Volume 23
Number 3 *Spring 1989*

*pp.*527-558

Spring 1989

Some Observations on the Analysis of Regulatory Takings in the Rehnquist Court

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SOME OBSERVATIONS ON THE ANALYSIS OF REGULATORY TAKINGS IN THE REHNQUIST COURT†

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The taking issue involves the question of compensation for property owners burdened by government regulation. The fifth amendment provides in part that private property shall not be taken for public use, without just compensation, and applies to the states through the fourteenth amendment.[1] For better or worse, the United States Supreme Court has concluded that there is no set formula for triggering the just compensation clause,[2] and admits, perhaps with some reticence, that the determination of a taking "calls as much for the exercise of judgment as for the application of logic."[3] The Court follows essentially an *ad hoc* approach, and the unpredictable nature of this approach was evident in three recent highly publicized and controversial decisions from the Court.[4]

In this Article, I will examine these cases to determine whether the opinions indicate significant new criteria used by the Court to address the compensation problem. My broader focus will be on the evolution of modern just compensation doctrine from the Burger Court to the Rehnquist Court. Both of these goals require, as a point of departure, that the Burger Court's most important regulatory takings decision—*Penn Central Transportation Co. v. New York City*[5]—be reviewed in some detail.

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1. U.S. CONST. amend. V. *See* Chicago B. & Q.R.R. v. Chicago, 166 U.S. 226, 235-41 (1897).

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

3. Andrus v. Allard, 444 U.S. 51, 65 (1979).

4. In one opinion, the Court upheld significant limitations on coal mining in Pennsylvania. Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1987). In a second opinion, the Court recognized the potential for monetary damage awards as a remedy for "temporary" regulatory takings. First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 107 S. Ct. 2378 (1987). In a third decision, the Court warned that certain conditions demanded by governments as a prerequisite for permission to develop may fail under takings analysis if there is no reasonable relationship between the effect of the development and the conditions imposed. Nollan v. California Coastal Comm'n, 107 S. Ct. 3141 (1987).

5. 438 U.S. 104 (1978).

I. THE *Penn Central* CASE

A. An Overview

In *Penn Central*,[6] the owners of Grand Central Terminal complained when the City of New York cut short their plans to construct an office building above the historic landmark. The city's Landmarks Preservation Commission concluded that any attempt to "balance a 55-story office tower above a flamboyant Beaux-Arts facade" would reduce the landmark "to the status of a curiosity."[7] The owners did not respond with a less ambitious plan; instead, they argued in court that the Landmarks Preservation Law had taken their property without just compensation.[8] Both state and federal courts concluded that the law was a valid police power regulation.[9]

In the Supreme Court opinion, Justice Brennan, writing for the majority, began his analysis with a statement that apparently draws unanimous support: just compensation law 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."[10] He then provided a list of factors to guide judicial effort in transforming this mandate into law. The list is more than just a litany of prior precedent. With carefully chosen words, Justice Brennan attempted to rechart the paths that prior opinions have set out for the takings clause.

First, Justice Brennan suggested that takings will occur more readily when the interference can be characterized as a "physical invasion" by the government.[11] To illustrate, the Court cited *United States v. Causby*,[12] where flights by army aircraft over a farmer's land were so low and frequent that they caused a direct interference with property rights compensable under law.[13] The glide path rules established by public regulation were characterized as an exercise of the power of eminent domain. In essence, the federal government had purchased a flight easement over the farmer's

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6. Penn Cent. Transp. Co. v. New York City, 438 U.S. 104 (1978).
7. *Id.* at 117-18.
8. *Id.* at 118-19.
9. *Id.* at 138; Penn Cent. Transp. Co. v. New York City, 42 N.Y.2d 324, 366 N.E.2d 1271, 397 N.Y.S.2d 914 (1977). For a review of the state court opinion, see Costonis, *The Disparity Issue: A Context for the Grand Central Terminal Decision*, 91 HARV. L. REV. 402 (1977).
10. *Penn Cent. Transp. Co.*, 438 U.S. at 123. The passage originated in Armstrong v. United States, 364 U.S. 40, 49 (1960). For a prophetic view that this statement signaled the Court's acceptance of "compensable takings," see Beuscher, *Some Tentative Notes on the Integration of Police Power and Eminent Domain by the Courts: So-called Inverse or Reverse Condemnation*, 1968 Urb. L. Ann. 11.
11. *Penn Cent. Transp. Co.*, 438 U.S. at 124.
12. 328 U.S. 256 (1946).
13. *Id.* at 266-67.

land.[14]

Justice Brennan then attempted to refine this concept by contrasting it with other government activities. "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."[15] The juxtaposition of these two factors resembles an approach to the taking issue suggested by Professor Sax.[16] Sax argued that governmental activity can be classified according to its purpose: in many instances, government works to enhance the economic value of its resources; in other circumstances, government acts to improve the public condition by resolving conflicts between competing private economic claims.[17] Local ordinances designed to abate or forestall private nuisances exemplify the latter category, and for these activities, no compensation is required.[18] The overflight cases provide an example of government acting in its enterprise capacity, and in these circumstances, compensation must be paid.[19]

To be sure, the passage quoted above does not suggest that the Court embraced the Sax "enterprise" theory as the touchstone of the takings question. But it does signal some sympathy toward the notion that government can be tested more stringently under the fifth amendment for certain categories of activity. If the public program simply calibrates the "benefits and burdens of economic life" between individuals or groups in order to further the common good, the Court will less readily intervene.[20] But where government actions "may be characterized as acquisitions of resources to permit or facilitate uniquely public functions," the Court will call it a taking.[21] Significantly, the Court cited both *Causby* and the Sax article in support of its rules.[22]

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14. *Id.* at 267. *See generally* Dunham, *Griggs v. Allegheny County in Perspective: Thirty Years of Supreme Court Expropriation Law*, 1962 SUP. CT. REV. 63, 82-90.

15. Penn Cent. Trans. Co. v. New York City, 438 U.S. 104, 124 (1978).

16. Sax, *Takings and the Police Power*, 74 YALE L.J. 36 (1964).

17. *Id.* at 62-63.

18. *Id.* at 69. Sax cites as examples Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962), and Consolidated Rock Prods. Co. v. City of Los Angeles, 57 Cal. 2d 515, 370 P.2d 342, 20 Cal. Rptr. 638, *appeal dismissed*, 371 U.S. 36 (1962).

19. Sax, *supra* note 16, at 68-69.

20. Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978). *Accord* Andrus v. Allard, 444 U.S. 51, 65 (1979).

21. *Penn Cent. Transp. Co.*, 438 U.S. at 128.

22. *Id.* The Court listed three other cases supporting compensation for "invasions" of this sort, Griggs v. Allegheny County, 369 U.S. 84 (1962) (overflights); Portsmouth Co. v. United States, 260 U.S. 327 (1922) (gunfire over claimant's land); and United States v. Cress, 243 U.S. 316 (1917) (floodings). The Court also cited, but failed to distinguish, another case denying compensation for damages caused to a building occupied by federal troops and besieged by rioters. YMCA v. United States, 395 U.S. 85 (1969).

Justice Rehnquist, in dissent, took a more traditional view of the "physical invasion" theory.[23] Prior to enactment of the landmarks law, he noted, Penn Central could have used its "air rights" to build an office building.[24] The Commission's decision, however, effectively prohibited any increase in the height of the terminal.[25] Penn Central is therefore being deprived of its liberty to exploit its "air rights," a property interest protected by law.[26] Conversely, the city has acquired this interest, "a nonconsensual servitude not borne by any neighboring or similar properties."[27] He also cited *Causby* in support of his analysis.[28]

Justice Brennan's response to this argument surfaces in his point-and-counterpoint rejection of the assertions made by the petitioner, Penn Central. He labeled "untenable" any argument that a taking can be established by the mere fact that a landowner is denied the opportunity to exploit a property interest.[29] " 'Taking' jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated."[30] Instead, he asserted, the Court must focus both on the character of the action and the impact of the law on the property considered as a whole.[31] He noted that unlike the public regulation in *Causby* (which destroyed the use of a farm), the landmarks law does not impair the present use of the terminal.[32] More significantly, perhaps, Justice Brennan concluded that unlike the acquisition of the servitude in *Causby* (which was accompanied by the actual possession and use of the airspace by government aircraft), the landmarks law neither "facilitates nor arises from any entrepreneurial operation of the city."[33] In sum, the majority concluded that the historic landmarks law is different both in kind and degree from prior "physical appropriation" cases.

Thus, an important factor for courts to consider under the analysis in *Penn Central* is the nature of the activity on the regulated land. Government can prohibit a beneficial use of property to the point of causing substantial individualized harm so long as the restriction is reasonably related to a policy "expected to produce a widespread public benefit and applicable

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23. The traditional view is discussed in Michelman, *Property, Utility and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1184-90 (1967); and Sax, *supra* note 16, at 46-48, 67-68.
24. *Penn Cent. Transp. Co.*, 438 U.S. at 142 (Rehnquist, J., dissenting).
25. *Id.* at 142, 143 n.5.
26. *Id.* at 143.
27. *Id.*
28. *Id.* at n.5.
29. Penn Cent. Transp. Co. v New York City, 438 U.S. 104, 130 (1978).
30. *Id.*
31. *Id.* at 130-31.
32. *Id.* at 135.
33. *Id.*

to all similarly situated property."[34] The Court referred to three cases to support this rule. The first is *Miller v. Schoene*[35] where a state statute authorized public officials to order the destruction of ornamental red cedar trees hosting a disease known as cedar rust, which might infect and destroy nearby apple orchards. The second case, *Hadachek v. Sebastian*,[36] upheld a city ordinance prohibiting the owner of a brickyard from operating his business in a residential community. The third opinion, *Goldblatt v. Hempstead*,[37] upheld a local ordinance that effectively prohibited the owner of a sand and gravel mining business from continuing his operation by banning any excavation below the city's water table.

The Court's characterization of these three cases is significant. Justice Brennan was extremely careful in defining the underlying rational of the various opinions. He expressly rejected the notion that in each case the government was prohibiting a "noxious" use of land and that this fact serves as justification for denying compensation.[38] Instead, he asserted that the Court was simply upholding a legislative determination of a preferred use between competing claimants. In *Miller*, for example, Justice Brennan argued that the Court was merely upholding the choice made by the state to destroy one class of property "in order to save another which, in the judgment of the legislature, is of greater value to the public."[39] Similarly, in *Hadacheck*, the local legislature was confronted with two inconsistent uses (a brickyard and a residential development); its decision to give preference to the latter was reasonable and, therefore, within constitutional parameters.[40] For Justice Brennan, then, the important point is not that the regulated land use can be characterized as "harmful," but that the use has become inconsistent with a reasonable legislative determination of the public interest.[41]

Justice Rehnquist, again, took a more traditional view[42] of these prior decisions. He asserted that the decisions allowed government to prevent a property owner from using his property "to injure others without having to compensate the owner for the value of the forbidden use."[43] But he concluded that Penn Central's proposed structure would not harm surrounding

34. *Id.* at 134 n.30.
35. 276 U.S. 272 (1928).
36. 239 U.S. 394 (1915).
37. 369 U.S. 590 (1962).
38. Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 134 n.30 (1978).
39. *Id.* at 126 (quoting Miller v. Schoene, 276 U.S. 272, 279 (1928)).
40. *Penn Cent. Transp. Co.*, 438 U.S. at 126.
41. *Id.* at 133-34 n.30. *See also* Sax, *supra* note 16, at 53 ("[T]he typical taking cases [involve] uses which have become inconsistent with the legislatively declared public interest.").
42. *See generally Developments in the Law - Zoning*, 91 HARV. L. REV. 1427, 1470-73 (1978).
43. Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 144 (1978) (Rehnquist, J., dissenting).

land owners. The addition, he noted, would comply with applicable health and safety regulations, including zoning laws.[44] Consequently, the city is not acting to prevent a nuisance, but instead is forcing the company to preserve the landmark "for the benefit of sightseeing New Yorkers and tourists."[45]

This distinction, which requires compensation when the state restricts property rights in order to obtain a public benefit but does not require payment where the restriction is designed to prevent landowners from imposing external harm upon others, has proved a resilient approach to the taking issue.[46] Professor Dunham wrote persuasively on the utility of such a test, and his writings[47] provide an appropriate lens for viewing the Rehnquist approach.

Dunham asserts that the common law allows for government to make a nuisance-like activity assume the burdens or costs which that activity may cause.[48] This, in turn, forces the activity to internalize these burdens as a cost of doing business.[49] He then adds:

> But to compel a particular owner to undertake an activity to benefit the public, even if in the form of a restriction, is to compel one person to assume the cost of a benefit conferred on others without hope for recoupment of the cost. An owner is compelled to furnish a public benefit just as much when his land is taken for the runway of an airport as when he is prevented from building upon his land so that airplanes may approach the runway. In the former the landowner is paid without question; in the latter there is an attempt from time to time to compel the landowner to furnish the easement of flight without compensation by restricting building. The evil of the latter system is that

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44. *Id.* at 146.

45. *Id.*

46. *See* R. ELLICKSON & A. TARLOCK, LAND USE CONTROLS: CASES AND MATERIALS 136 (1981). The distinction was first given eloquent form by Professor Freund in his treatise on governmental authority and constitutional rights. E. FREUND, THE POLICE POWER 546-47 (1904).

47. *See, e.g.*, Dunham, *A Legal and Economic Basis for City Planning*, 58 COLUM. L. REV. 650 (1958); Dunham, *Property, City Planning, and Liberty*, in LAW AND LAND 28 (C. Haar ed. 1964); Dunham, *Flood Control via the Police Power*, 107 U. PA. L. REV. 1098 (1959).

48. Dunham, *A Legal and Economic Basis for City Planning*, 58 COLUM. L. REV. 650, 665 (1958).

49. *Id.* Professor Dunham explains:

> All this means is that an activity declared to be a nuisance to the adjacent properties must purchase the right to damage the neighboring lands or must move elsewhere to a location which is by hypothesis less efficient and economical; or it must install expensive equipment and change the mode of operation so as to eliminate the external harm.

Id.

> there is no approximation of equal sharing of cost or of sharing according to capacity to pay as there is where a public benefit is obtained by subsidy or expenditure of public funds. The accident of ownership of a particular location determines the persons in the community bearing the cost of increasing the general welfare. A further consequence of an attempt to obtain a benefit by means of a restriction is that the full cost of the public benefit is thereby concealed from those in our democratic society who are given the power of deciding whether or not they want to obtain a benefit.[50]

Although both kinds of restrictions ultimately do result in some increment of general welfare, Professor Dunham argues that there is an important practical difference in their consequences. The attempt to obtain a benefit usually requires that the landowner engage in certain designated permitted uses.[51] The effort to eliminate a harm, on the other hand, prohibits some uses but allows for private choice to determine which remaining uses should be made of the land.[52] Of course, the most crucial question under such an analysis is the threshold characterization of the restriction.[53] Difficult though this may be, Professor Dunham suggests that the courts, not the legislatures, must decide whether prevention of harm is the objective of the law.[54]

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50. *Id.*

51. *Id.*

52. *Id.* at 664.

53. Therein lies the rub for most commentators critical of the harm-prevention/benefit extraction approach to takings cases. *See, e.g.*, Heyman & Gilhool, *The Constitutionality of Imposing Increased Community Costs on New Suburban Residents Through Subdivision Exactions*, 73 YALE L.J. 1119, 1128 (1964).

> The distinction between burden and benefit is, however, very difficult to make. . . . Consider, for instance, height and use limitations imposed on land surrounding an airport to facilitate the airport's safe operation. Should such zoning be viewed as preventing harms to the successful operation of the adjoining land use or should it be viewed as creating a public benefit? Industrial-only zoning is viewed by Dunham as benefit inducing; yet the cases are nearly unanimous in upholding the device. In fact, Dunham's analysis leads to no sure result in evaluating the host of land regulations, including setbacks and conventional zoning, which can be conceptualized both as harm preventing and as benefit inducing.

Id. (footnotes omitted). *See also* Sax, *supra* note 16, at 49 ("Actually the problem is not one of noxiousnous or harm-creating activity at all; rather it is a problem of inconsistency between perfectly innocent and independently desirable uses."). Further difficulties with the general approach are explored in Michelman, *supra* note 23, at 1196-1201.

54. Dunham, *Flood Control via the Police Power*, 107 U. PA. L. REV. 1098, 1124 (1959) ("An assertion by the legislature that such is its objective is not enough; the court must analyze the law and determine this for itself.") (footnote omitted). Professor Dunham apparently concedes the difficulties involved in classifying public measures as either preventing harms or providing benefits. *See* Ellickson, *Suburban Growth Controls: An Economic and Le-*

Justice Rehnquist utilized this approach to conclude that the Landmarks Preservation Commission was forcing Penn Central to provide a public amenity without paying for the benefit. He maintained that the Commission's actions "do not merely *prohibit* Penn Central from using its property in a narrow set of noxious ways."[55] Instead, he categorized the impact of the landmarks law as one placing "an *affirmative* duty on Penn Central to maintain the Terminal in its present state and in 'good repair.' "[56] As a result, Justice Rehnquist asserted, the company is not allowed to use its property according to choice within a range of permissible uses; rather, it is required to maintain the building and thus preserve part of the city's cultural heritage.[57] That, he concluded, is the kind of obligation that the city can exact only if it is willing to pay a just price.[58]

By way of contrast, Justice Brennan believes (apparently) that courts cannot, and perhaps should not, attempt to draw such distinctions. As noted previously, he asks only whether the legislative program reasonably implements a policy expected to produce widespread public benefits.[59] As one commentator has concluded, Justice Brennan "appears to assimilate benefits to harms in [his] reasoning that [any] land use that frustrates a legislatively declared public purpose is a 'harm,' whether or not the use is harmful or benign considered independently of that purpose."[60] This position is responsive to those critics who reject the harm-benefit dichotomy because it cannot be determined which landowner is causing harm to another.[61] Moreover, this position is consistent with Justice Brennan's general rule that takings are rare when government is merely adjusting "the benefits and burdens of economic life to promote the common good."[62] But it also raises a further question for the Court to address (and one that may be just as elusive as the benefit-harm distinction): By what criteria should the Court test the reasonableness of legislative judgments concerning the use of land?

Justice Brennan offered three suggestions to this inquiry at various

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gal Analysis, 86 YALE L.J. 385, 422 (1977).

55. Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 146 (1978) (Rehnquist J., dissenting).

56. *Id.*

57. *Id.*

58. *Id.* at 153.

59. *See supra* text accompanying notes 34-41.

60. Costonis, *Law and Aesthetics: A Critique and a Reformulation of the Dilemmas*, 80 MICH. L. REV. 355, 458 n.385 (1982).

61. *See* authorities cited *supra* note 53. *But see also* Ellickson, *Alternatives to Zoning: Convenants, Nuisance Rules, and Fines as Land Use Controls*, 40 U. CHI. L. REV. 681, 728-33 (1973) (defending the distinction and providing a test for determining between "harmful" and "beneficial" uses); Tarlock, *Regulatory Takings*, 60 CHI.[-]KENT L. REV. 23, 37 (1984) (". . .at the present time the harm-benefit test offers the best hope, despite all the difficulties of its application, of making sense out of the cases.").

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

points in his opinion. First, the use restrictions must be "reasonably necessary to the effectuation of a substantial public purpose."[63] Second, the restrictions must be applicable to all similarly situated property.[64] Third, the restrictions must not have an unduly harsh impact upon the owner's use of property.[65] This last rule introduces an additional factor in the Court's takings analysis—the severity of the impact of the law on affected landowners.

Up to this point, we have seen that the majority of the Court, speaking through Justice Brennan, has taken an exceedingly deferential approach to legislative restrictions on land use. The presumption seems quite formidably to favor the state. A landowner will not prevail unless he can marshall facts to show either that the action is patently arbitrary and unreasonable or that the state secretly covets his resources to "facilitate uniquely public functions."[66] The one exception to all of this is the Court's conclusion that perfectly legitimate public policies may nevertheless interfere so severely with "distinct investment-backed expectations" of individual landowners that compensation will be required to sustain the law.[67]

The genesis of this rule is *Pennsylvania Coal Co. v. Mahon.*[68] In that case, the state legislature passed a law prohibiting any mining of anthracite coal in ways that would cause the subsidence of public structures or private residences.[69] The Mahons sought an injunction to prevent the coal company from mining on their land. They had purchased the property from Pennsylvania Coal, but the company had reserved the right to remove coal without liability to the surface owners. Because the statute effectively prevented the company from exercising that right, the Court considered Pennsylvania Coal's defense to be a direct challenge to the scope of a legitimate exercise of the police power.[70]

Justice Holmes, writing for the majority, was willing to assume that the legislation advanced important public policies.[71] Even so, the Court concluded that the fifth amendment sets a limit on the extent to which public

63. *Id.* at 127 (citing Nectow v. City of Cambridge, 277 U.S. 183 (1928)). Significantly, Justice Brennan includes within this category land use regulations such as zoning which prohibit contemplated, as well as existing, uses of land. *Penn Cent. Transp. Co.*, 438 U.S. at 125.

64. *Penn Cent. Transp. Co.*, 438 U.S. at 134, n.30.

65. *Id.* at 127 (citing Goldblatt v. Hempstead, 369 U.S. 590 (1962) and Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922)).

66. *Penn Cent. Transp. Co.*, 438 U.S. at 128.

67. *Id.* at 127.

68. 260 U.S. 393 (1922).

69. *Id.* at 412.

70. *Id.* at 413. ("As applied to this case the statute is admitted to destroy previously existing rights of property and contract. The question is whether the police power can be stretched so far.").

71. *Id.* at 418.

necessity can frustrate private property expectations.[72] "The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."[73] The Court provided no guidelines for establishing threshold levels of regulatory legitimacy, but it indicated that judges would have to weigh the public interest against the harm resulting to individuals.[74] The question depends upon the particular facts, the Court concluded,[75] and in this case "the act cannot be sustained as an exercise of the police power, so far as it affects the mining of coal under streets or cities in places where the right to mine such coal has been reserved."[76]

This carefully restricted holding has subsequently given way to the expansive language of the rules that produced it.[77] In *Penn Central*, for example, Justice Brennan cites the case for the general proposition that "a state statute that substantially furthers important public policies may so frustrate distinct investment-backed expectations as to amount to a 'taking.' "[78] The Court determined first that the landmarks law was a legitimate exercise of the police power.[79] It then tested the law further by focusing on the statute's interference with the company's property expectations.[80] The Court concluded that the law did not affect a taking because (1) Penn Central's "primary expectation" concerning the use of the parcel as a terminal was unimpaired;[81] (2) the company could still seek approval for a less ambitious construction project;[82] and (3) Penn Central could transfer some development rights to nearby properties.[83]

Justice Rehnquist agreed with the general notion that otherwise legitimate police power measures may nevertheless require compensation if they deny to landowners a reasonable return on investment.[84] But he insisted that the corollary is not true: "A taking does not become a noncompensable

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72. *Id.* at 413.

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

74. *Id.* at 413-14.

75. *Id.* at 413.

76. *Id.* at 414.

77. *See, e.g.*, Goldblatt v. Town of Hempstead, 369 U.S. 510, 594 (1962) (regulatory actions can be "so onerous as to constitute a taking which constitutionally requires compensation." (citing Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922))).

78. Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 127 (1978). Justice Brennan's interpretation of *Pennsylvania Coal* is more fully developed in San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621, 649-50 (1981) (Brennan, J., dissenting).

79. *Penn Cent. Transp. Co.*, 438 U.S. at 128-35.

80. *Id.* at 136.

81. *Id.*

82. *Id.* at 136-37.

83. *Id.* at 137.

84. Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 149 (1978) (Rehnquist, J., dissenting).

exercise of police power simply because the government in its grace allows the owner to make some 'reasonable' use of his property."[85] Regulations which destroy property expectations may nevertheless become "noncompensable" if the prohibition involves noxious uses,[86] but he did not consider the landmarks law to fall within that category.[87] Even regulations which prohibit noninjurious uses can become "noncompensable" if the prohibition applies over a broad cross-section of land and burdens are therefore evenly shared.[88] Zoning, for example, can elude the compensation requirement because "the burden is shared relatively evenly and it is reasonable to conclude that on the whole an individual who is harmed by one aspect of zoning will be benefitted by another."[89] Justice Rehnquist concluded, however, that unlike zoning the landmarks law fails to secure such an average reciprocity of advantage because it parcels out the benefits and burdens to separate classes—historic landmark owners bear the costs of preservation; "sightseeing New Yorkers and tourists" enjoy the benefits.[90]

Justice Brennan apparently agrees that the risk of arbitrariness and the need for compensation are both reduced when community-wide regulations provide evidence of reciprocal burdens and benefits.[91] But he did not agree that Penn Central was "solely burdened and unbenefited" by the landmarks legislation.[92] He noted that the law applied to a large number of parcels throughout the city.[93] More importantly, perhaps, he was unwilling to second-guess the city council's determination that the legislation benefited all New York citizens, including landmark owners.[94] Justice Brennan conceded that the corporate owner is more burdened than benefited by the law, but he compared its fate to the brickyard owner in *Hadachek*, the cedar tree grower in *Miller*, and the gravel mine operator in *Goldblatt*.[95] In each instance, he concluded, the restrictions were reasonably related to important public policies, and that determination marks the end to the Court's inquiry.[96]

B. A Critique

These divergent approaches to the taking issue reveal basic differences

85. *Id.*
86. *Id.* at 144-45.
87. *Id.* at 145-46.
88. *Id.* at 147.
89. *Id.*
90. *Id.* at 146, 147-49.
91. Penn. Cent. Transp. Co. v. New York City, 438 U.S. 104, 135 n.32 (1978).
92. *Id.* at 134.
93. *Id.*
94. *Id.* at 134-35.
95. *Id.* at 135.
96. *Id.* at 133-34 n.30.

of opinion as to the mischief that the takings clause is designed to prevent. In *Penn Central*, Justice Rehnquist *primarily* viewed the provision as protection against unreasonable interferences with private property expectations. The focus here is predominantly on the impact of the law from the vantage point of the affected landowner. Justice Brennan *primarily* interpreted the provision as a guard against appropriation of property by collective action to further public objectives in arbitrary or unjust ways. This focus is predominantly on the nature of the government activity under review, although not exclusively so.

With such a divergence in premises, however, what is perhaps most surprising about this reconstructed dialogue between Justices Brennan and Rehnquist is that it reveals substantial agreement among the members of the Burger Court on the nature of the questions that need to be addressed in order to resolve a takings case. For example, both the majority and the dissenters in *Penn Central* agreed that the fifth amendment operates in part to insulate landowners from uncompensated public acquisitions of private resources. The majority asked whether the contested activity can be characterized as an acquisition of resources to facilitate uniquely public functions.[97] The dissenters asked whether the action results in a physical appropriation of protected property interests, such as air rights.[98] Similarly, both factions agreed that some government restrictions can elude the compensation requirement even though property expectations are adversely affected. The majority asked whether the restriction is reasonably related to a government program expected to produce widespread public benefits and equitably applied; if so, no taking occurs.[99] The dissenters would come to a similar conclusion if the regulated use is a noxious one or if the prohibition applies over a broad cross-section of land and evidences some average reciprocity of advantage among landowners.[100] All members of the Court also seemed to agree that the takings clause should protect individuals from any regulation so severe in its economic impact that fairness demands judicial intervention. The majority asked whether the law unduly frustrates distinct investment-backed expectations.[101] The dissenters asked whether the law denies to landowners the reasonable use of their property.[102] The answers to these various questions will of course depend upon the unique and individual circumstances of each separate case.[103]

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97. *Id.* at 128.
98. *Id.* at 142-43 (Rehnquist, J., dissenting).
99. Penn Cent. Trans. Co. v. New York City, 438 U.S. 104, 133-34 n.30 (1978).
100. *Id.* at 144-50 (Rehnquist, J., dissenting).
101. *Id.* at 124, 127.
102. *Id.* at 149 (Rehnquist, J., dissenting).
103. *Id.* at 124. *See also* Agins v. City of Tiburon, 447 U.S. 255, 261 (1980) ("[T]he question necessarily requires a weighing of private and public interests.").

In other words, there appears to be tacit agreement among the members of the Court on several basic tests for regulatory takings: the physical appropriation test, the harm-benefit distinction and, to a lesser extent, the noxious use test, and the governmental enterprise-arbitration theory. But unfortunately, each test can only provide at most a useful approach to a narrow range of takings cases.[104] They are all inadequate insofar as they fail to provide a realistic solution for problems resulting from the entire spectrum of activities that contemporary governments undertake.

Take, for example, the physical appropriation test. This approach holds that a taking may more readily be discerned when governments are actually acquiring resources to enhance public functions.[105] The rule works well in those cases of "institutional aggrandizement,"[106] such as the overflight cases,[107] where governments thwart private property expectations in order to facilitate public projects. In this context, the rule serves two legitimate functions. First, it provides compensation to landowners anxious about the fact that extremely basic values of ownership—possession and exclusivity—have been sacrificed to the public weal.[108] Second, it forces the body

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104. *See* Michelman, *supra* note 23, at 1183-1201. *See generally* Van Alstyne, *Taking or Damaging by Police Power: The Search For Inverse Condemnation Criteria*, 44 S. CAL. L. REV. 1 (1970).

105. Penn Cent. Transp. Co. v. New York City, 458 U.S. 104, 128 (1978).

106. The phrase is Professor Ackerman's. B. ACKERMAN, PRIVATE PROPERTY AND THE CONSTITUTION 53 (1977).

107. *See, e.g.*, Griggs v. Allegheny County, 369 U.S. 84 (1962); United States v. Causby, 328 U.S. 256 (1946).

108. Freeman, *Give and Take: Distributing Local Environmental Control Through Land Use Regulation*, 60 MINN. L. REV. 883, 928-29 (1976). *See also* Michelman, *supra* note 23, at 1228 ("The psychological shock, the emotional protest, the symbolic threat to all property and security, may be expected to reach their highest pitch when government is an unabashed invader.").

The Court reconfirmed these values of the takings clause by adopting a *per se* rule for permanent physical appropriations in Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982). There the Court held that any permanent physical occupation of property results in a taking to the extent of the occupation, without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner. The Court explained the reasoning for its holding in the following manner:

> Property rights in a physical thing have been described as the rights to "possess, use and dispose of it." United States v. General Motors Corp., 323 U.S. 373, 378 (1945). To the extent that 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. The power to exclude has traditionally been considered one of the most treasured strands in an owner's bundle of property rights. [citations omitted] 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. Although deprivation of the right to use and obtain a profit from property is not, in every case, independently sufficient to establish a taking, [citation omitted] it is clearly relevant. Finally, even though the owner may retain the bare legal right to dispose of the

politic to reconsider the efficacy of its determination to go forward with the project under consideration.[109] But the rule seems to spend itself analytically with those circumstances in which a transfer of resources can legitimately be detected. It provides no guidance for the variety of takings cases falling outside this parameter. As Professor Michelman aptly observed, "A physical invasion test, then, can never be more than a convenience for identifying *clearly compensable* occasions. It cannot justify dismissal of any occasion as *clearly noncompensable*."[110]

The noxious use test suffers a similar deficiency. To the extent that we can provide a defensible classification of "harms,"[111] the rule works well in those situations where the legislature reasonably concludes that nuisance-like activities must be curbed.[112] It serves to quiet citizen unrest by insulating neighbors from unneighborly conduct.[113] But the rule provides no insights for the significant number of takings cases that involve considerations transcending essentially localized conflicts.[114] To paraphrase Professor Michelman,[115] the noxious use test can never be more than a convenience for identifying clearly noncompensable exercises of the police power; it cannot justify dismissal of any such exercise as clearly compensable.

Similar difficulties confront those tests which attempt to transform the discriminants discussed above into a more sophisticated compensation practice, namely, the harm/benefit distinction proposed by Professor Dunham[116] and the governmental enterprise/arbitration theory proffered by Professor Sax.[117] These theories work well when government is engaged in an activity

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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 (footnote omitted). The rule in *Loretto* seems to have become a central tenet in the Court's takings analysis, *see, e.g.*, Keystone Bituminous Coal Ass'n v. DeBenedictus, 480 U.S. 470, 489 n.18 (1987), despite trenchant criticism by commentators. *See* Costonis, *Presumptive and Per Se Takings: A Decisional Model for the Taking Issue*, 58 N.Y.U.L. REV. 465 *passim* (1983); Radin, *The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings*, 88 COLUM. L. REV. 1667 *passim* (1988).

109. *See* B. ACKERMAN, *supra* note 106, at 51; Dunham, *A Legal and Economic Basis For City Planning*, 58 COLUM. L. REV. 650, 665 (1958).

110. Michelman, *supra* note 23, at 1228 (emphasis in original).

111. *See supra* note 53.

112. *See, e.g.*, Goldblatt v. Hempstead, 369 U.S. 590 (1962); Miller v. Schoene, 276 U.S. 272 (1928); and Hadacheck v. Sebastian, 239 U.S. 394 (1915). As mentioned previously, the majority of the Court in *Penn Central* chose not to categorize these cases as noxious use cases, but instead considered them reasonable restrictions related to policies expected to produce widespread public benefits. *See supra* text accompanying notes 34-41.

113. *See* Ellickson, *supra* note 61, at 724-33.

114. *See generally* Freeman, *supra* note 108, at 936-51.

115. *See supra* text accompanying note 110.

116. *See supra* text accompanying notes 48-54.

117. *See supra* text accompanying notes 17-19.

that falls clearly within either of the established classifications.[118] In these instances, both theories serve to foster a sense of certainty and concreteness in the difficult judicial task at hand. They also serve to inculcate basic economic nuances (primarily utilitarian conventions) in the development of a consistent compensation theory.[119] But these approaches falter when confronted with activities which defy convenient pigionholing. For example, set-back regulations, height limitations and even conventional zoning can all be viewed as nuisance-preventing government arbitration.[120] But these same regulations, particularly in view of their prospective application,[121] also add to the public weal various identifiable amenities, or benefits, such as broad streets, attractive skylines and well-planned communities. For these circumstances, the harm-benefit approaches seem inherently arbitrary when they are asked to provide a definitive answer to a particular case.[122]

The diminution-in-value test as currently applied is an exception to the assertion that existing takings criteria are underinclusive determinants. Except in cases involving permanent physical appropriations, the rule is now applied across the board; otherwise legitimate exercises of the police power will fall under the fifth amendment proscription if the regulation goes too far.[123] The test serves to promote efficiency[124] and to protect landowners deprived of "some distinctly perceived, sharply crystallized, investment-backed expectation."[125] But the test raises a number of questions that are difficult for courts to address.[126] For example, how severe does the economic impact have to be in order to consider the regulation unconstitutionally ambitious? And what constitutes "property" for purposes of the test? In *Pennsylvania Coal Co. v. Mahon*, the Court focused solely on subsurface rights in order to gauge impairment of value,[127] while in *Penn Central*, the Court refused to separate air rights from the surface estate in order to calculate the degree of interference with property expectations held by the landmark owner.[128] The factual differences in these two cases do not clearly support such different results.

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118. For example, the overflight cases can easily be classified as benefit-producing or public enterprise-enhancing activities.

119. *See* B. ACKERMAN, PRIVATE PROPERTY AND THE CONSTITUTION 50-54 (1977) (discussing Sax's theory); Ellickson, *supra* note 54, at 420-21 (discussing Dunham's theory).

120. *See* Gorieb v. Fox, 274 U.S. 603 (1927); Welch v. Swasey, 214 U.S. 91 (1909); Village of Euclid v. Ambler Realty Co., 272 U.S. 366 (1926).

121. *See* Freeman, *supra* note 108, at 940.

122. *See* Heyman & Gilhool, *supra* note 53, at 1128.

123. *See supra* text accompanying notes 67-83.

124. *See* Ellickson, *supra* note 54, at 420-21.

125. Michelman, *supra* note 23, at 1233.

126. *See generally* Sax, *supra* note 16, at 60.

127. *See* Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 414 (1922).

128. *See* Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 130-31 (1977).

Yet even more problematic is the uncertain manner in which these various tests are supposed to fit together. For me, the structure of the majority opinion in *Penn Central* has always been confusing. The opinion begins in Section IIA[129] with an overview of the various "takings" determinants. In Section IIB[130] of the opinion, the focus of the Court was primarily on the nature of the activity under review. If the interference with property interests can be characterized as an acquisition of resources to facilitate public functions, the action is simply an exercise of the power of eminent domain, a "taking." But if the legislative act promotes the general welfare by prohibiting particular uses of the land, the Court will uphold the regulation as a legitimate police power measure. But even here, as the Court pointed out in section IIC of its opinion,[131] if this legislative act unduly deprives the owner of his economic interest in the property, then the Court will say a "taking" has occurred and we are back within the sphere of the eminent domain power.

At a general level of abstraction, the Court's approach is difficult to visualize in some coherent manner. Now I realize that Justice Brennan was attempting to enunciate principles which would explain the whole pattern of past takings cases—an effort that has been likened to a connect-the-dots exercise.[132] But unfortunately the picture that emerges is not unlike one of the optical illusions in an M.C. Escher print—like the triangle composed of straight beams which are connected by three right angles:[133] We begin by focusing on the nature of the power imposed to see if it is merely a disguised exercise of eminent domain. If not, we turn to an analysis of legitimate purposes to determine if the exercise of police power is a reasonable one. But even assuming that it is, we then turn once again to determine if the state has gone "too far" and reentered the realm of eminent domain. Those who are able to explain such things as the Escherian triangle tell us that the effect is produced by an "ingenious linkage of different spatial realities."[134] If one focuses on each separate link, the image is logical; there is no error in any component part. But when looked at together, the whole is, in a word, impossible.[135] That may be as well an apt description of the

129. *Id.* at 123-28.

130. *Id.* at 128-35.

131. *Id.* at 135-38.

132. Ely, *Foreword: On Discovering Fundamental Values*, 92 HARV. L. REV. 5, 32 (1978).

133. The print entitled "The Waterfall," which uses this optical illusion, can be found in THE WORLD OF M.C. ESCHER (J.L. Locher ed. 1971) at cat. 258.

134. Locher, *The Work of M.C. Escher* in THE WORLD OF M.C. ESCHER 7, 17 (J.L. Locher ed. 1971).

135. *Id.* at 17-18. As Escher himself explained, "If we follow the various parts of this construction one by one we are unable to discover any mistake in it. Yet it is an impossible whole because changes suddenly occur in the interpretation of distance between our eye and the object." M.C. ESCHER, THE GRAPHIC WORK OF M.C. ESCHER 22 (rev. ed. 1984).

Court's attempt in *Penn Central* to reconcile past decisions which have addressed the tensions between police power activities and eminent domain limitations. The opinion was, in any event, the legacy of the Burger Court in the law of regulatory takings.

II. Regulatory Takings in the Rehnquist Court

A. An Overview

The various "images" of the *Penn Central* case were perhaps most prominent in the first important takings decision in the Court's 1986-87 term, *Keystone Bituminous Coal Association v. DeBenedictis*.[136] The Pennsylvania legislature enacted a law prohibiting coal mining that causes subsidence damage to surface structures. Under the law, the Pennsylvania Department of Environmental Resources (DER) typically requires 50% of the coal beneath such structures to be kept in place as a means of providing surface support.[137] The petitioners asserted that the law amounted to a taking of their property because it effectively requires coal companies throughout the state to leave 27 million tons of coal in the ground.[138]

In a case that is thus remarkably similar to *Pennsylvania Coal Co. v. Mahon*,[139] the Court in *Keystone* held that the state was acting pursuant to a perfectly legitimate, traditional police power objective.[140] The dominant focus of the majority opinion, written by Justice Stevens, was on the nature of the state's interest in the regulation.[141] The public interest in preventing activities similar to public nuisances is a substantial one, and Justice Stevens hinted that this factor alone might justify the state's intervention in this matter.[142]

But the Court also considered an impact analysis.[143] It rejected the petitioners' attempt to narrowly define and segment their property in order to assert a substantial deprivation. The Court held that the 27 million tons of coal left in place do not constitute a separate segment of property for takings law purposes.[144] Thus, the limitation on property rights here involves only one "strand" in the petitioners' bundle of property rights and it is not significant enough to conclude that a taking has occurred.[145]

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136. 480 U.S. 470 (1987).
137. *Id.* at 477.
138. *Id.* at 498.
139. 260 U.S. 393 (1922).
140. Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 488 (1987).
141. *Id.* at 488-93.
142. *Id.* at 492.
143. *Id.* at 493-502.
144. Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 498 (1987).
145. *Id.* at 497 (quoting Andrus v. Allard, 444 U.S. 51, 65-66 (1979): "[W]here an

In his dissenting opinion, Chief Justice Rehnquist focused predominantly on what he considers the relevant perspective—that of the property owner.[146] From this perspective, an identifiable segment of property (the 27 million tons of coal in place) has been completely destroyed by the government regulation. Moreover, much of this coal in place is a unit of property separately recognized by Pennsylvania as a support estate and utilized by buyers and sellers in the state as the basis for bargained-for exchanges.[147] The restriction on mining this coal constitutes a complete interference with this property right and thus extinguishes its value. This, the Chief Justice concluded, must be accompanied by just compensation.[148]

Perhaps even more enlightening is the Chief Justice's conclusion that he could not see "how the label placed on the government's action is relevant to consideration of its impact on property rights."[149] This would seem to indicate that Chief Justice Rehnquist is willing to focus *only* on the degree of interference with established expectations protected under state property law. Nevertheless, the Chief Justice concluded that this statute is not the type of regulation that would satisfy the nuisance exception to takings analysis. Although the legislature was motivated in part by a concern for public safety, the Chief Justice considered the statute as a regulation based essentially on economic concerns: preservation of existing buildings, economic development, and maintenance of property values to preserve the state's tax base. In his estimation, these purposes should not find shelter under the "nuisance" rational for "noncompensatory" regulations.[150]

Chief Justice Rehnquist further refined his own views on just compensation doctrine in the second significant opinion by the Court in 1987, *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*.[151] The Lutheran Church had purchased a twenty-one acre tract of land along the banks of the Middle Fork of Mill Creek in Mill Creek Canyon. The church established a campground known as "Lutherglen" on the site, which is in the mountains about 25 miles north of Los Angeles. The church used the facilities as a recreational area for handicapped children and as a retreat for church members. The area was subject to flash floods, a problem that was magnified by a fire in 1977 which denuded the hills upstream. As a result, serious flooding in 1978 destroyed all of the buildings at Lutherglen, including a dining hall, two bunk houses, a caretaker's lodge and an

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owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking because the aggregate must be viewed in its entirety.").

146. *Keystone Bituminous Coal Ass'n*, 480 U.S. at 518 (Rehnquist, C.J., dissenting).
147. *Id.* at 518-20.
148. *Id.* at 520.
149. *Id.* at 516.
150. *Id.* at 513.
151. 107 S. Ct. 2378 (1987).

outdoor chapel.

In response to the disaster, the County of Los Angeles adopted an interim flood protection ordinance which included the area on which Lutherglen had stood. The measure temporarily prohibited construction in this area because the county board believed that prohibition was urgently "required for the immediate preservation of the public health and safety."[152] The church immediately filed a complaint in California state court asserting that these regulations amounted to a taking of its property, but it was dismissed when the California court decided that a landowner may not maintain an inverse condemnation suit based upon a "regulatory" taking.

In reviewing the California court's decision, the Supreme Court held "that where the government's activities have already worked a taking of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective."[153] The Court did not decide whether the ordinance at issue had actually denied the church all use of its property or indeed whether the ordinance could be justified as a proper police power measure. But the decision was nevertheless an important one, for it firmly established that monetary damages are the preferred remedy for inverse condemnation actions under the federal Constitution.

Justice Stevens, in dissent, asserted that the majority distorted the meaning of prior takings cases. In portions of his dissenting opinion which were joined by Justices Blackmun and O'Connor, Stevens argued first that the interim flood protection ordinance could not as a matter of law amount to a taking of the church property.[154] Such health and safety regulations are traditional justifications for police power measures, and the church did not marshall any facts which would rebut the normal presumption of validity of the regulation. Second, Justice Stevens concluded that the church should be required to pursue an action demanding invalidation of the ordinance in the California courts prior to seeking Supreme Court review of state procedures.[155]

The third significant takings case came at the end of the 1986-87 term in *Nollan v. California Coastal Commission*.[156] The Nollans bought beachfront property in Ventura County, California. They wanted to demolish the bungalow on the lot and replace it with a more substantial three-bedroom home. The California Coastal Commission, however, found that the new house would increase blockage of the view of the ocean, and thus might

152. *Id.* at 2382.
153. *Id.* at 2389.
154. *Id.* at 2391-32 (Stevens, J., dissenting).
155. *Id.* at 2396-98.
156. 107 S. Ct. 3141 (1987).

leave some members of the public with the false impression that the beach is wholely private. Consequently, the Commission indicated that it would grant permission to rebuild the home only if the Nollans would provide the public with an easement to pass across a portion of their property adjacent to the ocean. This easement would assure access to public beaches near the Nollan lot. The Nollans argued that this constituted an outright taking of their property, and the United States Supreme Court agreed.

Justice Scalia, writing for a majority which included the Chief Justice and Justices White, Powell, and O'Connor, held that the condition amounted to a "permanent physical occupation" of the Nollans' property.[157] The Court concluded that the Commission's assumed power to forbid construction of the house in order to protect the public's view of the beach would include the power to condition construction of the home subject to the requirement that the Nollans provide a viewing spot on their property for passersby. Here, however, the condition to provide *lateral* access across their property had nothing to do with the Commission's power to limit construction. Thus, this particular land use regulation did not substantially advance the legitimate state interest in protecting the public's view of the beach and it must be invalidated. This conclusion is mandated, the Court suggested, whenever a condition does not reasonably relate to the public need or burden that the proposed construction creates or to which it contributes.[158]

Justice Brennan, in his dissent, argued that this case should be decided along the lines suggested by his *Penn Central* decision. The first question is: Is the regulatory activity a proper exercise of the police power? He answers this question by noting that the police power of the states encompasses the authority to impose conditions on private development.[159] In this case, California used its police power to condition the beachfront development upon preservation of public access to the ocean beach. This is a legitimate public purpose, Brennan contends, and under the traditionally deferential scope of review on such questions, the state could not be said to have acted irrationally.[160]

Assuming this constitutes a legitimate police power activity, Justice Brennan asserted that we must then proceed to question whether the regulation goes too far.[161] He considered the physical intrusion here minimal because even without the permit condition, the public's recognized right of

157. *Id.* at 3145.

158. *Id.* at 3147-48.

159. Nollan v. California Coastal Comm'n, 107 S. Ct. 3141, 3151 (1987) (Brennan, J., dissenting).

160. *Id.* at 3153-54.

161. *Id.* at 3156.

access permits it to pass within a few feet of the Nollans' seawall.[162] Thus, the requirement is not unlike the required dedication of a sidewalk in front of a private residence. This requirement also does not result in any significant impairment of the value of the land and the owners can make no reasonable claim to any prior investment-backed expectations of being able to exclude members of the public from crossing the edge of their property to gain access to the ocean.[163] Indeed, Justice Brennan concluded, the Nollans are both burdened and benefited by the Coastal Commission's permit condition program because they are able to walk along the beach beyond the confines of their own property over neighboring land on which the Commission had required similar deed restrictions.[164]

B. A Brief Critique

Justice Brennan's dissent in *Nollan* does raise as a legitimate question whether the Rehnquist Court has strayed considerably from the analytical mode the Burger Court adopted in the *Penn Central* case. Justice Brennan, for example, took issue with the majority in *Nollan* for that Court's determination to raise the standard of review in takings cases to some higher level of scrutiny. The majority, through Justice Scalia, held that regulations must "substantially advance" the legitimate "state interest" sought to be achieved in order to pass constitutional muster.[165] The Court then proceeded to examine both the legitimacy of the public purposes suggested on behalf of the law and the fit between these purposes and the means chosen by the California Coastal Commission to implement it.[166] Commentators have noted that this is a new, more stringent standard for regulatory measures.[167] But Justice Scalia cited for support of that proposition both *Agins* and Justice Brennan's own opinion in *Penn Central* ("a use restriction may constitute a 'taking' if not reasonably necessary to the effectuation of a sub-

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162. *Id.* at 3156-57.

163. *Id.* at 3158-60.

164. *Id.* at 3158.

165. Nollan v. California Coastal Comm'n, 107 S. Ct. 3141, 3146 (1987).

166. *Id.* at 3147-50.

167. *See, e.g.*, Falik & Shimko, *The "Takings" Nexus—The Supreme Court Chooses a New Direction in Land-Use Planning: A View From California*, 39 HASTINGS L.J. 359, 390-92 (1988); Humbach, *Economic Due Process and the Takings Clause*, 4 PACE ENVTL. L. REV. 311, 346-47 (1987); Karlin, *Back to the Future: From Nollan to Lochner*, 17 SW. U.L. REV. 627, 629-31 (1988); Siemon & Larsen, *The Taking Issue Trilogy: The Beginning of the End?* 33 WASH. U.J. URB. & CONTEMP. L. 169, 194 (1988). *Cf.* Michelman, *Takings, 1987*, 88 COLUM. L. REV. 1600, 1608-14 (1988) (arguing that the heightened scrutiny of *Nollan* may only apply in cases where the challenged regulation has the effect of imposing a permanent physical occupation on a landowner). Professor Michelman's article is the principal paper in a collection of essays reviewing the 1987 takings cases. *See The Jurisprudence of Takings*, 88 COLUM. L. REV. 1581 (1988).

stantial government purpose").[168]

Justice Brennan responded by saying that that is not what he said, or at least, that is not what he meant.[169] Yet the very nature of legal argument makes the definitive treatment of precedent problematic. It is true that many of the prior cases demonstrate an exceedingly deferential mindset on the part of the Court, as my previous discussion of the *Penn Central* case reveals.[170] But one can trace through *Nollan* and *Agins* to find the Supreme Court's 1928 decision, *Nectow v. City of Cambridge*,[171] at the root of this standard. This decision invalidated one of the early attempts at zoning because of the city's inofficious line-drawing. *Nectow* has been, and continues to be, one of the Court's most opaque zoning opinions.[172] It could arguably stand for the proposition that a higher degree of scrutiny attends some regulatory takings circumstances.

The problem is that the ruling in *Nollan* is not clear as to when the heightened scrutiny is in order. Will it apply only in subdivision exaction cases, as the facts of *Nollan* might suggest? Or perhaps only in cases involving "permanent physical occupations," as the holding in the case suggests? Or will it apply to all regulatory takings cases, as the cases cited in *Nollan* might suggest? The decision is confusing on this point, and there seems to be little justification for this uncertainty. A forthright analysis of the circumstances and policies justifying an enhanced judicial role is essential for both applying the standard in future cases and in analyzing the merits of the Court's analysis. As Professor Shapiro reminds us, "[R]easoned response to reasoned argument is an essential aspect of [the judicial] process. A requirement that judges give reasons for their decisions—grounds of decision that can be debated, attacked, and defended—serves a vital function in constraining the judiciary's exercise of

168. *See Nollan*, 107 S. Ct. at 3146 (quoting Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 127 (1978)).

169. *Nollan*, 107 S. Ct. at 3152 n.1 ("Our phraseology may differ slightly from case to case—*e.g.*, regulation must 'substantially advance,' Agins v. Tiburon, 447 U.S. 255, 260, (1980) [citations omitted] or be 'reasonably necessary to' Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 127, (1978) [citations omitted] the government's end. These minor differences cannot, however, obscure the fact that the inquiry in each case is the same.") (Brennan, J., dissenting).

170. *See supra* text accompanying notes 59-66.

171. 277 U.S. 183 (1928).

172. Commentators have seen in this opinion much that is relevant to modern compensation doctrinal debate. Professor Ellickson criticized the opinion for creating what he called the "*Nectow* fallacy" that a landowner's sole remedy for overrestrictive zoning classifications is injunctive relief and not damages. Ellickson, *Suburban Growth Controls: An Economic and Legal Analysis*, 86 YALE L.J. 385, 490-93 (1977). Professor Berger saw in the opinion the origin of the "reasonable beneficial return" standard for determining when a zoning law becomes constitutionally unacceptable. Berger, *The Accommodation Power in Land Use Controversies: A Reply to Professor Costonis*, 76 COLUM. L. REV. 799, 817 (1976).

power."[173]

Nor should one feel inhibited in asking the Court to provide explicit reasons and justifications for its decision in *Nollan* because that is in essence what the Court is demanding from the California Coastal Commission. The Commission was, in the Court's view, guilty of being disengenuous. You cannot tell us that you want to protect the ocean view for passersby, says the Court, and then allow the Nollans to build a home destroying that view provided they grant *lateral* access to the public beaches. In a sense, state and local governments have been imposed with an obligation of candor in their development permit programs. And ostensibly this requirement is imposed for reasons similar to the imposition of an obligation for candor in the judicial process. It serves a checking function. The limitations imposed by statutes or constitutions will prove ineffective if municipalities are allowed to use implausible justifications for their regulatory activities. This check is necessary both to enhance the effectiveness of judicial review and perhaps to reduce the degree of cynicism about public decision making that would result if regulators are, by either deception or evasion, not accountable for their decisions.

This checking function is also implicit in the *First English* case. The decision adds little to the development of doctrine on the difficult question of when one can confidently predict that a taking has occurred. But the decision on remedies is obviously designed to inhibit the abuse of municipal authority by allowing for damages in times of even temporary overreaching. "We 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," says the Court, "[b]ut such consequences necessarily flow from any decision upholding a claim of constitutional right. . . ."[174]

Chief Justice Rehnquist seems to have the gift of understatement. Academic and judicial debate on the question of compensation for regulatory takings has been intense since Justice Brennan suggested the idea in 1981.[175] Justice Stevens in his dissent in *First English* captures the prevail-

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173. Shapiro, *In Defense of Judicial Candor*, 100 HARV. L. REV. 731, 737 (1987) (footnotes omitted).

174. First English Evangelical Lutheran Church v. County of Los Angeles, 107 S. Ct. 2378, 2389 (1987).

175. Justice Brennan first suggested the mandatory damage rule in his *San Diego* dissent. *See* San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621, 658 (1981) (Brennan, J., dissenting). Academic debate on the subject began in earnest soon after that decision. *Compare, e.g.*, Johnson, *Compensation for Invalid Land-Use Regulations*, 15 GA. L. REV. 559 (1981) (arguing against compensation) *with* Cunningham, *Inverse Condemnation as a Remedy for "Regulatory Takings,"* 8 HASTINGS CONST. L.Q. 517 (1981). For a more recent, spirited debate on the same issue, compare Williams, Smith, Siemon, Mandelker & Babcock, *The White River Junction Manifesto*, 9 VT. L. REV. 193 (1984) (arguing against compensation)

ing sentiment of the critics to such a rule—regulators will be so intimidated by the sanction of monetary damages that they will refrain from enacting legitimate land use schemes for fear of crossing the threshold level of constitutional invalidity.[176]

My own view on the issue of damages for regulating takings is that the Court's decision was simply too absolute in nature. I take my queue here from Professor Paul Freund who, in 1975, critically reviewed the significant decisions of the Warren Court in the areas of voting rights, first amendment, equal protection and criminal law.[177] He was, to be sure, generally favorable to these developments, but he questioned the wisdom of "imposing absolute or exclusive sanctions to achieve constitutional ends."[178] For example, he criticized the exclusionary rule as the single instrumental rule for unreasonable searches and seizures. Allowing a discretionary rule coupled with a right of action for damages against the state, he surmised, might provide a better accommodation between the search for truth and unlawful police conduct.[179] To take another example, in *New York Times v. Sullivan*,[180] the Court adopted a single standard of liability regarding the defamation of public officials. Professor Freund urged a constitutional guarantee that might allow for a range of alternatives rather than a single instrumental rule.[181] Although the Court has remained faithful to the *New York Times* standard in cases involving public officials or public figures, it now allows for greater experimentation by the states where the speech concerns private individuals[182] or private matters.[183] The greater flexibility is frank recognition of the fact that there may be several effective means for balancing between first amendment considerations and the need to protect reputation interests.

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with Berger & Kanner, *Thoughts on The White River Junction Manifesto: A Reply to the "Gang of Five's" Views on Just Compensation for Regulatory Taking of Property*, 19 LOY. L.A.L. REV. 685 (1986).

176. *First English*, 107 S. Ct. at 2399-2400 (Stevens, J., dissenting).

177. Freund, *The Judicial Process in Civil Liberties Cases*, 1975 U. ILL. L. FORUM 493.

178. *Id.* at 500. Professor Freund explains:

> The decisions were absolute in the sense that they characteristically mandated one and only one means of complying with a constitutional guarantee that does not itself prescribe a particular solution or sanction to satisfy the guarantee. If the Court decides that a state law or practice cannot be squared with the Constitution, the question remains whether the Court will indicate a range of valid solutions or will specify an exclusive means to satisfy the constitutional objective.

Id. at 497.

179. *Id.* at 499.

180. 376 U.S. 254 (1964).

181. Freund, *supra* note 177, at 498-99.

182. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974).

183. *See* Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749 (1985) (plurality opinion).

The Supreme Court could follow a similar pattern in the context of regulatory takings. The absolute rule on damages may be confined to "physical occupation" cases, for example, while the states may be allowed to experiment with remedies for other types of interferences with property interests as long as base limitations are provided. The problem is that the question of damages is not an easy one, for landowners may be left with an insufficient remedy if they are uniformly denied, and cities may be unduly intimidated if they are uniformly allowed. But the advantages of allowing alternative legislative measures seems to me a wiser accommodation of the competing interests at stake.

By far the most important case of the 1986-87 Term, for analytical purposes, is the *Keystone* case. Justice Stevens, writing for the majority, took such extreme efforts to cabin the force of Holmes' opinion in *Pennsylvania Coal Co. v. Mahon* that some observers have said it is tantamount to overruling that decision.[184] But for me the more interesting fact is the basic difference in approach between the majority and dissenting opinions. Justice Stevens focused almost exclusively on the character of the governmental interest under review in order to test the law's validity. The dissent, on the other hand, focused almost exclusively on the impact of the law from the viewpoint of the landowner's interests.

In my opinion, this case reveals a fundamental difference in reasoning styles. The Chief Justice follows a traditional, formalistic approach for reviewing the constitutionality of the statute. Formalism, to borrow Judge Posner's definition, means the "use of deductive logic to derive the outcome of a case from premises accepted as authoritative."[185] What premises are at work here? First, conventional perceptions of property rights are a primary focus. Common law distributions of rights in land are accepted as natural and legislative decisions to alter these rights are viewed with suspicion. The constitutional text speaks plainly on this point, and broad policy concerns are not germane to the issue. The coal companies were "taken" here, and the proffered justifications simply do not measure up.

Justice Stevens, on the other hand, takes what might be considered a functionalist, nontraditional approach to the issue. "In general terms, functional approaches examine whether present practices undermine constitutional commitments that should be regarded as central."[186] In the context

184. *See, e.g.*, Clarke, *Regulatory Takings, Laissez Faire and Two Coal Cases From Pennsylvania*, 13 OKLA. CITY U.L. REV. 37 (1988); Large, *The Supreme Court and the Takings Clause: The Search for a Better Rule*, 18 ENVTL. L. 3, 35 (1987).

185. Posner, *Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution*, 37 CASE W. RES. L. REV. 179, 181 (1986). Formalism is experiencing something of a renaissance. *See, e.g.*, Weinrib, *Legal Formalism: On the Immanent Rationality of Law*, 97 YALE L.J. 949 (1988).

186. Sunstein, *Constitutionalism after the New Deal*, 101 HARV. L. REV. 421, 495

of regulatory takings, this approach centers on the nature of the public activity under review. It allows for policy considerations to illuminate the text of the Constitution and it demands a fair degree of deference to legislative enactments. This approach also does not view existing perceptions of property as sacrosanct. This sentiment was adequately captured by Justice Blackmun, in his dissenting opinion in *Loretto*: "[T]his Court long ago recognized that new social circumstances can justify legislative modification of a property owner's common-law rights, without compensation, if the legislative action serves sufficiently important public interests."[187]

Now I realize that I have taken liberties with these caricatures. Important assumptions on the nature of judicial review, the interpretation of legal texts, and the role of the framer's intent in analyzing contemporary constitutional issues are all brought into play with such sweeping generalizations. But my goal is to describe the reasons for the Court's vacillating images in the regulatory takings cases, and such broad profiles are essential to that task.

For example, this description of formalism describes well the position of the Court in the *First English* case. The Constitution permits no discussion of policy on the question of damages. If "property" has been "taken," compensation must be paid. A municipality's action is either correct or incorrect; the test is rather simple.

This reasoning is also implicit in Justice Scalia's opinion in *Nollan*, at least in one crucial respect. The enhanced means-end scrutiny suggested by the Court is reminiscent of the *Lochner*-era decisions searching for some "neutral" justifications of police power initiatives.[188] This was the period in the Court's history (1905-37) when the common law served as a baseline for questions of constitutional legitimacy.[189] The Court questioned proposed regulations by examining the "means" used to effectuate a legitimate governmental objective. In reality, this test allowed the Court to question the governmental objective itself. There can be no plausible justification (means) for an implausible objective (ends). In the *Nollan* case, the Court held that common law conceptions of property (here the easement for access) should not be considered subject to social reordering simply because the California Coastal Commission believes the public interest will be served by a continuous strip of publicly accessible beach along the coast. This objective can only be accomplished by the exercise of eminent domain

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(1987).

187. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 454 (Blackmun, J., dissenting).

188. *See generally* Williams, *Legal Discourse, Social Vision and the Supreme Court's Land Use Planning Law: The Genealogy of the "Lochnerian" Recurrence in "First English Lutheran Church" and "Nollan,"* 59 U. COLO. L. REV. 427 (1988).

189. *See generally* Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873 (1987).

authority.[190]

If one agrees with these portrayals, then an interesting line-up in the various factions appears in the Court's 1987 decisions. This assumes that the majority opinions in *Nollan* and *First English* and the dissent in *Keystone* are all predominantly formalistic, while the majority opinion in *Keystone* and the dissenting opinions in *First English* and *Nollan* are predominantly functionalistic in nature. Under this assumption, Chief Justice Rehnquist and Justice Scalia consistently follow the formalist's approach. Justices Stevens and Blackmun, on the other hand, appear consistently to follow the functional approach. Four of the current sitting Justices—White, O'Connor, Brennan and Marshall—appear to want to have it both ways. Although this ambivalence may sound a bit surprising, a similar phenomenon has been observed by Professor Strauss in his study on the separation of

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190. Rent control under some circumstances also violates this "nexus" requirement for Justice Scalia. Specifically, when rent control is used to effectuate a price wealth transfer from landlords to tenants, Justice Scalia asserts that taxation is the appropriate legislative response, not a police power measure. *See* Pennell v. City of San Jose, 108 S. Ct. 849, 863-64 (1988) (Scalia, J., dissenting).

In *Pennell*, the Court faced a challenge to San Jose's rent control ordinance which allows a hearing officer to consider the economic "hardship" to a tenant when determining whether to approve a proposed rent increase. The majority concluded that it was premature to consider the asserted takings claim because the ordinance did not require that a hearing officer reduce a proposed rent increase because of tenant hardship and because no concrete harm had been shown by the petitioner. *Id.* at 856-57. The Court did entertain, but rejected, facial challenges to the ordinance under the fourteenth amendment due process and equal protection clauses. *Id.* at 857-59.

Justice Scalia dissented from the holding that the takings claim was premature. In an opinion joined by Justice O'Connor, he argued that the ordinance did not substantially advance legitimate state interests. Thus, in his view, the Court was being called upon to once again determine if there was an appropriate nexus between the state interest involved and the means used to promote or effectuate that interest. He concluded that providing financial assistance to hardship tenants is not a state interest that can be legitimately furthered by regulating the use of property. *Id.* at 859-64 (Scalia, J., dissenting).

Significantly, for our purposes, Justice Scalia elaborated on the "nexus" requirement for ordinances challenged under the takings clause:

> Traditional land-use regulation (short of that which totally destroys the economic value of property) does not violate this principle because there is a cause-and-effect relationship between the property use restricted by the regulation and the social evil that the regulation seeks to remedy. Since the owner's use of the property is (or, but for the regulation, would be) the source of the social problem, it cannot be said that he has been singled out unfairly. Thus, the common zoning regulations requiring subdividers to observe lot-size and set-back restrictions, and to dedicate certain areas to public streets, are in accord with our constitutional traditions because the proposed property use would otherwise be the cause of excessive congestion.

Id. at 862 (Scalia, J., dissenting). In Justice Scalia's view, the ordinance in *Pennell* did not satisfy the cause-and-effect test because landlords cannot be said to have caused the more general problem that the "hardship" provision was designed to meet: the existence of some renters who are too poor to afford even reasonably priced housing.

powers question.[191]

This may help to explain the unpredictable nature of the Court's regulatory takings cases. But what can explain the apparent inconsistency within the group of uncommitted Justices? A possible explanation is that this particular faction follows an alternative, compromise approach. This approach focuses more particularly on the function the takings clause can perform in mediating between the conflicting concepts of police power and private property than it does on textual interpretation or historical justification for the various theories of just compensation law. A clue here might be *Agins v. City of Tiburon*[192] where the Court, through Justice Powell, frankly admitted that the takings question "necessarily requires a weighing of private and public interests."[193] The decision is neither formalistic nor functional as I have tried to define these terms. The opinion simply makes no choice. Significantly, it was a unanimous decision.

The attempt here to manage competing constitutional values through constitutional balancing is what I think gives rise to the appearance of ambivalence within this group of Justices.[194] But commentators have ably demonstrated that a candid perception of the underlying tensions in this area of the law will reveal how difficult it is to bind these concerns into some guiding, unitary theory for the takings clause. Professor John Costonis described the tension as a conflict between the "welfare" principles of the police power and the "indemnity" principles of the eminent domain power.[195] Professor Carol Rose defined the problem as a continuing tension

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191. Strauss, *Formal and Functional Approaches to Separation-of-Powers Questions—A Foolish Inconsistency*? 72 CORNELL L. REV. 488, 489 (1987). Professor Strauss does not define formal and functional approaches to the separation of powers question in the same manner that I have defined the two approaches here, and indeed this fact points up one of the problems with using such well-worn terms in varying contexts. *See also* Schauer, *Formalism*, 97 YALE L.J. 509, 509-10 (1988) (discussing the widely divergent uses of the term "formalism"). But I cite to the study of Professor Strauss because I think his method of defining and analyzing the different reasoning styles used by various Justices is a useful way to explore those areas of the law plagued by seemingly inconsistent rulings from the Court.

192. 447 U.S. 255 (1980).

193. *Id.* at 261.

194. *See also* Ross, *Modeling and Formalism in Takings Jurisprudence*, 61 NOTRE DAME L. REV. 372, 399-406 (1986) (describing the ambivalence in terms of differences in decisional frameworks that individual Justices bring to the takings cases).

195. Costonis, *supra* note 108, at 478.

> The police and eminent domain powers are anchored in value premises, termed here the welfare and indemnity principles, that frequently function at cross purposes. Through the welfare principle, the police power deliberately envisages the redistribution of utility, often in the form of recognized interests in real property, as a means of furthering the community's "health, safety, morals, or general welfare." Substantively open-ended and therefore uncabinable by present standards, the power sweeps as widely as government's inherent legislative power. The eminent domain power, through its indemnity principle, cuts the other way: its charge is protection of the individual, not the community, by

between the "Lockean/Madisonian/Benthamite argument for acquisition" of property, and the "civil conception of property as a means of developing character and promoting republican participation."[196] Over fifty years ago, Professor Francis Philbrick summarized the conflict simply as a contrast between those looking to individualism to save society and those looking to society to save the individual.[197] With such high stakes, balancing, flawed though it may be, seems for these Justices perhaps to be the most appropriate technique for constitutional adjudication.

In summary, then, one of the essential conflicts in the analysis of regulatory takings in the Rehnquist Court involves a difference in the reasoning

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making the individual whole in the wake of governmental acts that redistribute his or her property rights to others.

Id. (footnotes omitted).

196. Rose, *Mahon Reconstructed: Why The Takings Issue is Still a Muddle*, 57 S. CAL. L. REV. 561, 593 (1984). Professor Rose explains:

> Takings jurisprudence uses two quite divergent vocabularies, each reflecting one of the two divergent concepts of property. The takings dilemma is thus not simply a confusion over legal terms, to be solved by adopting scientific policy. Like the dilemma over state action, the takings dilemma is a legal manifestation of a much deeper cultural and political argument about the civic nature of what Holmes would have called the "human animal."
>
> This impasse is particularly unfortunate because both views of property have considerable commonsensible appeal. The argument for protecting acquisitiveness rests on the intuitive propositions that human beings act to further their own material well-being, that it is fruitless to attempt to suppress this characteristic entirely, and that the ability of individuals to act in their own best interest may have substantial social benefits. The civic argument rests on the equally intuitive propositions that any community—including one that protects private property—must rely on some moral qualities of public spiritedness and mutual forbearance in its individual members to bond the community together, and that a democracy may be particularly dependent on these qualities because it relies not on force, but on voluntary compliance with the norms of the community.

Id. at 596 (footnotes omitted).

197. Philbrick, *Changing Conceptions of Property in Law*, 86 U. PA. L. REV. 691, 728-29 (1938). Again, to place this observation in its context, Professor Philbrick states:

> Manifestly we need a modernized philosophy of property. No mere philosophy of words or aspirations, however. In that respect the contrast between Mill and Comte—one looking to individualism to save society, the other to society to save the individual—is precisely the same as that which existed between Aristotle and Plato. The first tenet of an adequate philosophy must be that property is the creature and dependent of law, including, of course, our constitutions—surely no radical doctrine! On one hand, private property, though admitting that it can only exist by virtue of public protection, pleads payment of taxes as the whole price of that protection, and beyond that claims immunity from all social obligations. On the other hand, the thought of the world for two generations has been tending toward collective Utopias.

Id. (footnotes omitted). Professor Philbrick's remarks were not focused on the just compensation clause and indeed are more readily considered as part of a general discussion of property jurisprudence. Nevertheless, his seminal article provides a good deal of insight into the particular values that are implicated in any discussion of land use and constitutional imperatives. *See generally* Cribbet, *Changing Concepts in the Law of Land Use*, 50 IOWA L. REV. 245 (1965).

styles exhibited by a fluctuating majority of the Justices. One faction follows a traditional, formalistic approach which favors conventional perceptions of property rights. Another faction follows a functionalist approach which centers on the nature of the public activity under review and allows a fair degree of deference to legislative enactments. A third group adopts a loosely constructed balancing test to mediate between the sometime conflicting concepts of police power and private property. Recent cases have been decided by majorities comprised of various combinations of the these constituencies.[198]

But this analysis does not fully explain the inconsistencies in the Court's 1987 takings cases. It does not, for example, explain the inconsistent approaches of Justice Brennan and Justice Stevens. Both are essentially functionalists in their analyses of regulatory takings.[199] Yet Justice Brennan cast a key vote in the *First English* case,[200] in which the Court adopted monetary damages as the sole remedy for temporary regulatory takings. His position in this case is by my description formal in nature.

It is possible to explain this ambivalence by suggesting that Justice Brennan viewed the issue in *First English* as an exceedingly narrow one: *If* the Court finds a taking, should compensation be paid? The answer for

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198. To recapitulate, here is a summary of the votes on the takings cases of the 1986-87 Term:

	Keystone	First English	Nollan
Majority	Stevens	Rehnquist	Scalia
	Blackmun	Brennan	Powell
	Brennan	Marshall	O'Connor
	Marshall	Powell	Rehnquist
	White	Scalia	White
		White	
Dissent	Rehnquist	Stevens	Brennan
	O'Connor	Blackmun (in part)	Marshall
	Powell	O'Connor (in part)	Blackmun (separate opinion)
	Scalia		Stevens (separate opinion)

Interestingly, Justice Powell sided with Chief Justice Rehnquist and Justice Scalia in all three cases. Because he did not author an opinion of his own, it is uncertain whether he rejected the mode of analysis he adopted in the *Agins* decision for the more formal analytical approach.

199. *See* Justice Stevens' majority opinion in Keystone Bituminois Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1987), and his dissent in First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 107 S. Ct. 2378, 2389 (1987) (Stevens, J. dissenting). Justice Brennan's functional approach is set out in his dissenting opinion in Nollan v. California Coastal Comm'n, 107 S. Ct. 3141, 3150 (Brennan, J., dissenting) and his majority opinion in Andrus v. Allard, 444 U.S. 51 (1979). Note in regard to the *Andrus* decision that Justice Scalia and Chief Justice Rehnquist have begun to argue that *Andrus* should be strictly limited to its facts. *See* Hodel v. Irving, 107 S. Ct. 2076, 2084-85 (1987) (Scalia, J., joined by Rehnquist, C. J., & Powell, J., concurring).

200. *First English*, 107 S. Ct. 2378.

Justice Brennan is *yes*. If you transcend police power limitations, you must pay for the constitutional error. But to determine *when* the constitutional violation occurs, Justice Brennan will use a functional analysis: "I believe that States should be afforded considerable latitude in regulating private development, without fear that their regulatory efforts will often be found to constitute a taking."[201] Thus, Justice Brennan may have been attempting to recast the compromise he struck in the *Penn Central* case in a different mold. Instead of vacillating between formal and functional approaches, he has firmly adopted the latter as the appropriate mode of analysis for regulatory takings. But should a violation occur under a functional analysis of a dispute, then compensation must be paid, and this is required by the fifth amendment's takings clause.

The problem is that in the *Nollan* decision a majority of the Court rejected this approach. This is, perhaps, one of the most important aspects of the *Nollan* opinion. In that decision, the Court rejected the functional approach that Justice Brennan was advocating for resolving the substantive issue as to when the "take" occurs. If *Nollan* is read expansively to embrace a large number of "takings" scenarios, it would foreshadow the end of *Penn Central's* deferential approach to legislative restrictions on land use. The *Nollan* opinion, coupled with the damages remedy sanctioned by the Court in the *First English* case, could well subject the actions of state and local governments to severe scrutiny by federal and state courts.[202]

Set against the likelihood of this happening, in a rather determined way, is Justice Stevens' majority opinion in *Keystone*. That decision is cast in functional terms and even opens the door to a reexamination of the proper office of the diminution-in-value test for regulatory takings. Some regulatory measures, such as anti-nuisance ordinances, may avoid conventional takings analysis altogether if the Court is persuaded that a sufficiently weighty, non-discriminitory purpose is the motivating factor behind the legislation.[203] Should this opinion be read expansively, the Court's role in supervising errant local governments could be circumscribed significantly. Thus, to a generous extent, the inarticulated balance between formal and functional approaches to the taking issue adopted by the Court in the *Penn Central* case remains unchanged. It may be ironic that Justice Stevens is primarily responsible for this. After all, he joined then-Justice Rehnquist's dissent in *Penn Central*. But one gets the sense that the Jus-

201. *Nollan*, 107 S. Ct. at 3162 (Brennan, J., dissenting).

202. For commentary suggesting the development of takings doctrine along these lines, see Epstein, *Takings: Descent and Resurrection*, 1987 SUP. CT. REV. 1. *But cf.* Note, *Taking a Step Back: A Reconsideration of the Takings Test of Nollan v. California Coastal Commission*, 102 HARV. L. REV. 448 (1988) (advocating a narrow reading of the *Nollan* opinion).

203. The opinion is admittedly ambiguous on this point. *See* Michelman, *Takings, 1987*, 88 COLUM. L. REV. 1600, 1604 n.19 (1988).

tices individually are evolving in their own analyses of regulatory takings as the Court takes on an increasing number of challenges to state and local government initiatives. Whether any of the major developments discussed in this Article will coalesce into a coherent theory for the takings clause, or at least into a view that will consistently garner a majority of the Justices, remains to be seen.

CONCLUSION

Anyone who analyzes the taking issue comes to appreciate that it involves a clash of deeply felt and basic constitutional values. Moreover, there is no clear consensus on the issue. In such instances, judges may work to find a solution that avoids exalting one of the competing sets of values at the expense of the other.[204]

This is what I think the Court was doing in the *Penn Central* case. That may explain why it is so difficult to understand. *Penn Central* was a composite of constitutional approaches to the taking issue. The Court utilized both functional and formalistic approaches to resolve the dispute without fully recognizing the inconsistent nature of these approaches. But in so doing it accomplished a compromise. In recent cases the particular rules—on damages, on scope of review, and on the proper office of the diminution-in-value test—may have been changed. But the essential compromises of the *Penn Central* case—between formalistic and functional approaches, between those looking to individualism to save society and those looking to society to save the individual—remain intact.

204. See the fitting tribute to Justice Powell by Richard H. Fallon, Jr., *A Tribute to Justice Lewis F. Powell, Jr.*, 101 HARV. L. REV. 399, 402 (1987).