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The Land Use Legacy of Chief Justice Rehnquist and Justice Stevens: Two Views on Balancing Public and Private Interests in Property

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INTRODUCTION

The death of Chief Justice Rehnquist in 2005 and the recent retirement of Justice Stevens provide an appropriate opportunity to examine and compare their respective contributions to land use law. Their tenure on the Supreme Court coincided with a period in which the Court aggressively tackled the question of regulatory takings issues regarding land. Prior to their tenure the Court had paid relatively little attention to takings claims on land for over half a century, leaving the states to judge the propriety of land use controls.[1] Yet in 1978, three years after Justice Stevens's appointment to the Court, the Court decided *Penn Central Transportation Co. v. New York City*,[2] its first major takings case in fifty years. *Penn Central* initiated a period in which the Court decided a significant number of land use cases.[3] Not surprisingly, almost all of the cases have been closely divided, with most decided by 5-4 or 6-3 majorities.[4] Despite a variety of specific issues raised, the cases address the fundamental issues of how society should view property rights and the relationship of private and public interests in land.

Chief Justice Rehnquist and Justice Stevens were active participants in these decisions, typically on opposite sides of closely decided cases.[5] Justice Stevens in particular wrote extensively, penning the only significant decisions upholding

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[1] *See* DANIEL R. MANDELKER ET. AL., PLANNING AND CONTROL OF LAND DEVELOPMENT: CASES AND MATERIALS 209-10 (6th ed. 2005).

[2] Penn Central Transp. Co. v. New York City, 438 U.S. 104 (1978).

[3] Since *Penn Central*, the Supreme Court decided a number of regulatory takings cases involving land use controls. Many of those decisions involved procedural issues, especially concerning issues of "ripeness." *See, e.g.*, MacDonald, Sommer & Frates v. Yolo Cnty., 477 U.S. 340 (1986); Williamson Cnty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172 (1985). A number of decisions, however, more directly addressed the substantive rules of takings jurisprudence, including: Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302 (2002); Palazzolo v. Rhode Island, 533 U.S. 606 (2001); Dolan v. City of Tigard, 512 U.S. 374 (1994); Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992); Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987); First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304 (1987); Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1987); Agins v. City of Tiburon, 447 U.S. 255 (1980).

[4] Examples of significant decisions decided by votes of 5-4 include: Palazzolo v. Rhode Island, 533 U.S. 606 (2001); Dolan v. City of Tigard, 512 U.S. 374 (1994); Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992); Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987); Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1987). Examples of 6-3 decisions include Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302 (2002) and First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304 (1987).

[5] For examples of Rehnquist majority opinions with Stevens dissents, see Dolan v. City of Tigard, 512 U.S. 374 (1994) and First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304 (1987). For examples of Stevens majority opinions with Rehnquist dissents, see Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302 (2002) and Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1987).

government actions[6] and writing dissents to landowner victories.[7] Chief Justice Rehnquist wrote less frequently, perhaps because he was typically in the majority, but did author two leading majority opinions,[8] as well as several significant dissents.[9] Taken together, their respective opinions represent two contrasting views on how government should regulate land in our society.

At its core, the regulatory takings cases involve how society should understand the balance between private and public interests in land. American law has long viewed private property as having a public as well as a private component, and held that use and control of private property must to some degree be subject to broader public interests.[10] Indeed, on this basic point all nine justices of the Court, including its most conservative members, agree.[11] Private property rights are nowhere near absolute and can be made subject to significant government regulations to further the public good. This view of property rights is nothing new, with American land use law long recognizing that land ownership involves both individual rights and a responsibility to the broader community.[12]

There is less agreement on how the balance should be drawn between these

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[6] *See* Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302 (2002); Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1987).

[7] *See* Palazzolo v. Rhode Island, 533 U.S. 606, 637 (2001) (Stevens, J., dissenting); *Dolan*, 512 U.S. at 396 (Stevens, J., dissenting); *Lucas*, 505 U.S. at 1061 (Stevens, J., dissenting); *First English*, 482 U.S. at 322 (Stevens, J., dissenting).

[8] *See Dolan*, 512 U.S. 374 (1994); *First English*, 482 U.S. 304 (1987).

[9] *See Tahoe-Sierra*, 535 U.S. at 343 (Rehnquist, C.J., dissenting); *Keystone*, 480 U.S. at 506 (Rehnquist, J., dissenting).

[10] *See, e.g.*, Hadacheck v. Sebastian, 239 U.S. 394, 410 (1915) (holding that private property interests must at times "yield to the good of the community"); Hudson Cnty. Water Co. v. McCarter, 209 U.S. 349, 355 (1908) (stating that private property limited by other interests, including exercise of the police power "to protect the atmosphere, the water and the forests"); Mugler v. Kansas, 123 U.S. 623, 665 (1887) ("[A]ll property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community.").

[11] *See, e.g.*, Dolan v. City of Tigard, 512 U.S. 374, 384-85 (1994) (majority opinion of Rehnquist, C.J., joined by O'Connor, Scalia, Kennedy and Thomas).

[12] For earlier Supreme Court decisions reflecting the principle that private property rights are limited by broader public concerns, see Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413 (1922) ("As long recognized some values are enjoyed under an implied limitation and must yield to the police power."); Hadacheck v. Sebastian, 239 U.S. 394, 410 (1915) (private property interests must at times "yield to the good of the community" for the sake of "progress"); Hudson Cnty. Water Co. v. McCarter, 209 U.S. 349, 355 (1908) (private property limited by other public interests, including exercise of police power "to protect the atmosphere, the water and the forests"); Mugler v. Kansas, 123 U.S. 623, 665 (1887) ("[A]ll property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community."). A number of academic commentators have also chronicled the substantial ways in which early American law subjected private property rights to the broader public good. *See, e.g.*, Carol M. Rose, *A Dozen Propositions on Private Property, Public Rights, and the New Takings Legislation*, 53 WASH. & LEE L. REV. 265 (1996); Myrl L. Duncan, *Property as a Public Conversation, Not a Lockean Soliloquy: A Role for Intellectual and Legal History in Takings Analysis*, 26 ENVTL. L. 1095 (1996).

two concerns, and it is here that Rehnquist and Stevens diverged and generally represented two lines of thinking. Rehnquist, representing the more conservative wing of the Court that has been dominant in land use matters in recent years, emphasized the burden on individual rights in his approach to takings jurisprudence. To be sure, Rehnquist recognized a significant responsibility to the broader public and accepted the need for public controls on the use of property.[13] Yet his regulatory takings opinions focused on the rights of the landowner and the need to guard against the excesses of government regulation of private property. As such, Rehnquist was concerned with the degree of burden on landowners, more than the justifications for the restrictions.[14]

Stevens, though certainly cognizant of landowner rights and burdens, placed a greater emphasis on a landowner's responsibility to the community. For Stevens the extent and severity of regulatory burdens were not as significant as the justification for the burden and how evenly shared the burden is among similarly situated landowners.[15] Stevens favored a community focused approach that gave significant weight to the importance of a restriction to the community and required burdens to be mutually shared. To the extent individual burdens are evaluated, Stevens put them in a broad context. For Stevens, concerns about landowner burdens turned not so much on their severity but on whether individuals were unfairly singled out to carry such burdens.[16]

These two views of property rights, one emphasizing individual rights and burdens and the other responsibility to the community, are in fact simply reflections of two competing visions of American land use law that have long informed takings jurisprudence.[17] Indeed, the debate over individual rights and

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[13] *See Dolan*, 512 U.S. at 384-85 (recognizing "authority of local governments to engage in land use planning").

[14] *See, e.g.*, *Tahoe-Sierra*, 535 U.S. at 343-46 (Rehnquist, C.J., dissenting) (emphasizing dramatic impact on landowner).

[15] *See* Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1067, 1075-76 (1992) (Stevens, J., dissenting).

[16] *See id.* at 1074-75 (emphasizing that takings analysis should turn on whether law is general in scope or targets a few individuals).

[17] A number of scholars have argued that the Takings Clause should reflect a strong emphasis on private property rights, substantially limiting government regulatory efforts, at least where there is substantial economic impact and a lack of reciprocal benefits. The leading proponent for such a position is Richard Epstein, who in his influential book *Takings: Private Property and the Power of Eminent Domain*, argues for a near absolute view of private property rights. On that basis he proposes that any land use restriction, including zoning, constitutes a taking because certain use or development rights have been removed from the landowners' bundle of rights. *See* RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 130-34 (1985). Epstein would recognize exceptions for regulations designed to stop nuisances, *see id.* at 126-30, and where reciprocal benefits are greater than the regulatory burden, *see id.* at 195-97. Other scholars, though not as extreme as Epstein, have also advocated interpretations of the Takings Clause quite protective of private property rights. *See, e.g.*, Douglas W. Kmiec, *The Original Understanding of*

community responsibility is one that goes far beyond land use law, and touches upon a variety of issues. It also is central to the ongoing discussion about the founders' vision for America, whether it was grounded in Lockean natural rights or reflected a republican vision stressing civic virtue.[18] The former stresses the rights of the individual while the latter emphasizes responsibility to the community.[19]

The debate between individual liberty and communal responsibility is one that has special vitality when discussing government control of land and

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the Taking Clause is Neither Weak Nor Obtuse, 88 COLUM. L. REV. 1630 (1988).

In contrast, numerous other scholars have argued for a more community-focused understanding of the Takings Clause, in which private property rights must yield to the greater public interest. In taking this position, scholars have noted that our legal system has long recognized that private property interests are subject to public interests, in which property ownership must be seen in a broader social setting with responsibilities as well as rights. *See, e.g.*, Leslie Bender, *The Takings Clause: Principles or Politics?*, 34 BUFF. L. REV. 735, 751-52 (1985) (discussing restrictions on perceived noxious activity in early America); John F. Hart, *Colonial Land Use Law and Its Significance for Modern Takings Doctrine*, 109 HARV. L. REV. 1252 (1996) (discussing numerous public limitations on private property to further public good during colonial era); Carol M. Rose, *A Dozen Propositions on Private Property, Public Rights, and the New Takings Legislation*, 53 WASH. & LEE L. REV. 265 (1996). On that basis, some have argued that regulatory takings should only occur with restrictions on existing uses of land, but not with restrictions on potential uses, *see* John A. Humbach, *Law and a New Land Ethic*, 74 MINN. L. REV. 339 (1989), while others have argued that regulatory takings should be abolished altogether, *see* J. Peter Byrne, *Ten Arguments for the Abolition of the Regulatory Takings Doctrine*, 22 ECOLOGY L.Q. 89 (1995).

[18] A number of scholars have noted that a natural rights/Lockean understanding of our founding ideology was dominant until the 1960s. *See, e.g.*, STEVEN M. DWORETZ, THE UNVARNISHED DOCTRINE: LOCKE, LIBERALISM AND THE AMERICAN REVOLUTION 4-6 (1990); Michael W. McConnell, *Tradition and Constitutionalism Before the Constitution*, 1998 U. ILL. L. REV. 173, 175-76. Several prominent early works advocating a Lockean natural rights ideology are: CARL L. BECKER, THE DECLARATION OF INDEPENDENCE: A STUDY IN THE HISTORY OF POLITICAL IDEAS (1958); EDWARD S. CORWIN, THE "HIGHER LAW" BACKGROUND OF AMERICAN CONSTITUTIONAL LAW (1929). Two recent defenses of Lockean natural rights as the dominant ideological basis for our founding are DWORETZ, *supra*, and MICHAEL P. ZUCKERT, THE NATURAL RIGHTS REPUBLIC: STUDIES IN THE FOUNDATION OF THE AMERICAN POLITICAL TRADITION (1996).

Two leading works advancing the argument that "classical republicanism" was the ideological basis of our founding are J.G.A. POCOCK, THE MACHIAVELLIAN MOMENT: FLORENTINE POLITICAL THOUGHT AND THE ATLANTIC REPUBLICAN TRADITION (1975) and GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776-1787 (2nd ed. 1998).

[19] *See* Henry A. Span, *Public Choice Theory and the Political Utility of the Takings Clause* 40 IDAHO L. REV. 11, 61 (2003). *See also* Curt Bentley, Comment, *Constrained by the Liberal Tradition: Why the Supreme Court Has Not Found Positive Rights in the American Constitution* 2007 B.Y.U. L. REV. 1721, 1736-37 ("Civic Republicanism's focus on the individual's duty to the public stands in contrast to the individual-centric Lockean liberalism."); Tania Tetlow, *The Founders and Slavery: A Crisis of Conscience,* 3 LOY. J. PUB. INT. L. 1, 26 (2001) ("[R]epublicanism expresses the goal of politics as the furtherance of the public good, rather than the protection of the individual's pursuit of her own goods.").

Scholars have at times related the Lockean and civic republican views to takings jurisprudence. *See, e.g.*, EPSTEIN, *supra* note 17 (stressing Lockean foundation of emphasis on private property rights); CAROL M. ROSE, PROPERTY AND PERSUASION: ESSAYS ON THE HISTORY, THEORY AND RHETORIC OF OWNERSHIP 61-62 (1994) (discussing civic republican influences on American property law and regulatory takings).

constitutional takings concerns.[20] It would be too much to say that Rehnquist and Stevens neatly corresponded to the libertarian and civic republican views of property rights - both of their views were too nuanced, and too pragmatic, for that. Yet, in a rough way, they represent two competing philosophies frequently reflected in the takings debate in recent years and which will likely continue in various forms in the future.

Ironically, although Rehnquist and Stevens came to represent two competing visions of how public and private interests in land should be balanced, they were two of the three dissenting justices in the first significant takings case in recent years, *Penn Central Transportation Co. v. New York City*.[21] In that case Justice Stevens, along with then Chief Justice Burger, joined in then Justice Rehnquist's dissent, taking to task the majority's rejection of a takings challenge to New York City's Landmark Preservation Law.[22]

Another irony of sorts is that the *Penn Central* decision itself, long ignored in the 1980s, has reasserted itself with a vengeance in recent years and is now the Court's primary analytical framework for deciding takings cases.[23] This hardly makes the views of Rehnquist and Stevens irrelevant. Not only did their own views on takings evolve since their *Penn Central* dissent (especially Justice Stevens), but both also adjusted themselves quite well to the *Penn Central* balancing test.[24] Indeed, the test is open-ended enough that it could easily accommodate the distinct land use visions of Rehnquist and Stevens.

This article will examine the separate and combined legacies of Chief Justice Rehnquist and Justice Stevens in the area of regulatory takings jurisprudence as applied to land use controls.[25] Part one will first examine the Supreme Court's takings jurisprudence during the tenure of Chief Justice Rehnquist and Justice Stevens, with special attention to their own contributions to regulatory takings analysis.[26] It will begin with the *Penn Central* decision and the

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[20] *See* Span, *supra* note 19 at 61 ("This contrast between classical liberalism's and civic republicanism's views of formal constitutional limitations is intensified in the case of private property.").

[21] Penn Central Transp. Co. v. New York City, 438 U.S. 104 (1978).

[22] *See id.* at 138-53 (Rehnquist, J., dissenting).

[23] *See* Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302 (2002); Palazzolo v. Rhode Island, 533 U.S. 606, 617-18, 632 (2001). *See also* Nestor M. Davidson, *The Problem of Equality in Takings*, 102 N.W. L. REV. 1, 7 (2008) (calling *Penn Central* the "lodestar of regulatory takings jurisprudence").

[24] *See Tahoe-Sierra*, 535 U.S. at 321, 342 (Stevens's majority opinion emphasizing importance of analyzing most taking cases under *Penn Central* test); Palazzolo v. Rhode Island, 533 U.S 606, 632 (2001) (Kennedy majority opinion, joined by Rehnquist, noting importance of applying *Penn Central* test).

[25] For an earlier discussion of Justice Stevens's contribution to regulatory takings doctrine, see John D. Echeverria, *The Triumph of Justice Stevens and the Principle of Generality*, 7 VT. J. ENVTL. L. 22 (2005-2006).

[26] Because this article focuses on Chief Justice Rehnquist and Justice Stevens's contributions to

Rehnquist/Stevens dissent and then examine several other significant decisions that form the core of the Court's recent takings jurisprudence. In doing so, the article will pay particular attention to opinions by Chief Justice Rehnquist and Justice Stevens.

Part two of the article will then briefly outline the land use visions presented by Rehnquist and Stevens. As noted above, in its simplest form the Rehnquist vision is one emphasizing burdens on individual rights, while Stevens places a greater emphasis on a landowner's responsibility to the community and focuses on the generality of regulation and the justification for restrictions. The article will attempt to elaborate on how Rehnquist and Stevens's views support their respective visions. Part three will then examine three specific issues relevant to takings jurisprudence and the respective contribution Rehnquist and Stevens made to each. Those issues are (1) the role of the state's regulatory interest in takings analysis, (2) how to define the relevant property for analyzing economic impact, and (3) reciprocity of advantage and generality of regulation.

I. MODERN TAKINGS JURISPRUDENCE

Modern takings jurisprudence tracks its origins to the Supreme Court's seminal 1922 decision in *Pennsylvania Coal Co. v. Mahon*,[27] in which the Court first recognized the idea of a regulatory taking. In *Pennsylvania Coal* the Court struck down a statute that required coal companies to keep a portion of coal in the ground to avoid subsidence to surface structures.[28] The Court acknowledged that government could not go on if it had to pay every time its regulations reduced the value of land[29] but stated that if a regulation "goes too far it will be recognized as a taking."[30] The Court concluded that the regulation under review had gone "too far" and constituted a taking, but offered little explanation other than to state that the statute made the mining of anthracite coal "commercially impracticable."[31]

The constitutional significance of *Pennsylvania Coal* was considerable, because it established that the mere regulation of property might constitute a taking if the economic impact of the regulation is too great. However, the Court gave little guidance on how that determination was to be made. This potentially opened the door to numerous takings challenges, especially as public land use

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regulatory takings jurisprudence, it will not examine the significant eminent domain decision in Kelo v. City of New London, 545 U.S. 469 (2005). Not surprisingly, though, Stevens and Rehnquist were also on opposite sides in that case, with Stevens writing the majority opinion and Rehnquist joining Justice O'Connor's dissent.

[27] Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922).

[28] *See id.* at 412-16.

[29] *Id.* at 413.

[30] *Id.* at 415.

[31] *Id.* at 414-15.

regulations began to grow in frequency in the early and middle part of the twentieth century.[32] At the same time, though, the Court was clear that not all diminutions in value are takings, only more severe ones, which suggests a balance of both private and public interests in land use.

Notwithstanding the impact of *Pennsylvania Coal*, the Court was largely absent from the regulatory takings field for more than half a century.[33] The Court did address takings on occasion with regard to physical invasions of private property and began to establish a principle that such intrusions into the right to exclude will almost always be a taking.[34] It also expanded the concept of "public use" for purposes of exercising eminent domain, making it essentially coterminous with the contours of the police power.[35] But the Court was still silent on the issue of when land use regulations go too far as to be a taking, even though the types and extent of land use controls exploded during this time.[36]

This silence ended in 1978 with the Court's takings decision in *Penn Central Transportation Co. v. New York City*.[37] *Penn Central* was the Court's first significant regulatory takings case since *Pennsylvania Coal* and has proven to be a case of enduring significance.[38] It also marked the start of an era in which the Supreme Court has much more aggressively engaged the regulatory takings issue in the context of land use controls. Over the next three decades the Court decided a number of takings cases, many of them of notable scope.[39] Interestingly, *Penn Central* also closely corresponded with the appointments to the Supreme Court of Justice Rehnquist in 1972 and Justice Stevens in 1975. Thus, Rehnquist and Stevens's tenure on the Court largely paralleled the Court's heightened interest in the regulatory takings issue. This section will briefly highlight the Court's principal cases during this period, beginning with *Penn*

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[32] *See* MANDELKER, *supra* note 1, at 209-10.

[33] Four years after *Pennsylvania Coal*, however, the Court upheld the constitutionality of zoning as a land use technique in Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 387 (1926). *Euclid* did not involve a taking challenge as such, so the rather ambiguous standard established in *Pennsylvania Coal* was not brought into play, but *Euclid* reaffirmed that government regulatory efforts that diminish land values are not per se unconstitutional. Most importantly, it established that there is a significant public interest in controlling how private property is used that justifies limitations placed on private property rights, which in many instances must yield to the greater public interest. At the same time, nothing in *Euclid* undermined the basic principle established in *Pennsylvania Coal*, that when the economic impact of a regulation on private interests becomes too great, a taking has occurred.

[34] *See* Griggs v. Allegheny Cnty., 369 U.S. 84 (1962); United States v. Causby, 328 U.S. 256 (1946).

[35] *See* Berman v. Parker, 348 U.S. 26 (1954).

[36] Land use regulations, especially zoning, became widespread in the United States from the 1920s on. *See generally* MANDELKER, *supra* note 1, at 209-10.

[37] Penn Central Transp. Co. v. New York City, 438 U.S. 104 (1978).

[38] *See* Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 321, 342 (2002); Palazzolo v. Rhode Island, 533 U.S. 606, 632 (2001).

[39] *See supra* note 3.

Central. It will then discuss five significant decisions in subsequent years, in which Rehnquist and Stevens played primary roles.

A. Penn Central

Penn Central Transportation Co. v. New York City involved a takings challenge to New York City's Landmark Preservation Law. Through that law Grand Central Terminal was recognized as a "landmark,"[40] thus requiring the Landmark Preservation Commission to approve any exterior changes to the building even if the changes were consistent with applicable zoning regulations. Penn Central, as the owner of Grand Central Terminal, sought approval of two alternative plans to build either a fifty-three or fifty-five story addition to the building, both of which met zoning requirements.[41] The Commission rejected both plans on the grounds that they would aesthetically denigrate the landmark,[42] in effect greatly reducing the previously existing and quite valuable air rights that Penn Central had. Penn Central then challenged the application of the Landmark Law to its property as a taking.[43]

A majority of the Supreme Court held the law constitutional, stating that both facially and as applied to Grand Central Terminal the law did not constitute a taking. The Court began its analysis by noting that it had previously eschewed any "set formula" for determining takings, preferring instead to engage in "essentially ad hoc, factual inquiries."[44] It then identified three factors it considered particularly relevant in deciding takings cases: the economic impact of the regulation, the degree of interference with investment-backed expectations, and the character of the government action.[45]

On that basis the Court found the Landmark Law valid, both in terms of its general workings and as applied to Penn Central's specific property. As to the law's general impact, the Court stated that diminution in value, though a relevant consideration, cannot by itself constitute a taking.[46] Similarly, neither the subjective nature of the landmark determination nor the non-comprehensive nature of the law were problematic, because Penn Central had failed to challenge the landmark designation and the law was part of a broader regulatory effort that benefitted as well as burdened affected properties.[47] As applied to the terminal itself, the Court stated that the regulation still permitted a "reasonable

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[40] *See Penn Central,* 438 U.S. at 115-16.

[41] *Id.*

[42] *See id.* at 117-18.

[43] *Id.* at 116-19.

[44] *Id.* at 123-24.

[45] *Id.* at 124.

[46] *See id.* at 131.

[47] *See id.* at 133-35.

return" on the investment in land and that there was no interference with Penn Central's expectations, since the terminal could still be used for its original purpose as a railroad terminal.[48] Thus, even though the Landmark Law in effect eliminated more intensive development opportunities previously permitted by applicable zoning, the assurance of a reasonable return and continuation of previous uses that formed earlier expectations negated any takings claim.

Justice Rehnquist wrote a dissenting opinion, joined by Chief Justice Burger and Justice Stevens. Rehnquist began his analysis by stating that the Landmark Law clearly destroyed valuable property rights held by Penn Central, which were the rights to develop freely the airspace above the terminal. He stated:

While neighboring landowners are free to use their land and "air rights" in any way consistent with the broad boundaries of New York zoning, Penn Central, absent the permission of appellees, must forever maintain its property in its present state. The property has been thus subjected to a nonconsensual servitude not borne by any neighboring or similar properties.[49]

Rehnquist then proceeded to state that such a destruction of property rights is a taking unless it falls within one of two previously recognized exceptions. First is where the government regulation, though destroying previously existing property rights, is designed to prevent a nuisance. Labeling this the "nuisance exception" to takings analysis, Rehnquist stated that in several previous cases the Court had held that there is no taking where government is prohibiting noxious uses, even if the prohibition results in substantial diminution in value and singles out a particular landowner.[50] He stressed, however, that the "nuisance exception . . . is not coterminous with the police power itself," but instead is limited to restricting land uses that pose a health or safety danger to others.[51] For that reason, Rehnquist stated that the Landmark Law could not be viewed as preventing a nuisance. The proposed addition would comply with all zoning requirements and do nothing that surrounding properties were not already doing. Rather, the Landmark Law was designed to secure the historic and architectural benefits of the building, not to prevent harm to others from proposed changes.[52]

Rehnquist also stated that the second exception to takings, where a regulation secures an average reciprocity of advantage, did not apply. This exception recognizes that even a non-injurious use can be prohibited "if the prohibition

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[48] *See id.* at 136.

[49] *Id.* at 143.

[50] *See id.* at 144-45. Rehnquist cited Goldblatt v. Hempstead, 369 U.S. 590 (1962), Hadacheck v. Sebastian, 239 U.S. 394 (1915), and Mugler v. Kansas, 123 U.S. 623 (1887) as representing the "nuisance exception," in which government can impose substantial economic burdens on individual landowners in order to prevent what would have constituted a common law nuisance.

[51] *Penn Central*, 438 U.S. at 145 (Rehnquist, J., dissenting).

[52] *See id.* at 145-46.

applies over a broad cross section of land and thereby 'secure[s] an average reciprocity of advantage.'"[53] For this reason, most zoning restrictions do not constitute a taking because, even though property values might be reduced, "the burden is shared relatively evenly" and burdens that might exist are at least partially offset by benefits.[54] Yet the Landmark Law, by singling out a few properties for unique restrictions not shared by neighboring properties, lacked any supporting reciprocity. Instead, Rehnquist said the Landmark Law imposed a burden "on less than one-tenth of one-percent of the buildings in New York City for the general benefit of all its people."[55] To him, "[i]t is exactly this imposition of general costs on a few individuals at which the 'taking' protection is directed."[56]

For Rehnquist, therefore, any substantial regulatory burden on land needed to be justified in one of two ways to avoid resulting in a taking: it either was preventing a noxious use or was part of a broadly applicable regulatory scheme that generated some reciprocity of advantage. These two themes of nuisance analysis and reciprocity of advantage, emphasized by the Rehnquist dissent, continued to assert themselves in subsequent years, yet neither became a central part of the Court's takings analysis. As it were, the majority's three factor test, examining the character of the government action, economic impact, and interference with investment-backed expectations, has become the primary focus of takings analysis,[57] with nuisance and reciprocity of advantage playing minor roles within that analysis.

As we will see, Rehnquist and Stevens themselves later diverged in their own understanding of how the factors of nuisance and reciprocity of advantage should apply in regulatory takings analysis. Stevens became perhaps the foremost champion on the Court for focusing on the generality of a regulation in takings jurisprudence,[58] a concept closely tied to reciprocity of advantage. For Stevens, however, the primary focus was whether a regulation was broadly applied or singled out a few landowners, rather than on the degree of reciprocal benefits actually generated by a restriction.[59] In contrast, Rehnquist saw regulatory breadth and reciprocity of advantage as intricately tied together. For Rehnquist a regulation was truly general only if there was some symmetry

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[53] *Id.* at 147 (quoting Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922)).

[54] *Id.*

[55] *Id.*

[56] *Id.*

[57] *See* Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302 (2002); Palazzolo v. Rhode Island, 533 U.S. 606, 617-18, 632 (2001).

[58] *See* Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1072-75 (1992) (Stevens, J., dissenting).

[59] *See id.* at 1074-75.

between those burdened and those benefitted by the regulation.[60]

Rehnquist and Stevens also diverged on the extent to which a nuisance rationale can justify imposing significant economic costs on landowners. As we will see, the Court has adopted a nuisance exception for takings but has limited it to what would clearly constitute a common law nuisance.[61] This limited understanding of the nuisance exception is quite apparent from the tone of Rehnquist's *Penn Central* dissent and is a position he continued to support. In contrast, Stevens exhibited a willingness to accept a broader array of state justifications, even if the regulation resulted in substantial economic loss.[62]

At the time, however, Rehnquist and Stevens appeared to be in general agreement in *Penn Central*. In fact, for most of the next decade the two remained in substantial agreement as the Court began to take a greater number of land use regulatory takings cases. For example, in *Agins v. City of Tiburon*,[63] a unanimous Court held that a city ordinance which permitted between one and five houses on the landowner's five-acre tract did not constitute a taking. Among other matters, the Court noted that the ordinance provided landowners with reciprocity of advantage, because it was a broad-based zoning ordinance, and that on its face the ordinance did not deprive the owner of economic viability.[64] A year later the Court, in a 6-3 opinion joined by both Rehnquist and Stevens, held that even a minimal physical invasion authorized by government constituted a per se taking requiring compensation.[65] The remaining cases in the mid-80s were dismissed by the Court on ripeness grounds, an issue on which Rehnquist and Stevens agreed in two of the three cases.[66]

The general agreement of Rehnquist and Stevens on takings issues lasted for about a decade, a period in which the Court was increasingly taking regulatory takings cases but did not issue what could be considered a major takings opinion after *Penn Central*. This came to an end in 1987, with what became known in land use circles as the 1987 takings trilogy.[67] These three cases not only marked a significant development in the Supreme Court's takings jurisprudence but also

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[60] This sentiment was arguably expressed in Rehnquist's dissent in *Tahoe-Sierra,* 535 U.S. at 354 (Rehnquist, C.J., dissenting). *See also Penn Central*, 438 U.S. at 147-48 (Rehnquist, J., dissenting).

[61] *See Lucas*, 505 U.S. at 1026-31.

[62] *See id.* at 1072-74 (Stevens, J., dissenting).

[63] Agins v. City of Tiburon, 447 U.S. 255 (1980).

[64] *See id.* at 259, 262-63.

[65] *See* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982).

[66] *See* MacDonald, Sommer & Frates v. Yolo Cnty., 477 U.S. 340 (1986); Williamson Cnty. Reg'l Planning Comm'n v. Hamilton Bank, 473 U.S. 172 (1985); San Diego Gas & Elec. Co. v. San Diego, 450 U.S. 621 (1981). Both Rehnquist and Stevens agreed that the takings issue was not ripe in both *Hamilton Bank* and *San Diego Gas & Electric,* but disagreed in *MacDonald*. In *MacDonald* Stevens wrote the majority opinion saying that the takings issue was not ripe, while Rehnquist wrote a dissent.

[67] *See, e.g.*, MANDELKER, *supra* note 1, at 127.

a sharp break between Rehnquist and Stevens on takings issues. The two justices were on opposite sides in all three cases, with each writing one majority opinion and one primary dissent. This established a trend continuing for the next two decades, with the two justices disagreeing on every significant takings decision and often authoring majority opinions or major dissents. The next subsection will examine the first two cases of the 1987 trilogy. The third case in the trilogy, *Nollan v. California Coastal Commission*,[68] though quite significant, involved takings standards for exactions, which will be discussed later with the Court's decision in *Dolan v. City of Tigard*.[69]

B. The 1987 Takings Trilogy

1. Keystone Bituminous Coal Ass'n v. DeBenedictis

The first of the 1987 trilogy of takings cases was *Keystone Bituminous Coal Ass'n v. DeBenedictis*,[70] a case involving facts remarkably similar to those of *Pennsylvania Coal Co. v. Mahon*. At issue in *Keystone* was a set of regulations promulgated pursuant to the Pennsylvania Subsidence Act, the purpose of which was to regulate coal mining to avoid or minimize subsidence damage to surface structures.[71] The regulations used a formula that required fifty percent of the coal near buildings to be kept in place to avoid subsidence.[72] A group of coal companies challenged the Act and regulations on their face, arguing that they amounted to a taking under the principles of *Pennsylvania Coal*.[73]

The Supreme Court, in a 5-4 decision by Stevens, rejected the takings challenge and found the Act constitutional. Justice Stevens distinguished *Keystone* from *Pennsylvania Coal* on two grounds. First, unlike *Pennsylvania Coal*, where the statute benefited a few private parties, the Subsidence Act articulated a variety of public interests specifically furthered by the Act, including preservation of the public health, protection of the environment, and preservation of the area's fiscal integrity.[74] Thus, Stevens saw the Act as protecting against concerns "tantamount to a public nuisance," which weighed heavily in its favor.[75] Second, unlike *Pennsylvania Coal*, where the regulation had a severe economic impact on the affected coal company, the economic impact of the challenged regulations was minimal, at the least in terms of a

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[68] Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987).

[69] Dolan v. City of Tigard, 512 U.S. 374 (1994).

[70] Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1987).

[71] *Id.* at 477.

[72] *See id.* at 476-77.

[73] *See id.* at 478-79, 481.

[74] *Id.* at 488.

[75] *See id.* at 485-92.

facial challenge. Stevens noted that not only did the regulations permit companies to remove fifty percent of the coal in affected areas, but on average only two percent of a company's total coal had to be left in the ground.[76] At least facially, this was far from a substantial economic impact.[77]

In reaching these conclusions, Stevens touched upon two themes that became central to his takings jurisprudence. First, he emphasized the strong public purpose supporting the Act, suggesting that this alone might be enough to avoid a taking.[78] In a sense this merely recognized the nuisance exception stated by the Rehnquist dissent in *Penn Central*, because Stevens stated that the dangers avoided by the Surface Subsidence Act in *Keystone* were "akin to a public nuisance."[79] Yet the tone of Stevens's opinion extended beyond that exception, or at least accommodated a very broad definition of public nuisance. He emphasized that the nature of the state's interest was critical to takings analysis.[80] Perhaps most significant, however, was Stevens's deference to the state's assertion of a strong public interest. After all is said and done, the real difference regarding the state's interest between *Pennsylvania Coal* and *Keystone* is this: in *Keystone* the state was careful to articulate in its preamble a strong public justification for the legislation.

Second, in analyzing the statute's economic impact, Stevens applied a broad view of the property, using the totality of the possible coal holdings as the denominator for analysis. The issue of how broadly or narrowly to define the property for analyzing economic impact is often referred to as conceptual severance, and has emerged as a critical one in takings jurisprudence.[81] Put simply, the more broadly the property is defined the more minimal is the resulting economic impact of any government regulation, while the more narrowly the property is defined the greater the economic impact.[82] The majority in *Penn Central* clearly rejected the idea of only focusing on the regulated part of the property, instead requiring that the property be treated as a whole for purposes of economic impact. Stevens reinforced this analysis in *Keystone*, rejecting any attempt to limit the relevant property to that left in the ground.[83] Such a narrow view of the relevant property would have suggested a dramatic economic impact. Instead, Stevens broadened the relevant property to

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[76] *Id.* at 496.

[77] *See id.* at 493-99.

[78] *Id.* 487-88.

[79] *Id.* at 488.

[80] *Id.* at 488-89.

[81] *See, e.g.*, John E. Fee, *Unearthing the Denominator in Regulatory Takings Claims*, 61 U. CHI. L. REV. 1535 (1994); Carol M. Rose, Mahon *Reconstructed: Why the Takings Issue is Still a Muddle,* 57 S. CAL. L. REV. 561, 566-69 (1984). *See generally infra* Part III.B.

[82] *See* Penn Central Transp. Co. v. New York City*,* 438 U.S.104, 130-31 (1978).

[83] *Keystone*, 480 U.S. at 496.

not only all the coal in affected areas, but even all the coal that companies could potentially mine, suggesting a minimal economic impact.[84]

Justice Rehnquist wrote a dissent, joined by three other justices, stating that *Pennsylvania Coal* was controlling and disagreeing with both of the grounds for the majority opinion. First, Rehnquist rejected Stevens's characterization of the statute as fitting within the "nuisance exception" to takings doctrine. He stated that the central purposes behind the statute focused more on economic concerns, such as economic development and maintenance of the tax base, which hardly pertain to traditional nuisance concerns.[85] Second, he rejected Stevens's broad characterization of the property in question, instead asserting that the statute completely destroyed an identifiable segment of property, the support estate.[86] As such, the economic impact was near total and constituted a taking.[87]

A comparison of the two opinions reflects disagreement on two different aspects of takings analysis, with Justice Stevens taking a broad perspective on each and Justice Rehnquist adopting a narrower construct. The first aspect is how the asserted state interest should affect the takings equation and how broad the nuisance exception should be. Stevens in effect gave a very broad reading to the nuisance exception to takings analysis, noting not only the safety concerns behind the Act but also environmental and economic considerations.[88] He also stressed in several places that the important purposes behind the Act are critical factors in takings calculus,[89] arguably suggesting a balancing of interests. In contrast, Justice Rehnquist seemed to limit any nuisance exception to threats to the public health and safety that would correspond to traditional nuisance categories.[90] Thus, though both justices recognized a nuisance exception for takings, Stevens appeared to construe the concept quite broadly, while Rehnquist would limit it to a narrow category of activities.[91]

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[84] *Id.* at 498-99.

[85] *See id.* at 509-15, (Rehnquist, C.J., dissenting). Rehnquist first argued that the asserted purposes were essentially the same under the Kohler Act in *Pennsylvania Coal* as under the Subsidence Act in *Keystone*, with both designed for largely economic purposes. *See id.* at 509-11. He then argued that the "nuisance exception" to the Takings Clause recognized in previous cases was a very narrow one, and was inapplicable in this case for two reasons. First, the rationales supporting the Subsidence Act went far beyond truly noxious concerns, and second, the Act completely extinguished the value of a parcel of property. *See id.* at 511-15.

[86] *Id.* at 518-19.

[87] *See id.* at 515-18.

[88] *See id.* at 488 (majority opinion).

[89] *Id.* ("[T]he nature of the State's interest in the regulation is a critical factor in determining whether a taking has occurred.").

[90] *Id.* at 511-12 (Rehnquist, C.J., dissenting).

[91] *See id.* at 512. Rehnquist made clear that he viewed the "nuisance exception" in much more narrow terms than Stevens:

> The ease with which the Court moves from the recognition of public interests to the assertion that the activity here regulated is "akin to a public nuisance" suggests an

Second, Stevens and Rehnquist took dramatically different approaches to how broadly to define the relevant parcel of property for purposes of evaluating economic impact. For Stevens, the regulation's economic impact was to be based on all the coal that could be mined, and not just the coal that had to stay in the ground. Given this broad definition of the affected property interest, the economic impact was minimal, with the regulation prohibiting use of an average of two percent of coal in the ground.[92] In contrast, Rehnquist defined the relevant property as only the support estate itself, in other words, the coal that had to stay in the ground. Under this narrow construction, the impact was near total, constituting a complete elimination of previously existing rights.[93]

Each of these two issues is critical to takings analysis and, depending on how broadly or narrowly they are construed, potentially dispositive of most takings cases. For example, an overly broad understanding of the nuisance exception, in which most important government objectives rise to the status of preventing harm to the public, will effectively insulate almost all government actions from a takings challenge. On the other hand, an overly narrow understanding of the property for evaluating economic impact will turn many, and perhaps most, government land use regulations into takings. As it turns out, however, both of those positions have been rejected by the Court in subsequent cases, with the narrower nuisance concept advocated by Rehnquist prevailing but the broader definition of property for evaluating economic impact advocated by Stevens becoming the norm.[94]

2. First English Evangelical Lutheran Church v. County of Los Angeles

Two months after *Keystone*, the Court decided the second case in the 1987 trilogy, *First English Evangelical Lutheran Church v. County of Los Angeles*.[95] This time the roles were reversed, with Rehnquist writing the majority opinion and Stevens writing the primary dissent. In fact, *First English* began a significant series of decisions in which the Court consistently sided with landowners bringing takings challenges.[96] In each of the cases Rehnquist was in

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> exception far wider than recognized in our previous cases. "The nuisance exception to the taking guarantee," however, "is not coterminous with the police power itself," but is a narrow exception allowing the government to prevent "a misuse or illegal use."

Id.

[92] *See id.* at 496-98 (majority opinion).

[93] *See id.* at 515-20 (Rehnquist, C.J., dissenting).

[94] *See* Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 332-33 (2002) (adopting broad definition of property); Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1026-31 (1992) (adopting narrow definition of "nuisance exception").

[95] First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304 (1987).

[96] Including *First English*, the Court decided four major land use cases over seven years in favor of landowners. *See* Dolan v. City of Tigard, 512 U.S. 374 (1994); Lucas v. South Carolina

the majority and Stevens in the dissent.

Unlike most takings cases, *First English* did not concern whether a particular government action or regulation constituted a taking, but rather the scope of remedial relief available once a taking is established. Specifically, the question before the Court was whether compensation is required for the period between the enactment of a land use regulation and a final judicial determination that a taking has occurred.[97] The Court had actually taken a number of earlier cases to decide this question but had never reached the issue before, either because the Court found no taking had occurred, or because the taking issue was not ripe.[98]

In *First English*, however, the remedial issue had been isolated procedurally. There, after a flood had destroyed a church camp's buildings, Los Angeles County imposed an interim ordinance that had the effect of prohibiting any construction on the property.[99] The camp challenged the ordinance as an unconstitutional taking but sought only damages for relief. The lower courts struck that portion of the complaint for failing to state a cause of action, stating that under California law the only relief for a regulatory taking was invalidation of the ordinance.[100] Thus, as a pleading matter, the Court was able to address the remedial issue without having first determined that a taking occurred.[101]

The Supreme Court, in a 6-3 decision authored by Rehnquist, held that, once it is determined that a taking has occurred, temporary compensation can be recovered for the period between when the restriction was enacted and when it was invalidated.[102] Rehnquist emphasized two reasons for requiring temporary compensation. First was the self-executing nature of the Fifth Amendment, which states that there shall be no taking without just compensation.[103] For Rehnquist, the plain language of the Constitution itself required compensation once a taking occurs, and that includes temporary as well as permanent takings.[104] Second, Rehnquist said that such an interpretation was supported by substantial precedent in which the Court had required compensation for temporary takings of private property, although such cases all involved physical rather than regulatory takings.[105]

Coastal Council, 505 U.S. 1003 (1992); Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987); First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304 (1987).

97 *See First English*, 482 U.S. at 310, 321.

98 *See* MacDonald, Sommer & Frates v. Yolo Cnty., 477 U.S. 340 (1986); Williamson Cnty. Reg'l Planning Comm'n v. Hamilton Bank, 473 U.S. 172 (1985); San Diego Gas & Elec. Co. v. San Diego, 450 U.S. 621 (1981); Agins v. Tiburon, 447 U.S. 255 (1980).

99 *First English*, 482 U.S. at 307.

100 *See id.* at 307-09.

101 *See id.* at 311-13.

102 *See id.* at 321.

103 U.S. CONST. amend. V.

104 *See First English*, 482 U.S. at 314-17.

105 *See id.* at 318-19.

Justice Stevens dissented, joined by Justices Blackman and O'Connor. Stevens said the majority opinion had four flaws, two of which concerned what he considered the majority's misreading of the complaint and misreading of California law.[106] He also believed the majority erred in relying on the Takings Clause, rather than Procedural Due Process, as a means to guard against unfair temporary delays in property use.[107]

Stevens's primary substantive argument, however, concerned whether a temporary restriction on land could ever constitute a taking. Stevens acknowledged that the Court had previously recognized temporary physical takings as requiring compensation but said that regulatory takings are very different. Whereas physical invasions are nearly per se takings, the Court had long treated regulatory takings differently, requiring that at a minimum the restriction destroy "a major portion of the property's value."[108] In assessing the restriction's economic impact, however, the entirety of the property must be examined, including what Stevens referred to as the property's depth, width, and length. Building upon his "totality of the property" analysis in *Keystone*, Stevens stated:

> Regulations are three dimensional; they have depth, width, and length. As for depth, regulations define the extent to which the owner may not use the property in question. With respect to width, regulations define the amount of property encompassed by the restrictions. Finally, and for purposes of this case, essentially, regulations set forth the duration of the restrictions. It is obvious that no one of these elements can be analyzed alone to evaluate the impact of a regulation, and hence to determine whether a taking has occurred. For example, in *Keystone Bituminous* we declined to focus in on any discrete segment of the coal in the petitioners' mines, but rather looked to the effect that the restriction had on the entire mining project.[109]

Stevens then argued that the type of temporary taking involved in *First English* (i.e., between enactment of a restriction and its eventual judicial invalidation) was simply one dimension of the broader assessment of economic impact. In this assessment the duration of the restriction must be considered along with the severity of the restriction and the property affected.[110] He conceded that in extreme cases a temporary restriction might rise to a taking, such as where the restriction "remains in effect for a significant percentage of

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[106] Stevens's first criticism of the majority opinion was that it improperly construed the complaint as alleging an unconstitutional taking of property, *id.* at 323-28 (Stevens, J., dissenting), and his third criticism of the majority opinion was that it misconstrued California law, *id.* at 335-39.

[107] *See id.* at 339-41.

[108] *Id.* at 329.

[109] *Id.* at 330.

[110] *Id.* at 330-31.

the property's useful life."[111] But in most cases such a temporary restriction cannot be viewed as rising to the level of a taking, because the durational restriction will be rather limited, allowing appropriate use of the property for most of its useful life. Stevens argued that because the Court had often held there was no taking even when substantial use restrictions were imposed on property, it made little sense to require compensation when much more modest durational limitations occurred.[112]

Stevens's dissent on this point argued for "parcel as a whole" with a vengeance, suggesting an extremely broad view of the relevant property when evaluating a regulation's economic impact. Although both Justices Blackmun and O'Connor declined to join this portion of the dissent, leaving Stevens by himself, his position was largely vindicated by his majority opinion fifteen years later in *Tahoe-Sierra Preservation Council Inc. v. Tahoe Regional Planning Agency*.[113] At the time, though, it seemed a radical notion, and certainly one out of step with the Court's evolving takings jurisprudence.

C. From Lucas to Tahoe-Sierra

After the 1987 takings trilogy, the Court continued to take a number of takings cases over the next decade and a half, in most instances siding with landowners, and with Chief Justice Rehnquist and Justice Stevens on opposite sides in almost every case. This section will discuss three of those decisions: *Lucas v. South Carolina Coastal Council*,[114] *Dolan v. City of Tigard*,[115] and *Tahoe-Sierra Preservation Council Inc. v. Tahoe Regional Planning Agency*.[116] *Lucas* was a significant decision in which Justice Stevens wrote a major dissent. The majority opinion in *Dolan* was written by Rehnquist, with Stevens writing the primary dissent. The roles were then reversed in *Tahoe-Sierra*, with Stevens writing the majority opinion and Rehnquist the primary dissent. Taken together, these three cases continued to develop the themes established in the earlier cases, presenting two contrasting visions of the balance between private and public interests in land.

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[111] *Id.* at 331.

[112] *See id.* at 332. Stevens also criticized Rehnquist's opinion as internally inconsistent, because Rehnquist said normal delays in obtaining building permits would not constitute temporary takings. Stevens said Rehnquist failed to "explain why there is a constitutional distinction between a total denial of all use of property during such 'normal delays' and an equally total denial for the same length of time in order to determine whether a regulation has 'gone too far' to be sustained unless the government is prepared to condemn the property." *Id.* at 334.

[113] *See* Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 332-33 (2002).

[114] Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992).

[115] Dolan v. City of Tigard, 512 U.S. 374 (1994).

[116] Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302 (2002).

1. Lucas v. South Carolina Coastal Council

In *Lucas* the plaintiff, David Lucas, purchased two residential beach lots for $975,000, planning to build single-family homes as then permitted under applicable law. After his purchase, however, the South Carolina legislature passed legislation designed to preserve critical areas along the coast.[117] As applied to his land, the legislation barred the building of any permanent habitable structure on his property, in essence requiring that the property be kept in its natural state.[118] The state trial court found that the property had been made "valueless," and held that this constituted a taking under *Pennsylvania Coal*.[119] The South Carolina Supreme Court reversed, stating that however great the economic impact might be, it was not a taking because it was designed "to prevent serious public harm."[120]

Justice Scalia, writing for the majority in an opinion joined by Chief Justice Rehnquist, began his analysis by stating that the Court had generally avoided any "set formula" in deciding takings cases, instead engaging in essentially ad hoc inquiries.[121] Nevertheless, he noted that the Court had previously recognized two types of categorical takings, in which a taking is found once certain facts are established. First is where the government "physically invades" or requires that another be permitted to invade the property.[122] Second, and central to the facts of the case, is "where the regulation denies all economically beneficial and productive use of land."[123] The Court supported the reasonableness of such a categorical taking by noting that "in the extraordinary circumstance" when the land has lost all economic viability, "it is less realistic to indulge in our usual assumption that the legislature is simply adjusting the benefits and burdens of economic life."[124]

The Court further noted that loss of all economic viability cannot be justified merely by asserting important public interests, as the Coastal Council had

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[117] *See Lucas*, 505 U.S. at 1008-09.

[118] *Id.* at 1006-09.

[119] *Id.* at 1009.

[120] Lucas v. South Carolina Coastal Council, 304 S.C. 376, 383, 404 S.E.2d 895, 899 (1991).

[121] *Lucas*, 505 U.S. at 1015 (quoting Penn Central Transp. Co. v. New York City, 438 U.S. 104, 124 (1978)).

[122] *Id.* The Court cited several examples of takings by physical invasion, most significantly Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982) (finding a law requiring landlords to allow cable companies to place cables on rental properties constituted a taking).

[123] *Id.* at 1015-16. In recognizing this type of categorical taking, the Court pointed to a number of cases in which it had stated, albeit in dictum, that a taking occurs when a regulation "denies an owner economically viable use of his land." *See, e.g.*, Nollan v California Coastal Comm'n, 482 U.S. 825, 834 (1987); Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 495 (1987); Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 295-96 (1981); Agins v. City of Tiburon, 447 U.S. 255, 260 (1980).

[124] *Lucas*, 505 U.S. at 1017-18 (quoting *Penn Central*, 438 U.S. at 124).

attempted to do.[125] Rather, the loss of all economic viability can be justified only where the regulation is preventing what would amount to a common law nuisance.[126] Thus, the effect of *Lucas* was to recognize a "nuisance exception" to the "no economic viability" categorical takings, but to limit that exception to common law nuisances. The Court remanded *Lucas* on this basis, noting that although there was no economic viability, the issue of whether the statute was preventing a common law nuisance was a matter of state law.[127] In dictum, however, the Court expressed doubt that the harms justifying the statute would qualify as a common law nuisance.[128]

The majority opinion drew strong dissents from both Justices Blackmun and Stevens.[129] Stevens, in his dissent, rejected both the idea that a categorical takings rule exists for loss of all economic viability and the idea that any exception to that rule should be limited to common law nuisances. First, Stevens argued that no such categorical rule had ever been recognized by the Court, instead stating that a regulation's economic impact was merely one factor to be considered in a weighing of interests.[130] He further argued that the new categorical takings rule might prove unsound in practice, encouraging developers to overly subdivide land so as to manipulate the relevant property and increase the likelihood that a loss of all economic viability will occur.[131] Finally, he also believed that the Court had failed to offer any valid justifications for the rule.[132]

Second, Stevens also criticized the Court's limiting the nuisance exception to common law nuisances, stating that it "effectively freezes the State's common law, denying the legislature much of its traditional power to revise the law governing the rights and uses of property."[133] Stevens's primary concern here was that as society changes, legislatures need to be free to revise and adjust property rights to new societal needs and information. By limiting any nuisance exception to what would qualify as a common law nuisance, the Court was locking a balance of private and public interests into the past.[134] In essence, he

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[125] *Id.* at 1029.

[126] *Id.* at 1026-31.

[127] *Id.* at 1031.

[128] *Id.* at 1031-32.

[129] *See id.* at 1036-61 (Blackmun, J., dissenting); *id.* at 1061-76 (Stevens, J., dissenting). Justice Souter also dissented, but on ripeness grounds. *See id.* at 1076-78 (Souter, J., dissenting).

[130] *See id.* at 1063-64 (Stevens, J., dissenting).

[131] *See id.* at 1065-66.

[132] *See id.* at 1066.

[133] *Id.* at 1068-69.

[134] Stevens emphasized the problems of freezing the understanding of property rights in the past, stating:

> Arresting the development of the common law is not only a departure from our prior decisions; it is also profoundly unwise. The human condition is one of constant learning

argued that the legislature needs to be free to identify important public concerns that would justify restrictions that might otherwise qualify as a taking. This, of course, is an argument very similar to the understanding he gave the nuisance exception in *Keystone*: a broad, rather than narrow, understanding of the concept, providing legislative flexibility to protect the broader public interest.

Finally, Stevens emphasized at length the need to consider the generality of a regulatory program in assessing its constitutionality. He noted that the Takings Clause "was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[135] For this reason, the "generality" of a program should play a particularly important role in takings analysis. A regulation that targets just a few parcels of land is more likely to be a taking than one of broader applicability, since it goes directly to the fairness of how regulatory burdens are shared.[136] As applied to Lucas, the generality of the challenged law was a significant reason to uphold its constitutionality. Rather than targeting just a few landowners, Stevens said the Act regulated the entire coastline, and restricted not just undeveloped land, but restricted developed property also.[137]

In concluding, Stevens conceded that the challenged restriction had a significant economic impact and substantially interfered with Lucas's investment-backed expectations, but that the law was nevertheless constitutional. Indeed, he stated that even if Lucas's property had lost all value, the inherent risk of such investments, the generality of the Act, and the important purpose behind the law justified the restrictions.[138] This sentiment captured much of Stevens's emerging takings philosophy: as long as the law served important public interests, and as long as the law was of a general, broad nature, it should not be considered a taking.

2. Dolan v. City of Tigard

Dolan v. City of Tigard,[139] decided in 1994, addressed the question left open in *Nollan v. California Coastal Commission*[140] regarding the necessary degree of relationship between a development exaction and the projected impact from

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> and evolution - both moral and practical. Legislatures implement that new learning; in doing so they must often revise the . . . rights of property owners. . . . New appreciation of . . . endangered species; the importance of wetlands; and the vulnerability of coastal lands, shapes our evolving understandings of property rights.

Id. at 1069-70 (citations omitted).

135 *Id.* at 1071 (quoting Armstrong v. United States, 364 U.S. 40, 49 (1960)).

136 *See id.* at 1072-74.

137 *See id.* at 1074-75.

138 *See id.* at 1075-76.

139 Dolan v. City of Tigard, 512 U.S. 374 (1994).

140 Nollan v. California Coastal Commission, 483 U.S. 825 (1987).

proposed development. This is an issue of some significance, because in recent years development exactions have become extremely popular and an important means of forcing developers to offset some of the burdens created by their development.[141] In *Nollan* the Court held that there must be an "essential nexus" between required exactions and development burdens the exaction was designed to offset,[142] but did not address the level of connection that must exist. In *Dolan*, however, the Court proceeded to answer that question.

In *Dolan* the owner of a plumbing supply store sought permission to double the size of her store, including a significant increase in the paved parking lot. The city approved the expansion, subject to two exactions. First, the owner had to dedicate to the city a portion of her property falling within a 100-year floodplain in order to improve a storm drainage system along a creek running adjacent to the store's property. Second, the owner had to dedicate a 15-foot strip of land adjacent to the other dedication to be used as a pedestrian/bicycle path. This path would connect to other property that was acquired for the pathway.[143] After failing to receive variances from the city, the owner challenged the two exactions as unconstitutional takings.[144]

Rehnquist wrote the opinion for the majority of the Court, holding that the two exactions were takings. He began his analysis reaffirming local government's need to engage in land use planning and zoning,[145] but stated that the exactions here differed from more typical zoning restrictions in two ways. First, unlike zoning restrictions, which are legislative acts affecting large areas of a city, exactions are adjudicative in nature.[146] Second, the exactions in question were not mere restrictions on use, but required physical dedication of land that interfered with the owner's right to exclude.[147] Thus, the challenged exactions presented a different type of land use control than a typical zoning restriction.[148]

Rehnquist then stated that any exaction must first meet the "essential nexus"

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[141] The term "development exaction" generally refers to the practice of requiring a developer to provide land or money in return for a needed development approval. *See* ALAN A. ALTSHULER & JOSE A. GOMEZ-IBANEZ, REGULATION FOR REVENUE 3 (1993). Development, while often beneficial to a community, also brings a variety of costs and burdens in the form of required services. In theory, exactions simply require a developer to pay for increased costs and burdens that accompany development. Over the past four decades local governments have increasingly relied on development exactions as a land use control device. *See id.* at 19-20, 35-39.

[142] *Nollan*, 483 U.S. at 837. The Court in *Nollan* stated that because the exaction there failed to meet even the most "untailored standards," it did not need to decide how close a fit was required between the development impact and the required exaction. *Id.* at 838.

[143] *Dolan*, 512 U.S. at 379-80.

[144] *Id.* at 380-83.

[145] *Id.* at 384-85.

[146] *Id.* at 385.

[147] *Id.*

[148] *See id.*

standard established in *Nollan*, which requires that there be at least some minimal relationship between exactions and development impact.[149] He found both exactions easily met that initial requirement. Rehnquist stated that it was obvious that there was a nexus between the required dedicated greenspace and the impact of a larger store. Increasing the size of the store and paving the parking lot would increase the amount of stormwater runoff into the adjacent creek. A required dedication of land in the floodplain would help absorb that runoff.[150] Similarly, doubling the store size would increase traffic on the roads, which in theory could be partially offset by a pedestrian/bicycle path.[151]

Rehnquist then proceeded to address the question left open in *Nollan*, which was "the required degree of connection between the exactions and the projected impact of the proposed development."[152] In answering this question, Rehnquist first looked to state court approaches to the issue, because states had substantially more experience in addressing exaction questions.[153] He stated that states fell into three general categories in terms of their required degree of connection. First, some states simply require a "very generalized" statement regarding the necessary connection, a standard Rehnquist considered "too lax to adequately protect" landowner interests.[154] Second, some states "require a very exacting correspondence" between the exaction and development impact, which Rehnquist considered too stringent.[155]

The majority of states, according to Rehnquist, fell into an "intermediate position," requiring a "reasonable relationship" between the exaction and the development impact.[156] He believed this intermediate position was close to what the constitutional standard should be but articulated instead a "rough proportionality" test for the required connection between exaction and impact.[157] Under this test, "No precise mathematical calculation is required, but the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed

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149 *See id.* at 386.

150 *See id.* at 387.

151 *See id.* at 387-88.

152 *Id.* at 377.

153 *Id.* at 389.

154 *Id.*

155 *Id.* at 389-90.

156 *Id.* at 390-91.

157 *Id.* at 391. Even though Rehnquist considered the "reasonable relationship" test adopted by most states to approximate the desired constitutional standard, he declined to adopt it as such "because the term 'reasonable relationship' seems confusingly similar to the term 'rational basis' which describes the minimal level of scrutiny under the Equal Protection Clause of the Fourteenth Amendment." He therefore adopted "rough proportionality" as a better statement of the constitutional requirement. *See id.* at 391.

development."[158]

Rehnquist then proceeded to apply this new standard to the challenged exactions, concluding that both failed to meet the "rough proportionality" test. With regard to the dedicated greenspace, Rehnquist acknowledged that prohibiting development on the floodplain portion of the property would help address the increased stormwater runoff created by the store expansion. But the required exaction greatly exceeded what was necessary, because it required that the landowner deed over a portion of the property, rather than simply restricting development on it.[159] Similarly, the city failed to justify the need for the pedestrian/bicycle path, simply asserting that the path "could offset some of the traffic generated" by the store expansion.[160] In finding this fell short of "rough proportionality," the Court said "[n]o precise mathematical calculation is required, but the city must make some effort to quantify its findings in support of the dedication for the pedestrian/bicycle pathway beyond the conclusory statement that it could offset some of the traffic demand generated."[161]

Justice Stevens wrote the primary dissent, joined by two other justices. Stevens had a number of criticisms of the majority opinion, including what he considered a misreading of the state decisions used to support the "rough proportionality" test[162] and how the Court actually applied that test to the facts of the case.[163] His more basic criticism, however, concerned the majority's failure to evaluate the exactions' actual impact on the landowner's interest, which he considered minimal, and the introduction of a new and unjustified form of heightened scrutiny, analogous to *Lochner*-era substantive due process.[164] First, Stevens emphasized the need to evaluate the exactions' impact on the parcel as a whole, a theme he previously had stressed in both *Keystone*[165] and *First English*.[166] He criticized the majority for focusing on just "one strand in the property owner's bundle of rights," the right to exclude, and suggested a

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158 *Id.*

159 *See id.* at 392-95.

160 *Id.* at 395.

161 *Id.* at 395-96.

162 *See id.* at 397-400 (Stevens, J., dissenting). Stevens said that the state decisions did not apply a "rough proportionality" standard, but a standard similar to the "essential nexus" test in *Nollan*, often in a very deferential manner. *Id.* at 398-99. He also said that the majority in *Dolan* ignored the fact that the state cases, in evaluating the validity of an exaction, often considered how the landowner benefitted from the exchange, *id.* at 399, and the extent to which state courts "required that the *entire parcel* be given controlling importance." *Id.* at 400 (emphasis in original). These last two observations relate to Justice Stevens's common themes of reciprocity and the need to focus on the parcel as a whole when analyzing the impact of a regulation.

163 *See id.* at 403-05.

164 *See id.* at 406-07.

165 *See* Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 493-99 (1987).

166 *See* First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. at 304, 330-31 (1987) (Stevens, J., dissenting).

more appropriate approach would be evaluating the exaction's impact on the totality of the landowner's interest, which would be more minimal.[167] He said this is particularly true when commercial property is involved, since in this context the required exaction is simply a type of business regulation, necessitating substantial judicial deference.[168]

Second, Stevens was critical of the majority's use of the "unconstitutional conditions" doctrine in a situation, such as this, involving a "mutually beneficial transaction between a property owner and a city."[169] In particular, Stevens noted that affected property owners had not necessarily been forced to forego their constitutional right to just compensation, because the value of the discretionary benefit granted by the city might well exceed any loss to affected landowners.[170] Stating that the Court had long emphasized that such "reciprocity of advantage" must be considered when analyzing a taking, Stevens argued that even if the physical dedication by itself could be considered a taking, compensation had occurred by the reciprocal benefit of the building permit.[171]

Finally, Stevens's opinion emphasized throughout the need to defer to local governments in land use planning, as long as the actions are rational. In doing so, he considered the use of exactions as just one dimension of a broader land use regulatory effort, one in which courts should be reluctant to second guess local governments. His concluding paragraph summarized the essence of this sentiment:

In our changing world one thing is certain: uncertainty will characterize predictions about the impact of new urban developments on the risks of floods, earthquakes, traffic congestion, or environmental harms. When there is doubt concerning the magnitude of those impacts, the public interest in averting them must outweigh the private interest of the commercial entrepreneur. If the government can demonstrate that the conditions it has imposed in a land use permit are rational, impartial and conducive to fulfilling the aims of a valid land use plan, a strong presumption of validity should attach to those conditions. The burden of demonstrating that those conditions have unreasonably impaired the economic value of the proposed improvement belongs squarely on the shoulders of the party challenging the state action's constitutionality. That allocation of burdens has served us well in the past. The Court has stumbled badly today by reversing it.[172]

As in previous cases, Stevens's opinion was characterized by its broad, rather

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[167] *See Dolan*, 512 U.S. at 400-03 (Stevens, J., dissenting).

[168] *See id.* at 401 ("The Court's narrow focus on one strand in the property owner's bundle of rights is particularly misguided in a case involving the development of commercial property.").

[169] *See id.* at 407.

[170] *See id.* at 408-09.

[171] *See id.*

[172] *Id.* at 411.

than narrow, understanding of the issues. The exactions' impacts are to be evaluated relative to the landowner's total interest in the property, rather than just the right to exclude. The Court must consider the reciprocal benefits provided by the grant of a discretionary permit. And exactions should be considered as just one component of a broader set of land use controls designed to address ever-changing societal needs. As the above quote states, as long as exactions are rational and impartial, Stevens would find them valid.

3. Tahoe-Sierra Preservation Council Inc. v. Tahoe Regional Planning Agency

The Court's final takings decision involving significant Rehnquist and Stevens opinions, *Tahoe-Sierra Preservation Council Inc. v. Tahoe Regional Planning Agency*,[173] addressed the issue whether a temporary moratorium on land development, which prohibited all development during that period, constituted a temporary taking. The Court, in an opinion by Justice Stevens, held that the moratorium did not constitute a per se taking under *Lucas*. Chief Justice Rehnquist dissented, joined by Justices Scalia and Thomas, stating that the length of the moratorium restriction, even if temporary, constituted a taking.[174]

Tahoe-Sierra involved two successive moratoria on land development in the Lake Tahoe region, treated by the majority as a thirty-two month moratorium, while studying development impact and designing a growth strategy for the region.[175] The moratorium was challenged by a large number of landowners as constituting a categorical taking of their property during the moratorium period. The argument was primarily based upon the combined logic of *First English* and *Lucas*. *Lucas* held that a complete loss of economic viability constitutes a categorical taking,[176] whereas *First English* held that even temporary regulatory takings require compensation under the Fifth Amendment.[177] Therefore, the argument ran, when a land use regulation prohibits all economic activity even for a temporary period, which a moratorium does, it constitutes a temporary categorical taking under the combined logic of the two decisions.[178]

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[173] Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302 (2002).

[174] *Id.* at 354 (Rehnquist, C.J., dissenting).

[175] *See id.* at 306-12 (majority opinion). Justice Stevens's majority opinion treated the only question before the Court as whether a thirty-two month moratorium on development constituted a per se taking under the Takings Clause. *See id.* at 306. Chief Justice Rehnquist believed that the total period in which government action prohibited development was almost six years. *Id.* at 343-46 (Rehnquist, C.J., dissenting).

[176] *See* Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1019 (1992).

[177] *See* First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 321-322 (1987).

[178] *See Tahoe-Sierra*, 535 U.S. at 316-17 (summarizing district court decision in the case that the moratorium constituted a taking under *Lucas*); *Id.* at 320-21.

Justice Stevens, writing for a six-person majority, rejected the above reasoning, stating that a temporary restriction, such as a moratorium, is not a categorical taking.[179] At the same time, however, he rejected the position that a moratorium is never a taking. Instead, he said that moratoria, like other land use restrictions, should be analyzed under the totality of facts, using the *Penn Central* balancing test.[180]

Stevens began his analysis by noting that categorical takings are very rare occurrences in takings law, typically reserved for condemnations and physical takings, whereas regulatory takings are typically characterized by "essentially ad hoc, factual inquiries."[181] Stevens stressed that the Court had long treated physical invasions on the one hand, and regulations on the other, quite differently, and that the rationales supporting the Court's per se, categorical approach to physical invasions are largely inapplicable when analyzing regulations on the use of property.[182] Whereas even a temporary physical invasion of property constitutes a categorical taking, the same does not hold true for temporary restrictions on the use of property.[183] He acknowledged that the Court had recognized a categorical taking in *Lucas* when a government regulation denies an owner all economic viability, but noted that in that case the regulation had been enacted as a permanent and total elimination of all economically productive use of the property, an extremely rare occurrence.[184]

Stevens then proceeded to the heart of the case, stating that the thirty-two month moratorium did not qualify as a *Lucas* type categorical taking because it failed to permanently deprive landowners of all economic use of their property. In this regard Stevens stated that the moratorium's economic impact had to be evaluated against the parcel as a whole, which includes both durational as well as spatial dimensions. Using an analysis very similar to that offered in his *First English* dissent, Stevens stated:

> An interest in real property is defined by the metes and bounds that describe its geographic dimensions and the term of years that describes the temporal aspect of the owner's interest. See Restatement of Property §§ 7-9 (1936). Both dimensions must be considered if the interest is to be viewed in its entirety. Hence, a permanent deprivation of the owner's use of the entire area is a taking of "the parcel as a whole," whereas a temporary restriction that merely causes a diminution in value is not. Logically, a fee simple estate cannot be rendered valueless by a temporary

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[179] *Id.* at 321, 331-32.

[180] *Id.* at 321, 342.

[181] *Id.* at 322 (quoting Penn Central Transp. Co. v. New York City, 438 U.S. 104, 124 (1978)).

[182] *Id.* at 322-23.

[183] *Id*.

[184] *Id.* at 330.

> prohibition on economic use, because the property will recover value as soon as the prohibition is lifted.[185]

For this reason the moratorium could not be considered a categorical taking, because it did not eliminate all use and value of the property from a temporal perspective. At the same time Stevens was clear that finding that moratoria do not constitute categorical takings under *Lucas* does not mean that such moratoria are never takings. Instead, courts should evaluate them under the *Penn Central* balancing test, considering the totality of circumstances.[186]

Stevens's majority opinion in *Tahoe-Sierra* helped to solidify several important principles in takings jurisprudence, at least for the time being. First, of course, it established the constitutional validity of moratoria as a land use planning device, if properly used. This is of some consequence, since moratoria are an increasingly important land use tool to provide flexibility to local governments in responding to new problems posed by growth.[187] Second, it further clarified the parcel as a whole principle in analyzing economic impact. This had been a special project of Stevens, and in *Tahoe-Sierra* he further ingrained the principle in takings doctrine, expanding it to temporal as well as spatial dimensions of property ownership. Third, the opinion emphasized how very limited categorical takings are under *Lucas*. Not only did his opinion indicate they are inapplicable to regulations intended to be temporary, but Stevens repeatedly emphasized how even permanent restrictions must be completely without any economic use to be a categorical taking.[188] This had been suggested in *Lucas* itself, which emphasized the complete lack of economically productive or beneficial use in that case,[189] and further confirmed in *Palazzolo v. Rhode Island*, which rejected a categorical taking claim.[190] But Stevens's opinion in *Tahoe-Sierra*, though not overruling *Lucas*, made the categorical taking recognized in that decision as narrow a rule as possible. This is not surprising considering Stevens's disdain for per se rules in regulatory takings cases.[191]

Finally, and perhaps most significantly, *Tahoe-Sierra* helps clarify the ascendency of the *Penn Central* balancing test, a process begun in *Palazzolo*.

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185 *Id.* at 331-32.

186 *Id.* at 321, 342.

187 *See* DANIEL R. MANDELKER, LAND USE LAW §§ 6.06, 6.07 (5th ed. 2003).

188 *See Tahoe Sierra*, 535 U.S. at 330.

189 *See* Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1017 (1992) (loss of all economic viability an "extraordinary circumstance").

190 *See* Palazzolo v. Rhode Island, 533 U.S. 606, 631 (2001) (ability to build a house on an 18-acre parcel establishes some economic viability).

191 *See Lucas*, 505 U.S. at 1071 (Stevens, J., dissenting) ("'[F]airness and justice' are often disserved by categorical rules."). *See also Tahoe-Sierra*, 535 U.S. at 342 ("[T]he interest in 'fairness and justice' will be best served by relying on the familiar *Penn Central* approach when deciding cases like this, rather than by attempting to craft a new categorical rule.").

Both cases made clear that just because a restriction does not deprive a landowner of all economic viability does not end the takings inquiry - it must still be evaluated under *Penn Central*.[192] It is now clear that any regulatory taking challenge needs to be evaluated under a two-fold test based on *Lucas* and *Penn Central*: first, does the regulation deprive the landowner of all economic viability, and if not, does the regulation constitute a taking under the three-factor *Penn Central* test. Because the answer to the first question is almost invariably no according to Stevens, almost all takings claims are to be determined under *Penn Central*.[193]

There is a certain irony to this, since Stevens and Rehnquist were two of the three dissenting justices in *Penn Central*. Yet the open-ended nature of the *Penn Central* test is one that suited Justice Stevens's jurisprudence quite well. Apart from physical invasions, Stevens had very little use for categorical rules, preferring instead an approach that considers as many variables as possible. Even Rehnquist, though more open to categorical approaches to takings, came to accept the *Penn Central* balancing test (along with the rest of the Court) as the primary analytical tool for deciding takings. He, of course, would apply that test in a very different manner than would Stevens.

II. TWO CONTRASTING VISIONS

As the previous section demonstrates, Chief Justice Rehnquist and Justice Stevens championed contrasting visions of takings jurisprudence and the balance of public and private rights in land. During the tenure of their three decades on the Court together the Court pursued an aggressive regulatory takings and land use agenda, with Rehnquist and Stevens taking the lead in articulating how that balance should be drawn, with each attempting to lead the Court in different directions.

Before exploring their differences, however, it is important to recognize their agreement on several "big picture" issues: in particular, that takings jurisprudence is a balance of interests. First, both justices agreed that there is a public component to private rights in land, meaning that the private use of property can be limited for the broader public good. Stevens saw this public component as rather broad,[194] but Rehnquist acknowledged that there are also public interests that justify limiting private use of property. The most obvious is

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[192] *Tahoe-Sierra,* 535 U.S. at 321, 342. *See Palazzolo,* 533 U.S. at 632.

[193] *See* Davidson, *supra* note 23 at 7 (calling *Penn Central* the "lodestar of regulatory takings jurisprudence"); John D. Echeverria, *Making Sense of* Penn Central, 23 UCLA J. ENVTL. L. & POL'Y 171, 173-74 (2005); Robert Meltz, *Takings Law Today: A Primer for the Perplexed*, 34 ECOLOGY L.Q. 307, 334 (2007) (except for per se takings, "*Penn Central* reigns triumphant").

[194] *See e.g.*, Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1068-1070 (1992) (Stevens, J. dissenting); Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 488-89 (1987).

prevention of private activity amounting to a common law nuisance.[195] Beyond that, however, Rehnquist's takings jurisprudence clearly permitted a variety of land use controls on land pursuant to sound planning practices. In *Dolan* he acknowledged the legitimacy of land use planning[196] and his dissent in *Penn Central* suggested a willingness to accommodate broad restrictions where reciprocity exists.[197] Indeed, Rehnquist's *Penn Central* dissent identified two possible ways to justify public restrictions: (1) prevention of a common law nuisance, or (2) broad restrictions that provide reciprocity of advantage.

As a practical matter Justice Rehnquist's willingness to permit broad land use controls where reciprocal benefits occur is significant, because it effectively includes the vast majority of traditional land use controls. Indeed, typical zoning restrictions, which limit the use of land, are exactly the type of public restrictions that Rehnquist was willing to support.[198] Thus, although Rehnquist and Stevens had sharp disagreements over the scope of state interests that might justify substantial burdens on property, as a practical matter Rehnquist was willing (as was Stevens) to recognize the vast majority of land use restrictions as legitimate. This simply reinforced the Court's longstanding recognition that private property is held subject to certain public interests, which at times might substantially limit use of the property.[199]

Therefore, the land use visions of Rehnquist and Stevens did not significantly differ when it came to more traditional land use restrictions, such as typical zoning ordinances. The contrast becomes apparent, however, with more modern and innovative land use regulations that became increasingly popular during Rehnquist and Stevens's tenure on the Court. These regulations have pushed the degree to which private property interests are viewed as subject to broader public interests. This is especially true of environmental land use controls, such as wetlands restrictions, coastal zone protection, farmland preservation, conservation of habitat for endangered species, and open space protection. Unlike typical zoning restrictions, these controls often require that land be left in its natural state and free from development. As such, the economic impact of the restrictions is more pronounced, and often severe.[200] Moreover, it is often

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[195] *See Lucas*, 505 U.S. at 1026-31; Penn Central Transp. Co. v. New York City, 438 U.S. 104, 144-45 (1978) (Rehnquist, J., dissenting).

[196] *See* Dolan v. City of Tigard, 512 U.S. 374, 384-85 (1994).

[197] *See Penn Central*, 438 U.S. at 147 (Rehnquist, J., dissenting).

[198] *See id.*

[199] *See, e.g.*, Hadacheck v. Sebastian, 239 U.S. 394, 410 (1915) (holding that private property interests must at times "yield to the good of the community"); Hudson Cnty. Water Co. v. McCarter, 209 U.S. 349, 355 (1908) (stating that private property limited by other interests, including exercise of the police power "to protect the atmosphere, the water and the forests"); Mugler v. Kansas, 123 U.S. 623, 665 (1887) ("all property in this country is held under the implied obligation that the owner's use of it not be injurious to the community").

[200] *See Lucas,* 505 U.S. at 1018 (loss of all economically beneficial and productive use of land

difficult to identify the type of clear reciprocal benefits that typically accompany such land restrictions. It is no surprise that such restrictions, together with the increasingly common development exactions, have dominated the types of takings cases the Court has reviewed in recent years.[201]

It is here that the competing visions of Rehnquist and Stevens are seen in sharp contrast. Stevens's vision put a primacy on landowners' responsibility as members of a community, and therefore he was willing to accept significant burdens as long as the restrictions serve important interests and are evenly spread among similarly situated landowners. Indeed, at times Stevens seemed suspicious about the regulatory takings doctrine, likening it to a cousin of *Lochner* in that it led to judicial interference with legitimate legislative goals designed to better the broader community. For example, in his *Dolan* dissent Stevens stated:

> The so-called "regulatory takings" doctrine that the Holmes dictum kindled has an obvious kinship with the line of substantive due process cases that *Lochner* exemplified. Besides having similar ancestry, both doctrines are potentially open-ended sources of judicial power to invalidate state economic regulations that Members of this Court view as unwise or unfair.[202]

It is not surprising, therefore, that in a number of cases Stevens stressed the difference between physical invasions, which are to be scrutinized, and "mere" regulations, which he viewed as far less problematic and deserving of substantial judicial deference, even when resulting in significant economic losses.[203] Nevertheless, Stevens certainly accepted the possibility of regulatory takings but would recognize them in very narrow circumstances. Accordingly he strongly resisted per se rules for regulatory takings, and instead preferred the admittedly indeterminate *Penn Central* test.[204] That test gives courts the ability to review the totality of the circumstances, including the importance of the purpose served

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typically occurs when it must "be left substantially in its natural state").

[201] *See* Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302 (2002) (moratorium on development in Lake Tahoe region); Palazzolo v. Rhode Island, 533 U.S. 606 (2001) (environmental restrictions on coastal wetlands); Dolan v. City of Tigard, 512 U.S. 374 (1994) (development exaction); Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992) (coastal zone preservation law); Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987) (development exaction).

[202] *Dolan*, 512 U.S. at 406-07 (Stevens, J., dissenting).

[203] *See Tahoe-Sierra*, 535 U.S. at 323-24 (emphasizing difference between physical invasions and regulations); First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 328-30 (1987) (Stevens, J., dissenting) (same). *See also* Andrea L. Peterson, *The False Dichotomy Between Physical and Regulatory Takings Analysis: A Critique of* Tahoe-Sierra*'s Distinction Between Physical and Regulatory Takings*, 34 ECOLOGY L.Q. 381 (2007) (criticizing Stevens's strong emphasis in *Tahoe-Sierra* between physical and regulatory takings).

[204] *See Tahoe-Sierra*, 535 U.S. at 326; *Lucas*, 505 U.S. at 1071 (Stevens, J., dissenting).

by the regulation. Moreover, Stevens saw the values of "fairness and justice," which are the foundation of regulatory taking doctrine,[205] as best pursued by flexible and open-ended principles. As he stated, "fairness and justice are often disserved by categorical rules."[206]

In applying the open-ended principles of *Penn Central*, Stevens's primary considerations in pursuit of "fairness and justice" were the importance of the government interest and the generality of the regulation, with less attention given to a regulation's economic impact. Stevens was often concerned that regulatory takings doctrine not hamper government's pursuit of the public welfare and consequently was willing to recognize a broad spectrum of government purposes sufficient to justify substantial economic burdens. This was apparent in *Keystone*, where the first half of his opinion essentially rejected the takings challenge based solely on the important purposes behind the legislation.[207] Stevens expressed similar sentiments in his *Lucas* dissent where he criticized the majority's new categorical rule and narrow definition of nuisance for "denying the legislature much of its traditional power to revise the law governing the rights and uses of property."[208] Stevens emphasized that societal needs and understandings were ever-changing, and that legislatures needed to be able to implement those changes for the broader public welfare, even if it meant redefining property rights.[209] He was particularly concerned that the new categorical rule would especially hamper "local officials and planners who must deal with increasingly complex problems in land-use and environmental regulation."[210]

Equally important to Stevens in discerning "fairness and justice" was the generality of the regulation, whether it targeted a few landowners or applied evenly to similarly situated parties.[211] To Stevens, distributional concerns were

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[205] *See* Armstrong v. United States, 364 U.S. 40, 49 (1960) (the Takings Clause "was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole"). *See also Tahoe-Sierra*, 535 U.S. at 332 (quoting *Armstrong*); *Palazzolo*, 533 U.S. at 617-18 (quoting *Armstrong*).

[206] *See Lucas*, 505 U.S. at 1071 (Stevens, J., dissenting).

[207] *See* Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 488-89 (1987).

[208] *Lucas*, 505 U.S. at 1068-69 (Stevens, J., dissenting).

[209] *See id.* at 1069. *See also* Dolan v. City of Tigard, 512 U.S. 374, 411 (1994) (Stevens, J., dissenting) (emphasizing the uncertainty of future events in a "changing world" and the need for government to be able to respond to them).

[210] *Lucas*, 505 U.S. at 1070 (Stevens, J., dissenting).

[211] This was most clearly expressed in Stevens's *Lucas* dissent, where he stressed the importance of generality as central to takings analysis. To Stevens, broad and generally applicable regulations had a strong presumption of constitutionality, whereas regulations that targeted only one or two tracts were suspect. *See Lucas*, 505 U.S. at 1072-74 (Stevens, J., dissenting). *See also* Echeverria, *supra* note 25 ("[T]he most significant - and certainly the most consistent - thread of Justice Stevens' thinking on takings has been his focus on whether the challenged government action is general in character, affecting not only the claimant but others in the community as well, or whether instead the action singles out a particular owner for unique treatment.").

at the heart of takings analysis as reflected in the Court's oft-repeated statement that the Takings Clause "was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[212] Thus, for Stevens, the degree of a burden was less important than whether the burden was equally shared.

These dual concepts of the importance of the purposes served and the generality of regulation emphasize the community-focused approach of Stevens's regulatory takings doctrine. Stevens appreciated that societal values, knowledge, and needs are not static, and legislatures need the freedom to pursue them. This will often mean redefining property rights, at times with substantial economic impacts. For Stevens such regulatory impacts were simply the cost of common citizenship as long as the cost was evenly shared. As such, takings concerns were less about economic burdens that might interfere with perceived private property rights than about shared burdens for the betterment of the broader community.

But Stevens nevertheless gave some consideration to economic burdens and interference with investment expectations as required by *Penn Central*.[213] In doing so, however, he was careful not to exaggerate economic impacts, but chose instead to evaluate them from a broader perspective. This was clearest in his largely successful campaign to evaluate economic impacts against the "parcel as a whole" and not just in regard to the segment restricted. This was seen in *Keystone* where he gave an expansive view of the affected property so that the economic impact was potentially only a two percent diminution in value.[214] Even more significant was his majority opinion in *Tahoe-Sierra*, where he included temporal as well as spatial dimensions of the property when determining the relevant "parcel" of land.[215] This expansive view of the affected property turned what might at first glance appear to be significant economic impacts into more easily accepted impacts.

In contrast to Stevens, Rehnquist had no misgivings about regulatory takings doctrine and saw it as an important protection for private property interests. As noted above, Rehnquist had no problem accepting typical zoning restrictions that were supported by substantial reciprocity of advantage.[216] Nor did he have a problem restricting land use that posed clear harm to the public. But he gave

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[212] Armstrong v. United States, 364 U.S. 40, 49 (1960).

[213] Penn Central Transp. Co. v. New York City, 438 U.S. 104, 124 (1978) (stating that "[t]he economic impact of the regulation on the claimant and . . . the extent to which the regulation has interfered with distinct investment-backed expectations" are important considerations in takings analysis).

[214] *See* Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 498 (1987).

[215] *See* Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 332-33 (2002).

[216] *See* Dolan v. City of Tigard, 512 U.S. 374, 384-85 (1994).

both of these traditional underpinnings of land use controls relatively narrow interpretations, limiting the public harm exception to traditional nuisance-like activity[217] and recognizing reciprocity of advantage for broad-based limitations.[218] Moreover, these two traditional grounds for supporting land use controls both easily fit within a private property focus: a landowner's "bundle of property rights" has never included the right to cause a nuisance, and the existence of substantial reciprocity of advantage mitigates regulatory burdens.

For Rehnquist, though, the heart of regulatory takings doctrine was individual property rights, which he held in high regard. This was expressed quite clearly in his majority opinion in *Dolan*, where he criticized Stevens's characterization of development exactions as "a species of business regulation" that was subject to substantial deference.[219] Rehnquist stated that simply characterizing a government action as a "business regulation" did not immunize it from constitutional scrutiny when it implicated the Bill of Rights, citing Fourth Amendment and First Amendment cases involving business regulations.[220] He then stated: "We see no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or Fourth Amendment, should be relegated to the status of a poor relation in these comparable circumstances."[221]

This recognition of private property as an important, if not necessarily a fundamental, right made Rehnquist willing to monitor government intrusions into private property rights. For example, Rehnquist recognized development exactions as a legitimate means of requiring developers to pay for the societal burdens they created, but also recognized their potential for abuse.[222] *Dolan's* "rough proportionality" standard was essentially an intermediate level of scrutiny designed to protect against government overreaching when requiring exactions.[223]

Rehnquist also reflected a willingness to monitor restrictions on land use, at least when they imposed significant burdens on private property rights. While acknowledging the distinction between physical invasions and mere regulations,[224] Rehnquist did not consider the distinction as stark as Stevens when severe regulatory burdens result. The Court made this point in *Lucas*,

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[217] *See* Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1028-29 (1992) (Scalia opinion joined by Rehnquist); *Keystone,* 480 U.S. at 512-14 (Rehnquist, J., dissenting); *Penn Central*, 438 U.S. at 144-46 (Rehnquist, J., dissenting).

[218] *See Penn Central*, 438 U.S. at 147-48 (Rehnquist, J., dissenting).

[219] *Dolan*, 512 U.S. at 392.

[220] *Id.*

[221] *Id.*

[222] *See id.* at 396.

[223] *See id.* at 391.

[224] *See id.* at 384-85.

where it suggested that one reason for its new categorical taking was that, from the landowner's perspective, loss of all economic viability was equivalent to a physical appropriation of the land.[225] Rehnquist reiterated this point in his *Tahoe-Sierra* dissent, stating:

> But whatever basis there is for [the distinction between physical invasions and regulations] does not apply when a regulation deprives a landowner of all economically beneficial use of his land. In addition to the "practical equivalence" from the landowner's perspective of such a regulation and a physical appropriation, we have held that a regulation denying all productive use of land does not implicate the traditional justification for differentiating between regulations and physical appropriations.[226]

For that reason Rehnquist focused not only on how burdens were distributed, but also on the severity of the burden. This is seen in his support of the categorical "loss of economic viability" rule in *Lucas*[227] and his *Tahoe-Sierra* dissent[228] where he argued that the dramatic economic impact of the moratorium in that case constituted a taking. Although Rehnquist did not go so far as to argue that any moratorium constituted a taking, he viewed the moratorium as completely depriving landowners of all economic use of their property for nearly six years.[229] In doing so, he rejected Stevens's distinction between temporary and permanent restrictions, in essence treating a significant durational restriction on property use as a discrete and complete denial of productive use of the property.[230]

As suggested by *Tahoe-Sierra*, Rehnquist often analyzed the affected property interest as a discrete unit, instead of as part of a broader whole as Stevens did, thus indicating a more dramatic economic impact. This began in *Penn Central* itself where in his dissent Rehnquist treated the air rights above Grand Central terminal as a distinct and valuable set of property rights that were destroyed by the Landmark Law.[231] To him, such an interference with distinct property rights could be justified only if there was reciprocity of advantage or the restriction was necessary to prevent a public nuisance, neither of which existed.[232] Similarly, in *Keystone* Rehnquist treated the coal that had to remain in place as

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[225] *See* Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1018-19 (1992).

[226] *See* Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 349 (2002) (Rehnquist, C.J., dissenting).

[227] *See Lucas*, 505 U.S. at 1015-16.

[228] *See Tahoe-Sierra*, 535 U.S. at 354 (Rehnquist, C.J., dissenting).

[229] *Id.* at 351.

[230] *See id.* at 347-49.

[231] *See* Penn Central Transp. Co. v. New York City, 438 U.S. 104, 142-44 (1978) (Rehnquist, J., dissenting) (characterizing "air rights" above terminal as destroyed by the Landmark Law).

[232] *See id.* at 144-49.

"an identifiable and separable property interest."[233] As such, he said the challenged regulation "extinguishes the whole bundle of rights in an identifiable segment of property."[234]

Thus, Rehnquist gave much greater significance to severe economic impacts in his takings analysis than did Stevens, both by treating loss of economic viability as the equivalent of a physical appropriation and by treating portions of property as discrete property rights. As such, for Rehnquist regulatory takings doctrine was an important guard against government abuses of private property rights, which he refused to view as a "poor relation" to the rest of the Bill of Rights.[235] This did not pose a barrier to more traditional types of zoning restrictions, which had more modest economic impacts and typically generated substantial reciprocity of advantage.[236] But newer regulatory controls, such as development exactions and environmental land use restrictions, were more likely to result in government abuses and severe economic burdens that Rehnquist saw the Takings Clause as designed to protect against.[237]

III. THREE ISSUES IN PERSPECTIVE

This final part will examine three issues central to regulatory takings jurisprudence and to the thinking of Stevens and Rehnquist: (1) the role of the state interest in takings analysis, (2) how to define the relevant parcel for assessing economic impact, and (3) the role of reciprocity of advantage and generality of regulation. Speaking generally, Stevens framed all three issues broadly, permitting greater recognition of the state interests that can justify a regulation, giving a broad view of the relevant parcel, and providing a generous view of reciprocity and generality. In contrast, Rehnquist framed the same three issues narrowly, limiting public justifications for restrictions, construing the relevant parcel narrowly, and having a limited understanding of reciprocity and generality. It is fair to say that of the three issues, Rehnquist largely prevailed on the first, Stevens largely prevailed on the second, while the third issue is still unresolved.

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[233] *Keystone,* 480 U.S. at 517 (Rehnquist, J., dissenting).

[234] *Id.*

[235] *See Dolan,* 512 U.S. at 392.

[236] *See id.* at 384-85; Agins v. City of Tiburon, 447 U.S. 255, 263 (1980); *Penn Central*, 438 U.S. at 147 (Rehnquist, J., dissenting).

[237] *See* Palazzolo v. Rhode Island, 533 U.S. 606 (2001) (environmental restrictions on coastal wetlands); Dolan v. City of Tigard, 512 U.S. 374 (1994) (development exactions); Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992) (coastal zone preservation law); Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987) (development exaction).

A. The Role of the State Interest

An initial, and very important, area of disagreement that emerged between Chief Justice Rehnquist and Justice Stevens concerned the role the state's interest should have in regulatory takings analysis. Specifically, to what extent should the nature and the importance of the asserted state interest play a role in deciding whether a government regulation constitutes a taking? Initially, Chief Justice Rehnquist and Justice Stevens seemed to be on the same page here, with Rehnquist's dissent in *Penn Central*, joined by Justice Stevens, suggesting that the asserted state interest is relevant only when it is designed to prevent a nuisance activity, what Rehnquist labeled the "nuisance exception."[238] In such situations the restriction is valid, even when it imposes a substantial economic burden and there is a lack of reciprocal benefits.

A clear division between the two justices arose a decade later in *Keystone Bituminous Coal Ass'n v. DeBenedictis*.[239] In his majority opinion Stevens in part justified the Pennsylvania restrictions on mining coal because of the significant state interests supporting the legislation, including safety, economic and environmental concerns.[240] Although Stevens framed this justification in terms of the "nuisance exception,"[241] his analysis, as noted by Rehnquist, certainly exceeded that.[242] Stevens emphasized the important purposes behind the legislation and, in the first part of his opinion, made clear that such purposes were sufficient to justify the restrictions.[243] As a practical matter, Stevens seemed to say that if the purposes are important enough, they justify any burdens placed on landowners, as long as the burdens are applied evenhandedly. This is a very broad view of the types of state interests sufficient to negate takings concerns.

In contrast, Rehnquist rejected any broad characterization of what would constitute a nuisance rationale in takings analysis. He argued that the "nuisance exception to the takings guarantee . . . is not coterminous with the police power,"[244] but needs to be narrowly constructed. He recognized that broader justifications would suffice when there is a clear reciprocity of advantage, but in the absence of such reciprocity, justifications must be limited to clearly harmful activity.[245] Otherwise, almost any government interest would be enough to avoid a taking. As he noted:

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[238] *Penn Central,* 438 U.S. at 144-45 (Rehnquist, J., dissenting).

[239] Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1987).

[240] *Id.* at 488 (the State "is acting to protect the public interest in health, the environment, and the fiscal integrity of the area.").

[241] *See id.* at 491.

[242] *See id.* at 511-12 (Rehnquist, C.J., dissenting).

[243] *See id.* at 488-89 (majority opinion).

[244] *Id.* at 512 (Rehnquist, C.J., dissenting).

[245] *Id.*

> A broad exception to the operation of the Just Compensation Clause based on the exercise of multifaceted health, welfare, and safety regulations would surely allow government much greater authority than we have recognized to impose societal burdens on individual landowners, for nearly every action the government takes is intended to secure for the public an extra measure of "health, safety, and welfare."[246]

This same tension again played out in *Lucas v. South Carolina Coastal Commission*,[247] although this time with the roles reversed. Chief Justice Rehnquist joined Justice Scalia's majority opinion which provided little room for the importance of the state interest as a consideration in takings analysis.[248] Although the majority recognized a "nuisance exception" to what would otherwise be a regulatory taking, it explicitly limited the exception to what would constitute a common law nuisance.[249] Though differing somewhat in the analysis offered, this was essentially the position advocated by Rehnquist in both his *Keystone* and *Penn Central* dissents.[250] In particular, the majority in *Lucas* was hesitant to let the legislature define for itself what constitutes important or critical state interests.[251] To do so would empower legislatures to almost always articulate a sufficiently important interest to justify the restriction, all but eliminating the Takings Clause as a constitutional protection.[252]

Justice Stevens's dissent was quite critical of this part of the majority opinion, saying that it "effectively freezes the State's common law, denying the legislature [the] power to revise the law governing the rights and uses of property."[253] Stevens emphasized the need for legislative bodies to have the flexibility to respond to new threats to the public interest, such as in the environmental area.[254] He voiced some of these same concerns again in his

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[246] *Id.* at 513.

[247] Lucas v. South Carolina Coastal Commission, 505 U.S. 1003 (1992).

[248] The Court was particularly leery of permitting legislatures to avoid a taking simply by articulating some "harm-preventing" rationale. The Court noted that almost any land use control can be characterized as either "benefit-conferring" or "harm-preventing" simply by the choice of words. This would in effect allow government to always avoid a taking simply by how it characterized restrictions, leaving little constitutional protection. *See id.* at 1024-25.

[249] *Id.* at 1026-31.

[250] See *Keystone*, 480 U.S. at 511-12 (Rehnquist, C.J., dissenting); Penn Central Transp. Co. v. New York City, 438 U.S. 104, 144-45 (1978).

[251] *Lucas*, 505 U.S. at 1025.

[252] Justice Scalia's opinion, joined by Justice Rehnquist, rejected the idea that even when a regulation deprives a landowner of all economic viability it is not a taking if the legislature "recited a harm-preventing justification," stating that it would mean that takings jurisprudence would be nothing more than "a test of whether the legislature has a stupid staff." *Id.* at 1025 n.12.

[253] *Id.* at 1068-69 (Stevens, J. dissenting).

[254] Stevens in arguing for the need for legislative flexibility in responding to the new threats to the public interest, stated:

> Arresting the development of the common law is not only a departure from our prior

Dolan dissent, emphasizing the need for governmental flexibility to keep abreast of societal needs.[255]

As the above indicates, Rehnquist and Stevens differed significantly in the role government interests play in takings analysis, and in particular what type of state justifications might be akin to preventing a nuisance. Rehnquist consistently adopted a narrow view of the "nuisance exception," limiting it to clear harms to the public or, in joining the *Lucas* majority, common law nuisances. In contrast, Stevens clearly expanded the category of justifying state interests beyond clear public harms or common law nuisances, including economic and environmental concerns. Rehnquist and Stevens also disagreed on who should be able to make judgments about what interests should justify restrictions. Stevens emphasized the importance of deferring to legislative expertise,[256] while Rehnquist would place that judgment primarily in the hands of the courts.

What role the importance of the state interest should have in takings analysis is a critical issue, and arguably goes to the essence of what takings are all about. On occasion the Court has suggested that the takings question involves a balancing of the asserted state interest against private concerns.[257] However, more frequently the Court has indicated that the takings question does not concern whether the state can act, but who should bear the burden of regulation. This was first suggested in *Pennsylvania Coal*, where the Court stated that landowners must accept the economic burdens of government regulation, but at some point the burden becomes too great and must shift to the government.[258]

> decisions; it is also profoundly unwise. The human condition is one of constant learning and evolution - both moral and practical. Legislatures implement that new learning; in doing so they must often revise the definition of property and the rights of property owners. Thus, when the Nation came to understand that slavery was morally wrong and mandated the emancipation of all slaves, it, in effect, redefined "property." On a lesser scale, our ongoing self-education produces similar changes in the rights of property owners: New appreciation of endangered species; the importance of wetlands; and the vulnerability of coastal lands, shapes our evolving understandings of property rights.

Id. at 1069-70 (citations omitted).

[255] *See* Dolan v. City of Tigard, 512 U.S. 374, 411 (1994) (Stevens, J., dissenting).

[256] *See id.* at 406-07 (comparing regulatory takings doctrine to *Lochner*-era substantive due process); *Lucas*, 505 U.S. at 1068-69 (Stevens, J., dissenting) (criticizing majority for "denying the legislature much of its traditional power to revise the law governing the rights and uses of property").

[257] Some people interpret the first part of Justice Holmes's opinion in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), as balancing the respective public and private landowner interests in the case. *See id.* at 412-14. It is clear, however, that Holmes then proceeded to analyze the case in terms of the economic impact on the affected property owner. *See id.* at 413-15. Justice Stevens's opinion in *Keystone* also arguably involved some implicit balancing in that he emphasized the strong public interest supporting the challenged legislation. *See* Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 488-89 (1987).

[258] *See Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413, 415 (1922).

In particular, the Court stated that "the question at bottom is upon whom the loss of the changes desired should fall."[259] Thus, the taking issue is not so much whether government is justified in acting, but who should bear the cost of regulation. As envisioned by *Pennsylvania Coal*, most costs of regulation should fall on landowners themselves as part of the give and take of economic life, but at some point, when the regulation has "gone too far," the cost shifts to the government.[260]

Over the years the Court has continually reaffirmed the basic principle that the essence of the takings question is not whether government is justified in acting, but who should bear the cost of regulation. This is reflected in the frequently quoted language from *Armstrong v. United States*,[261] where the Court stated that the Takings Clause 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."[262] This quote has been repeated in numerous subsequent decisions, with the Court emphasizing that takings jurisprudence is fundamentally about the "fairness and justice" of distributing regulatory burdens.[263] Such a focus has less to do with the purpose of a regulation than with the degree of burden and how it is shared with others.

This same point was emphasized in the recent decision of *Lingle v. Chevron U.S.A. Inc.*,[264] where the Court rejected an ends/means test as part of Takings Clause analysis. In doing so, the Court drew a distinction between substantive due process, which concerns the purpose and effectiveness of a regulation, and the Takings Clause, which concerns distributional fairness and who should bear regulatory costs.[265] For that reason an ends/means analysis, which focuses on purpose and effectiveness, has little to do with the distributional concerns underlying the Takings Clause.[266] *Lingle*, however, confirmed what earlier cases had strongly suggested, that the purpose of a regulation has little to do with whether it amounts to a regulatory taking, but rather who should bear the burden of regulation.

Understanding takings as being primarily about who should bear the burden of regulation arguably suggests that the importance of the asserted state interest

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[259] *Id.* at 416.

[260] *See id.* at 415.

[261] Armstrong v. United States, 364 U.S. 40 (1960).

[262] *Id.* at 49.

[263] Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 537 (2005) (quoting *Armstrong*); Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 334 (2002) (quoting *Armstrong*); Palazzolo v. Rhode Island, 533 U.S. 606, 618 (2001) (quoting *Armstrong*); Dolan v. City of Tigard, 512 U.S. 374, 384 (1994) (quoting *Armstrong*); Penn Central Transp. Co. v. New York City, 438 U.S. 104, 123-24 (1978) (quoting *Armstrong*).

[264] Lingle v. Chevron U.S.A. Inc., 544 U.S. 528 (2005).

[265] *See id.* at 542.

[266] *See id.* at 542-43.

should play only a minimal role in determining whether a taking has occurred.[267] Stated differently, the importance of the asserted interest goes to the issue of whether government has the authority to act and whether, from a public policy perspective, it should act. It does not necessarily answer the question who should bear the cost of the regulation, which is what takings analysis is about. This is particularly true if the degree of burden is so great as to otherwise be a taking.

In such situations it makes sense, of course, to recognize a narrow nuisance exception to takings, a point which all justices recognize.[268] That is simply because private property interests have never included the right to cause a nuisance.[269] Thus, restrictions designed to prevent a common law nuisance are in essence not prohibiting anything that was part of a landowner's rights to begin with,[270] and thus should never constitute a taking, no matter how great the economic burden. But when the importance of the state's interest is asserted as a justification for what would otherwise constitute a taking, there is a sense of mixing apples and oranges. An important state interest certainly justifies state action, but it does not answer the question who should bear the cost of that action, which the Supreme Court has repeatedly said is the focus of the Takings Clause.[271]

The danger, of course, is that if a significant public interest can justify otherwise impermissible burdens on landowners, then almost any government action can be justified and the focus of the Takings Clause is lost. This point has often been made by members of the Court, who have noted that potentially any government action can be justified, since it is easy to characterize state

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[267] As stated by John Echeverria:

> [I]t is intuitively appealing to conclude that, the greater the public interest served by a regulatory program, the less willing the courts should be to assess takings liability and thereby deter government from addressing public concerns. But, given that regulatory takings doctrine is a subset of condemnation law, it makes no logical sense to excuse the government from liability on the ground that takings power is being used to accomplish an important public purpose. After all, no one would argue that the government should be able to avoid paying for a right-of-way because a road will serve an important transportation purpose.

Echeverria, *supra* note 192. *See also* Christopher T. Goodin, *The Role and Content of the Character of the Governmental Action Factor in a Partial Regulatory Takings Analysis*, 29 U. HAW. L. REV. 437, 444 (2007) (arguing that purpose/effectiveness of a regulation should not be part of *Penn Central* balancing). *But see* Michael Lewyn, *Character Counts: The "Character of the Government Action" in Regulatory Takings Actions*, 40 SETON HALL L. REV. 597 (2010).

[268] *See* Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1027-29 (1992) (recognizing common law nuisance exception to regulatory takings).

[269] *See id.* at 1029-31.

[270] *See id.*

[271] *See, e.g.*, Palazzolo v. Rhode Island, 533 U.S. 606, 618 (2001); Dolan v. City of Tigard, 512 U.S. 374, 384 (1994).

interests in significant and important ways.[272] Indeed, to give a broad reading to the public nuisance exception potentially insulates all government action from a takings challenge.[273] And again, it converts the takings inquiry into something new, focusing on whether the state is justified in acting, rather than on who should bear the burden of regulation.

Throughout his takings opinions Justice Stevens raised various concerns about giving a narrow reading to the nuisance exception, fearing that it will freeze the state common law in the past and, most significantly, deny legislative bodies the flexibility they need to respond to changing societal needs.[274] These are significant concerns, but are overstated and do not pose the threat to legislative flexibility that Stevens suggested. First, contrary to Stevens's suggestion, state common law nuisance doctrine is not necessarily locked into the past and inflexible, but instead has the flexibility to be responsive to changing conditions. Indeed, the Restatement test for nuisance, referred to by the majority in *Lucas*, includes multiple variables and is quite open-ended in its application.[275] This is not to say that limiting the exception to only common law nuisances will not constrain legislative action to some extent. It certainly will, in part because nuisance law requires an interference with specific property, rather than assertion of a broader public concern. But nuisance analysis is not altogether tied to the past and inflexible, as suggested by Justice Stevens.

Second, Stevens was certainly correct that legislative bodies are better equipped than courts to determine harms to the public welfare,[276] but that does not mean they should be given broad authority to determine when public concerns justify restrictions that would otherwise be a taking. As noted above, this confuses the nature of the takings inquiry, which is designed to determine who should bear the costs of regulatory burdens, not whether the regulations are necessary. More importantly, to defer to the legislature in determining whether state concerns amount to nuisance prevention so as to justify burdens is a classic example of letting the fox guard the chicken coop. It is the legislative actions themselves that potentially constitute a taking, and thus the same body that is

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[272] *Lucas*, 505 U.S. at 1025-26.

[273] *See id.* at 1025 n.12 (stating that since a harm-preventing justification can be articulated for almost any legislative action, the Takings Clause would amount "to a test of whether the legislature has a stupid staff"); Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 513 (1987) (Rehnquist, J., dissenting) (arguing against a broad understanding of the nuisance exception, since nearly every government "is intended to secure for the public an extra measure of 'health, safety, and welfare'"). *See also* Penn Central Transp. Co. v. New York City, 438 U.S. 104, 145 (1978) (Rehnquist, J., dissenting) (stating that "nuisance exception" "is not coterminous with the police power itself").

[274] *See Lucas*, 505 U.S. at 1068-69 (Stevens, J., dissenting).

[275] Among the factors considered are the harm to the plaintiff, the social utility of the defendant's conduct, the suitability of the uses to the particular locale, and the relative ease of each party to avoid the harm in question. *See* RESTATEMENT (SECOND) OF TORTS §§ 826-831 (1979).

[276] *See Lucas*, 505 U.S. at 1069-70 (Stevens, J., dissenting).

creating the taking is given the authority to pronounce the state interest weighty enough to justify it. The two questions need to be kept separate: the legislative expertise justifies the state determining whether certain interests are important enough to be pursued, but the question of who should bear the costs of such burdens is a takings inquiry properly left to courts.

Third, and most important, limiting the nuisance exception to what would constitute common law nuisances does very little to hamper government's flexibility to protect the public interest, which is at the heart of Stevens's objections. As noted earlier, the Supreme Court has long recognized that most regulatory burdens and costs must be borne by landowners themselves,[277] and it is only in more extreme situations that regulatory takings analysis shifts the burden to government. Indeed, even in recent years, when the Court has often sided with landowners, it has still indicated that it is only in relatively rare situations that the extent of a burden will constitute a taking.[278]

For this reason a narrow construction of the "nuisance exception" will pose little threat to legislative flexibility to address new problems. The nuisance rationale is triggered only when a restriction would otherwise constitute a taking. There is little doubt that ordinary run-of-the-mill zoning restrictions almost never constitute takings if done pursuant to sound planning. The only place where flexibility might be impeded would be more recent environmental land use controls, such as regulations designed to protect wetlands, coastal zones, farmland, habitat for endangered species, and open space. Here, restrictions often preclude development altogether. Even then, however, the Court's analysis suggests that most restrictions do not constitute takings.[279] This

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[277] The Court in *Pennsylvania Coal*, though for the first time recognizing the idea of a "regulatory taking," made it clear that most regulatory burdens and costs must be borne by landowners themselves. *See* Pennsylvania Coal Co. v Mahon, 260 U.S. 393, 413 (1922). In a number of prior decisions the Court had stated that private property is held subject to certain public interests which can substantially limit its use. *See* Hadacheck v. Sebastian, 239 U.S. 394, 410 (1915); Hudson Cnty. Water Co. v. McCarter, 209 U.S. 349, 355 (1908); Mugler v. Kansas, 123 U.S. 623, 665 (1887).

[278] For example, the Court has been very clear that categorical takings under *Lucas* are very rare occurrences. In *Lucas* itself the Court characterized a categorical taking based on loss of all economic viability as an "extraordinary circumstance," *Lucas,* 505 U.S. at 1017, and that even a 95 percent loss in value would not be a categorical taking, *see id.* at 1019 n.8. Lower courts have also required very dramatic economic impacts before finding a taking. *See, e.g.*, Appolo Fuels, Inc. v. United States, 381 F.3d 1338, 1348 (Fed. Cir. 2004), *cert. denied*, 543 U.S. 1188 (2005) (no taking under *Penn Central* after 78 percent and 92 percent diminution in value on two parcels); Pace Res., Inc. v. Shrewsbury Township, 808 F.2d 1023, 1031 (3rd Cir. 1987) (finding that a property reduced in value from $495,600 to $52,000 was not a taking); William C. Haas & Co. v. San Francisco, 605 F.2d 1117, 1120-21 (9th Cir. 1979) (finding no taking with a 95 percent diminution in value). *But see* Formanek v. United States, 26 Cl. Ct. 332, 340 (1992) (finding an 88 percent diminution in value a taking). *See generally* Brace v. United States, 72 Fed. Cl. 337, 357 (2006) (stating the Federal Court of Claims "has generally relied on diminutions well in excess of 85 percent before finding a regulatory taking).

[279] Although the economic impact of environmental land use restrictions is undoubtedly more

is particularly true when the parcel as a whole is considered in analyzing economic impact, a battle which Stevens fought and won. That is considered next.

B. Parcel as a Whole

A second issue of considerable importance on which Chief Justice Rehnquist and Justice Stevens showed disagreement is how broadly or narrowly to define the relevant parcel of property for purposes of analyzing economic impact. Sometimes known as the denominator or conceptual severance issue, this has emerged in recent years as one of the most important issues in takings analysis, generating substantial academic commentary.[280] The Court itself has frequently noted the importance of the issue, with no one paying more attention to it than Justice Stevens.[281]

The critical role this issue plays in takings analysis is seen in how it potentially affects the evaluation of a restriction's economic analysis under both *Lucas* and *Penn Central*. As a general matter, the more broadly the relevant property for analysis is defined the less pronounced the economic impact of a regulation, and the less likely the restriction constitutes a taking. Conversely, the more narrow the property is defined the greater a restriction's economic impact, and the more likely it constitutes a taking.

For example, suppose a landowner owns 100 acres of land, and 90 acres are subject to an environmental regulation that prohibits any development of the property. Should the regulation's economic impact focus only on the 90 acres subject to the restriction, or should a court evaluate the restriction's economic impact on the entire 100 acres? If only the 90 acres are used for evaluating economic impact, then the regulation might constitute a categorical taking under *Lucas*, because it might well deprive the landowner of all economic viability on the 90 acres. Conversely, if the relevant parcel for analysis is the entire 100 acres, then it is almost certainly not a categorical taking, since despite the potential loss of economic viability on the 90 acres, 10 acres still remain

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severe than ordinary zoning regulations, even here most restrictions do not constitute categorical takings as long as some portion of the property can be used economically.

[280] *See e.g.*, Lynda J. Oswald, *Cornering the Quark: Investment-Backed Expectations and Economically Viable Uses in Takings Analysis*, 70 WASH. L. REV. 91, 126-27 (1995); Carol M. Rose, Mahon *Reconstructed: Why the Takings Issue is Still a Muddle*, 57 S. CAL. L. REV. 561, 566-69 (1984); Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1192 (1967); John E. Fee, *Unearthing the Denominator in Regulatory Takings Claims*, 61 U. CHI. L. REV. 1535, 1538-42 (1994).

[281] *See, e.g.*, Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 330-32 (2002); Palazzolo v. Rhode Island, 533 U.S. 606, 631 (2001); Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 491 (1987); Penn Central Transp. Co. v. New York City, 438 U.S. 104, 130-32 (1978).

economically viable.[282]

The issue of how to properly define the relevant parcel of property for purposes of evaluating a restriction's economic impact dates back to *Pennsylvania Coal*, where the Holmes majority opinion and the Brandeis dissent differed in how the property should be defined.[283] The Court's modern discussion of the issue dates back to *Penn Central*, where the majority indicated that a parcel must be considered as a whole when evaluating a restriction's economic impact. In that case Penn Central had argued that the relevant unit of property for analysis was only the restricted air rights, which arguably could have led to a finding of significant economic impact.[284] The Court rejected the argument, however, instead treating the relevant unit of property for analysis as the air rights together with the underlying currently developed parcel. The Court stated:

> "Taking" jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole.[285]

The above language from *Penn Central* clearly adopts a "parcel as a whole" approach to the denominator issue, rejecting any attempt to segment property for purposes of analyzing economic impact. The reason is obvious: analyzing the segment restricted can potentially turn any regulation into a taking. The Court has reiterated this position in two subsequent decisions, both written by Justice Stevens. Indeed, Stevens has championed the parcel as a whole analysis on numerous occasions. Rehnquist, in contrast, wrote dissents in which he rejected Stevens's parcel as a whole approach.

The first of the two Stevens opinions was in *Keystone Bituminous Coal Ass'n v. DeBenedictis*,[286] where the Court reviewed whether a requirement that a portion of coal be left in the ground in proximity to surface structures to avoid

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[282] This example is based on a hypothetical presented by the Court in *Lucas* to illustrate the significance of how broadly or narrowly to define the relevant parcel of property when evaluating a restriction's economic impact. *See Lucas*, 505 U.S. at 1016-17 n.7.

[283] Holmes's majority opinion evaluated the economic impact of the challenged statute only on the subsurface mining rights and support estate, which was the only property interest owned by the coal company. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 414-15. Justice Brandeis rejected the propriety of engaging in an economic impact analysis under the facts of the case, but said that any evaluation of the statute's economic impact should consider its impact on the totality of the property, including the surface rights. *See id.* at 419 (Brandeis, J., dissenting).

[284] *Penn Central*, 438 U.S at 130.

[285] *Id.* at 130-31.

[286] Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1987).

subsidence problems. In the second half of his majority opinion, Stevens analyzed the restriction's economic impact. The coal companies attempted to argue that the relevant property for analysis was the coal that had to be left in place, and thus the restriction constituted a complete taking of their interest.[287] Stevens rejected that definition of the property, quoting *Penn Central* that "takings jurisprudence does not divide a single parcel into discrete segments" and that the parcel must be considered as a whole.[288] As noted by Stevens, segmenting the property as argued by the coal companies could turn even ordinary land use restrictions into takings:

> Many zoning ordinances place limits on the property owner's right to make profitable use of some segments of his property. A requirement that a building occupy no more than a specified percentage of the lot on which it is located could be characterized as a taking of the vacant area as readily as the requirement that coal pillars be left in place. Similarly, under petitioners' theory one could always argue that a setback ordinance requiring that no structure be built within a certain distance from the property line constitutes a taking because the footage represents a distinct segment of property for takings law purposes.[289]

For that reason Stevens said that it was inappropriate to define the property as only the twenty-seven million tons of coal that had to be left in place.[290] Instead, he considered the relevant property for purposes of analyzing the restriction's economic impact as all the coal that potentially could be mined. In that context, the coal that must be left in place constituted less than two percent of the coal that could be mined.[291]

Chief Justice Rehnquist's dissent disagreed with Justice Stevens's analysis on several points, including his treatment of the definition of the relevant property affected for economic analysis. He stated that regulations typically limit how a particular property can be used but do not completely eliminate all rights in that property.[292] In such situations where the use of property is simply limited, the *Penn Central* balancing is an appropriate analytical tool to determine whether a taking has occurred.[293] Rehnquist argued, however, that it is a different matter when a regulation completely eliminates all use of a particular segment of property, in which case the effect is similar to a physical invasion of the land.[294]

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[287] *See id.* at 496-97.
[288] *See id.* at 497.
[289] *Id.* at 498.
[290] *Id.* at 496-99.
[291] *See id.* at 496-99.
[292] *Id.* at 516 (Rehnquist, C.J., dissenting).
[293] *See id.* at 516.
[294] *See id.* at 517.

In the same way that a physical invasion of one segment of property would be considered a taking, it should also be a taking when government eliminates all use rights in an identifiable segment of property. The fact that the coal that had to be left in the ground was very small compared to the coal that could be mined, while critical to Stevens's conception of the property, was irrelevant to Rehnquist.[295] In a footnote Rehnquist acknowledged the parcel as a whole language from *Penn Central* but found it inapplicable since *Penn Central* gave no guidance on how to distinguish between a "discrete segment" and a "single parcel."[296]

The issue of how to define the relevant parcel for evaluating economic impact arose several months later in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*,[297] with Rehnquist and Stevens again taking distinctly different approaches. As noted earlier, *First English* did not concern whether a particular action or regulation constituted a taking, but rather the scope of remedial relief once a taking was established. Specifically, the question before the Court was whether compensation is required for the period between the enactment of a land use regulation and a final judicial determination that a taking had occurred.[298] The Court, in an opinion by Rehnquist, held that once a taking has occurred temporary compensation can be recovered for the period between when the restriction was enacted and when the restriction is terminated.[299]

The Rehnquist majority opinion did not discuss the parcel as a whole issue, because the remedial issue had been procedurally isolated and it was therefore unnecessary to decide whether a taking had in fact occurred. Stevens, however, made the "parcel as a whole" issue central to his dissent, taking an even more expansive approach in defining the parcel than he had used in *Keystone*. Stevens began by acknowledging that temporary physical takings require compensation, but said that regulatory takings are quite different. Whereas physical invasions are nearly per se takings, the Court had long treated regulatory takings differently, requiring that at a minimum that the restriction

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[295] *See id.* at 515-18 (Rehnquist, C.J., dissenting).

[296] *Id.* at 517 n.5. Rehnquist's dissent also separately discussed that under Pennsylvania law the "support estate" was a distinct estate from the surface estate and mineral estate. Although Stevens's majority opinion considered this a "legalistic distinction," *id.* at 500, Rehnquist gave it considerable weight and stated that the effect of Pennsylvania's law was to altogether eliminate this separate estate if retained by coal companies. *Id.* at 520. But a reading of Rehnquist's opinion as a whole indicates that his conclusion that the law had a dramatic economic impact was not dependent on recognition of the distinct support estate; it simply provided an additional rationale why the law constituted a taking.

[297] First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304 (1987).

[298] *See id.* at 313.

[299] *See id.* at 319.

destroy "a major portion of the property's value."[300] In assessing the restriction's economic impact, however, the entirety of the property must be examined, including what Stevens referred to as the property's depth, width and length. Building upon his "totality of the property" analysis in *Keystone*, Stevens stated:

> Regulations are three dimensional; they have depth, width, and length. As for depth, regulations define the extent to which the owner may not use the property in question. With respect to width, regulations define the amount of property encompassed by the restrictions. Finally, and for purposes of this case, essentially, regulations set forth the duration of the restrictions. It is obvious that no one of these elements can be analyzed alone to evaluate the impact of a regulation, and hence to determine whether a taking has occurred. For example, in *Keystone Bituminous* we declined to focus in on any discrete segment of the coal in the petitioners' mines, but rather looked to the effect that the restriction had on their entire mining project.[301]

Stevens then argued that the type of temporary denial of use involved in *First English*, i.e., between enactment of a restriction and its eventual invalidation, was simply one dimension of the broader economic impact in which the duration of the restriction must be considered along with the severity of the restriction and the property affected.[302] He conceded that in extreme cases a temporary restriction might rise to a taking, such as where the restriction "remain[s] in effect for a significant percentage of the property's useful life."[303] But in most cases such a temporary restriction cannot be viewed as rising to the level of a taking, since the durational restriction will be rather limited, allowing appropriate use of the property for most of its useful life. Stevens argued that since the Court had often held there was no taking even when substantial use restrictions are imposed on property, it makes little sense to require compensation when much more modest durational limitations occur.[304]

Even though Stevens invoked *Keystone* in his analysis, his dissent in *First English* was a significant expansion of the "parcel as a whole" analysis in that case. *Keystone* involved a parcel as a whole spatially, which is the ordinary

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[300] *See id.* at 329 (Stevens, J., dissenting).

[301] *Id.* at 330.

[302] *See id.* at 330-31.

[303] *Id.* at 331.

[304] Stevens stated:

> Why should there be a constitutional distinction between a permanent restriction that only reduces the economic value of the property by a fraction - perhaps one-third - and a restriction that merely postpones the development of a property for a fraction of its useful life - presumably far less than a third?

Id. at 332.

meaning of the term and certainly the context in which the phrase was used in *Penn Central*. By incorporating the temporal dimension as well he expanded the definition of the relevant property for analyzing economic impact and thus greatly reduced the idea of compensatory takings. Although this perspective would be later vindicated in *Tahoe-Sierra*, at the time it was out of step with where the Court was headed with its takings jurisprudence.

Stevens once again argued for a broad reading of parcel as a whole in his dissenting opinion in *Dolan v. City of Tigard*,[305] in which Rehnquist wrote the majority opinion. The majority's "rough proportionality" for development exactions was in part predicated upon landowners surrendering the right to exclude, of which the Court is highly protective.[306] But Stevens once again criticized the majority for only focusing on one strand in the bundle of property rights - the right to exclude - instead of considering the economic impact on the property as a whole. Stevens acknowledged that limiting the right to exclude others is a significant intrusion on property rights.[307] However, he nevertheless argued that such a limitation must still be evaluated in the broader context of the totality of a landowner's rights, instead of just focusing on that one strand of property ownership.[308] Stevens said this is particularly true with regard to commercial property, where exactions are best seen as a type of business regulation.[309] In that context, and viewing the totality of Dolan's property interest, there was no showing that interference with the right to exclude had any "impact at all on the value or profitability of [Dolan's] planned development."[310]

Stevens and Rehnquist again disagreed with how to define the relevant property for analyzing economic impact in the more recent decision of *Tahoe-Sierra Preservation Council Inc. v. Tahoe Regional Planning Agency*.[311] In that case the Court addressed whether a rolling moratorium on land development lasting thirty-two months constituted a temporary taking. Affected landowners had argued that the moratorium constituted a categorical taking under the combined logic of *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*[312] and *Lucas*. *Luca*s held that total loss of economic viability constitutes a categorical taking,[313] while *First English* held that even temporary regulatory takings require compensation under the Fifth

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[305] Dolan v. City of Tigard, 512 U.S. 374 (1994).

[306] *See id.* at 384-86.

[307] *See id.* at 401 (Stevens, J., dissenting).

[308] *See id.* at 400-02.

[309] *See id.* at 402.

[310] *Id.* at 402.

[311] Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302 (2002).

[312] First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304 (1987).

[313] Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1015-16 (1992).

Amendment.[314] Therefore, the argument ran, if a land use regulation prohibits all economic activity even for a temporary period, which a moratorium does, it constitutes a temporary categorical taking.[315]

Justice Stevens's majority opinion rejected that argument, holding that a moratorium might, in some instances, constitute a taking under *Penn Central*, but it could not constitute a categorical taking.[316] Critical to his analysis was an expansive definition of the relevant property for analyzing the moratorium's economic impact. Largely building on his dissent in *First English*, Stevens stated that the relevant property for analysis had to be defined not just spatially but also temporally. Whereas in previous cases Stevens had emphasized the need to examine the parcel as a whole geographically, here he argued that takings jurisprudence also requires that the entirety of the parcel be considered durationally. Using essentially the same multi-dimensional analysis he had developed in his *First English* dissent, Stevens said:

> An interest in real property is defined by the metes and bounds that describe its geographic dimensions and the term of years that describes the temporal aspect of the owner's interest. See Restatement of Property §§ 7-9 (1936). Both dimensions must be considered if the interest is to be viewed in its entirety. Hence, a permanent deprivation of the owner's use of the entire area is a taking of "the parcel as a whole," whereas a temporary restriction that merely causes a diminution in value is not. Logically, a fee simple estate cannot be rendered valueless by a temporary prohibition on economic use, because the property will recover value as soon as the prohibition is lifted.[317]

Stevens therefore rejected the temporary categorical taking argument, saying that the petitioners were essentially trying to sever a thirty-two month segment from the property for purposes of analyzing the moratorium's impact.[318] For the same reason that the Court cannot simply focus on the geographic portion that is regulated, similarly it cannot just define the property as the durational portion that is regulated. To do so, according to Stevens, potentially turns every delay into a taking.[319] In this case, since substantial economic viability remained with the property after the moratorium ended, the restriction clearly did not qualify as a categorical taking.[320]

Justice Rehnquist's dissent did not directly address the parcel as a whole

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[314] *First English,* 482 U.S. at 321.
[315] *See id.* at 316-17, 320-21.
[316] *Tahoe-Sierra*, 535 U.S. at 337.
[317] *Id.* at 331-32.
[318] *Id.* at 331.
[319] *Id.*
[320] *See id.* at 332.

issue, but was implicitly unwilling to accept the broad manner in which Stevens perceived the property. To a large extent Rehnquist's analysis turned on a factual disagreement with Stevens, arguing that the record indicated the total delay attributed to the government's actions was six years, not thirty-two months, and that such a lengthy delay should be viewed as a taking.[321] He noted that the "permanent" taking in *Lucas* lasted only two years, while the "temporary" prohibition in this case lasted almost six.[322] In such situations, Rehnquist believed that the distinctions between restrictions that are intended to be permanent and those intended to be temporary is meaningless, and that whenever a landowner is deprived of all productive and economic use of the property for a significant period it should be considered a taking.[323] Thus, although not directly addressing the parcel as a whole analysis, Rehnquist's dissent implicitly rejected the idea that property interests should be viewed broadly durationally as well as spatially in analyzing a restriction's economic impact.

As should be obvious from the above, the issue of how to define the relevant parcel of property for analyzing a restriction's economic impact is a critical one. This is true not only for determining whether a restriction constitutes a categorical taking under *Lucas*, but also in evaluating economic impact under *Penn Central*. Although the Court has at times suggested that the issue is not yet resolved,[324] as a practical matter the Court appears to have generally adopted a broader rather than a narrower view of the property, at least as it concerns the spatial and temporal dimensions of property. Lower courts have similarly followed Stevens's lead, consistently interpreting the relevant property in a broad fashion geographically.[325]

Justice Stevens's overall emphasis on considering the parcel as a whole is the most sensible approach for two reasons. First, as noted by Stevens on several occasions, to focus just on the segment of property subject to regulation potentially turns every regulation into a taking.[326] Almost all land use regulations, including standard zoning ordinances, preclude use of some portion of the property. To focus only on the portion regulated, such as with a setback

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[321] *See id.* at 346-47 (Rehnquist, C.J., dissenting).

[322] *Id.* at 345-46.

[323] *See id.* at 349-351.

[324] *See* Palazzolo v. Rhode Island, 533 U.S. 606, 631 (2001) (suggesting Court had not yet decided how to analyze parcel as a whole issue); Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1016-17 n.7 (1992) (same).

[325] *See, e.g.*, Cienega Gardens v. United States, 503 F.3d 1266, 1280 (Fed. Cir. 2007); Tabb Lakes, Ltd. v. United States, 10 F.3d 796, 802 (Fed. Cir. 1993); Brace v. United States, 72 Fed. Cl. 337 (2006); K & K Constr., Inc. v. Dep't of Natural Res., 575 N.W.2d 531 (1998); Animas Valley Sand and Gravel, Inc. v. County of La Plata, 38 P.3d 59, 67-69 (Colo. 2010).

[326] *See Tahoe-Sierra,* 535 U.S. at 331; Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 498 (1987).

requirement, potentially turns the simplest of restrictions into a taking. This would be true of durational limitations as well, with standard delays potentially being takings.[327] The impact on environmental land use regulations would be particularly devastating, since many require that a portion of the land be kept in its natural state. To focus only on the portion restricted would thus turn almost all environmental land use restrictions into unconstitutional takings.

Second, the parcel as a whole approach better reflects a restriction's true regulatory burden. As noted in the previous section, the Court's current takings jurisprudence focuses primarily on the landowner's burden rather than the state's justification in determining whether a taking has occurred. It is essential, therefore, to accurately determine the extent of a burden. To only focus on the segment of property restricted distorts the actual burden imposed. An assessment of a landowner's burden must necessarily include not only what he or she cannot do with the land, but also what is permitted. This in turn requires consideration of permitted uses on unrestricted portions of the property.

This is not to suggest that Justice Stevens's extremely expansive view of the relevant parcel for evaluating regulatory impact completely carried the day, nor should it. His desire to evaluate limitations on the right to exclude in the context of the broader bundle of rights,[328] looking at the totality of economic impact, was rejected in *Dolan* and is certainly inconsistent with how the Court typically views such limitations.[329] Further, although Stevens's inclusion of the temporal dimension of property as part of the relevant parcel triumphed in *Tahoe-Sierra*, that was only for restrictions intended to be temporary when imposed. *Tahoe-Sierra* left undisturbed the Court's holding in *First English*, which did not consider the temporal dimension when the restriction was designed to be permanent.[330]

Further, even with the spatial dimension of property, which is clearly the most important part of the denominator analysis, Justice Stevens's "parcel as a whole" approach is likely to have some limits in ambiguous cases. Without a doubt, in the typical case of contiguous property acquired at the same time, Stevens's "parcel as a whole" analysis has appropriately triumphed. As a practical matter this will cover a substantial majority of issues that arise. But at times the special facts of cases might call for a more nuanced approach to determining the appropriate parcel for analysis, which many lower courts have recognized.

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[327] *See Tahoe-Sierra,* 535 U.S. at 331.

[328] *See* Dolan v. City of Tigard, 512 U.S. 374, 400-02 (1994) (Stevens, J., dissenting).

[329] *See, e.g.*, Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 435 (1982) (interference with the right to exclude "does not simply take a single 'strand' from the 'bundle' of property rights: it chops through the bundle, taking a slice of every strand"); Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979) (the right to exclude is "one of the most essential sticks in the bundle of rights commonly characterized as property").

[330] *See Tahoe-Sierra,* 535 U.S. at 328-29 (distinguishing *First English* as a remedial decision).

Thus, although generally adopting a "parcel as a whole" approach for contiguous property,[331] lower courts have recognized that there will be occasional situations in which contiguous property might not be considered as a single parcel.[332] For example, if a landowner obtained two adjacent properties from different owners at different times, then at least in some circumstances they should be treated as separate parcels for evaluating economic impact. Similarly, two tracts of land owned by the same person but divided by a major highway or even a topographical feature might be reasonably treated as separate parcels in some circumstances.[333]

Such circumstances will be the exception, however, and not the rule, and take very little away from Stevens's consistent emphasis on the "parcel as a whole" when evaluating economic impact. From a big picture perspective Stevens has certainly prevailed on this issue, and rightly so. To the extent that economic impact remains a central concern in regulatory takings analysis, and for most justices it does, then it is critical to accurately determine what the true impact is. Stevens's "parcel as a whole" approach, which considers not only what is prohibited on the land but also what is permitted, is the best vehicle for making an accurate determination.

C. Reciprocity of Advantage and Generality of Regulation

A third issue of significance to the takings jurisprudence of Chief Justice Rehnquist and Justice Stevens are the related concepts of reciprocity of advantage and generality of regulation. Reciprocity of advantage refers to the idea that the same regulation that imposes a burden on a landowner often also bestows benefits in the form of similar restrictions on neighboring property.[334] Generality of regulation refers to the breadth or narrowness of the class of restricted landowners.[335] The two are often, though not always, closely tied to each other, because in most instances the broader the regulation the greater the

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[331] *See, e.g.*, Cienega Gardens v. United States, 503 F.3d 1266, 1280 (Fed. Cir. 2007); Tabb Lakes, Ltd. v. United States, 10 F.3d 796, 802 (Fed. Cir. 1993); Brace v. United States, 72 Fed. Cl. 337 (2006); K & K Const., Inc., v. Dep't of Natural Res., 456 Mich. 570, 575 N.W.2d 531 (1998); Animas Valley Sand and Gravel, Inc. v. Cnty. of La Plata, 38 P.3d 59, 67-69 (Colo. 2010).

[332] *See Brace*, 72 Fed. Cl. at 348. The court identified five relevant factors in making a "parcel as a whole" determination: (1) whether a property was treated as a single economic unit; (2) degree of contiguity between interests; (3) dates of acquisition; (4) extent to which the parcel has been treated as a single income-producing unit; and (5) extent to which the regulated lands enhance the value of the remaining lands. *Id*. at 348.

[333] *See generally Meltz*, *supra* note 192 at 348-51 (summarizing parcel as a whole analysis and instances where courts might, in limited cases, exclude portions of contiguous land from relevant parcel when evaluating economic impact).

[334] *See, e.g.*, Agins v. City of Tiburon, 447 U.S. 255, 263 (1980).

[335] See Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1072-74 (1992) (Stevens, J., dissenting).

reciprocity of advantage that is generated.

Unlike the previous two issues, the idea of reciprocity of advantage and generality of regulation have not played a central role in the Supreme Court's takings jurisprudence in recent years, though both are at times mentioned and are often lurking beneath the surface. Although in *Penn Central* Rehnquist and Stevens emphasized the Landmark Law's lack of reciprocity and narrowness of regulation as a reason it was a taking,[336] in subsequent years the two had very different understandings of reciprocity and generality and how the concepts should apply. Stevens repeatedly emphasized concepts related to reciprocity and generality as a reason why a land use regulation was valid.[337] Rehnquist was generally quiet about both concepts after *Penn Central*, but implicit in his jurisprudence was a more narrow concept of what both mean and how they should be applied.[338]

As noted above, the concept of reciprocity of advantage refers to the idea that the same regulation that imposes a burden on a landowner often also bestows a benefit in the form of similar restrictions on neighboring properties. This potentially negates any taking challenge, because benefits received offset, or at least mitigate, burdens imposed. The idea of reciprocity of advantage as justifying regulations against takings challenges was first noted in *Pennsylvania Coal*, where the Court distinguished the Kohler Act in that case from earlier statutes the Court had upheld that required that pillars of coal must be kept in place along boundaries with adjacent property.[339] The Court stated that a reciprocity of advantage existed in those earlier cases, because any burden created by requiring that coal be kept in place was offset by the benefits of neighboring properties having similar restrictions, thus "securing an average reciprocity of advantage."[340] In contrast, the Kohler Act in *Pennsylvania Coal* did not provide any comparable benefits on regulated coal companies.[341]

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[336] Penn Central Transp. Co. v. New York City, 438 U.S. 104, 147 (1978) (Rehnquist, J., dissenting).

[337] See *Lucas*, 505 U.S. at 1072-74 (Stevens, J., dissenting); Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 491 (1987).

[338] For example, in his *Tahoe-Sierra* dissent, Rehnquist acknowledged that "Lake Tahoe is a national treasure" and that its preservation furthers the public interest. Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 354 (2002) (Rehnquist, C.J., dissenting). Yet Rehnquist clearly did not consider those broad societal benefits in a calculating reciprocity of advantage. Similarly, the fact that all similarly situated owners near the lake were regulated did not mean the restriction was sufficiently general. Instead, Rehnquist characterized the restriction as following on "a few targeted citizens." *Id.*

[339] *See* Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922). In an earlier decision, Plymouth Coal Co. v. Pennsylvania, 232 U.S. 531 (1914), the Supreme Court had held constitutional a requirement that pillars of coal be left next to adjacent properties owned by different coal companies to avoid subsidence along the boundaries. *Id.* at 540.

[340] *Pennsylvania Coal*, 260 U.S. at 415.

[341] *See id.*

As noted above, Justice Rehnquist's dissent in *Penn Central*, joined by Justice Stevens, made much of the lack of reciprocity from the Landmark Law. Rehnquist had argued that where a significant burden is imposed on property owners, as occurred in *Penn Central*, then it could only be justified when the law is designed to prevent a nuisance,[342] which was not the case with the Landmark Law, or where it was supported by reciprocal benefits.[343] Rehnquist noted that normal zoning restrictions are typically justified by such reciprocity because, by imposing the same restriction on all neighboring properties, the burden of regulation is partially offset by the benefit of the same regulation on neighboring land.[344] The Landmark Law in *Penn Central*, however, failed to provide such reciprocity of advantage, because it targeted only isolated property owners for restrictions that neighboring properties did not have.[345]

Although Rehnquist and Stevens viewed the lack of reciprocity as fatal under the circumstances of *Penn Central*, equally important was their recognition that the existence of reciprocity of advantage is the basis on which many land use regulations can be justified. In fact, Rehnquist indicated that the concept of reciprocity is what justifies typical zoning restrictions, stating:

> Even where the government prohibits a noninjurious use, the Court has ruled that a taking does not take place if the prohibition applies over a broad cross section of land and thereby "[secures] an average reciprocity of advantage." It is for this reason that zoning does not constitute a "taking." While zoning at times reduces *individual* property values, 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 the zoning will be benefitted by another.[346]

The above quote suggests that for Rehnquist the breadth of a regulation and reciprocity of advantage are interconnected, because it is a regulation's breadth that generates the reciprocal benefits to the burdened landowner. It also reveals two reasons why reciprocity of advantage justifies most zoning restrictions. First, broad-based zoning restrictions tend to be evenly shared; thus, individual landowners are not singled out to bear disproportionate burdens. If burdens are created, at least everyone carries them equally, which is a matter of fundamental fairness. Second, zoning restrictions typically not only create burdens, but also provide benefits by restrictions on others. Rehnquist did not say that benefits will necessarily offset burdens, but implicitly suggested that benefits will at least

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[342] *See* Penn Central Transp. Co. v. New York City, 438 U.S. 104, 144-46 (1978) (Rehnquist, J., dissenting).

[343] *See id.* at 147.

[344] *Id.*

[345] *Id.*

[346] *Id.*

significantly mitigate burdens, which is certainly the case with most zoning restrictions.

Notwithstanding their agreement in *Penn Central* that the absence of reciprocity in that decision constituted a taking, in subsequent decisions Rehnquist and Stevens took very distinct approaches to the dual issue of reciprocity of advantage and generality of regulation. Rehnquist, though mostly silent on the concepts, nevertheless remained firmly committed to the idea that the existence of reciprocity of advantage is a basic principle to justify many, if not most, land use regulations.[347] But he construed the concept of reciprocity quite narrowly, where a broad class of similarly situated landowners shared the same restriction that generated real, though not necessarily full, reciprocal benefits. For that reason Rehnquist had no problem, as did the rest of the Court, with accepting the validity of typical zoning restrictions, which limit but do not altogether preclude development.[348]

But Rehnquist failed to find similar reciprocity of advantage in less traditional, though certainly significant, land use restrictions, such as exactions and environmental restrictions. His analysis in *Dolan* emphasized the individualized nature of development exactions,[349] which implicitly limits the potential for reciprocal benefits. Similarly, the more environmentally focused land restrictions in *Lucas* and *Tahoe-Sierra* lacked the clear reciprocal benefits found in more traditional zoning restrictions.[350] Importantly, there is less symmetry with such restrictions between those burdened and those benefitted. Arguably, for Rehnquist and other conservative members of the Court, concepts

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[347] Rehnquist's continuing endorsement of reciprocity of advantage as a justification for many land use restrictions can be inferred from his strong endorsement of traditional land use controls in *Dolan*. *See* Dolan v. City of Tigard, 512 U.S. 374, 384-85 (1994). Indeed, one of the two grounds on which he distinguished development exactions from traditional land use controls is that exactions focus on individual parcels while traditional controls, such as zoning, restrict "entire areas of the city." *Id.* at 385. Rehnquist also joined the majority opinion in *Agins v. City of Tiburon*, 447 U.S. 255 (1980), in which the Court upheld a single-family zoning restriction on land, emphasizing that the restriction generated reciprocity of advantage by imposing the same restriction on others. *Id.* at 263.

[348] *See Dolan*, 512 U.S. at 384-85 (recognizing the validity of most land use regulations, in part because they involve "essentially legislative determinations classifying entire areas of the city"); *Agins,* 447 U.S. at 263.

[349] *See Agins*, 447 U.S. at 385.

[350] For example, Rehnquist characterized the environmental restrictions in *Tahoe-Sierra* as designed to further the broader public interest, but burdening relatively few to achieve that, stating:

> Lake Tahoe is a national treasure, and I do not doubt that respondent's efforts at preventing further degradation of the lake were made in good faith in furtherance of the public interest. But, as is the case with most governmental action that furthers the public interest, the Constitution requires that the costs and burdens be borne by the public at large, not by a few targeted citizens.

Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 354 (2002) (Rehnquist, C.J., dissenting).

of reciprocity and generality have less of a role to play when the right to exclude is implicated, as in *Dolan*, or where there is a perceived loss of all economic viability, as in *Lucas* and *Tahoe-Sierra*.[351]

Justice Stevens, on the other hand, began to take a distinctly different approach to reciprocity of advantage and generality. In his opinions, Stevens frequently emphasized the reciprocal benefits a landowner received from regulatory schemes, in ways ignored by Rehnquist and others. For example, in *Keystone* Stevens noted that the public nuisance exception for takings is in part justified by the idea of reciprocity of advantage, stating that "[w]hile each of us is burdened somewhat by such restrictions, we, in turn, benefit greatly from the restrictions placed on others."[352] This statement is certainly consistent with the narrow meaning of reciprocity acknowledged by Rehnquist, but some have argued that Stevens was referring to the more general reciprocity that comes from other restrictions.[353]

Justice Stevens's broad understanding of reciprocity of advantage, however, is perhaps most apparent in his *Dolan* dissent. In arguing that the development exaction in that case did not constitute a taking, Stevens repeatedly emphasized the benefits the Dolans received from the city's regulatory plan, including improved flood control for all owners adjacent to the creek.[354] Stevens also noted that since the city could deny the permit altogether, the benefit to be gained from the discretionary permit to enlarge the store and parking lot might more than offset the Dolans' limited loss of the right to exclude.[355] This is a very broad concept of reciprocity, suggesting that because the Dolans would likely be better off receiving permission to build with a required dedication of land than they would be not building at all, there is no taking.

Perhaps more significant than his expansive view of reciprocity was Stevens's emphasis on the generality and even-handedness of regulations.[356] Again, to Stevens, takings concerns were not so much about diminution in value, but how regulatory burdens were spread among similarly situated landowners. Even substantial or near-total diminutions in value were constitutional if they were evenly and broadly spread among relevant landowners.[357] It was only when a

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[351] *See* Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1017-18 (1992) (stating that "in the extraordinary circumstance when *no* productive or economically beneficial use of land is permitted, it is less realistic to indulge our usual assumption that the legislature is simply 'adjusting the benefits and burdens of economic life'").

[352] Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 391 (1987).

[353] *See* Raymond R. Coletta, *Reciprocity of Advantage and Regulatory Takings: Toward a New Theory of Takings Jurisprudence*, 40 AM. U.L. REV. 297, 336-39 (1990).

[354] *See* Dolan v. City of Tigard, 512 U.S. 374, 399-400 (1994) (Stevens, J., dissenting).

[355] *See id.* at 402-03.

[356] *See* Echeverria, *supra* note 25 (discussing Stevens's focus on generality of regulation).

[357] *See* Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1072-76 (1992) (Stevens, J., dissenting).

few landowners were targeted for regulatory burdens not shared by others that a taking occurred, because such a restriction failed to meet the distributional fairness concerns underlying the Takings Clause. Thus, whereas Rehnquist valued broad-based regulations not only because of fairness but because of the reciprocity they typically generated,[358] Stevens saw generality as a justifying factor in and of itself, even absent reciprocal benefits.

Stevens's emphasis on generality was most apparent in his *Lucas* dissent. Stevens criticized the majority's new categorical rule for focusing only on the economic impact and expectation factors of *Penn Central* and ignoring the character of the government action, and in particular its generality.[359] Stevens argued that the generality of a regulation had long been a central consideration in the Court's takings jurisprudence. He stated that the heightened scrutiny for development exactions and physical invasions was in part because those types of government actions often involved singling out a landowner for disproportionate burdens.[360] He further noted that there is a big "difference between a regulation that targets one or two parcels of land and a regulation that enforces a statewide policy."[361]

Stevens then argued that the generality of the challenged Beachfront Act was a significant factor in its constitutionality. He noted that the Act did "not target particular landowners, but rather regulates the use of the coastline of the entire state."[362] Further, the Act did not target only undeveloped property, but "prohibited owners of developed land from rebuilding if their structures were destroyed" and "from repairing sea walls and other erosion control devices.[363] For that reason he viewed the Act as applying significant burdens to all coastal landowners, rather than targeting just a few.[364] Stevens acknowledged that the economic impact of the regulation was "dramatic" and the interference with investment-backed expectations "substantial."[365] But the generality of the regulation, together with the important purposes served by it, justified the significant burdens imposed.[366]

This emphasis on the generality of the regulation and the important interests served is consistent with Stevens's emphasis on community responsibilities rather than individual burdens. Although Stevens does not say that regulatory

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[358] *See* Penn Central Transp. Co. v. New York City, 438 U.S. 104, 147 (1978) (Rehnquist, J., dissenting).

[359] *See Lucas,* 505 U.S. at 1071 (Stevens, J., dissenting).

[360] *See id.* at 1072-73.

[361] *Id.* at 1073.

[362] *Id.* at 1074.

[363] *Id.*

[364] *Id.*

[365] *Id.* at 1075.

[366] *See id.* at 1075-76.

burdens are irrelevant, his willingness to tolerate admittedly dramatic economic impacts as long as landowners are not targeted for excessive burdens suggests a very secondhand role for regulatory burdens.[367] There is no doubt that Stevens's takings jurisprudence changed over the years, but the importance he attributed to the generality of a regulation helps explain his joining the Rehnquist dissent in *Penn Central*. As emphasized in that dissent, the Landmark Law essentially targeted only a few buildings for restrictions not put on neighboring properties. Although Justice Brennan's majority opinion argued that the landmark restrictions benefitted the entire city, and that Penn Central therefore received reciprocal benefits in that very broad sense,[368] as a practical matter Penn Central had a burden that neighboring properties did not.

There is little doubt that the dual concepts of reciprocity of advantage and generality of regulation are relevant to takings jurisprudence, a point upon which both Rehnquist and Stevens agreed. Where they parted ways is what role those factors should have and how the concepts themselves should be viewed. For Rehnquist reciprocity of advantage and regulatory breadth were intricately tied together, and generality by itself was not sufficient to justify an otherwise severe economic impact. Indeed, severe diminution in value would arguably negate the existence of any meaningful reciprocity of advantage. For Stevens, though, economic impact was clearly secondary to generality. For example, in *Lucas* he acknowledged the near total loss of value, but saw the generality of regulation and importance of the government interest as justifying it.[369]

Just as significant, the justices also had different understandings of what qualified as reciprocity of advantage and generality. To Stevens generality meant that all similarly situated landowners be treated the same, even if the group burdened and the group benefitted were not the same. Rehnquist, however, more closely connected the importance of broadly-based regulations and reciprocity of advantage, and arguably required some symmetry between those burdened and those benefitted by a regulation.[370] That is to say a

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[367] *Id.* at 1075-76.

[368] *See* Penn Central Transp. Co. v. New York City, 438 U.S. 104, 134-35 (1978).

[369] *See id.*

[370] Rehnquist arguably took this position in several cases. For example, in *Tahoe-Sierra* Rehnquist concluded his dissent by stating:

> Lake Tahoe is a national treasure, and I do not doubt that respondent's efforts at preventing further degradation of the lake were made in good faith in furtherance of the public interest. But, as is the case with most governmental action that furthers the public interest, the Constitution requires that the costs and burdens be borne by the public at large, not by a few targeted citizens.

Tahoe-Sierra, 535 U.S. at 354 (Rehnquist, C.J., dissenting). This strongly suggests that Rehnquist viewed the benefits of the restriction as primarily going to broader society and burdens falling on a more limited set of landowners, thus failing to provide the generality of regulation and reciprocity of advantage necessary to justify the regulation. This is similar to the concerns he expressed in his

regulation might not be broadly based if the group burdened did not receive significant reciprocal benefits.

In applying the distinct approaches Rehnquist and Stevens took to reciprocity and generality, three types of regulatory scenarios might be envisioned, with Rehnquist and Stevens agreeing on two of the three. First are typical zoning restrictions, in which restrictions are applied comprehensively throughout a district in a broad and general manner.[371] No owner or small group of owners is singled out, with burdens distributed broadly. Moreover, in such situations the same group of owners burdened by the restriction is also the primary group benefitted, though by no means the only ones.[372] Both Rehnquist and Stevens would find the reciprocity generated by such a comprehensive restriction sufficient to avoid a taking. Indeed, this is essentially the classic meaning of reciprocity of advantage envisioned by Rehnquist as undergirding the validity of most land use restrictions.[373]

Second, and at the other extreme, are situations where one or a small group of landowners are singled out from a larger group of similarly situated landowners to carry large burdens for the broader class. For example, if a large group of landowners had property suitable for a restriction, but only a few were selected, this would amount to unfair targeting. Not only would Rehnquist find this unconstitutional, but most likely Stevens would too, or at least it would be a factor in favor of finding a taking.[374] This is the classic distributional fairness concern of Stevens, who framed his takings analysis mostly in terms of even-handed distribution of burdens, rather than the size of the burden.[375]

Situated between these two extremes is a third scenario, where the underlying

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dissenting opinion in *Penn Central*, stressing that a narrow set of property owners were burdened in order to provide benefits for broader society. *See Penn Central*, 438 U.S. at 147 (Rehnquist, J., dissenting) (New York City has "imposed a substantial cost on less than one one-tenth of all the buildings . . . for the general benefit of all its people").

[371] *See, e.g.*, Agins v. City of Tiburon, 447 U.S. 255, 263 (1980).

[372] As stated by Justice Rehnquist in his *Penn Central* dissent:

> [A]ny such abstract decrease in value will more than likely be at least partially offset by an increase in value which flows from similar restrictions as to use on neighboring properties. All property owners in a designated area are placed under the same restrictions, not only for the benefit of the municipality as a whole, but also for the common benefit of one another.

Penn Central, 438 U.S. at 139-40 (Rehnquist, J., dissenting). *See also* John E. Fee, *The Takings Clause as a Comparative Right*, 76 S. CAL. L. REV. 1003, 1057 (2003) (arguing that takings analysis requires substantial relation between those burdened and those benefitted by a regulation).

[373] *See Penn Central* 438 U.S. at 147 (Rehnquist, J., dissenting).

[374] Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1074 (1992) (Stevens, J., dissenting).

[375] *See id.* at 1073 (Stevens, J., dissenting) ("In analyzing takings claims, courts have long recognized the difference between a regulation that targets one or two parcels of land and a regulation that enforces a statewide policy.").

distributional fairness or lack thereof is not so clear. Many land use restrictions necessarily turn on the unique nature or location of property, and therefore the universe of similarly situated properties is relatively narrow to begin with. This is particularly true with property that has environmental value, such as wetlands, coastal zones, or critical habitat for endangered species. In such situations a restriction on all land within a class, such as wetlands, might still affect a relatively small number of people in a geographic area.[376] On the one hand such a restriction is still general and broad, in that it applies to all properties that are similarly situated (i.e., share similar characteristics), rather than intentionally targeting just a few properties for regulation.[377] On the other hand, the number of properties might still be relatively small within the region, surrounded mostly by properties that do not have the restriction. Thus, unlike traditional zoning, where all properties within an area share a common regulatory burden, here a few properties will be burdened and most will not.

It is arguably in this third scenario where Rehnquist and Stevens's views of reciprocity and generality most diverge. Rehnquist would almost certainly not have found reciprocity of advantage in such situations. First, to Rehnquist such restrictions were not broad-based, since they do not apply to all or almost all property in a relevant area, as traditional zoning does, but instead restrict only properties with unique environmental features.[378] Second, and perhaps more important, there is limited symmetry between those burdened and those benefitted from the regulation, unlike that which occurs with classic zoning. Rather, a relatively narrow group of landowners are often heavily burdened, with most of the benefits going to broader society.[379] Rehnquist would not automatically view this as a taking, but he would certainly reject justifying such a regulation on the basis of reciprocity of advantage.

To Stevens, though, such restrictions are general in nature if they apply equally to all similarly situated parties, and as such carry a heavy presumption of constitutionality.[380] The lack of symmetry between those burdened and those benefitted is not problematic because, unlike Rehnquist's view, generality of

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[376] *See* William W. Wade & Robert L. Bunting, *Average Reciprocity of Advantage: "Magic Words" or Economic Reality - Lessons from* Palazzolo*,* 39 URB. LAW. 319, 342 (2007).

[377] *See, e.g.*, *Lucas*, 505 U.S. at 1074 (Stevens, J., dissenting) (arguing for generality of the South Carolina Beachfront Management Act in *Lucas*, stating that it applied to all landowners within the applicable zone). *See also* Walcek v. United States, 49 Fed. Cl. 248, 270-71 (2001) (noting that wetlands regulations applied generally to all similarly situated landowners and therefore did not target plaintiffs).

[378] *See Penn Central*, 438 U.S. at 147-48 (Rehnquist, J., dissenting).

[379] For example, in *Tahoe-Sierra* Rehnquist viewed the challenged moratoria as designed to preserve a "national treasure." But he stated that "as is the case with most government action that furthers the public interest, the Constitution requires that the costs and burdens be borne by the public at large, not by a few targeted citizens." Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 354 (2002) (Rehnquist, C.J., dissenting).

[380] *See Lucas*, 505 U.S. at 1073 (Stevens, J., dissenting).

regulation is not intricately tied to generating reciprocal benefits.[381] Moreover, Stevens arguably had a broader view of reciprocity of advantage itself, which included the benefits a regulated party received as a member of society enjoying environmental protection.

On balance, the best approach to the role of reciprocity and generality is somewhere between that of Rehnquist and Stevens, an approach that considers the generality of regulation but does not give it disproportionate weight. Stevens is certainly right that generality relates to the Court's frequent statements that takings jurisprudence is fundamentally about "fairness and justice."[382] Certainly general regulations that treat all similarly situated parties the same are considered more fair and just than regulations that target just a few landowners. Thus, Stevens's argument that considerations of generality should be incorporated into *Penn Central's* character of government prong makes sense, a point recognized by lower courts and commentators.[383]

There are two problems, however, with giving the generality of a restriction disproportionate weight, as Stevens appeared to do. First, takings jurisprudence has always considered the extent of the burden an important, and perhaps central, consideration in determining whether a taking exists. This was first suggested by *Pennsylvania Coal's* ambiguous "goes too far" standard,[384] and has been repeatedly emphasized in subsequent decisions, including the now significant *Penn Central* analysis.[385] This emphasis is not surprising, because the extent of a burden also relates to its perceived fairness. Even if all similarly situated landowners are treated equally, to impose dramatic economic burdens on regulated parties seems less fair than to impose more moderate costs. This is particularly true if all the similarly situated parties subject to the regulation are still a relatively small subset of society as a whole.

This leads into the second concern about overemphasizing the importance of generality, which is that even general land use restrictions of the type envisioned by Stevens are still relatively limited in their reach when compared to those who benefit. For example, although the restriction in *Lucas* was part of a state-wide

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[381] This was most clearly seen in *Lucas*, where Stevens conceded that the restriction had a severe economic impact. *Id.* at 1075. This implicitly recognizes a lack of meaningful reciprocity of advantage to the burdened landowners. Yet Stevens emphasized that the generality of the regulation and the important societal purposes served by the law justified the restriction. *See id.* at 1075-76.

[382] *See* Armstrong v. United States, 364 U.S. 40, 49 (1960) (the Takings Clause "was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole"). *See also Tahoe-Sierra*, 535 U.S. at 332 (quoting *Armstrong*); Palazzolo v. Rhode Island, 533 U.S. 606, 617-618 (2001) (quoting *Armstrong*).

[383] *See, e.g.*, A.A. Profiles, Inc. v. Ft. Lauderdale, 850 F.2d 1483, 1844 (11th Cir. 1988); Wheeler v. Pleasant Grove, 664 F.2d 99, 100 (5th Cir. 1981); Wensmann Realty, Inc. v. City of Eagan, 734 N.W.2d 623, 693 (Minn. 2007). *See also* Meltz, *supra* note 192 at 346; Davidson, *supra* note 23 at 22; Echeverria, *supra* note 192 at 192-93.

[384] *See* Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).

[385] *See* Penn Central Transp. Co. v. New York City, 438 U.S. 104, 124 (1978).

program that regulated all landowners similarly situated to Mr. Lucas, those actually subject to the "dramatic" burdens under that scheme were very few.[386] The potential unfairness of imposing significant burdens on relatively few people becomes apparent when recognizing that the benefits from the restrictions go to a much broader category of people. In *Lucas* the purposes behind the Beachfront Management Act included environmental protection, economic development, and tourism.[387] As a practical matter these benefits flowed to the state as a whole, while the actual number of people subject to the types of burdens suffered by Mr. Lucas was very small. Thus, even a regulation that treats all similarly situated people the same might still require a small number of people to bear heavy burdens for the benefit of society as a whole.[388] The greater the mismatch between those restricted and those benefitted, the closer it comes to the frequently voiced concern that the Takings Clause "was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[389] This is especially true when the burden itself is dramatic.

A more proper approach to generality and reciprocity, which places it between the extremes of Rehnquist and Stevens, is to consider generality and reciprocity as factors, but only as factors, in the broader *Penn Central* analysis. Regulatory breadth or narrowness needs to be an important consideration in evaluating distributional fairness. But it needs to be viewed in the context of how many people are actually restricted, how broadly benefits as well as burdens are distributed, and the economic severity of the burden. Such a balancing of factors is most consistent with the purpose of regulatory takings and the distributional fairness concerns upon which it rests.

CONCLUSION: WHERE THE COURT GOES FROM HERE

The death of Chief Justice Rehnquist and retirement of Justice Stevens signify a changing of the guard with regulatory takings. Their tenure on the Court coincided with a three-decade period in which the Court aggressively tackled the question of regulatory takings, with Rehnquist and Stevens each playing important roles in shaping regulatory takings doctrine. In doing so, they

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[386] *See Lucas*, 505 U.S. at 1035-36 (Kennedy, J., concurring in the judgment) (noting that "the State did not act until after the property had been zoned for individual lot development and most other parcels had been improved, throwing the whole burden of the regulation on the remaining lots").

[387] *See id.* at 1021 n.10.

[388] John Fee has argued that takings jurisprudence should focus on the degree to which those burdened are also those who benefit from a regulation. He states that if "a restriction on one group of owners only makes sense because of its benefits to other, nonregulated members of the public, the restriction presents a classic case for compensation." *See* Fee, *supra* note 371 at 1057.

[389] Armstrong v. United States, 364 U.S. 40, 49 (1960).

reflected different visions of how society should balance private and public interests in land, especially as it relates to newer forms of land use controls, such as restrictions on environmentally sensitive land and development exactions. Rehnquist championed a private property view, while Stevens championed a more community-based approach to private and public rights.

Where the Court will go from here is anyone's guess, though it is likely that it will remain divided on regulatory takings issues. The replacement of Rehnquist with Chief Justice Roberts and the replacement of Stevens with Justice Kagan will likely have little effect with regard to the Court's balance on regulatory takings issues. Roberts is likely to emulate Rehnquist's embrace of private property, and, although it is still early, it is reasonable to believe that Kagan will reflect the more community-based views of Stevens. For similar reasons, Justice Sotomayor will probably reflect the views of Justice Souter, who typically sided with Stevens and the more liberal wing of the Court on takings issues.

The appointment that has the most potential for impacting the Court's balance on takings, at least marginally, is Justice Alito, who is likely to be a little more protective of private property than his predecessor, Justice O'Connor. Although O'Connor typically sided with Rehnquist and the conservative block on takings issues,[390] both she and Justice Kennedy at times departed and sided with government regulatory efforts that Rehnquist considered a taking.[391] That would leave Justice Kennedy as the closest justice there is to a swing vote on regulatory takings issues, a position he is increasingly finding himself in with other issues.

The Court's most recent regulatory takings case, *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection*,[392] decided last term, reflects this potential division on the Court. *Stop the Beach Renourishment* presented the question whether a decision by a state court might constitute a "judicial taking" by eliminating previously held property rights.

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[390] *See, e.g.*, Dolan v. City of Tigard, 512 U.S. 374 (1994); Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992); Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987); Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 506 (1987) (Rehnquist, J., dissenting).

[391] Justice O'Connor joined Stevens's majority opinion in *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency,* 535 U.S. 302 (2002) and Stevens's dissent in *First English Evangelical Lutheran Church v. County of Los Angeles,* 482 U.S. 304, 322 (1987). She also wrote a concurring opinion in *Palazzolo v. Rhode Island*, 533 U.S. 606, 632 (2001), which limited the majority opinion in significant respects.

Justice Kennedy also joined Stevens's majority opinion in *Tahoe-Sierra* and declined to join Justice Scalia's majority opinion in *Lucas*, instead writing an opinion concurring in the judgment. *Lucas*, 505 U.S. at 1032-36 (Kennedy, J., concurring in the judgment). *See also* John D. Echeverria, *supra* note 192 at 174 (describing Justices O'Connor and Kennedy as ideologically in the middle of the Court, including regulatory takings issues).

[392] Stop the Beach Renourishment, Inc. v. Florida Dep't of Envtl. Prot., 130 S. Ct. 2592 (2010).

The case arose out of Florida's Beach and Shore Preservation Act,[393] which permits local governments to restore beaches by depositing sand. Such restoration results in a new property line, which property owners claimed constituted a taking by depriving them of certain littoral rights without just compensation.[394] The Florida Supreme Court, responding to a certified question, held that, on its face, the challenged Act did not constitute an unconstitutional taking of littoral rights.[395] The affected landowners then argued that the Florida Supreme Court decision itself constituted an unconstitutional taking.[396]

Justice Stevens did not participate in the United States Supreme Court decision. The remaining eight justices unanimously held that the Florida Act was not a taking, finding that the Act was consistent with "background principles" of Florida law governed by the doctrine of avulsion.[397] The Court was deeply divided, however, on whether a state court decision might constitute a judicial taking. Justice Scalia, in an opinion joined by Chief Justice Roberts and Justices Thomas and Alito, argued that the text of the Takings Clause does not distinguish between branches of government, nor would common sense support such an idea.[398] Thus, "[i]f a legislature *or a court* declares that what was once an established right of private property no longer exists, it has taken that property, no less than if the State had physically appropriated it or destroyed its value by regulation."[399] The remaining four justices declined to address the "judicial taking issue," stating it was unnecessary to resolution of the case, advising caution, and raising a number of potential problems that "judicial takings" might present.[400]

While *Stop the Beach Renourishment* was the Court's first takings decision without either Rehnquist or Stevens, it reflects the same divisions that characterized the Court during their tenure. It is particularly ironic that Justice Stevens did not participate in the case, considering his substantial contributions to regulatory takings doctrine over the years and the issues raised by "judicial takings." In particular, Justice Stevens's consistent theme of the need for legislative flexibility in responding to society's needs, which includes the need to redefine property rights,[401] seems equally applicable to judicial takings. Both

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393 FLA. STAT. §§ 161.011-161.45 (2007).

394 *Stop the Beach Renourishment*, 130 S. Ct. at 2600.

395 *See* Walton Cnty. v. Stop the Beach Renourishment, Inc., 998 So. 2d 1102 (Fla. 2008).

396 *Stop the Beach Renourishment*, 130 S. Ct. at 2600.

397 *See id.* at 2611-12.

398 *See id.* at 2601-02 (Scalia, J., plurality opinion).

399 *Id.* at 2602 (emphasis in original).

400 *See id.* at 2614 (opinion of Kennedy, J.); *id.* at 2618 (opinion of Breyer, J.).

401 *See* Dolan v. City of Tigard, 512 U.S. 374, 411 (1994) (Stevens, J., dissenting); Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1069-70 (1992) (Stevens, J., dissenting).

potentially require the ability to redefine property rights as society changes, a consistent theme in Stevens's jurisprudence, but an idea that alarmed the private property sensitivities of Rehnquist.

This theme of flexibility and redefining the balance of private and public rights will undoubtedly continue to engage the Court in the years ahead. One likely context where this will arise is with the effects of climate change, which will require a number of "adaptation" strategies to rising temperatures.[402] Indeed, the Florida coast itself, the setting of *Stop the Beach Renourishment*, is but one of many areas in which adaptation strategies will require a rethinking of what private property ownership means in coastal zones and other environmentally sensitive lands. That rethinking of property rights will inevitably bring into tension once again Rehnquist's concern of protecting private property rights on the one hand and Stevens's focus on property owners' participation in the broader community on the other.

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[402] *See* RICHARD G. HILDRETH, ET. AL., CLIMATE CHANGE LAW: MITIGATION AND ADAPTATION 619-717 (2009) (discussing need for legal adaptation strategies in response to climate change).