owner's property.[113] In *PruneYard*, the Court noted that although a solicitor "may have 'physically invaded' [an owner's] property," the invasion could not be determinative under the facts of the case.[114]

In 1982, in *Loretto v. Teleprompter Manhattan CATV Corp.*,[115] the Supreme Court considered the issue of whether a minor, but permanent, physical occupation of an owner's property constituted a taking. New York law required a landlord to permit a cable television company to install its cable facilities upon the landlord's property.[116] In *Loretto*, the Court reiterated that no "set formula" existed to determine when governmental regulation is a compensable taking and that a court must engage in "essentially ad hoc, factual inquiries."[117] Still, the Court decided the inquiry was "not standardless."[118] It stated that the economic impact of a regulation, "especially the degree of interference with investment-backed expectations, is of particular significance."[119] The Court also referred to the "character of the governmental action."[120] It explained, "[a] 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by government, than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good."[121]

The Court acknowledged that substantial regulation of an owner's use of his or her private property will not be a compensable taking when it is "deemed necessary to promote the public interest."[122] Nevertheless, the Court emphasized that "a physical intrusion by govern-

112. *Id.* at 262-63. The Court decided that the zoning ordinance benefitted the landowner as well as the public by "serving the city's interest in assuring careful and orderly development of residential property with provision for open-space areas." *Id.* at 263. It concluded that in assessing the "fairness" of zoning ordinances, the benefits must be considered along with any diminution in market value that the landowner might suffer. *Id.* at 226.

113. 447 U.S. 74 (1980).

114. *Id.* at 84. Here, the invasion was temporary and limited in nature, being confined to the common areas of a public shopping center. *Id.* at 83-84.

115. 458 U.S. 419 (1982).

116. *Id.* at 421. The installation occupied portions of the landowner's roof and the side of her building.

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

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.*

ment [is] a property restriction of an unusually serious character for purposes of the Takings Clause."[123] The Court declared, "[w]hen faced with a constitutional challenge to a permanent physical occupation of real property, this Court has invariably found a taking."[124]

Thus, the Court made the clear distinction in *Loretto* between physical occupation by the government of private property and mere restriction on the use of private property.[125] It also distinguished between permanent occupation by governmental authorities, even if they occupy "only relatively insubstantial amounts of space and do not seriously interfere with the landowner's use of the rest of his land,"[126] and more temporary invasions that cause consequential damage.[127]

The Court acknowledged that previous cases subjected physical invasions to a balancing process, but emphasized that those cases "do not suggest that a permanent physical occupation would ever be exempt from the Takings Clause."[128] It stressed that whether a permanent physical occupation "achieves an important public benefit or has only minimal economic impact on the owner" is irrelevant in its determination of whether there has been a taking.[129] The Court decided

123. *Id.* The Court stated that it had "long considered" a physical invasion to be a compensable taking. It decided that its cases "further establish that when the physical intrusion reaches the extreme form of a permanent physical occupation, a taking has occurred." *Id.* It then commented that in such a case, " 'the character of the government action' not only is an important factor in resolving whether the action works a taking but is also determinative." *Id.*

124. *Id.* at 427.

125. *Id.*

126. *Id.* at 430.

127. *Id.* at 430-31. With respect to flooding cases, the Court noted that "flooding must 'constitute an actual, permanent invasion of the land, amounting to an appropriation of, and not merely an injury to, the property.' " *Id.* at 428 (quoting Sanguinetti v. United States, 264 U.S. 146, 149 (1924)).

128. *Id.* at 432.

129. *Id.* at 434-35. The Court concluded that a "permanent physical occupation of another's property . . . is perhaps the most serious form of invasion of an owner's property interest." *Id.* at 435. Borrowing a metaphor from Andrus v. Allard, 444 U.S. 51 (1979), the Court asserted that the government "does not simply take a single 'strand' from the 'bundle' of property rights: it chops through the bundle, taking a slice of every strand." *Id.* According to the Court, when

> the government permanently occupies physical property, it effectively destroys *each* of these rights. First, the owner has no right to possess the occupied space himself, and also has no power to exclude the occupier from possession and use of the space. . . . Second, the permanent physical occupation of property forever denies the owner any power to control the use of the property; he not only cannot exclude others, but can make no nonpossessory use of the property. . . . Finally, even though the owner may retain the bare legal right to dispose of the occupied space by transfer or sale, the permanent occupation of that space by a stranger will ordinarily empty the right of any value, since the purchaser will also be unable to make any use of the property.

Id. at 435-36. The Court also pointed to a special kind of injury when a "*stranger* directly invades and occupies the owner's property." *Id.* at 436. According to the

that a permanent invasion is "qualitatively more severe than a regulation of the *use* of property, even a regulation that imposes affirmative duties on the owner, since the owner may have no control over the timing, extent, or nature of the invasion."[130] The Court pointed out that its holding in *Loretto* was "very narrow."[131] It stated:

> [w]e affirm the traditional rule that a permanent physical occupation of property is a taking. In such a case, the property owner entertains a historically rooted expectation of compensation, and the character of the invasion is qualitatively more intrusive than perhaps any other category of property regulation. We do not, however, question the equally substantial authority upholding a State's broad power to impose appropriate restrictions upon an owner's *use* of his property.[132]

Thus, in *Loretto*, the Court disavowed a "set formula" for determining when there is a taking, while simultaneously constructing a "rigid per se takings rule" that a permanent physical occupation authorized by government is a taking without regard to the public interest it may serve.[133]

In 1986, the Supreme Court again considered the question of when governmental regulation becomes a taking.[134] In *Keystone Bituminous Coal Ass'n v. DeBenedictis*,[135] the Court reviewed its earlier decisions, spanning sixty-five years, concluding that the "question depends upon the particular facts."[136] In *Keystone*, the Court reiterated its findings in *Hodel v. Virginia Surface Mining and Reclamation Ass'n*[137] that, while it had "generally been unable to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by government,"[138] and would examine the "taking" issue by "engaging in essentially ad hoc, factual inquiries,"[139] it had identified several factors that "have particular significance."[140] These factors included "the economic impact of the regulation, its interference with reasonable investment backed expectations, and the character of the government action."[141]

Court, to require an owner to permit another "to exercise complete dominion literally adds insult to injury." *Id.*

130. *Id.*
131. *Id.* at 441.
132. *Id.*
133. *Id.*
134. *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1986).
135. *Id.*
136. *Id.* at 474 (quoting Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413 (1922)).
137. 452 U.S. 264 (1981).
138. *Keystone*, 480 U.S. at 495 (quoting *Hodel*, 452 U.S. at 295-96)(citations omitted).
139. *Id.*
140. *Id.*
141. *Id.*

In 1987, in *First English Evangelical Lutheran Church v. County of Los Angeles*,[142] the Court commented that it had ruled, at least since 1933 in *Jacobs v. United States*[143] "that claims for just compensation are grounded in the Constitution itself."[144] But the Court also pointed out that *Jacobs* "does not stand alone," for, as it has frequently repeated, "in the event of a taking, the compensation remedy is required by the Constitution."[145] It reaffirmed its position from earlier cases that " 'temporary' takings which . . . deny a landowner all use of his property, are not different in kind from permanent takings, for which the Constitution clearly requires compensation."[146] A majority of members of the Court were, for the most part, not concerned that its holding would limit the flexibility of governmental authorities and land-use planners. The majority announced:

> [w]e realize that even our present holding will undoubtedly lessen to some extent the freedom and flexibility of land-use planners and governing bodies of municipal corporations when enacting land-use regulations. But such consequences necessarily flow from any decision upholding a claim of constitutional right; many of the provisions of the Constitution are designed to limit the flexibility and freedom of governmental authorities, and the Just Compensation Clause of the Fifth Amendment is one of them. As Justice Holmes aptly noted more than 50 years ago, "a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change."[147]

In *Nollan v. California Coastal Commission*,[148] the Court again observed that "land-use regulation does not effect a taking if it 'substantially advance[s] legitimate state interests' and does not 'den[y] an owner economically viable use of his land.' "[149] But the Court also reiterated that a "use restriction may constitute a 'taking' if it is not reasonably necessary to the effectuation of a substantial government purpose."[150] The Court acknowledged that its cases "have not elaborated on the standards for determining what constitutes a 'legitimate state interest' or what type of connection between the regulation and

142. 482 U.S. 304 (1987).

143. 290 U.S. 13 (1933).

144. *First English*, 482 U.S. at 315.

145. *Id.* at 316.

146. *Id.* at 318.

147. *Id.* at 321-22 (quoting Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 416 (1922)). *See* discussion *supra* notes 39-49 and accompanying text.

148. 483 U.S. 825 (1987).

149. *Id.* at 834 (quoting Agins v. City of Tiburon, 447 U.S. 255, 260 (1980)).

150. *Id.* (quoting Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 127 (1978)).

the state interest satisfies the requirement that the former 'substantially advance' the latter."[151]

In his 1992 majority opinion in *Lucas v. South Carolina Coastal Council*,[152] Justice Scalia reviewed and summarized the Court's takings jurisprudence. Justice Scalia concluded that until *Pennsylvania Coal Co. v. Mahon*,[153] "it was generally thought that the Takings Clause reached only a 'direct appropriation' of property, or the functional equivalent of a 'practical ouster of [the owner's] possession.' "[154] Moreover, Justice Scalia suggested that considerations in *Mahon* "gave birth" to the "oft-cited maxim that 'while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.' "[155]

The *Lucas* majority assumed that in "70-odd years of succeeding 'regulatory takings' jurisprudence" the Court had described "at least two discrete categories of regulatory action as compensable without case-specific inquiry into the public interest advanced in support of the restraint."[156] According to the majority, "regulations that compel a property owner to suffer a physical 'invasion' of his property" and regulation that "denies all economically beneficial or productive use of land" require compensation.[157] With respect to regulations that cause an invasion of private property, the Court asserted that "no matter how minute the intrusion, and no matter how weighty the public purpose behind it," compensation had been required.[158] The Court expressed regret that "the rhetorical force of [its] 'deprivation of all

151. *Id.* In a dissenting opinion, Justice Stevens voiced his concern that because of what he termed the "remarkable ruling" in First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304 (1987), "local governments and officials must pay the price for necessarily vague standards in this area of the law." *Nollan*, 483 U.S. at 866 (Stevens, J., dissenting). Justice Brennan, also dissenting, expressed "hope" that a "broader vision" would "ultimately prevail," but remarked that while states "should be afforded considerable latitude in regulating private development without fear that their regulatory efforts will often be found to constitute a taking," regulation that "denies a private property owner the use and enjoyment of his land" may indeed be a compensable taking. *Id.* at 864 & n.14 (Brennan, J., dissenting).

152. 112 S. Ct. 2886 (1992).

153. 260 U.S. 393 (1922).

154. *Lucas*, 112 S. Ct. at 2892 (alteration in original) (citations omitted).

155. *Id.* at 2893 (quoting Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922)).

156. *Id.*

157. *Id.*

158. *Id.* The Court stated that its "total taking" inquiry, "will ordinarily entail . . . [an] analysis of, among other things, the degree of harm to public lands and resources, or adjacent private property," caused by a landowner's actions. *Id.* at 2901. It stated that a state must identify "background principles of nuisance and property law that prohibit the uses [the landowner] intends in the circumstances in which the property is presently found." *Id.* at 2901-02. According to the Court, "only on this showing can the State fairly claim that, in proscribing all such beneficial uses, [a regulation] is taking nothing." *Id.*

economically feasible use' rule is greater than its precision, since the rule does not make clear the 'property interest' against which the loss of value is to be measured."[159]

The Court acknowledged that, under certain circumstances, a landowner who suffers a 95% loss of property value because of a government regulation on the use of such property may not recover compensation whereas the landowner with a 100% loss would recover in full.[160] Still, the Court considered "that occasional result [to be] no more straining than the gross disparity between the landowner whose premises are taken for a highway (who recovers in full) and the landowner whose property is reduced to 5% of its former value by the highway (who recovers nothing)."[161]

In *Lucas*, the Court referred to a "harmful or noxious use" principle it described as the Court's early attempt to describe "harm preventing" regulation, which it decided required no compensation to the property owner.[162] The Court preferred to characterize its decisions that found no taking as having discerned a legitimate state interest which was advanced by the regulation—for example, the implementation of a policy " 'expected to produce a widespread public benefit and applicable to all similarly situated property.' "[163] The Court also noted the ease of transition from what it called its "early focus on control of 'noxious' uses to [its] contemporary understanding of the broad realm within which government may regulate without compensation," explaining that "the distinction between 'harm-preventing' and 'benefit-conferring' regulation is often in the eye of the beholder."[164]

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159. *Id.* at 2894 n.7. The Court opined that the answer to difficult takings questions "may lie in how the owner's reasonable expectations have been shaped by the State's law of property—*i.e.*, whether and to what degree the State's law has accorded legal recognition and protection to the particular interests in land." *Id.*

160. *Id.* at 2895 n.8.

161. *Id.* The majority of the Court believed that regulation that leaves the owner of land without economically beneficial or productive options for its use "carry with them a heightened risk that private property is being pressed into some form of public service under the guise of mitigating serious public harm." *Id.*

162. *Id.* at 2897.

163. *Id.* (quoting Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 133-34 n.30 (1978)).

164. *Id.* The Court made it clear that "harm-preventing" regulation was no more likely to be exempt from the Takings Clause than "benefit-conferring" legislation. The Court commented:

> [w]hen it is understood that "prevention of harmful use" was merely our early formulation of the police power justification necessary to sustain (without compensation) *any* regulatory diminution in value; and that the distinction between regulation that "prevents harmful use" and that which "confers benefits" is difficult, if not impossible, to discern on an objective, value-free basis; it becomes self-evident that noxious-use logic cannot serve as a touchstone to distinguish regulatory "takings"—which require compensation—from regulatory deprivations that do not require compensation. *A fortiori*, the legislature's recitation of a noxious-use justification cannot be the basis

The Court recognized only one exception to its rule that "regulation that deprives land of all economically beneficial use"[165] is a compensable taking: a state may resist compensation only if the owner's property was initially subject to the proscribed use.[166]

Dissenting Justices in *Lucas* were concerned that the Opinion of the Court announced a "sweeping" new doctrine.[167] According to Justice Stevens, *Lucas* eliminates what he conceived to be the most important factor the Court had previously considered in determining when governmental regulation became a taking—that is, the character of the governmental action.[168]

In its latest takings decision, *Dolan v. City of Tigard*,[169] the Supreme Court ruled that in adjudicating takings claims, a court must "determine whether [an] 'essential nexus' exists between a 'legitimate state interest' " and a governmental restriction or condition.[170] Furthermore, the Court ruled that if a nexus is found to exist, courts must "decide the required degree of connection between the exaction and the projected impact" of the governmental restriction.[171] The Court decided that a "term such as 'rough proportionality' best encapsulates what [it held] to be the requirement of the Fifth Amendment."[172] It acknowledged that "no precise mathematical calculation is required, but [a governmental entity] must make some sort of individualized determination" that the restriction in question satisfies the proportionality requirement.[173]

In summarizing Supreme Court regulatory takings jurisprudence for the hundred-year period from *Monongahela Navigation Co. v. United*

> for departing from our categorical rule that total regulatory takings must be compensated. If it were, departure would virtually always be allowed.

Id. at 2898-99.

165. *Id.* at 2899.

166. *Id.* The Court commented that "title" must be "somehow held subject to the 'implied limitation.' " *Id.* at 2900.

167. *Id.* at 2917 (Blackmun, J., dissenting). Justice Blackmun quipped, in his dissenting opinion: "[t]oday the Court launches a missile to kill a mouse." *Id.* at 2904 (Blackmun, J., dissenting). He stated:

> [m]y fear is that the Court's new policies will spread beyond the narrow confines of the present case. For that reason, I, like the Court, will give far greater attention to this case than its narrow scope suggests—not because I can intercept the Court's missile, or save the targeted mouse, but because I hope perhaps to limit the collateral damage.

Id.

168. *Id.* at 2922-23 (Stevens, J., dissenting).

169. 114 S. Ct. 2309 (1994).

170. *Id.* at 2317 (quoting Nollan v. California Coastal Comm'n, 483 U.S. 835 (1987)).

171. *Id.* The Court commented that the absence of a nexus between an exaction and the projected impact can "convert[ ] a valid regulation of land use into 'an out-and-out plan of extortion.' " *Id.* (quoting J.E.D. Assocs., Inc. v. Atkinson, 432 A.2d 12, 14-15 (1981)).

172. *Id.*

173. *Id.* at 2319-20.

States[174] to *Dolan v. City of Tigard*,[175] one can extract some guidelines to aid governmental officials in land-use planning. In 1893, the Court declared, in *Monongahela*, that the right to compensation afforded by the Takings Clause is an incident of the government's power to take private property, which "reaches back of all constitutional provisions."[176] The Court asserted in 1960, in *Armstrong v. United States*,[177] that the Fifth Amendment provides a constitutional "safety net," which protects private citizens against having to bear public burdens.[178] More recently, in *First English Evangelical Lutheran Church v. County of Los Angeles*,[179] *Nollan v. California Coastal Commission*,[180] *Lucas v. South Carolina Coastal Council*,[181] and *Dolan v. City of Tigard*,[182] it affirmed the elevated, almost exalted, status it accords the Takings Clause. These recent rulings, which hold that a taking occurs when regulation deprives a landowner of all economically beneficial uses of private property or when it "is not reasonably necessary to the effectuation of a substantial government purpose,"[183] demonstrate that the Supreme Court presently, as in 1897, in *Chicago, Burlington & Quincy Railroad Co. v. City of Chicago*,[184] views the Takings Clause as "an affirmance of a great doctrine established . . . for the protection of private property."[185] Thus, unquestionably, governmental planners must consider the Takings Clause in all forms of land-use planning.

In reviewing the Court's opinions, it is evident that the Court has recognized a distinction between governmental regulation that causes permanent physical occupation, governmental regulation that is a physical invasion but causes only temporary occupation, and governmental regulation that only restricts the use of private property. While the Court has always viewed permanent occupation, and even temporary physical invasions, as being "of an unusually serious character,"[186] the Court has not always required compensation for such takings if there was a valid exercise of the police power. The Court had no "rigid per se" regulatory takings rule until 1982 in *Loretto v.*

174. 148 U.S. 312 (1893). *See also supra* notes 25-30 and accompanying text.
175. 114 S. Ct. 2309 (1994). *See also* discussion *supra* notes 169-73 and accompanying text.
176. 148 U.S. 312, 325 (1893) (quoting Sinnickson v. Johnson, 17 N.J.L. (2 Harr.) 129, 145 (1839)).
177. 364 U.S. 40 (1960).
178. *See supra* notes 72-74 and accompanying text.
179. 482 U.S. 304 (1987).
180. 483 U.S. 825 (1987).
181. 112 S. Ct. 2886 (1992).
182. 114 S. Ct. 2309 (1994).
183. *Nollan*, 483 U.S. 825, 834 (1987) (quoting Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 127 (1978)).
184. 166 U.S. 226 (1897).
185. *Id.* at 236 (quoting 2 STORY'S COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES *1790). *See supra* notes 33-35 and accompanying text.
186. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 426 (1982).

Teleprompter Manhattan CATV Corp.[187] In *Loretto*, the Court made the "very narrow" ruling that a permanent physical occupation authorized by government was a taking without regard to the public interest it may serve.[188]

With respect to all other regulatory takings, including temporary physical invasions, the Court has used a balancing test to weigh public and private interests.[189] The balancing test considered such factors as fairness,[190] character of governmental action, economic impact, and interference with investment expectations.[191] The Court also considered whether the regulation extinguished any fundamental attributes of ownership.[192]

There is authority in several prior Supreme Court rulings for the conclusion that regulation in the form of a valid exercise of the police power, when governmental officials are attempting to prohibit uses of property that are "injurious to the health, morals, or safety of a community,"[193] does not require compensation even if there is a total deprivation of the property owner's rights.[194] But, in light of the majority opinions in *First English* and *Lucas*, which hold that permanent physical invasions and the denial of all economically beneficial or productive use of land, even temporarily, are compensable takings, this conclusion can no longer be taken for granted.[195]

In reviewing the majority opinions in *First English*, *Nollan*, *Lucas*, and *Dolan*, it is apparent that the Court has now, in fact, established a "rigid per se" regulatory takings rule for physical governmental occupations of private property, whether temporary or permanent, and regardless of the public purpose. In addition, it is also clear that it has established a "per se" rule with respect to governmental "use" of private property when the owner is deprived of all "economically feasi-

187. 458 U.S. 419 (1982).

188. *Id.* at 441. *See supra* text accompanying notes 131-33.

189. *See, e.g.*, Agins v. City of Tiburon, 447 U.S. 255, 260-61 (1980).

190. *See* United States v. Fuller, 409 U.S. 488 (1973).

191. These characteristics were discussed in Penn Central Transportation Co. v. New York City, 438 U.S. 104 (1978); Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982); Keystone Bituminous Coal Ass'n v. DeBenedictis, 470 U.S. 470 (1986). *See also supra* notes 134-41 and accompanying text.

192. *See* Agins v. City of Tiburon, 447 U.S. 255 (1980). *See supra* note 107 and accompanying text.

193. Mugler v. Kansas, 123 U.S. 623, 668 (1887).

194. *See, e.g.*, Agins v. City of Tiburon, 447 U.S. 255 (1980); Penn Cent. Transp. Co. v. New York City, 438 U.S. 104 (1978); Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962); Miller v. Schoene, 276 U.S. 272 (1928); Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926); Hadacheck v. Sebastian, 239 U.S. 394 (1915); Mugler v. Kansas, 123 U.S. 623 (1887).

195. Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2893 (1992); First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 318 (1987).

ble use" of his or her property.[196] However, as the majority conceded in *Lucas*, there is uncertainty in applying the per se rule to a governmental use of property.[197] How does one determine when there has been a total deprivation of private interests? What property interest becomes the denominator of the fraction, "the burdened portion of the tract" or "the tract as a whole?"[198]

As to governmental regulation which limits an owner's use of private property, but falls short of total deprivation, the Court would undoubtedly continue to apply a balancing test. But the test has presumably changed. Apparently, the Court will no longer consider a "valid exercise of the police power" as a determining factor. In *Dolan*, the Court ruled that there must be an "essential nexus" between a "legitimate state interest" and a governmental exaction.[199] If the "nexus" exists, the Court held that a "rough proportionality" test should be used to determine whether or not an owner is entitled to compensation.[200]

Other factors that the Court previously used in applying the balancing test[201] may or may not be considered. According to the majority in *Lucas*:

> [t]he "total taking" inquiry . . . will ordinarily entail . . . analysis of, among other things, the degree of harm to public lands and resources, or adjacent private property, posed by the claimant's proposed activities, the social value of the claimant's activities and their suitability to the locality in question, and the relative ease with which the alleged harm can be avoided through measures taken by the claimant and the government (or adjacent private landowners) alike.[202]

Significantly, if the "character of the governmental action" is no longer a factor in determining when governmental regulation becomes a taking,[203] the elimination of potential future profits by prohibiting private interests from updating historical properties may be a "total deprivation" that would be a compensable taking. If so, the Court's decision in *Penn Central* may no longer be sound doctrine. A survey

196. Justice Scalia's majority opinion in *Lucas* recognized an exception to this rule, stating that a government "may resist compensation only if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with." *Lucas*, 112 S. Ct. at 2899.

197. *Id.* at 2894 n.7.

198. *Id.* The *Lucas* Court did not support the calculation in *Penn Central* in which the state court "examined the diminution in a particular parcel's value produced by a municipal ordinance in light of total value of the taking claimant's other holdings in the vicinity." *Id.*

199. Dolan v. City of Tigard, 114 S. Ct. 2309, 2317 (1994). *See supra* notes 169-73 and accompanying text.

200. *Dolan*, 114 S. Ct. at 2319.

201. *See supra* text accompanying notes 91-93.

202. *Lucas*, 112 S. Ct. at 2901 (citations omitted).

203. *See supra* text accompanying note 168.

of historical preservation regulation is useful in predicting how the Court will, in the future, address preservation regulation.

II. ARE HISTORICAL PRESERVATION LAWS A "TAKING?"[204]

Beginning at the turn of the century, Congress and the states began to realize that many historically significant properties in the United States were in jeopardy, and that many others had already been destroyed without considering their historical or cultural value. However, efforts to preserve and to protect archaeological and anthropological resources were initially ineffectual because of their limited scope. At that time, there was little, if any, governmental regulation of the use of private property. Thus, courts were not required to determine applicability of the Takings Clause to preservation regulations.

The later impetus to enact legislation to preserve historical treasures within domestic boundaries was precipitated by two concerns.[205] One was the "recognition that . . . large numbers of historic structures, landmarks, and areas ha[d] been destroyed without adequate consideration of either the values represented therein or the possibility of preserving the destroyed properties for use in economically productive ways."[206]

The second concern was the "widely shared belief that structures with special historic, cultural, or architectural significance enhance the quality of life for all."[207] The enactment of historical preservation statutes eventually resulted from a recognition that historical treasures not only "represent the lessons of the past and embody precious features of our heritage, they serve as examples of quality for today."[208]

The first congressional attempt to save historic treasures within the United States was its enactment of the Antiquities Act of 1906.[209] The Act provides penalties for destroying or damaging any historic ruins on public lands.[210] The Antiquities Act was limited in its application, however, because it subjected persons to penalties for the appropria-

204. Some of the summary material of historical preservation laws was taken from MARILYN PHELAN, MUSEUM LAW, A GUIDE FOR OFFICERS, DIRECTORS AND COUNSEL (1994), and MARILYN PHELAN, NONPROFIT ENTERPRISES §§ 16:07 to :08.50, 16:20 to :21 (1985).

205. Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 108-09 (1978).

206. *Id.* at 108.

207. *Id.*

208. *Id.*

209. An Act for the Preservation of American Antiquities, Pub. L. No. 59-209, §§ 1-4, 34 Stat. 225 (codified as amended at 16 U.S.C. §§ 431-433 (1988 & Supp. V 1993)).

210. 16 U.S.C. § 433.

tion of a "ruin," "monument," or "object of antiquity,"[211] terms which the Act did not define.[212]

The Antiquities Act became more effective when Congress enacted the Historic Sites Act in 1935.[213] The Historic Sites Act declared it a national policy "to preserve for public use historic sites, buildings, and objects of national significance for the inspiration and benefit of the people of the United States."[214] The Secretary of the Interior was given the power to contract, and to enter into cooperative agreements with the states, municipal subdivisions, and private organizations and individuals, to protect, preserve, maintain, or operate historic structures and sites connected with a public use.[215] Thus, as late as the 1930s, historical preservation laws were directed toward preserving historical structures on public property; such laws did not restrict a citizen's use of private, historical properties.

In 1939, a court first ruled that a government could "take" private historical property and preserve it for the "public good." In *Barnidge v. United States*,[216] the Eighth Circuit held that the Secretary of the Interior could institute condemnation proceedings to acquire private property that the Secretary determined to possess exceptional value as a historical site. Regulation of the "use" of such property followed.

In 1949, the National Trust for Historic Preservation in the United States (the "National Trust") was chartered as a private, nonprofit organization.[217] The National Trust was established "to receive donations of sites, buildings, and objects significant in United States history and culture, [and] to preserve and administer them for the public ben-

211. *Id.*

212. The Archaeological Resources Protection Act of 1979, 16 U.S.C. §§ 470aa-470mm (1988), built upon the Antiquities Act. It was enacted to protect archaeological resources and sites located on public and Native American lands. The Act prohibits the sale, purchase, transport, exchange, or receipt of any archaeological resources removed without permission from public or Indian land. 16 U.S.C. § 470ee(a). The Archaeological Resources Protection Act, which is more explicit in its coverage than is the Antiquities Act, specifically defines an "archaeological resource" that is protected under the Act as any material remains of past human life or activities which is of archaeological interest and at least 100 years old. 16 U.S.C. § 470bb(l).

The Archaeological Resources Protection Act was also intended "to foster increased cooperation and exchange of information between governmental authorities, the professional archaeological community, and private individuals having collections of archaeological resources." 16 U.S.C. § 470aa(b).

213. An Act to Provide for the Preservation of Historic American Sites, Buildings, Objects, and Antiquities of National Significance, and for Other Purposes, Pub. L. No. 74-292, §§ 1-7, 49 Stat. 666 (codified as amended at 16 U.S.C. §§ 461-467 (1988)).

214. 16 U.S.C. § 461.

215. 16 U.S.C. § 462(e).

216. 101 F.2d 295 (8th Cir. 1939).

217. An Act to Further the Policy Enunciated in the Historic Sites Act (49 Stat. 666) and to Facilitate Public Participation in the Preservation of Sites, Buildings, and Objects of National Significance or Interest and Providing a National Trust for Historic Preservation, Pub. L. No. 81-408, 63 Stat. 927 (codified as amended at 16 U.S.C. §§ 468-468d (1988)).

efit."[218] Recently, the Supreme Court of Illinois ruled that the National Trust had standing to maintain actions in courts to prevent the destruction or alteration of buildings with national historic significance.[219]

For the most part, governmental regulation of the use of private properties that have historical value began with the National Historic Preservation Act,[220] which was enacted in 1966. The Act provides for the maintenance and expansion of "a National Register of Historic Places composed of districts, sites, buildings, structures, and objects significant in United States history, architecture, archaeology, and culture."[221] In 1980, the Act was amended to provide better guidance for the National Historic Preservation Program at the federal, state, and local levels. At that time, Congress asserted that a partnership had developed between the federal government, the several states, and the private sector to protect the nation's historic resources.[222]

Most historical preservation is accomplished through the states in cooperation with the federal government. In the past two decades, numerous state preservation programs have been initiated, and each state has established some form of a state preservation agency.[223] But an impediment to state historic preservation is the concern that once a structure is designated as having historic significance, it may not be altered or destroyed. For example, in *Penn Central Transportation Co.*

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218. 16 U.S.C. § 468.

219. Landmarks Preservation Council v. City of Chicago, 531 N.E.2d 9 (Ill. 1988). According to the Illinois Court in *Landmarks*, the National Trust has standing to maintain actions in state courts to enable it to fulfill its congressionally mandated functions to prevent the unlawful destruction of buildings that have national historic significance. *Id.* at 14.

220. 16 U.S.C. §§ 470 to 470w-6 (1988 & Supp. V 1993).

221. 16 U.S.C. § 470a(1)(A). The Act requires "the head of any federal agency having direct or indirect jurisdiction over a proposed Federal, or federally assisted undertaking in any State . . . to take into account the effect of the undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register." 16 U.S.C. § 470f. The National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-4370a (1988 & Supp. V 1993), requires that environmental and cultural values be considered along with economic and technological values when proposed federal projects are assessed. 42 U.S.C. §§ 4331-32. It provides that the federal government must "use all practicable means . . . to improve and coordinate Federal plans, functions, programs, and resources to the end that the Nation may preserve important historic, cultural, and natural aspects of our national heritage." 42 U.S.C. § 4331(b)(4). If proposed major federal action "significantly affect[s] the quality of the human environment," the appropriate governmental agency must prepare an environmental impact statement. 42 U.S.C. § 4332(C).

222. H.R. Rep. No. 1457, 96th Cong., 2d Sess. 17 (1980), *reprinted in* 1980 U.S.C.C.A.N. 6378, 6380.

223. *See, e.g.*, CAL. PUB. RES. CODE §§ 5020-5029 (West 1986 & Supp. 1995); CONN. GEN. STAT. ANN. §§ 7-147a to 7-147y, §§ 10-321 to 10-321cc (West 1986 & Supp. 1994); MASS. ANN. LAWS ch. 9, §§ 26-28 (Law. Co-op. 1988 & Supp. 1994); N.Y. PARKS REC. & HIST. PRESERV. LAW § 3.01-.23 (McKinney 1994 & Supp. 1995); 37 PA. CONS. STAT. ANN. §§ 101-906 (1994).

v. New York City,[224] the owner of Grand Central Terminal wanted to demolish a portion of the terminal building and construct an office tower above it.[225] The terminal, one of New York City's most famous buildings, had been designated a "landmark" pursuant to city law. When New York City refused to grant permission, Penn Central brought a lawsuit alleging that the designation restricted the use of property and diminished its value, thus constituting a "taking." The Supreme Court did not find a taking, likening New York's Landmarks Preservation Law to zoning regulations that are "substantially related to the promotion of the general welfare."[226] Thus, the Court held that the diminution in property value caused by application of the preservation law to the owner's property did not constitute a taking.[227]

In general, courts have not found preservation regulations to be compensable takings of property. Even prior to the Supreme Court's ruling in *Penn Central*, several lower courts rejected the notion that landmark designation constituted a taking. In *Maher v. City of New Orleans*,[228] the Fifth Circuit Court of Appeals ruled that the application of a historical preservation ordinance, which prevented an owner's demolition of a building within a historic district, was not a taking of the owner's property.[229] In *Mayor of Annapolis v. Anne Arundel County*,[230] the Maryland Court of Appeals determined that application of a city's historical district ordinance, which prevented the demolition of a historic church, was not a taking.[231] In *Manhattan Club v. Landmarks Preservation Commission*,[232] the New York Supreme Court ruled that the landmark designation of the former home of Jennie Jerome, Winston Churchill's mother, was not a taking of private property.[233] However, in *Lutheran Church in America v. City of New York*,[234] the New York Court of Appeals found "nothing short of a naked taking"[235] when a landmark preservation ordinance prevented a church from replacing its obsolete building, finding the

224. 438 U.S. 104 (1978).

225. *Id.* at 116-17.

226. *Id.* at 138.

227. *Id.* at 136-37.

228. 516 F.2d 1051 (5th Cir. 1975), *cert. denied*, 426 U.S. 905 (1976).

229. *Id.* at 1067.

230. 316 A.2d 807 (Md. 1974).

231. *Id.* at 808, 822. The congregation consisted of free blacks. The court pointed out that the church was a "significant symbol of black society and of the accomplishments of free black persons surrounded . . . by conditions of chattel slavery and racial discrimination." *Id.* at 808.

232. 273 N.Y.S.2d 848 (N.Y. Sup. Ct. 1966).

233. *Id.* at 852. The court pointed out that the owner could use the interior of the building, was guaranteed a reasonable return on its investment, and could make changes to the property if no plan could be devised to provide such a guarantee. *Id.*

234. 316 N.E.2d 305 (N.Y. 1974).

235. *Id.* at 312.

landmark building "totally inadequate for the [owner's] legitimate needs."[236]

Since the Supreme Court's decision in *Penn Central*, lower courts have cited that decision as authority that no taking occurs when historical preservation laws restrict the use of privately-owned historical properties. In *Society for Ethical Culture v. Spatt*,[237] the First Department of New York's Appellate Division ruled that a city's landmarks law did not constitute a taking as applied to a historical building owned by a nonprofit, charitable organization. The property owner had argued that landmark designation stood as a bar against "putting [its] property to its most lucrative use."[238] However, the First Department held that governmental regulation depriving property of its most beneficial use was not unconstitutional.[239]

In *Mayes v. City of Dallas*,[240] the Fifth Circuit Court of Appeals cited *Penn Central* in ruling that an owner of a home located within a historic preservation district could not change the property's exterior features without obtaining prior approval from the city.[241] The court held that a municipality had "the constitutional power to regulate the use of private property in the interest of historic preservation."[242]

In *Rector, Wardens, and Members of the Vestry of St. Bartholomew's Church v. City of New York*,[243] the Second Circuit Court of Appeals ruled that a landmarks law "may freeze [church] property in its existing use and prevent [a] Church from expanding or altering its activities," stating that the Supreme Court's decision in *Penn Central* explicitly permitted such restrictions.[244] Finally, in *Teachers Insurance*

236. *Id.* The *Penn Central* Court also recognized the validity of this finding. Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 113 n.13 (1978).

237. 415 N.E.2d 922 (N.Y. App. Div. 1980).

238. *Id.* at 926.

239. *Id.*

240. 747 F.2d 323 (5th Cir. 1984).

241. *Id.* at 324-26.

242. *Id.* at 324.

243. 914 F.2d 348 (2d Cir. 1990), *cert. denied*, 499 U.S. 905 (1991).

244. *Id.* at 356. Church members of the historic church wanted to erect a commercial office tower on one of the buildings to expand the church's ministerial and charitable activities. *Id.* at 351.

Members of the church also contended the city's landmarks law violated their free exercise of religion. The Second Circuit decided that the law did not violate their First Amendment rights because, according to the court, the members did not prove that they could not continue their religious practices in the church's existing facilities. *Id.* at 352-53.

In First Covenant Church of Seattle v. City of Seattle, 840 P.2d 174 (Wash. 1992), the Supreme Court of Washington ruled that a city's landmarks preservation ordinance did violate a church's right to free exercise of religion under the First Amendment. *Id.* at 183, 187. The Court distinguished *St. Bartholomew's* because the church sought an exception for an adjacent building, not for its house of worship, and because the Second Circuit did not consider the constitutionality of a liturgy-based religious exemption. *Id.* at 181, 189. The *First Covenant Church* court noted that St. Bartholomew's had accepted designation as a landmark without objection, whereas

and Annuity Ass'n v. City of New York,[245] the New York Court of Appeals ruled that a landmark designation "must be upheld if it has support in the record, a reasonable basis in law, and is not arbitrary or capricious."[246]

III. Determining Whether Preservation Regulations Constitute Compensable Takings

In essence, the issue currently before preservation planners is whether they can continue to rely upon *Penn Central* to resist compensation to private interests when preservation laws substantially limit the use of landmark property. If the Supreme Court has tipped the balancing test scales in favor of private interests, then some preservation regulation, which previously did not require payment to landowners, may now transgress the constitutional limitations imposed by the Takings Clause. Owners who have sought, or who have accepted without objection, designation of their property as a landmark may have waived any takings claims relating to restrictions on the use or modification of their properties. It can hardly be said that these owners have been singled out unfairly. Furthermore, a general and comprehensive preservation program, which affects all property owners in a certain historical district equally and does not target individual properties, is less likely to constitute a taking of the property interests of the individual owners.[247] However, if a preservation regulation totally destroys any future economic or beneficial use of historical properties, the Supreme Court would undoubtedly rule that such regulation amounts to a taking.[248] The Court in *Lucas* presumably elimi-

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the First Covenant Church had continuously objected to such a designation. *Id.* at 181. Furthermore, the First Covenant Church claimed the landmark designation reduced the value of its principal asset by almost one-half. *Id.*

245. 623 N.E.2d 526 (N.Y. 1993).

246. *Id.* at 528. The court stated that a landmarks commission is "presumed to have developed an expertise" that requires the courts to accept its interpretation of the law. *Id.* But the court conceded that "deference" to such a commission "is not required where the question is one of pure legal interpretation." *Id.*

247. Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 131-33 (1978). In *Penn Central*, the Court commented that landmark laws that embody a comprehensive plan to preserve structures of historical interest are not discriminatory, like "reverse spot" zoning. *Id.* at 132.

248. The New York Court of Appeals so ruled in Lutheran Church in America v. City of New York, 316 N.E.2d 305 (N.Y. 1974), prior to the Supreme Court's decision in *Penn Central*.

The Supreme Court asserted in *Penn Central* that it had, in the past "upheld land-use regulations that destroyed or adversely affected recognized real property interests." *Penn Central*, 438 U.S. at 125. But the query now is whether *Penn Central* will dictate future Supreme Court rulings given the Court's opinions in Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886 (1992), and Dolan v. City of Tigard, 114 S. Ct. 2309 (1994). The majority in *Lucas* pointed out as "extreme" and "unsupportable" the mathematical calculation used in *Penn Central* to determine whether the owner suffered a substantial diminution in value of its property. *Lucas*, 112 S. Ct. at 2894 n.7.

nated a consideration of the "character of the governmental action."[249] Thus, it would seem that, unless property with historical or cultural significance can be characterized as property having an "antecedent" proscribed use placed upon it,[250] governmental regulation in the form of historical preservation would not be given any preferential status.

For constitutional purposes, the relevant question can no longer be solely whether governmental preservation regulation has interfered in some minimal manner with the owner's use of his or her private historical property. An intelligible takings inquiry must ask whether the extent of the interference is so exacting as to constitute a compensable taking in light of the owner's alternative uses for the property. In *Dolan v. City of Tigard*,[251] the Supreme Court ruled that local governments and officials must make an "individualized determination" that a governmental exaction through permit or similar conditions is "related both in nature and extent to the impact" of the condition and that there be a "rough proportionality" between any burden placed on private property and the "benefit" to the public through the exaction.[252] There is a question whether the majority opinion in *Dolan* would also apply to some, or all, forms of government regulation.[253] In addressing this possibility, perhaps local governments and officials should make such an "individualized determination" respecting the nature and extent of restrictions placed upon private property through preservation regulation, and should consider that a substantial diminution in value of historical property through restrictions on its use

249. *See supra* text accompanying note 168.

250. *See Lucas*, 112 S. Ct. at 2899. The majority in *Lucas* concluded that a state may resist compensation when a regulation has deprived an owner of all economically beneficial use of his or her property "only if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with." *Id.* at 2899. But the Court would not agree that, in such an instance, title "is somehow held subject to [an] 'implied limitation,' " permitting a state, then, to subsequently eliminate all economically valuable use of the property. *Id.* at 2900.

251. 114 S. Ct. 2309 (1994).

252. *Id.* at 2319-20. The burden for making such a determination is on the government. *Id.* at 2320 n.8. The majority in *Dolan* also ruled that while a governmental entity is not required to make a "precise mathematical calculation," it "must make some effort to quantify its findings" to support its regulation. *Id.* at 2322.

253. Although *Dolan* applies to exactions, Chief Justice Rehnquist, in writing the opinion for the majority, remarked that "simply denominating a governmental measure as a 'business regulation' does not immunize it from a constitutional challenge on the grounds that it violates a provision of the Bill of Rights." *Id.* at 2320. Justice Rehnquist was responding to Justice Stevens' dissent in which Justice Stevens commented that exactions associated with the development of a business are "a species of business regulation that heretofore warranted to a strong presumption of constitution validity." *Id.* at 2324. In *Lucas*, the Court seemingly rejected "character of a governmental action" as a factor in takings analysis. *Lucas*, 112 S. Ct. at 2922-23 (Stevens, J., dissenting). This suggests at least that the Court now views "development exactions" and governmental regulations in the same light.

may now require compensation to the owner.[254] Clearly, the Court's ruling in *Penn Central*, that a destruction of one "strand" of an owner's otherwise full "bundle" of rights is not a taking, may no longer be valid in light of the Court's more recent decision in *Lucas*.

Another aspect of historical preservation that may produce future takings claims, centers around the conflict between the nation's museums and Native Americans in the collection and protection of Native American artifacts. Native Americans view their culture as being separate and unique, insisting that their special heritage should be identified and set apart from the historical heritage of the United States generally. Thus, Native Americans have asserted an ownership in, and have demanded repatriation of, Native American artifacts from museums having such artifacts in their collections.[255] In 1991, Congress enacted the Native American Graves Protection and Repatriation Act,[256] which now requires museums having possession or control over collections of Native American funerary and religious objects, to return such cultural resources, upon request, to the respective Native American tribe.[257] There undoubtedly will be a takings challenge to the Act's requirement that museums repatriate artifacts they acquired,

254. Although, given the nationwide concern for the preservation and protection of historical properties, governmental officials may have little difficulty in demonstrating *Dolan's* requisite "rough proportionality" between any burden placed on private historical properties and the "benefit" obtained to the public in preserving and protecting such property. Governmental officials must bear in mind that substantial diminution in value of private property through material restrictions on its use, imposed after an owner's acquisition of the property, may require compensation to the owner.

The Court in *Dolan* seemed to reject a "reasonable relationship" test between a "legitimate state interest" and an exaction as "too lax" a standard. *Dolan*, 114 S. Ct. at 2318-19. A majority of the Court presumably views its "rough proportionality" test as a stricter standard. *Id.* at 2319. The Court clearly does not approve the "very generalized statement" some states have used in justifying exactions without compensation.

If one can legitimately infer from *Lucas* and *Dolan* that a majority of the Court views governmental exactions and governmental regulation as synonymous, its "rough proportionality" test would be applicable to preservation regulation. Such a test could render a substantial diminution in the value of private historical or cultural property, through a substantial restriction on its use, a compensable taking.

255. Native Americans originally cited the American Indian Religious Freedom Act, 42 U.S.C § 1996 (1988 & Supp. V 1993), as authority for their right to retain their cultural resources. They contended the Act authorized them to obtain a return of various Native American religious artifacts that are a part of museum collections. But the Act does not include a provision that museums must return such artifacts to Native American tribes. Thus, museums resisted efforts of various tribes to reclaim their historical treasures.

256. 25 U.S.C. §§ 3001-3013 (Supp. V 1993).

257. *Id.* The Act requires museums to compile an inventory, in consultation with tribal governments, Native Hawaiian organization officials, and traditional religious leaders, of all such artifacts and, to the extent possible, based on information museums possess, to identify the geographical and cultural affiliation of the artifacts. 25 U.S.C. § 3003(a)-(b). Museums must supply documentation of existing records for the purpose of determining the geographical origin, cultural affiliation, and basic facts

mostly legally, through purchase or donation. The requirement to repatriate is not governmental regulation, but rather a direct appropriation of affected museums' collections.

CONCLUSION

While there remains a lack of clarity in the Supreme Court's application of the Takings Clause to governmental regulation of private property, historical preservationists can discern some principles to serve as guidelines when they embark on preservation programs. It is clear that, unless private property was already subject to preservation restrictions when it was acquired, any physical invasion of private property through preservation regulation, whether temporary or permanent, must now be compensated. But, it would seem that comprehensive nondiscriminatory preservation programs, which do not "specifically or disproportionately burden"[258] a landowner, would continue to be, like zoning regulations, "facially constitutional."[259] Still, in applying preservation restrictions to the "use" of private property, governmental officials should quantify, through some form of mathematical calculation, the extent of the burden on private property. If the burden is substantial, planners should consider compensation.

The new constitutional limitations placed upon land-use planners by recent Supreme Court rulings will unquestionably "lessen the freedom and flexibility"[260] historical preservationists experienced in the past. But perhaps preservationists may find some redeeming value in the current posture of the Supreme Court. When governmental officials become more willing to assess the cost of governmental regulation to

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surrounding the acquisition and accession of Native American human remains and associated funerary objects. *Id.* at § 3003(b).

258. *See* Carter v. Helmsley-Spear, Inc., 861 F. Supp. 303, 327 (S.D.N.Y. 1994).

259. *See* Agins v. City of Tiburon, 447 U.S. 225 (1980). Because comprehensive preservation programs advance legitimate governmental interests and generally do not deny the owner's economically viable use of the property, they should not be compensable takings. But, as in *Agins*, with respect to zoning regulations, the Court would likely require a "weighing of private and public interest" to determine whether property subject to such restrictions has been taken. *See supra* text accompanying notes 107-12.

In weighing private and pubic interests, the Court would undoubtedly, as in the past, require a balancing test. The question is whether the present Court would continue to apply factors it deemed relevant in its previous decisions (in *Lucas*, it decided "character of the governmental action" would no longer be a relevant factor) or whether it would use a "rough proportionality" test as enunciated in *Dolan*. The Court apparently views its rough proportionality test to be a stricter standard. *See Dolan*, 114 S. Ct. at 2319. In either case, as the Court recognized in *Lucas*, as to governmental regulation generally, local governments and officials are "offered little insight" into when preservation regulation has gone "too far" and has become a taking under the Fifth Amendment. *Lucas*, 112 S. Ct. at 2893.

260. *See* First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304 (1987), and *supra* note 147 and accompanying text.

private interests, some of the fear associated with having private property designated as a historical landmark may be abated. If the present concern in some circles about the burden placed upon private property through preservation regulation is alleviated, private interests may be more inclined to join the government in its efforts to preserve historical treasures. Thus, rather than dismantling historical preservation programs, the *Lucas* missile could ultimately improve and enhance the movement.