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Taking a Look at the Modern Takings Clause Jurisprudence: Finding Private Property Protection Under the Federal and Utah Constitutions*

I. INTRODUCTION

The United States Constitution and the Utah Constitution both contain provisions which restrict government's ability to infringe upon private property interests. The Fifth Amendment of the United States Constitution provides: "[P]rivate property [shall not] be taken for public use, without just compensation."¹ The Utah Constitution has a similar provision: "Private property shall not be taken or damaged for public use without just compensation."² At first glance, these constitutional provisions seem simple, yet courts have struggled to establish a consistent interpretation and application of their protections. This Comment explores the United States Supreme Court's analysis in interpreting and applying the Fifth Amendment's Takings Clause, and examines the Utah Supreme Court's analysis in applying the Utah Constitution's corresponding provision.

Part II of this Comment presents a condensed overview of modern takings analysis, briefly outlining the analytical steps followed in applying both the federal provision and the Utah provision. This part is designed to serve as a quick reference for the practitioner who is exploring takings questions. Part III gives a detailed explanation of the United State Supreme Court's Takings Clause analysis, examining the fundamental theories that have driven the evolution of its modern interpretation. Part IV examines in detail the Utah Supreme Court's analysis of takings questions under article I, section 22 of the Utah Constitution. While the Utah court's analysis is signifi-

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1. U.S. CONST. amend. V.

2. UTAH CONST. art. I, § 22.

cant, it does not match the United States Supreme Court's analysis in either complexity or breadth.

II. GENERAL OVERVIEW: THE ANALYSIS OF MODERN TAKINGS CLAUSE JURISPRUDENCE

A. *The United States Supreme Court's Analysis Under the Fifth Amendment's Takings Clause*³

In applying the Fifth Amendment's Takings Clause, the United States Supreme Court follows a bifurcated analysis, applying one analysis to regulations that deny an owner economically viable use of her land and another to regulations that do not substantially advance a legitimate state interest. Accordingly, governmental actions that affect private property interests effect a taking if they (1) deny an owner economically viable use of her land, or (2) fail to substantially advance a legitimate state interest.⁴

3. This Comment is by no means the first piece of scholarly work that has attempted to analyze the Supreme Court's Takings Clause jurisprudence and summarize the rules of law in this complex constitutional issue. See, e.g., John J. Costonis, *Presumptive and Per Se Takings: A Decisional Model for the Taking Issue*, 58 N.Y.U. L. REV. 465 (1983) (presenting a comprehensive model for takings analysis). In 1988 a conference held at Dartmouth College presented the ideas of several professors and practitioners in light of the four takings cases handed down by the Supreme Court in 1987 (*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); *Hodel v. Irving*, 481 U.S. 704 (1987); and *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987)). The works prepared for this conference are reproduced in the December 1988 issue of the COLUMBIA LAW REVIEW. Gregory S. Alexander, *Takings, Narratives, and Power*, 88 COLUM. L. REV. 1752 (1988); William A. Fischel, *Introduction: Utilitarian Balancing and Formalism in Takings*, 88 COLUM. L. REV. 1581 (1988); William W. Fisher III, *The Significance of Public Perceptions of the Takings Doctrine*, 88 COLUM. L. REV. 1774 (1988); Douglas W. Kmiec, *The Original Understanding of the Taking Clause Is Neither Weak nor Obtuse*, 88 COLUM. L. REV. 1630 (1988); Frank Michelman, *Takings, 1987*, 88 COLUM. L. REV. 1600 (1988) [hereinafter *Michelman Takings*]; Frank Michelman, *A Reply to Susan Rose-Ackerman*, 88 COLUM. L. REV. 1712 (1988); Margaret J. Radin, *The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings*, 88 COLUM. L. REV. 1667 (1988); Susan Rose-Ackerman, *Against Ad Hocery: A Comment on Michelman*, 88 COLUM. L. REV. 1697 (1988); Stewart E. Sterk, Nollan, Henry George, and Exactions, 88 COLUM. L. REV. 1731 (1988); T. Nicolaus Tideman, *Takings, Moral Evolution, and Justice*, 88 COLUM. L. REV. 1714 (1988).

A compendium of current, informative and thought-provoking works on the Takings Clause can also be found in William C. Leigh & Bruce W. Burton, *Predatory Governmental Zoning Practices and the Supreme Court's New Takings Clause Formulation: Timing, Value, and R.I.B.E.*, 1993 B.Y.U. L. REV. 827, 876 app. B.

4. See *infra* part III.B.

1. *Governmental actions that deny an owner economically viable use of her land*⁵

The first analysis applied by the Court examines governmental actions that affect the value or use of a person's private property interest. Land-use regulations are the most common type of governmental actions reviewed under this analysis. The rule is that regulations that deny an owner economically viable use of her land will be found to violate the Takings Clause whenever the regulations go "too far" in denying a landowner the benefit of her property.⁶ In applying this rule, the Court has recognized three categories of regulation: (a) regulations that impose a permanent physical invasion, (b) regulations that deny an owner *all* economically viable use of her land, and (c) regulations that affect a property's value, but fall short of completely extinguishing the property's commercial value. When a regulation fits into categories (a) or (b) the Court will find a violation of the Takings Clause. In contrast, regulations that fit into category (c) are seldom deemed to violate the prohibition against governmental takings.

The rule for each category of regulation can be summarized as follows:

(a) Land-use regulations that compel the property owner to suffer a permanent physical invasion, no matter how inconsequential, violate the Takings Clause.⁷

(b) Land-use regulations that deny the property owner *all* economically beneficial or productive use of land violate the Takings Clause.⁸ To fit into this category, a regulation must deprive the property owner of any residual value.⁹

(c) Land-use regulations that fall short of completely extinguishing a property's value probably do not violate the Takings Clause.¹⁰ Nevertheless, the Court has suggested that a violation could be found by examining the economic impact of the regulation, the extent to which the regulation has interfered with distinct investment-backed expectations, and the nature of the governmental regulation.¹¹

5. See *infra* part III.B.1.

6. See *infra* parts III.A-B.1.

7. See *infra* part III.B.1(a).

8. See *infra* part III.B.1(b).

9. *Id.*

10. See *infra* part III.B.1(c).

11. *Id.*

2. *Governmental actions that fail to substantially advance legitimate state interests*¹²

The modern Court has confined this second analysis to examination of governmental development exactions.¹³ The Court examines a development exaction to determine whether the purpose behind the exaction substantially advances legitimate state interests.

In approaching development exactions the Court asks three questions. First, does the state have the power to withhold issuance of the development permit altogether? If not, then the state cannot demand the exaction as a condition to issuance of the permit. Second, does an "essential nexus" exist between the legitimate state interest and the permit requirement? The exact "fit" necessary to meet the essential-nexus requirement has not yet been clearly articulated. Third, is the degree of the exaction "roughly proportional" to the projected impact of the proposed development? To satisfy the "rough proportionality" requirement the government must have made an individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development.

B. *The Utah Supreme Court's Takings Analysis Under Article I, Section 22 of the Utah Constitution*

In an inverse condemnation action against the State of Utah, three elements must be satisfied before a private property owner can recover just compensation under article I, section 22 of the Utah Constitution.¹⁴ First, the property interest alleged to have been taken or damaged must be a recognized interest in real property.¹⁵ Recognized property interests "include[], but [are] not limited to any land and improvements subject to the substantive law of real property."¹⁶ Second, the

12. See *infra* part III.B.2.

13. "Development exactions are a form of land-use regulation in which a municipality requires a developer to give something to the community as a condition to receiving permission to develop." Nicholas V. Morosoff, Note, "Take My Beach, Please!": *Nollan v. California Coastal Commission and a Rational-Nexus Constitutional Analysis of Development Exactions*, 69 B.U. L. REV. 823, 823 (1989) (citing Donald L. Connors & Michael E. High, *The Expanding Circle of Exactions: From Dedication to Linkage*, 50 LAW & CONTEMP. PROBS. 69, 70 (1987)).

14. See *infra* part IV.B.

15. See *infra* part IV.B.1.

16. *Farmers New World Life Ins. Co. v. Bountiful City*, 803 P.2d 1241, 1244 (Utah 1990) (citing 2 NICHOLS ON EMINENT DOMAIN § 5.45 (3d ed. 1990)).

existence of a taking or damage must be confirmed by the court.¹⁷ A "taking" is any state interference which reduces a property's value or which substantially abridges the owner's right to the enjoyment thereof. A "damaging" is any type of state-initiated "permanent or recurring interference with property rights."¹⁸ Third, the alleged taking or damaging must have been occasioned by the state for a legitimate public use.¹⁹ If the alleged taking or damage is a result of negligence, or not intended for the public benefit, it will not be compensable under article I, section 22 of the Utah Constitution.

III. THE FEDERAL TAKINGS ANALYSIS: ECONOMIC IMPACT AND LEGITIMATE STATE INTERESTS

"[P]rivate property [shall not] be taken for public use, without just compensation."²⁰ At first glance, interpretation of this constitutional command appears to be straightforward. By its terms, this clause requires the payment of "just compensation" whenever government appropriates or acquires an individual's private property for the benefit of the public.²¹ Such a simple characterization, however, belies the difficulties the Supreme Court has faced in its struggle to articulate a logically consistent interpretation of the Fifth Amendment's Takings Clause.

The root of the Court's struggle originates in its review of two interrelated powers: the eminent domain power and the police power. These two powers share an important similarity: whenever either is exercised by a state or municipal government, it is always done for the benefit of the general public. However, these two powers also have a distinct difference. By definition, any exercise of the eminent domain power includes the payment of just compensation for the private property taken.²² An exercise of the police power, on the other hand, sel-

17. See *infra* part IV.B.2.

18. *Colman v. Utah State Land Bd.*, 795 P.2d 622, 627 (Utah 1990).

19. See *infra* part IV.B.3.

20. U.S. CONST. amend. V.

21. See, e.g., *Fred F. French Investing Co. v. City of New York*, 350 N.E.2d 381, 384 (N.Y.) ("[W]hen the State 'takes', that is appropriates, private property for public use, just compensation must be paid. In contrast, when there is only regulation of the uses of private property, no compensation need be paid."), *cert. denied*, 429 U.S. 990 (1976).

22. Black's Law Dictionary defines eminent domain as

[t]he power to take private property for public use by the state, municipalities, and private persons or corporations authorized to exercise functions of public character. . . . However, the Constitution limits the power

dom requires that the government compensate those directly restricted by the regulation.²³ This difference presents state and municipal governments with a temptation that is difficult to resist because much of what a government entity can accomplish affirmatively through the eminent domain power can also be accomplished negatively through the police power.²⁴ In the absence of a suitable restraint, governments could achieve eminent domain goals *at no cost* through a simple exercise of the police power. The modern federal takings analysis provides such a restraint.

The early Supreme Court failed to recognize that regulatory exercises of the police power could amount to a *de facto* exercise of the eminent domain power. In a long line of cases which implicated Takings Clause issues,²⁵ the Court routinely

to taking for a public purpose and prohibits the exercise of the power of eminent domain without just compensation to the owners of the property which is taken.

BLACK'S LAW DICTIONARY 470 (5th ed. 1979); *see also* U.S. CONST. amend. V.

23. *See, e.g., Goldblatt v. Town of Hempstead*, 369 U.S. 590, 592 (1962) ("It is an oft-repeated truism that every regulation necessarily speaks as a prohibition. If this ordinance is otherwise a valid exercise of the town's police powers, the fact that it deprives the property of its most beneficial use does not render it unconstitutional [or require compensation].") (citations omitted); *Hadacheck v. Sebastian*, 239 U.S. 394, 410 (1915) (The police power is "one of the most essential powers of government, one that is the least limitable. It may, indeed, seem harsh in its exercise, usually is on some individual, but the imperative necessity for its existence precludes any limitation upon it when not exerted arbitrarily."); *see also Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 417 (1922):

Every restriction upon the use of property imposed in the exercise of the police power deprives the owner of some right theretofore enjoyed, and is, in that sense, an abridgment by the State of rights in property without making compensation. But restriction imposed to protect the public health, safety or morals from dangers threatened is not a taking [requiring compensation].

Id. at 417 (Brandeis, J., dissenting).

24. Morosoff, *supra* note 13, explains that

A municipality could do this by simply passing a regulation that forbids the property owner from asserting a traditionally recognized property interest. This is exactly what Pennsylvania attempted to do in *Pennsylvania Coal Co. v. Mahon*. Rather than purchasing support rights from the coal companies, the state passed the Kohler Act which prohibited the companies from mining in such a way as to cause subsidence. This regulation effectively denied the companies all use of the support estate for which the companies had expressly contracted.

Morosoff, *supra* note 13, at 832 n.76 (citation omitted, italics supplied).

25. *See, e.g., Goldblatt v. Hempstead*, 369 U.S. 590 (1962); *Miller v. Schoene*, 276 U.S. 272 (1928); *Hadacheck v. Sebastian*, 239 U.S. 394 (1915); *Mugler v. Kansas*, 123 U.S. 623 (1887).

sustained the state's use of its police power under a due process analysis²⁶ that ignored the dictates of the Takings Clause.²⁷ Until Justice Holmes' landmark decision in *Pennsylvania Coal Co. v. Mahon*,²⁸ the Constitution's prohibition against taking went unrecognized as a valid check on the exercise of the police power. In *Pennsylvania Coal*, Justice Holmes acknowledged "the natural tendency of human nature" to expand the operation of the police power "more and more until at last private property disappears."²⁹ By requiring compensation whenever a "regulation goes too far,"³⁰ *Pennsylvania Coal* forever changed the Court's Takings Clause analysis.

The Supreme Court's modern application of the Takings Clause, which has evolved since Holmes' time, can be distilled into a two-pronged analysis that has its origins in early case law. The modern Court either expressly applies the Takings Clause and asks whether the regulation has gone "too far,"³¹ or it follows a limited due process analysis that asks whether the regulation substantially advances a legitimate state interest.³² A brief review of the early developments in Supreme Court takings jurisprudence enhances one's understanding of the modern Court's two-pronged approach.

A. *Early Federal Takings Cases: The Roots of Modern Analysis*

When first confronted with early Takings Clause challenges, the Supreme Court avoided applying the actual language of the Takings Clause and instead examined the regulations using a due process analysis. Resort to this analysis consistently

26. This due process analysis asked whether the regulation was a legitimate exercise of the state's police power, primarily examining whether the regulation protected a legitimate public purpose and whether the legislative means adequately advanced the public purpose. Justice Brandeis' forceful dissent in *Pennsylvania Coal Co. v. Mahon* exemplifies this approach in the context of land-use regulation. 260 U.S. 393, 417-18 (1922) (Brandeis, J., dissenting) ("The restriction upon the use of this property can not, of course, be lawfully imposed, unless its purpose is to protect the public. . . . Furthermore, a restriction, though imposed for a public purpose, will not be lawful, unless the restriction is an appropriate means to the public end.").

27. See *infra* part III.A.

28. 260 U.S. 393 (1922).

29. *Id.* at 415.

30. *Id.*

31. See *infra* part III.B.1.

32. See *infra* part III.B.2.

favorable government, upholding regulations that had a severe economic impact on individual landowners.

For example, in *Mugler v. Kansas*,³³ the State of Kansas enacted a prohibition that denied the defendants essentially all their properties' economically beneficial use.³⁴ The Supreme Court first upheld the regulations as a valid exercise of the police power,³⁵ and then rejected the idea that compensation was required when a land-use regulation denies an owner all beneficial use of her property.³⁶ Later, in *Hadacheck v. Sebastian*,³⁷ the Court again invoked a due process analysis and refused to grant relief to a property owner even though the property's value was substantially diminished by a municipal regulation. The Court reasoned that the regulation did not require compensation because the municipality had grounded its action in a rational exercise of the police power.³⁸ The plaintiff had purchased property worth approximately \$800,000.³⁹ Then the property's value was decreased to less than \$60,000 when the City of Los Angeles placed the land in a

33. 123 U.S. 623 (1887).

34. *Id.* at 654-57. The statute in question declared "that the manufacture and sale of intoxicating liquors should be forever prohibited in [the] State." *Id.* at 655. Defendants owned breweries that had been manufacturing alcoholic beverages since before the statute was adopted, and the Court recognized that because of this prohibition "the value of [defendants'] property will be very materially diminished." *Id.* at 657.

35. *Id.* at 660-62. The Court found that the statute was a legitimate exercise of the state's police power to protect "the public health, the public morals, and the public safety" and that it was "fairly adapted" to a legitimate public purpose. *Id.* at 662.

36. *Id.* at 664. The Court stated:

[T]he present case must be governed by principles that do not involve the power of eminent domain, in the exercise of which property may not be taken for public use without compensation. A prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or an appropriation of property for the public benefit. Such legislation does not disturb the owner in the control or use of his property for lawful purposes, nor restrict his right to dispose of it, but is only a declaration by the State that its use by any one, for certain forbidden purposes, is prejudicial to the public interests. . . . The exercise of the police power by the destruction of property which is itself a public nuisance, or the prohibition of its use in a particular way, whereby its value becomes depreciated, is very different from taking property for public use

Id. at 668-69.

37. 239 U.S. 394 (1915).

38. *Id.* at 407-10.

39. *Id.* at 405.

limited-use district.⁴⁰ Despite this enormous loss of value, the Court denied relief,⁴¹ reasoning that the regulation was a valid exercise of the police power and, as such, did not require compensation.⁴²

In these early cases the Court simply assumed that the Takings Clause was not qualified to restrain an exercise of the police power. With the landmark case of *Pennsylvania Coal Co. v. Mahon*,⁴³ however, the Court began to breathe life into the Takings Clause. In *Pennsylvania Coal*, a coal company had sold the plaintiffs a surface estate while expressly retaining the right to mine the coal beneath the surface.⁴⁴ Plaintiffs had purchased the property with an understanding that the underground coal mining might cause subsidence damage to their surface estate.⁴⁵ Then, Pennsylvania adopted legislation that prohibited the mining of coal if such mining would cause surface collapse or damage,⁴⁶ and plaintiffs sued to prevent the coal company from mining below their property, alleging that "whatever may have been the Coal Company's rights, they were taken away by [the Pennsylvania law]."⁴⁷

For the first time, the Court gave heed to the Fifth Amendment's prohibition against taking. Justice Holmes recognized that the statute "destroy[ed] previously existing rights of property," then queried "whether the police power [could] be stretched so far."⁴⁸ Believing that a state's power to infringe

40. *Id.* at 404-05.

41. *Id.* at 408-09.

42. *Id.* at 409-10, 413-14. The Court found no merit in the property owner's claim. Concerning the municipality's exercise of the police power, the Court reasoned:

It is to be remembered that we are dealing with one of the most essential powers of government, one that is the least limitable. It may, indeed, seem harsh in its exercise, usually is on some individual, but the imperative necessity for its existence precludes any limitation upon it when not exerted arbitrarily. . . . There must be progress, and if in its march private interests are in the way they must yield to the good of the community.

Id. at 410.

43. 260 U.S. 393 (1922).

44. *Id.* at 412.

45. *Id.* ("The deed conveys the surface, but in express terms reserves the right to remove all the coal under the same, and the grantee takes the premises with the risk, and waives all claim for damages that may arise from mining out the coal.")

46. *Id.* at 412-13.

47. *Id.* at 412.

48. *Id.* at 413.

on property rights through regulation "must have its limits,"⁴⁹ Justice Holmes invoked a constitutional restraint on the exercise of the police power by citing the constitutional requirement that government pay just compensation when diminution of property value "reaches a certain magnitude."⁵⁰ He articulated a simple test: "The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."⁵¹ This test is not a bright-line rule. It was designed to engender a factual analysis which would scrutinize all of the relevant factors before determining whether a regulation had gone "too far."⁵²

The modern two-pronged Takings Clause analysis has grown from the decision in *Pennsylvania Coal*. The prong most commonly relied upon is nothing more than an attempt to determine whether, as Justice Holmes expressed it, the regulation in question has gone too far.⁵³ The numerous cases performing this factual examination have begotten multiple factors that are more or less important depending upon the factual scenario involved. Nevertheless, the economic diminution prong

49. Justice Holmes explained the problem as follows:

Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law. As long recognized, some values are enjoyed under an implied limitation and must yield to the police power. But obviously the implied limitation must have its limits, or the contract and due process clauses are gone.

Id.

50. *Id.* ("One fact for consideration in determining such limits is the extent of the diminution [in value]. When [the diminution] reaches a certain magnitude, in most if not all cases there must be an exercise of eminent domain and compensation to sustain the act.")

51. *Id.* at 415.

52. "[T]he question depends upon the particular facts. The greatest weight is given to the judgment of the legislature, but it always is open to interested parties to contend that the legislature has gone beyond its constitutional power." *Id.* at 413. Subsequent courts have recognized the ad hoc nature of this approach. See *infra* part III.B.1.

53. Professor Michelman has some provocative thoughts on this point. He examined the current state of takings jurisprudence in 1987 and asked: "[W]hat makes a regulatory restriction on the use or disposition of property become a taking for which just compensation is required by mandate of the United States Constitution?" Michelman *Takings*, *supra* note 3, at 1600-01. After noting that the myriad of Takings Clause interpretations have failed to produce a simple, abstract rule of law, he concludes that this lack of any definite rule of law is a healthy result of the judicial process. *Id.* at 1625-29 (This result "is not law's antithesis but a part of law's essence."). Cf. Kmiec, *supra* note 3, at 1630-31 (disagreeing with Professor Michelman's interpretation of the 1987 takings cases and attempting to answer "the question the Court avoids: when does a regulatory taking occur?").

has not outgrown the simple test envisioned by Justice Holmes: the diminution in economic value gauges whether the exercise of police power has gone too far.⁵⁴ Economic diminution is the most common analysis employed to determine if a compensable taking has occurred, and is free from the earlier Court's substantive due process examination of the government's exercise of the police power. However, the early Court's substantive due process analysis has not been entirely abandoned. The second prong of modern Takings Clause analysis examines whether the governmental action substantially advances legitimate state interests. The application of this prong has been constrained to the narrow factual scenario of development exactions.

B. *The Modern Court's Analysis*

The modern Supreme Court's Takings Clause analysis follows a two-pronged approach. In reviewing governmental actions which trespass on individual property interests, the Supreme Court will find a violation of the Takings Clause if the government action (1) "denies an owner economically viable use of his land," or (2) "does not substantially advance legitimate state interests."⁵⁵ These two prongs are mutually exclusive; each is used to assess distinct factual situations.⁵⁶ The first is an outgrowth of Justice Holmes' fact-intensive general rule which gauges whether the government's exercise of its police powers has gone too far by examining the property's diminution in economic value.⁵⁷ The other path of analysis is a remainder of the Court's substantive due process examination of takings issues.⁵⁸ This second path scrutinizes the

54. See *supra* note 50 and accompanying text.

55. *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980) (citing *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 138 n.36 (1978), for the first prong and *Nectow v. City of Cambridge*, 277 U.S. 183, 188 (1928), for the second prong). Since *Agins*, the modern Court has frequently cited this passage as the general rule for regulatory takings issues. *Dolan v. City of Tigard*, 114 S. Ct. 2309, 2316 (1994); *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886, 2894 (1992); *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 834 (1987); *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 485 (1987).

56. These analyses are rooted in the early takings decisions of the Supreme Court. For an overview of the influence these early decisions have had on modern takings analysis, see *supra* part III.A.

57. For a more detailed explanation of Justice Holmes' *Pennsylvania Coal* decision, see *supra* notes 43-52 and accompanying text.

58. For a "genealogy of the two principal competing discourses of Supreme

government's exercise of its police power more directly, striking it down if it does not substantially advance a legitimate state interest. The modern Court has only resorted to this analysis when a municipality has denied a land-use permit for failure to comply with a specific development exaction.⁵⁹

This Comment will first examine the modern Court's attempt to delineate how far is "too far." This is the path of analysis that was begat by Justice Holmes in *Pennsylvania Coal*.⁶⁰ Next, the Court's substantive due process analysis will be examined.⁶¹ This alternate path of analysis furthers Takings Clause objectives by limiting a government's ability to exercise its police power in the area of development exactions.

1. How far is too far? When regulation denies an owner economically viable use of the land

Most modern Takings Clause cases are analyzed under the economic viability prong. When Justice Holmes stated that "if regulation goes too far it will be recognized as a taking,"⁶² he stated a test that is ill-suited to bright-line distinctions.⁶³ Indeed, he anticipated an analysis that would examine the facts of a particular case,⁶⁴ especially the extent to which the government regulation diminishes a property's economic value,⁶⁵ in determining whether the government's land-use regulation violates the Takings Clause.⁶⁶ The modern Supreme Court

Court land use planning jurisprudence," see Robert A. Williams, Jr., *Legal Discourse, Social Vision and the Supreme Court's Land Use Planning Law: The Genealogy of the Lochnerian Recurrence in First English Lutheran Church and Nollan*, 59 U. COLO. L. REV. 427, 428 (1988). According to Professor Williams, the two competing discourses are: "[T]he discourse of aggressive judicial review of police power regulations grounded in the *Lochner* era social vision of property as a fundamental right, and the discourse of judicial deference grounded in the New Deal social vision that rejected judicial intervention in the socioeconomic field." *Id.* at 428-29 (footnotes omitted); see also *supra* notes 25-27, 33-? and accompanying text.

59. See, e.g., *Dolan*, 114 S. Ct. at 2309; *Nollan*, 483 U.S. 825.

60. See *supra* part III.A.

61. See *infra* part III.B.2.

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

63. In Justice Holmes' words, this analysis is "a question of degree—and therefore cannot be disposed of by general propositions." *Id.* at 416.

64. *Id.* at 413 ("[T]he question depends upon the particular facts.").

65. *Id.* ("One fact for consideration in determining such limits is the extent of the diminution. When it reaches a certain magnitude, in most if not in all cases there must be an exercise of eminent domain and compensation to sustain the act.").

66. *Id.* at 413-16.

routinely relies upon Justice Holmes' reasoning as the foundation of its analysis under this prong.

The many cases that have relied on the economic diminution analysis have generated numerous factors that gauge the extent of the property's diminution in value. In fact, the analysis is so case-sensitive that the Court has characterized it as an "essentially ad hoc, factual inquiry."⁶⁷ Despite the numerous factors that have been articulated over the years that might aid the Court with its analysis, the Court will always find that a land-use regulation violates the Takings Clause and requires compensation in two narrow instances.⁶⁸ A land-use regulation violates the Takings Clause only when it either "compel[s] the property owner to suffer a physical 'invasion' of his property"⁶⁹ or when it "denies *all* economically beneficial or productive use of land."⁷⁰ Regulations that only partially diminish a

67. *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978) (quoting *Goldblatt v. City of Hempstead*, 369 U.S. 590 (1962)); see also *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982) (acknowledging that, "[o]rdinarily, the Court must engage in essentially ad hoc, factual inquiries."). The *Lucas* Court explained:

[O]ur decision in *Mahon* offered little insight into when, and under what circumstances, a given regulation would be seen as going "too far" for purposes of the Fifth Amendment. In 70-odd years of succeeding "regulatory takings" jurisprudence, we have generally eschewed any "set formula" for determining how far is too far, preferring to "engag[e] in . . . essentially ad hoc, factual inquiries."

Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2893 (1992). This ad hoc approach has—not surprisingly—sometimes produced inconsistent results. Compare *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922) (finding that a state statute which prohibited the mining of coal below inhabited land violated the requirements of the Takings Clause), with *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987) (analyzing a factual scenario remarkably similar to that presented in *Pennsylvania Coal*, the Court found that a state statute which prohibited the mining of coal below inhabited land did *not* violate the requirements of the Takings Clause).

68. In a recent case the Court expressly acknowledged its practice of requiring compensation in only two limited situations. In Justice Scalia's words, the Court has

described at least two discrete categories of regulatory action as compensable without case-specific inquiry into the public interest advanced in support of the restraint. The first encompasses regulations that compel the property owner to suffer a physical "invasion" of his property. . . . The second situation in which [the Court has] found categorical treatment appropriate is where regulation denies all economically beneficial or productive use of land.

Lucas, 112 S. Ct. at 2893 (citations omitted).

69. *Id.*; see also *Loretto*, 458 U.S. at 419; see *infra* part III.B.1(a).

70. *Lucas*, 112 S. Ct. at 2893; see *infra* part III.B.1(b).

property's value, no matter how substantial the diminution, have never been held to require compensation.⁷¹

When confronted with a regulation that denies an owner economically viable use of the land, determine into which category the regulation best fits: (a) does the regulation impose an actual physical invasion of property? (b) does the regulation deny the owner all economically beneficial or productive use of the land? or (c) does the regulation only partially diminish the property's value? Constitutionality will depend on which category best contains the regulation in question. If the regulation falls into category (a) or (b) it is unconstitutional and requires compensation. But, if it falls into category (c) the regulation has not risen to the level of a constitutional violation under the Takings Clause.

(a) *Regulations that impose an actual physical invasion of property.* Whenever government regulation compels a property owner to suffer actual physical invasion of property, "no matter how minute the intrusion, and no matter how weighty the public purpose behind it,"⁷² the Court has "invariably found a taking."⁷³

The modern case that best represents this rule is *Loretto v. Teleprompter Manhattan CATV Corp.*⁷⁴ In *Loretto*, the State of New York enacted legislation "[t]o facilitate tenant access to [cable television]."⁷⁵ The law "provide[d] that a landlord [could] not 'interfere with the installation of cable television facilities upon his property.'"⁷⁶ A landlord brought suit against a cable television company that had installed cables on the landlord's building, alleging that the company's installation of cable under the provisions of the act was "a taking without just compensation."⁷⁷ The Court ruled in favor of the landlord,

71. See *infra* part III.B.1(c).

72. *Lucas*, 112 S. Ct. at 2890 (citing *Loretto*, 458 U.S. at 426). Cf. *Kaiser Aetna v. United States*, 444 U.S. 164, 178-80 (1979) (holding that the imposition of navigational servitude on a marina created and rendered navigable at private expense constituted a taking).

73. *Loretto*, 458 U.S. at 427.

74. 458 U.S. 419 (1982).

75. *Id.* at 423. According to the New York Court of Appeals, this legislation served "the legitimate public purpose of 'rapid development of . . . a means of communication which has important educational and community aspects.'" *Id.* at 425 (quoting *Loretto v. Teleprompter Manhattan CATV Corp.*, 423 N.E.2d 320, 329 (N.Y. 1981) (*rev'd*, 458 U.S. 419 (1982))).

76. *Id.* at 423 (quoting N.Y. EXEC. LAW § 828(1)(a) (McKinney Supp. 1994)).

77. *Id.* at 424.

concluding that a permanent physical occupation, no matter how minor,⁷⁸ constituted a taking of property for which just compensation was due.⁷⁹ The government's interest in this regulation was of little weight in the analysis. As the *Loretto* Court explained, any "permanent physical occupation authorized by government is a taking without regard to the public interests that [the regulation] may serve."⁸⁰

(b) *Regulations that deny the owner all economically beneficial or productive use of the land.* As with regulations causing a physical occupation, regulations that deprive an owner of all economically beneficial use of a property are subject to a substantially predictable guideline. Whenever a land-use regulation is seen as effectively denying a landowner all economically beneficial or productive use of her property,⁸¹ the Court has consistently found a taking and required compensation.⁸²

78. This was, by all accounts, a *very* minor physical intrusion. The cable company "installed a cable slightly less than one-half inch in diameter and of approximately 30 feet in length along the length of the building . . . and directional taps, approximately 4 inches by 4 inches by 4 inches on the front and rear of the roof." *Id.* at 422 (quoting *Loretto*, 423 N.E.2d at 324).

79. *Id.* at 426 ("We conclude that a permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve. Our constitutional history confirms the rule, recent cases do not question it, and the purposes of the Takings Clause compel its retention.").

80. *Id.*

81. The Court has described these occurrences as "relatively rare situations" and as "extraordinary circumstance[s]." *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886, 2894 (1992). If the Court determines that the regulation does not effect a complete denial of all economically beneficial or productive use, then the Court will apply a different analysis. For the analysis applicable to situations in which the regulation leaves the property with some value, see *infra* part III.B.1(c).

82. Notice that the Court has the final say in determining whether a regulation has in fact denied a landowner of *all* economically beneficial or productive use—an inherently qualitative determination. Many landowners have sought relief under the Takings Clause only to be denied because, in the Court's view, the regulation did not completely extinguish a fundamental attribute of ownership, leaving the landowner something more than nothing. See, e.g., *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987); *Agins v. City of Tiburon*, 447 U.S. 255 (1980); *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978); see also *infra* part III.B.1(c).

In *Lucas*, the Supreme Court acknowledged this problem of subjectivity, recognized that it had sometimes led to inconsistent results, but declined to resolve the issue on the facts of that case. The Court explained:

Regrettably, the rhetorical force of our "deprivation of all economically feasible use" rule is greater than its precision, since the rule does not make clear the "property interest" against which the loss of value is to be measured. . . . Unsurprisingly, this uncertainty regarding the composition of the denominator in our "deprivation" fraction has produced inconsistent [results]. The answer to this difficult question may lie in how the owner's

The modern case that best represents this proposition is *Lucas v. South Carolina Coastal Commission*.⁸³ In *Lucas*, a developer had purchased two shorefront lots on a barrier island with plans to construct single-family houses on the lots.⁸⁴ The properties were not subject to the state's coastal regulations at the time of purchase.⁸⁵ However, two years later the state legislature enacted the Beachfront Management Act,⁸⁶ which barred the developer from erecting any permanent habitable structures on the lots.⁸⁷ The developer "promptly filed suit . . . contending that the . . . Act's construction bar effected a taking of his property without just compensation."⁸⁸ The trial court found that the Act "decreed a permanent ban on construction insofar as [the developer's] lots were concerned, and that this prohibition 'deprive[d the developer] of any reasonable economic use of the lots, . . . and render[ed] them valueless.'"⁸⁹ The trial court then "concluded that [the developer's] properties had been 'taken' by operation of the Act, and it ordered [the state] to pay 'just compensation.'"⁹⁰ The state supreme court reversed, resorting to an analysis reminiscent of the early Court's takings decisions.⁹¹ Deferring to the state legislature's "uncontested findings" that new construction threatened the public shoreline resources,⁹² the state supreme court ruled that when a regulation is designed to "prevent serious public harm,"⁹³

reasonable expectations have been shaped by the State's law of property—i.e., whether and to what degree the State's law has accorded legal recognition and protection to the particular interest in land with respect to which the takings claimant alleges a diminution in (or elimination of) value. In any event, we avoid this difficulty in the present case

112 S. Ct. at 2894 n.7 (citations omitted).

83. 112 S. Ct. 2886 (1992).

84. *Id.* at 2889. The developer paid \$975,000 for the lots. *Id.*

85. *Id.* at 2890.

86. S.C. CODE ANN. § 48-39-250 to 48-39-360 (Law. Co-op. Supp. 1993).

87. *Lucas*, 122 S. Ct. at 2889.

88. *Id.* at 2890. The petitioner "did not take issue with the validity of the Act as a lawful exercise of [the state's] police power, but contended that the Act's complete extinguishment of his property's value entitled him to compensation regardless of whether the legislature had acted in furtherance of legitimate police power objectives." *Id.*

89. *Id.* at 2890 (citations omitted).

90. *Id.* (citations omitted).

91. See *supra* part III.A.

92. *Lucas v. South Carolina Coastal Council*, 404 S.E.2d 895, 898 (S.C. 1991).

93. *Id.* at 899 (citing *Mugler v. Kansas*, 123 U.S. 623 (1887)).

"no compensation is owing under the Takings Clause regardless of the regulation's effect on the property's value."⁹⁴

The United States Supreme Court reversed and remanded, recognizing the general rule that "where regulation denies all economically beneficial or productive use of land,"⁹⁵ compensation is required "without case-specific inquiry into the public interest advanced in support of the restraint."⁹⁶ The Court cited numerous cases to support this general rule,⁹⁷ but candidly recognized that it has "never set forth the justification for this rule."⁹⁸ Then, after discussing several possible justifications,⁹⁹ the Court bluntly concluded that "there are good reasons for our frequently expressed belief that when the owner of real property has been called upon to sacrifice *all* economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking."¹⁰⁰

The Court then engaged in a lengthy attempt to clarify its holding (and this general rule) in light of its numerous prior opinions¹⁰¹ which suggest "that 'harmful or noxious uses' of property may be proscribed by government regulation without the requirement of compensation."¹⁰²

94. *Lucas*, 112 S. Ct. at 2890 (quoting *Lucas*, 404 S.E.2d at 899).

95. *Id.* at 2893.

96. *Id.* (citations omitted).

97. See *Nollan v. California Coastal Commission*, 483 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, Inc.*, 452 U.S. 264, 295-96 (1981); *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980).

98. *Lucas*, 112 S. Ct. at 2894.

99. The Court begins by stating that "perhaps" the rule exists because "total deprivation of beneficial use is, from the landowner's point of view, the equivalent of a physical appropriation." *Id.* (citing *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621, 652 (1981) (Brennan, J., dissenting)). The Court then advances a second justification: "regulations that leave the owner of land without economically beneficial or productive options for its use . . . carry with them a heightened risk that private property is being pressed into some form of public service under the guise of mitigating serious public harm." *Id.* at 2894-95. The Court continued, explaining that "[t]he many statutes on the books . . . that provide for the use of eminent domain to impose servitudes on private scenic lands preventing developmental uses . . . suggest the practical equivalence in this setting of negative regulation and appropriation." *Id.* at 2895.

100. *Id.* at 2895 (emphasis in original).

101. See *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962); *Miller v. Schoene*, 276 U.S. 272 (1928); *Hadacheck v. Sebastian*, 239 U.S. 394 (1915); *Mugler v. Kansas*, 123 U.S. 623 (1887). For a discussion of the trend established in these cases, see *supra* part III.

102. *Lucas*, 112 S. Ct. at 2897. The Court characterizes its "harmful or nox-

Although this general rule might seem impenetrable, *Lucas* recognized one potentially significant exception: "Where the State seeks to sustain regulation that deprives land of all economically beneficial use, we think it may resist compensation only if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his [or her] title to begin with."¹⁰³ In other words, a state can avoid this general rule requiring compensation by demonstrating that the property owner's bundle of rights did not include the property interest impaired by the regulation. To determine which rights are included in the proverbial "bundle" and which are not, the Court defers to the "background principles of the State's law of property and nuisance already . . . upon land ownership" when property is purchased.¹⁰⁴ In other words, government can still regulate away all economically beneficial use of land if it can show that "it was possible to prohibit this use under the state's existing property law."¹⁰⁵

ious use' analysis" as an "early attempt to describe in theoretical terms why government may, consistent with the Takings Clause, affect property values by regulation without incurring an obligation to compensate." *Id.* at 2897. The Court substantially impairs the vitality of its "harmful or noxious use" logic as a means for identifying regulatory takings that require compensation, *id.* at 2898-99, by boxing it into a substantive due process analysis. The Court states: "Harmful or noxious use' analysis was . . . simply the progenitor of our more contemporary statements that 'land-use regulation does not effect a taking if it substantially advance[s] legitimate state interests.'" *Id.* at 2897 (quoting *Nollan*, 483 U.S. at 834). See *infra* part III.B.2. In other words, "prevention of harmful use' was merely [the Court's] early formulation of the police power justification necessary to sustain (without compensation) any regulatory diminution in value." 112 S. Ct. at 2898-99. And since what constitutes a harmful use may be impossible to discern, "noxious-use logic cannot serve as a touchstone to distinguish regulatory 'takings'—which require compensation—from regulatory deprivations that do not require compensation. A *fortiori* the legislature's recitation of a noxious-use justification cannot be the basis for departing from [the] categorical rule that total regulatory takings must be compensated." *Id.* at 2899.

103. *Id.* at 2898.

104. *Id.* at 2900-02.

105. The Court's precise approach to this exception is expressed as follows:

Where "permanent physical occupation" of land is concerned, we have refused to allow the government to decree it anew (without compensation), no matter how weighty the asserted "public interests" involved—though we assuredly *would* permit the government to assert a permanent easement that was a pre-existing limitation upon the landowner's title. We believe similar treatment must be accorded confiscatory regulations, *i.e.*, regulations that prohibit all economically beneficial use of land: Any limitation so severe cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background of the State's law of property and nuisance already place upon

(c) *Regulations that fall short of completely extinguishing a property's value.* If the regulation falls short of completely extinguishing a property's value, the landowner's chances of recovering compensation are slim. Only regulations that amount to a permanent physical invasion of property or deprive the owner of all economic value have been found to require compensation. Since *Pennsylvania Coal*, the Court has regularly threatened to find a taking in this category, but it has never required compensation unless the regulation deprived the property of *all* economic value.¹⁰⁶ Of course, the Court may one day sharpen the teeth of this less-than-total-deprivation analysis.¹⁰⁷ Therefore, the factors that the Court has examined and applied in analyzing regulations that deprive the landowner of less than all beneficial use may profitably be reviewed. *Penn Central Transportation Co. v. New York City*¹⁰⁸ identifies these factors.

In *Penn Central*, the City of New York enacted an ordinance designed to "protect [its] historic landmarks and neighborhoods from precipitate decisions to destroy or fundamentally alter their character."¹⁰⁹ The city believed that its "standing . . . as a world-wide tourist center and world capital of business, culture and government" would be threatened" without this ordinance.¹¹⁰ "The primary responsibility for admin-

land ownership. A law or decree with such an effect must, in other words, do no more than duplicate the result that could have been achieved in the courts—by adjacent landowners (or other uniquely affected persons) under the State's law of private nuisance, or by the State under its complementary power to abate nuisances that affect the public generally, or otherwise.

Id. at 2900 (citations omitted).

106. For an overview of the Court's approach to regulations that deny all economically viable use of land, see *supra* part III.B.1(b).

107. In Richard G. Wilkins, *The Takings Clause: A Modern Plot for an Old Constitutional Tale*, 64 NOTRE DAME L. REV. 1 (1989), Professor Wilkins suggests that the Court could give the Takings Clause an appropriate bite by consistently applying the three factors enumerated in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978). See *infra* notes 109-128 and accompanying text.

108. 438 U.S. 104 (1978).

109. *Id.* at 109.

110. *Id.*

The city believed that comprehensive measures to safeguard desirable features of the existing urban fabric would benefit its citizens in a variety of ways: e.g., fostering "civic pride in the beauty and noble accomplishments of the past"; protecting and enhancing "the city's attractions to tourists and visitors"; "support[ing] and stimul[ating] business and industry"; "strengthen[ing] the economy of the city"; and promoting "the use of his-

istering the ordinance [was] vested in the Landmarks Preservation Commission."¹¹¹ Acting pursuant to its authority under the ordinance, "the Commission designated [Grand Central] Terminal a 'landmark'" property.¹¹² Under the provisions of the ordinance, the owners of a landmark property were required to obtain permission from the Commission before altering the exterior of the property.¹¹³ The owner of Grand Central Terminal, a corporation that opposed the landmark designation but "did not seek judicial review of the final designation decision" as authorized under the landmarks law, entered a lease agreement whereby the lessee would "construct a multi-story office building [in the space] above the Terminal."¹¹⁴ The owner and lessee then sought the Commission's approval for the contemplated construction as required under the landmark ordinance.¹¹⁵ Two different plans for construction of the proposed office building above the terminal, both of which satisfied the applicable zoning ordinances, were deemed unacceptable by the Commission.¹¹⁶ The owner of the terminal and the lessee brought suit claiming that application of New York

toric districts, landmarks, interior landmarks and scenic landmarks for the education, pleasure and welfare of the people of the city."

Id. (alterations in original).

111. *Id.* at 110.

112. *Id.* at 115. Properties were to be given "landmark" status if the Commission determined that the properties had "a special character or special historical or aesthetic interest or value as part of the development, heritage or cultural characteristics of the city, state or nation." *Id.* at 110.

113. Specifically, the law imposed two restrictions on the owner of landmark property:

First, the law imposes a duty upon the owner to keep the exterior features of the building "in good repair" to assure that the law's objectives not be defeated by the landmark's falling into a state of irremediable disrepair. Second, the Commission must approve in advance any proposal to alter the exterior architectural features of the landmark or to construct any exterior improvement on the landmark site, thus ensuring that decisions concerning construction on the landmark site are made with due consideration of both the public interest in the maintenance of the structure and the landowner's interest in use of the property.

Id. at 112.

114. *Id.* at 116.

115. *Id.*

116. *Id.* at 116-18. One of the plans was rejected because it involved "tearing down a portion of the Terminal [and] stripping off" some of its features. *Id.* at 116-17. The other plan, which involved cantilevering a 55-story building above the Terminal's facade and resting it on the Terminal's roof, was rejected because such a massive building would destroy one view of the site and would be aesthetically inconsistent with the Terminal's architectural style. *Id.* at 116-18.

City's landmarks law had "taken" private property without just compensation.¹¹⁷

The Supreme Court ruled that designating the Grand Central Terminal as a landmark property and subjecting it to New York City's landmarks law did not amount to a taking.¹¹⁸ To reach this holding, the Court "review[ed] the factors that have shaped the jurisprudence of the Fifth Amendment injunction [against takings without just compensation]"¹¹⁹ and articulated three factors¹²⁰ for determining when a regulation amounts to a taking.¹²¹ (1) "[t]he economic impact of the regulation on the claimant," (2) "the extent to which the regulation has interfered with distinct investment-backed expectations," and (3) "the character of the governmental action."¹²² After articulating these factors, the Court assessed the appellant's takings claim and refused to find a taking for several reasons.¹²³ First, the law did not interfere with the building's present uses, but allowed the owner to continue using it as had been done in the past. In the Court's judgment, this permitted the owner to "obtain a 'reasonable return' on its investment."¹²⁴ Second, the law did not necessarily prohibit occupancy of any of the air space above the landmark building, since it was possible that construction in the air space might be allowed in the future.¹²⁵ Third, the law did not deny all use of the owner's pre-existing air right above the landmark building, since under a transferable rights program, the owner could

117. *Id.* at 119.

118. *Id.* at 138.

119. *Id.* at 123.

120. The Court characterized these factors as having "particular significance." *Id.* at 124. For a comprehensive overview and analysis of these three factors, see Craig A. Peterson, *Land Use Regulatory "Takings" Revisited: The New Supreme Court Approaches*, 39 HASTINGS L.J. 335, 339-51 (1988).

121. *Penn Central Transp. Co.*, 438 U.S. at 124. Before articulating these factors, the Court noted:

The question of what constitutes a "taking" for purposes of the Fifth Amendment has proved to be a problem of considerable difficulty. . . . Indeed, [the Court has] frequently observed that whether a particular restriction will be rendered invalid by the government's failure to pay for any losses proximately caused by it depends largely "upon the particular circumstances [in that] case."

Id. at 123-24 (quoting *United States v. Central Eureka Mining Co.*, 357 U.S. 155, 168 (1958)).

122. *Id.* at 124 (citation omitted).

123. *Id.* at 128-138.

124. *Id.* at 136.

125. *Id.* at 136-37.

transfer the development rights it was foreclosed from using at Grand Central Terminal to its other neighboring properties.¹²⁶

The factors presented in *Penn Central* for determining whether a regulation that only partially diminishes the property's value amounts to a taking rarely lead to the conclusion that a taking has occurred.¹²⁷ As a practical matter, a regulation must deprive an owner of all economically beneficial use of the land or a violation of the Takings Clause will not be found.¹²⁸

2. *The police power limit: governmental development exactions that do not substantially advance legitimate state interests*

In recent years, the Supreme Court has also examined a narrow species of Takings Clause challenges using a substantive due process analysis. Instead of asking whether the government's action has gone too far, the Court has examined whether the governmental action substantially advances the state interest.¹²⁹ This substantive due process analysis is applied to the narrow circumstance in which a state or municipal government has conditioned the grant of a land-use permit upon the dedication of a specific property interest. Such a condition is called a "development exaction" because the government is exacting something in return for allowing development.¹³⁰ In two recent development exactions cases, *Nollan v.*

126. *Id.* at 137.

127. *See, e.g.,* *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987).

128. *See supra* part III.B.1(b).

129. The Court's return to a substantive due process analysis has been sharply criticized as an unnecessary revival of a discredited approach to judicial analysis. *See, e.g.,* Norman Karlin, *Back to the Future: From Nollan to Lochner*, 17 S.U. L. REV. 627 (1988); David A. Myers, *Some Observations on the Analysis of Regulatory Takings in the Rehnquist Court*, 23 VAL. U. L. REV. 527 (1989); Wilkins, *supra* note 107, at 3-4 ("The wisdom of testing legislative or administrative action against a rigorous 'means/ends' standard, however, is questionable. Such an approach proved unmanageable and unwise in the heyday of 'substantive due process,' and there is little reason to think the methodology will prove more workable—or justifiable—in the context of the takings clause.")

130. *See, e.g.,* Morosoff, *supra* note 13, at 823 ("Development exactions are a form of land-use regulation in which a municipality requires a developer to give something to the community as a condition to receiving permission to develop.") (citing Donald L. Connors & Michael E. High, *The Expanding Circle of Exactions: From Dedication to Linkage*, 50 LAW & CONTEMP. PROBS. 69, 70 (1987)).

*California Coastal Commission*¹³¹ and *Dolan v. City of Tigard*,¹³² the Court has used this substantive due process approach. In both cases, the landowner prevailed; the governments' attempts to exact a permanent public easement by making the granting of the easement a condition for obtaining a development permit violated the Takings Clause.¹³³

In *Nollan*, the owners of a beachfront lot sought to tear down an old bungalow on the premises and replace it with a larger house.¹³⁴ As required by state law, the owners applied to the California Coastal Commission for a building permit.¹³⁵ The Commission granted the building permit on condition that the owners give "the public an easement to pass across [the] portion of their property" which lay between the water and the house.¹³⁶ The owners petitioned for a writ of administrative mandamus and obtained a permit over the Commission's denial.¹³⁷ The Commission appealed.¹³⁸ On appeal, the Supreme Court held the Commission's exaction violated the Takings Clause.¹³⁹ A similar scenario occurred in *Dolan*. In that case, the owner of a local business wished to expand her store and pave her parking lot.¹⁴⁰ The owner applied for the requisite building permit.¹⁴¹ The City Planning Commission conditioned approval of the owner's construction upon the dedication of a portion of her property for a public greenway and for a

131. 483 U.S. 825 (1987).

132. 114 S. Ct. 2309 (1994).

133. For an examination of how the Takings Clause can be interpreted to protect property owners from the various "predatory municipal zoning practices," see Leigh & Burton, *supra* note 3, at 828. *But cf.* Vicki Been, "Exit" as a Constraint on Land Use Exactions: Rethinking the Unconstitutional Conditions Doctrine, 91 COLUM. L. REV. 473, 543-45 (1991) (arguing that the case for imposing legal constraints—particularly as a matter of constitutional law—is weak because market forces can adequately constrain the conduct of municipalities).

Professor Sterk has proposed several reasons why Professor Been's campaign to relax constitutional restraints in favor of market forces and economic restraints is misguided. Stewart E. Sterk, *Competition Among Municipalities as a Constraint on Land Use Exactions*, 45 VAND. L. REV. 831 (1992) (asserting that market forces are inadequate to eliminate the potential for municipal abuse of the exaction process).

134. *Nollan*, 483 U.S. at 827-28.

135. *Id.* at 828.

136. *Id.*

137. *Id.* at 828-29.

138. *Id.* at 829.

139. *Id.* at 841-42.

140. *Dolan v. City of Tigard*, 114 S. Ct. 2309, 2311 (1994).

141. *Id.* at 2313.

public bicycle path.¹⁴² Expanding upon the analysis established in *Nollan*, the Supreme Court held that the city's dedication requirement constituted an uncompensated taking of property.¹⁴³

An understanding of the Court's logic is necessary in order to fully appreciate the Court's analysis in these cases. That analysis is based on the assumption that the government has the power to withhold issuance of the permit altogether.¹⁴⁴ The Court reasoned in *Nollan* as follows: "If a prohibition designed to accomplish [the city's] purpose would be a legitimate exercise of the police power rather than a taking, it would be strange to conclude that providing the owner an alternative to that prohibition which accomplishes the same purpose is not."¹⁴⁵ Furthermore, "a permit condition that serves the same legitimate police-power purpose as a refusal to issue the permit should not be found to be a taking."¹⁴⁶ Therefore, a taking should be found only if the condition's purpose differs from the legitimate police-power purpose for withholding the permit.

In making this determination, the Court follows a two-step analysis. It first "determine[s] whether the 'essential nexus' exists between the 'legitimate state interest' and the permit condition exacted by the city."¹⁴⁷ This primary inquiry examines whether the state's articulated purpose for demanding fulfillment of the condition adequately relates to the actual demands of the condition. This is a necessary first inquiry because, "if the condition substituted for the prohibition utterly fails to further the end advanced as the justification for the prohibition," then "[t]he evident constitutional propriety [arising from the state's power to withhold the permit altogether] disappears."¹⁴⁸ *Nollan* provides an illustration. In that case, the State Commission asserted an interest in (1) "protecting the public's ability to see the beach," (2) "assisting the public in

142. *Id.* at 2314.

143. *Id.* at 2316-22.

144. *See Nollan*, 483 U.S. at 836-37.

145. *Id.*

146. *Id.* at 836.

147. *Dolan*, 114 S. Ct. at 2317 (citing *Nollan*, 483 U.S. at 837). For a detailed examination of the *Nollan* Court's nexus requirement, see William A. Falik & Anna C. Shimko, *The "Takings Nexus"—The Supreme Court Chooses a New Direction in Land-Use Planning: A View from California*, 39 HASTINGS L.J. 359 (1988).

148. *Nollan*, 483 U.S. at 837.

overcoming the 'psychological barrier' to using the beach created by a developed shorefront," and (3) "preventing congestion on the public beaches."¹⁴⁹ The Court agreed, without deciding, that these are valid public purposes for which the Commission "unquestionably would be able to deny the [owners] their permit outright if their new house . . . would substantially impede these purposes."¹⁵⁰ Despite the apparent validity of these purposes, however, the Court recognized that "unless the permit condition serves the same governmental purpose as the development ban, the building restriction is not a valid regulation of land use but 'an out-and-out plan of extortion.'"¹⁵¹ Then, without explaining "how close a 'fit' between the condition and the burden is required,"¹⁵² the Court held that the Commission's "imposition of the permit condition cannot be treated as an exercise of its land-use power for any of [its asserted public] purposes."¹⁵³ The Court in *Nollan* thus did not

149. *Id.* at 835.

150. *Id.* at 835-36. After noting that the Court's "cases have not elaborated on the standards for determining what constitutes a 'legitimate state interest,'" but that "[t]hey have made clear that a broad range of governmental purposes and regulations satisfies these requirements," *id.* at 834-35, the Court addressed this initial question as follows:

The Commission argues that among these permissible purposes are protecting the public's ability to see the beach, assisting the public in overcoming the "psychological barrier" to using the beach created by a developed shorefront, and preventing congestion on the public beaches. We assume, without deciding, that this is so—in which case the Commission unquestionably would be able to deny the [owners] their permit outright if their new house . . . would substantially impede these purposes

Id. at 835-36. Citing *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978), the Court noted that a taking could still be found if the "denial would interfere so drastically with the [owner's] use of their property as to constitute a taking." *Id.* at 836. See *supra* part III.B.1(c).

151. *Nollan*, 483 U.S. at 837 (quoting *J.E.D. Assoc., Inc. v. Atkinson*, 432 A.2d 12, 14-15 (N.H. 1981)) (other citation omitted).

152. *Id.* at 838.

153. *Id.* at 839. The *Nollan* Court explained why it felt that the condition in that case did not adequately relate to the state's police power purposes.

It is quite impossible to understand how a requirement that people already on the public beaches be able to walk across the prospective property reduces any obstacles to viewing the beach created by the new house. It is also impossible to understand how it lowers any "psychological barrier" to using the public beaches, or how it helps to remedy any additional congestion on them caused by construction of the prospective new house.

Id. at 838-42.

find the requisite nexus between the condition's demands and the state's purpose in making those demands.¹⁵⁴

When the Court does find the requisite nexus, the Court will proceed to the next inquiry: "whether the degree of the exactions demanded by the city's permit conditions bear the required relationship to the projected impact of [the] proposed development."¹⁵⁵ In *Nollan*, the Court never delineated what constituted the "required relationship" because the development exaction was invalidated under the first inquiry.¹⁵⁶ The required relationship was, however, articulated in *Dolan*. In that case, the Court found that the essential nexus exists between preventing flooding and congestion and requiring partial dedication of the owner's property for a public greenway and bicycle path.¹⁵⁷ Turning to the second part of the analysis, the Court asked "whether the degree of the exactions demanded by the city's permit conditions [bore] the required relationship to the projected impact of [the owner's] proposed development."¹⁵⁸ The Court approved of the intermediate position taken by many states that requires a "reasonable relationship" between the required dedication and the impact of the proposed development."¹⁵⁹ However, the Court declined to adopt this reasonable relationship test "partly 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."¹⁶⁰ Instead, the Court adopted a test of "rough proportionality."¹⁶¹ Under the rough proportionality test, "[n]o precise mathematical calculation is required, but the [government] must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development."¹⁶²

154. *See id.* at 838-39.

155. *Dolan v. City of Tigard*, 114 S. Ct. 2309, 2318 (1994) (citing *Nollan*, 483 U.S. at 834).

156. *Id.* at 2317; *see also Nollan*, 483 U.S. at 838-39.

157. *Dolan*, 114 S. Ct. at 2318.

158. *Id.* (citing *Nollan*, 483 U.S. at 834).

159. *Id.* at 2319.

160. *Id.*

161. *Id.*

162. *Id.* at 2319-20.

IV. THE UTAH ANALYSIS UNDER ARTICLE I, SECTION 22 OF THE UTAH CONSTITUTION

A state's power of eminent domain is "[t]he power to take private property for public use."¹⁶³ In exercising this power, however, the state is required, by express constitutional command, to pay "just compensation" for any private property it takes or damages for public use.¹⁶⁴ The process of exercising the eminent domain power is commonly referred to as "condemnation."¹⁶⁵ In Utah, legislation has been adopted to guide the state's exercise of its eminent domain power in condemnation proceedings.¹⁶⁶ Utah's eminent domain statute establishes specific public uses for which the eminent domain power may be exercised.¹⁶⁷ In addition, it identifies the types of private property that may be taken,¹⁶⁸ sets the conditions precedent to condemnation,¹⁶⁹ indicates how to assess compensation,¹⁷⁰ and generally outlines the details of condemnation proceedings.¹⁷¹

If, however, the state takes private property without initiating a condemnation proceeding, the private property owner may initiate an "inverse condemnation" action against the state.¹⁷² The Utah Supreme Court's analysis of inverse condemnation claims is grounded in the requirements of article I, section 22 of the Utah Constitution. To understand the Utah court's application of article I, section 22, it is necessary to first

163. BLACK'S LAW DICTIONARY 470 (5th ed. 1979).

164. The Federal Constitution states: "No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." U.S. CONST. amend. V. The Utah Constitution parallels the Federal Constitution in substantial part: "Private property shall not be taken or damaged for public use without just compensation." UTAH CONST. art. I, § 22. Notice that the Utah Constitution expressly prohibits "taking" or "damaging" private property for public use without just compensation, while the Federal Constitution only expressly prohibits a "taking."

165. BLACK'S LAW DICTIONARY 470 (5th ed. 1979). In a condemnation action, the state initiates a legal proceeding to determine the value of the property. See UTAH CODE ANN. §§ 78-34-1 to 78-34-20 (1992).

166. See UTAH CODE ANN. §§ 78-34-1 to 78-34-20 (1992).

167. *Id.* § 78-34-1.

168. *Id.* § 78-34-3.

169. *Id.* § 78-34-4.

170. *Id.* § 78-34-10.

171. *Id.* §§ 78-34-6 to 78-34-16.

172. Inverse condemnation is "[a] cause of action against a government agency to recover the value of property taken by the agency, though no formal exercise of the power of eminent domain has been completed." BLACK'S LAW DICTIONARY 740 (5th ed. 1979) (citation omitted).

understand how, historically, confusion surrounding the doctrine of sovereign immunity impeded the full application of Utah's takings clause.

A. *The Doctrine of Sovereign Immunity and the Development of Utah's Takings Analysis*

In the earliest days of Utah's history, even before adoption of the Utah Constitution, the territorial court was sympathetic to individuals whose private property had been injured by the government.¹⁷³ Ratification of the Utah Constitution in 1896 raised this sentiment to the level of a constitutionally guaranteed protection. Article I, section 22 of the Utah Constitution provides, quite simply, that "[p]rivate property shall not be taken or damaged for public use without just compensation."¹⁷⁴ By its express terms, the Utah clause would seem to provide more explicit protection than that provided by the Takings Clause of the Fifth Amendment,¹⁷⁵ since the Utah clause requires compensation for both a "taking" and a "damaging" of private property. Ironically, rather than providing heightened protection, this distinction between taking and damaging retarded the development of takings protection in Utah.

When the Utah Supreme Court began to distinguish claims that asserted a taking of property from those that asserted only a damaging, a property owner's remedies against the state under article I, section 22 for a taking or damaging of private property began to diminish.¹⁷⁶ Eventually, in *Holt v. Utah State Road Commission*,¹⁷⁷ the court reached the conclusion that the doctrine of sovereign immunity barred a private property owner from suing the state for a damaging of property.¹⁷⁸ The *Holt* court strictly construed the Utah Governmen-

173. See, e.g., *Dooly Block v. Salt Lake Rapid Transit Co.*, 33 P. 229 (Utah 1893) (upholding an injunction that stopped construction of a third set of trolley tracks and electric poles along Dooly Block's lots, reasoning that the construction would seriously reduce the value of the property and was not necessary to provide public transportation).

174. UTAH CONST. art. I, § 22.

175. The Takings Clause of the Fifth Amendment provides that "private property [shall not] be taken for public use, without just compensation." U.S. CONST. amend. V. For an examination of the Supreme Court's multifarious application of this clause, see *supra* parts II & III.

176. See, e.g., *State ex rel. State Rd. Comm'n v. District Court*, 78 P.2d 502, 512-25 (Utah 1938) (Wolfe, J., dissenting) (arguing that damages and takings claims require separate procedural remedies).

177. 511 P.2d 1286 (Utah 1973).

178. *Id.* at 1288; see also *Anderson Inv. Corp. v. State*, 503 P.2d 144, 147

tal Immunity Act¹⁷⁹ "to preserve sovereign immunity," and concluded that "the State waived immunity only where clearly expressed."¹⁸⁰ Since the state had not clearly waived its immunity from suit in takings cases, the court concluded that even claims for just compensation based on article I, section 22 of the Utah Constitution were precluded.¹⁸¹ Until 1990, an individual property owner's ability to pursue an inverse condemnation claim was severely limited by this sovereign immunity rationale.¹⁸²

*Colman v. Utah State Land Board*¹⁸³ dissolved the governmental immunity barrier to property damages claims. In this case, a landowner brought an inverse condemnation action alleging that the state's "destruction of his canal constitute[d] a taking of his property without just compensation in violation of article I, section 22 of the Utah Constitution."¹⁸⁴ The state responded that it was immune from this inverse condemnation claim under the Utah Governmental Immunity Act.¹⁸⁵ After reviewing the history of article I, section 22 of the Utah Constitution, and noting that "the overwhelming majority of states with similar constitutional provisions hold them to be self-executing,"¹⁸⁶ the court overruled thirty years of precedent and "reaffirm[ed] that article I, section 22 is self executing."¹⁸⁷ In so holding, the court recognized that property owners who

(Utah 1972) (concluding that sovereign immunity precludes a landowner's suit for injunctive relief against state commissioners as long as the commissioners have acted within the scope of their authority); *Hampton v. State ex rel. Road Comm'n*, 445 P.2d 708, 709 (Utah 1968) (disallowing a damage claim to property on the grounds of sovereign immunity); *Hjorth v. Whittenburg*, 241 P.2d 907, 908-09 (Utah 1952) (concluding that in the absence of state consent, sovereign immunity barred actions by private property owners against the state or its employees for injury to property). *But see* *Three D Corp. v. Salt Lake City*, 752 P.2d 1321, 1325-26 (Utah Ct. App. 1988) (reasoning that substantial impairment of a right appurtenant to property ownership which causes substantial devaluation, though not sufficient to amount to a physical taking, warrants compensation).

179. UTAH CODE ANN. §§ 63-30-1 to 63-30-34 (1953) (the complete act is codified at UTAH CODE ANN. §§ 63-30-1 to 63-30-38 (1993)).

180. Justin T. Toth, Note, *Colman v. Utah State Land Board: Searching for a Balanced Approach to "Takings" Under the Utah Constitution*, 1991 UTAH L. REV. 505, 511; *see also* *Holt*, 511 P.2d at 1288.

181. *Holt*, 511 P.2d at 1287-88.

182. For a discussion of the case law that led to the *Colman* decision and an examination of the analysis in that case, *see* Toth, *supra* note 180, at 505.

183. 795 P.2d 622 (Utah 1990).

184. *Id.* at 630.

185. *Id.*

186. For a list of these states, *see id.* at 632 n.2.

187. *Id.* at 630.

suffer a taking or damaging of property have a constitutional right to sue the state to recover just compensation. Accordingly, the state's consent to suit through waiver of sovereign immunity is no longer a prerequisite to recovering just compensation under article I, section 22 in Utah.¹⁸⁸

B. *The Utah Supreme Court's Modern Takings Analysis*

In the Utah Supreme Court's most recent application¹⁸⁹ of article I, section 22, the court articulated three elements of an inverse condemnation claim: "For the purposes of [this] constitutional provision, an inverse condemnation action requires (1) property, (2) a taking or damages, and (3) a public use."¹⁹⁰ This methodical approach logically incorporates prior precedent into an efficient three-element analysis. The simplicity of these three elements can mislead one into believing that the analysis is complete. As Justice Zimmerman observed, however, "the precise limits of a taking or damaging have yet to be carefully or consistently spelled out by this court."¹⁹¹ Indeed, all five justices agree that "a detailed picture of what constitutes a taking or damaging has not [yet] been painted by this court."¹⁹² Therefore, while these three elements provide a

188. The court frankly conceded that its old precedent had failed to give article I, section 22 its proper place in constitutional government.

The history of these cases shows that for a time the Court's concentration on the doctrine of sovereign immunity caused it to neglect this constitutional provision, which was designed to protect individual rights. This elevation of legislation and common law principles over a clear constitutional limitation strikes at the heart of constitutional government: The people of Utah established the Utah Constitution as a limitation on the power of government. It can hardly be maintained that the doctrine of sovereign immunity, alone among all doctrines, is outside of the limitations the people established.

Id. at 634-35.

189. *Farmers New World Life Ins. Co. v. Bountiful City*, 803 P.2d 1241 (Utah 1990).

190. *Id.* at 1243-44.

191. *Colman v. Utah State Land Bd.*, 795 P.2d 622, 637 (Zimmerman, J., concurring) (citing *Three D Corp. v. Salt Lake City*, 752 P.2d 1321, 1324-25 (Utah Ct. App. 1988)). Reversing a long line of precedent, *Colman* made a significant contribution to the Utah takings analysis by holding that article I, section 22 of the Utah Constitution was self-executing. *Id.* at 630; see *supra* notes 183-188 and accompanying text. Justice Zimmerman remarked, however, that "[t]here will be time enough for [the court] to carefully consider [the precise limits of a taking or damaging] in future cases." *Colman*, 795 P.2d at 637.

192. *City of Logan v. Utah Power & Light Co.*, 796 P.2d 697, 701 (Utah 1990) (citing *Colman*, 795 P.2d at 625-31).

concise analysis, the court has recognized that there remains ample room to further develop its application of article I, section 22.

1. *Nature of the property*

The first element of an inverse condemnation analysis in Utah's courts examines whether the plaintiff possesses a property interest protected by article I, section 22 of the Utah Constitution. "A claimant must possess some protectible interest in property before that interest [sic] is entitled to recover under [article I, section 22]."¹⁹³ "Property" is a term that can be construed very broadly. The Utah Supreme Court has recognized that the term "'property' includes but is not limited to land and improvements subject to the substantive law of real property."¹⁹⁴ Under this definition, any real estate, structure,¹⁹⁵ or interest in land¹⁹⁶ would be recognized as a legitimate property interest protected from taking or damaging by article I, section 22 of the Utah Constitution.

Although the term "property" is interpreted very broadly, it does have its limits. For example, in *Walker v. Brigham City*¹⁹⁷ the plaintiff sued Brigham City, contending that the

193. *Colman*, 795 P.2d at 625.

194. *Farmers New World Life Ins. Co. v. Bountiful City*, 803 P.2d 1241, 1244 (citing 2 NICHOLAS' THE LAW OF EMINENT DOMAIN, § 5.45 (3d ed. 1990)).

195. See, e.g., *Farmers*, 803 P.2d at 1244 (recognizing the structural damage to a commercial mall caused by adjacent construction as a "property interest protected by article I, section 22"); *Lund v. Salt Lake County*, 200 P. 510, 512 (Utah 1921) (considering an inverse condemnation claim for the contamination of a pond and the destruction of fish, the court stated that "[t]he kinds of property subject to the [eminent domain right are] practically unlimited"); *O'Neill v. San Pedro, L.A. & S.L.R. Co.*, 114 P. 127 (Utah 1911) (finding a house damaged by the vibrations, smoke and cinders of a nearby railroad within the definition of protected property under article I, section 22).

196. "An easement is an interest in land, and it is taken in the constitutional sense when the land over which it is exercised is taken; but if it is only destroyed and ended, a destruction for public purposes may also be an appropriation for the same purpose." *Colman*, 795 P.2d at 625 (quoting 2 NICHOLS' THE LAW OF EMINENT DOMAIN § 5.14 at 5-186 (3d ed. 1989)). Both express and implied easements have been recognized as property interests protected by article I, section 22 of the Utah Constitution. See, e.g., *id.* at 625 (recognizing an express easement in an underwater canal as protected property); *Utah State Road Comm'n v. Miya*, 526 P.2d 926, 928-29 (Utah 1974) (recognizing an implied easement); *Hampton v. State ex rel. Road Comm'n*, 445 P.2d 708, 710 (Utah 1968) (recognizing a property owner's ability to access an abutting highway as protected property); *Whiterocks Irrigation Co. v. Mooseman*, 141 P. 459, 460 (Utah 1914) (recognizing an express easement).

197. 856 P.2d 347 (Utah 1993).

city's "excessive" overcharging for electric utility service was an unconstitutional taking.¹⁹⁸ Invoking the property interest element, the court quickly noted that the plaintiff's contention failed to "demonstrate that he has 'some protectible interest in property.'"¹⁹⁹ For purposes of article I, section 22, the court concluded that there is no "property interest in the rate charged for utility service."²⁰⁰

2. *Existence of a taking or damage*

Once the court determines that the plaintiff possesses a protectible property interest, the court examines whether that interest has been taken or damaged. The court defines a taking as "any substantial interference with private property which destroys or materially lessens its value, or by which the owner's right to its use and enjoyment is in any substantial degree abridged or destroyed."²⁰¹ This definition accommodates the natural idea that a taking has occurred whenever state actions lessen a property's value or impair its use. In characterizing the damage requirement of article I, section 22, the court distinguishes between physical damage that is of a one-time nature²⁰² and damage that is recurrent in nature. One-time damage causes monetary loss but does not permanently lower the property's value (once it has been repaired), while recurrent damage, because of its recurrence, permanently diminishes the property's value. "[D]amages protectible under article I, section 22 must be physical and permanent, continuous, or recurring."²⁰³ Damage of a one-time nature causes a pecuniary harm, but such one-time damage does not permanently diminish the property's value. Of course, damage that

198. *Id.* at 351.

199. *Id.* (quoting *Colman*, 795 P.2d at 625).

200. *Id.* n.20 (citations omitted).

201. *Colman*, 795 P.2d at 626 (quoting *State ex rel. State Rd. Comm'n v. District Court*, 78 P.2d 502, 506 (Utah 1937)); see *Hampton*, 445 P.2d at 711-12.

202. In *Rocky Mountain Thrift Stores, Inc. v. Salt Lake City Corp.*, 784 P.2d 459, 465 (Utah 1989), a business owner's inverse condemnation action against a city for injuries resulting from the city's interference with access to the owner's store was denied because the damage resulted from a "temporary, one-time occurrence"—the operation and maintenance of a drainage system during and after a flood—rather than a "permanent, continuous, or inevitably recurring interference with property rights." *Id.* at 465.

203. *Farmers New World Life Ins. Co. v. Bountiful City*, 803 P.2d 1241, 1244 (Utah 1990).

causes a "permanent or recurring interference with property rights"²⁰⁴ will amount to a taking.²⁰⁵

3. *Public use requirement*

The third element of an inverse condemnation claim requires that the taking or damage be effected for the benefit of the public, or for a legitimate public use. "[D]amages which are not a direct and necessary consequence of the . . . public use are not recoverable in an inverse condemnation action."²⁰⁶ "Damages arising out of the carelessness or negligence or indifference [of a state agency when acting] for public use are not damages contemplated by the statutes as recoverable under the principles of law pertaining to eminent domain proceedings."²⁰⁷ This principle is best illustrated by several examples.

In *O'Neill v. San Pedro, L.A. & S.L.R. Co.*,²⁰⁸ the Utah Supreme Court held that in an inverse condemnation action, recovery is allowed only for injuries that "necessarily [arise] from the proper and careful operation of the improvement."²⁰⁹ Any damages arising from the railroad's negligent operation of its trains were recoverable only in a negligence action.²¹⁰ In *Lund v. Salt Lake County*,²¹¹ a property owner sought to "recover damages for injury to certain fish ponds and [the] destruction of fish" caused by contaminated water released into the ponds by Salt Lake County.²¹² The court denied the inverse condemnation claim, holding that "the damages for which

204. *Colman*, 795 P.2d at 627.

205. *Id.* In *Board of Educ. v. Croft*, 373 P.2d 697 (Utah 1962), the court provided this explanation of what amounted to "damage" under article I, section 22:

Damages to land, by the construction of a public or industrial improvement, though no part thereof is taken as provided for under [Utah's eminent domain statute], . . . is limited to injuries that would be actionable at common law, or where there has been some physical disturbance of a right, either public or private, which the owner enjoys in connection with his property and which gives it additional value, and which causes him to sustain a special damage with respect to his property in excess of that sustained by the public generally.

Id. at 699.

206. *Farmers*, 803 P.2d at 1245.

207. *Thomas E. Jeremy Estate v. Salt Lake City*, 49 P.2d 405, 407 (Utah 1935) (citation omitted).

208. 114 P. 127 (Utah 1911).

209. *Id.* at 130.

210. *Id.*

211. 200 P. 510 (Utah 1921).

212. *Id.* at 511.

compensation is allowed under article I, § 22, of the State Constitution are such as are the direct consequences of the lawful exercise of the right of eminent domain, and that ordinarily such damages are unavoidable."²¹³ Because these damages were not the direct result of an eminent domain action, the court found that the property was "not taken for a public use."²¹⁴

In two separate opinions, Justice Wade wrote that inverse condemnation damages are limited to those necessarily arising out of the public use. In *Springville Banking Co. v. Burton*,²¹⁵ Justice Wade wrote that inverse condemnation damages must "grow out of" an intentional public use rather than merely result from a negligent or wrongful state action.²¹⁶ And in *Fairclough v. Salt Lake County*,²¹⁷ Justice Wade noted that article I, section 22 "clearly requires the taking or damaging of tangible private property, and that the public use . . . be intentional and not merely accidental or negligently caused."²¹⁸

V. CONCLUSION

For years the United States Supreme Court failed to afford substantive protection under the Fifth Amendment prohibition against takings of private property or public use without just compensation. This lack of constitutional protection stemmed from the interrelation of two powers: the eminent domain power and the police power. The eminent domain power allows a taking of private property but requires compensation. The police power also effectively allows a taking, but, traditionally, no just compensation is required even when land's value is reduced. Because of the confusion surrounding the exercise of these two powers, governments were tempted to achieve eminent domain goals through exercises of the police power, thereby effecting a taking without having to pay just compensation.

With the Supreme Court's decision in *Pennsylvania Coal*, the Takings Clause was finally given an active role in constitutional jurisprudence. *Pennsylvania Coal* recognized that exercises of the police power which go too far can constitute an

213. *Id.* at 514.

214. *Id.* at 513.

215. 349 P.2d 157 (Utah 1960).

216. *Id.* at 166 (Wade, J., concurring).

217. 354 P.2d 105 (Utah 1960).

218. *Id.* at 110 (Wade, J., dissenting).

unconstitutional taking in violation of the Fifth Amendment. Since *Pennsylvania Coal*, the Court has struggled to clearly articulate exactly when an action has gone too far. While its efforts have often been criticized, the Court has not completely failed to articulate a logical body of law.

The development of the Utah Supreme Court's analysis of the Utah Constitution's takings clause has paralleled that of the United States Supreme Court. For many years the Utah Supreme Court failed to give any substantial protection under article I, section 22 of the Utah Constitution in much the same way that the United States Supreme Court failed to provide landowners any protection under the Fifth Amendment's Takings Clause. Before its landmark decision in *Colman*, the Utah court had not recognized any significant protection under Utah's takings clause. In *Colman*, the court abandoned its long-held belief that the doctrine of sovereign immunity barred a plaintiff from suing the state whenever the state had damaged the plaintiff's property without just compensation. The court decided that the Utah Constitution's takings clause requires a self-executing remedy that cannot be circumvented by state statute. Today, while the Utah analysis is not as detailed as its federal counterpart, it at least provides the essential protection of private property that was envisioned by the state's founders and incorporated into the Utah takings clause.

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