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Notes

The Evolution of the “Nuisance Exception” to the Just Compensation Clause: From Myth to Reality

by
Scott R. Ferguson*

Introduction

According to Pär Lagerkvist, the role of the Pythia or priestess of the Oracle at Delphi was of incomparable grandeur and futility. This young maiden was periodically lashed to a tripod above a noisome abyss, where her god dwelt and from which nauseating odors rose and assaulted her. There, the god entered her body and soul, so that she thrashed madly and uttered inspired, incomprehensible cries. The cries were interpreted by the corps of professional priests of the Oracle, and their interpretations were, of course, for mere mortals the words of the god. The Pythia experienced incalculable ecstasy and degradation; she was viewed with utmost reverence and abhorrence; to her every utterance, enormous importance attached; but, from the practical point of view, what she said did not matter much.¹

Professor Anthony Amsterdam used the legend of the Pythia as a metaphor for the role of the United States Supreme Court in the criminal justice system. The parable also aptly describes the Court’s forays into the area of regulatory takings—cases where a property owner claims a public regulation has so diminished the property’s value as to require just compensation under the Fifth Amendment.²

¹ J.D., 1994; B.A., University of Virginia, 1987.

Regulatory takings are to be distinguished from so-called physical invasion takings, where the government has physically occupied all or a part of the claimant’s property. See,
The Court sits upon its tripod in Washington, assaulted from time to time by the noxious odors rising from lower court disputes between private landowners and government regulators. In response to these cases, the Court utters inspired, though often incomprehensible, opinions. These opinions are then interpreted by a corps of lawyers, judges, and scholars. Property owners and governmental bodies, in turn, rely on these interpretations—as the words of a god—when making decisions about the use of, investment in, and regulation of real property. Great importance is given to Supreme Court opinions on regulatory takings issues, but the decisions consist of a bewildering assortment of tests, factors, and rules. It is debatable how much they really matter to most property owners.

This Pythian model is typified by the so-called "nuisance exception" to the Just Compensation Clause. Under this exception, the government is exempt from the Fifth Amendment's requirement of "paying for the change" when a regulation is aimed at suppressing a nuisance, even if the practical result is a total diminution in value of the property at issue. The doctrine was created by then-Justice Rehnquist in a dissenting opinion to *Penn Central Transportation Co. v. New York City.* Rehnquist asserted that a line of cases following *Mugler v. Kansas,* focusing on the validity of the public purpose of the regulation and upholding laws if aimed at suppressing nuisances, e.g., *Loretto v. Teleprompter Manhattan CATV,* 458 U.S. 419 (1982) (holding that a television cable constituted a compensable physical invasion). In both regulatory takings and physical invasion cases, the claim is known as inverse condemnation—an assertion that the government, in order to carry out its objective, should have exercised its powers of eminent domain and condemned the claimant's property. See 2 JULIUS L. SACKMAN, NICHOLS' THE LAW OF EMINENT DOMAIN § 6.21 (rev. 3d ed. 1990).

Commentators have used a variety of terms to describe the jurisprudence of takings: "untidy and confused, somewhat illogical, a muddle, a crazy-quilt pattern, open-ended and standardless, chaotic, mystifying, and incoherent." Ruddick C. Lawrence, Jr., Note, *Bright Lines in the Big City: Seawall, Tenant Succession Rights, and the Jurisprudence of Takings,* 91 COLUM. L. REV. 609, 609 (1991) (citations omitted).

One caveat must be given concerning the myth of the Pythia as applied to regulatory takings. Whereas the Pythia had no choice about the nature or frequency of the assaults made by her god, the Supreme Court—through the device of certiorari—can pick and choose among the hundreds of cases wafting up through the judicial system. This power of discretionary review allowed the Court to stay out of the takings area for most of the twentieth century. See, e.g., Norman Williams & Holly Ernst, *And Now We Are Here on a Darkling Plain,* 13 Vt. L. REV. 635, 636 (1989) (noting that "[a]fter a few other rather minor decisions in the 1920's, the Supreme Court left the field of land use control severely alone").

7. 123 U.S. 623 (1887). The cases commonly cited as following *Mugler* are *Reinman v. City of Little Rock,* 237 U.S. 171 (1915); *Hadacheck v. Sebastian,* 239 U.S. 394 (1915); *Miller v. Schoene,* 276 U.S. 272 (1928); and *Goldblatt v. Town of Hempstead,* 369 U.S. 590 (1962). For brevity I will refer to this group as the "*Mugler* line."
forms its own discrete category—a “nuisance exception” to the Just Compensation Clause. Since then, the doctrine has been faithfully recited—but never relied on—in Supreme Court opinions, and embraced, as the words of a god, by legions of legal commentators.

Despite its acceptance, the nuisance exception has never been established as a categorical rule. A careful reading of *Penn Central* and its progeny suggests that what Justice Rehnquist generously termed a “nuisance exception” has never been more than a “nuisance justification”—one factor among many to be balanced—and that the Supreme Court has never relied exclusively on the doctrine to uphold a confiscatory land use regulation. Moreover, state and local governments have never been able to take advantage of the nuisance exception because lower federal courts have uniformly rejected the notion that the suppression of nuisances forms a categorical exception to the Takings Clause. Like the Pythia herself, the nuisance exception has been a myth.

*Lucas v. South Carolina Coastal Council*8 changed this. Writing for the majority, Justice Scalia held for the first time that the nuisance exception exists as a categorical rule, applicable even in cases where regulation results in the total diminution in the value of property.9 The reason for the change has less to do with Takings Clause jurisprudence than it does with the current Supreme Court’s preference for categorical rules over balancing tests.

Part I of this Note examines Justice Rehnquist’s creation of the nuisance exception in his *Penn Central* dissent and critiques his reliance on the *Mugler* line. This Part then shows that, despite its acceptance in dicta and legal commentary, the nuisance exception has never been used as a per se rule to uphold a challenged land use regulation. In fact, the nuisance rationale has never been more than one factor among many in the balancing analysis undertaken by the modern Court. Part II describes and attempts to explain Justice Scalia’s categorization of the nuisance exception in *Lucas* and argues that it is part of a larger movement on the Court to create and apply categorical rules in all areas of constitutional law. The Conclusion of this Note critiques Justice Scalia’s categorization of the nuisance exception, and argues that, in the takings area, the Court should remain true to the balancing-of-interests approach.

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9. Justice Scalia added an important caveat to this categorical rule: Only use of prohibitions that exist at common law, or “inhere in the title itself,” will suffice to bring an otherwise confiscatory regulation within the exception. *See infra* notes 117-118 and accompanying text.
I. The Myth of the Nuisance Exception

The nuisance exception to the Just Compensation Clause has become a staple tenet of takings law. Since its introduction by Justice Rehnquist in his Penn Central dissent, the notion has appeared in a number of major Supreme Court takings cases. The nuisance exception has also been adopted by litigants in the circuit courts.

Legal commentators, in particular, have embraced the doctrine. Professor Michelman asserted that the Keystone Court "reaffirmed a long-standing notion that regulations of uses classed as socially harmful or nuisance-like ordinarily cannot be considered takings despite any specially onerous consequences they may carry for regulated owners." Thomas Hippler likewise recognized the existence of the nuisance exception, and argued that precedent supports a categorical exception even broader than that discussed by the Court in Keystone.

Mark Pollot, in his book on regulatory takings, recognized the existence of the nuisance exception (or "police power exception") and

15. Thomas A. Hippler, Note, Reexamining 100 Years of Supreme Court Regulatory Takings Doctrine: The Principles of "Noxious Use," "Average Reciprocity of Advantage,"
criticized it as a “property rights-defeating” doctrine. More recently, Professor John Nolon stated “[t]here is no dispute that there is a ‘nuisance exception’ to the application of the Just Compensation Clause of the Fifth Amendment.” Moreover, state and local governments defending strict land use laws against takings claims have also seized upon the nuisance exception.

Despite this wide acceptance, an examination of the Penn Central dissent, the cases relied upon to justify the nuisance exception and the subsequent case law reveal nothing to support the existence of a categorical exception to the Just Compensation Clause.

A. Penn Central: The Birth of the Nuisance Exception

The nuisance exception saw its debut in Justice Rehnquist’s dissenting opinion in Penn Central, a case that had nothing to do with either nuisances or nuisance-like uses of land. The majority rejected a takings challenge to New York City’s Landmarks Preservation Law, which prevented Penn Central from erecting a skyscraper atop Grand Central Terminal. Dissenting, Justice Rehnquist argued that there had been a taking and examined “the two exceptions where the destruction of property does not constitute a taking” to show that a taking had indeed occurred. The first was the nuisance exception.
Justice Rehnquist characterized the exception as a long-accepted principle of takings law:25 "As early as 1887, the Court recognized that the government can prevent a property owner from using his property to injure others without having to compensate the owner for the value of the forbidden use."26 Citing the broad language of Mugler27 and its progeny28 to support the existence of the exception, he conceded that it did not apply in the present case because "appellees [New York City] are not prohibiting a nuisance."29

Justice Rehnquist's strong language in favor of nuisance prevention30 suggested a per se exception, "where the destruction of property does not constitute a taking."31 The nuisance justification thus would exempt government from paying for the change no matter how severe the diminution in value—a categorical exception to the Just Compensation Clause.32

The majority, on the other hand, rejected the notion that nuisance prevention requires a categorical takings exemption. The Court avoided the sweeping language of Mugler (quoted at length by the dissent) that supports any regulation, no matter how adversely it af-

25. Cf. Connors, supra note 19, at 139 (noting that "[w]hile the Court treats the exception as a longstanding legal doctrine, relevant case law demonstrates that the exception qua exception is in fact a relatively new phenomenon").
27. 

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. . . . The power which the States have of prohibiting such use by individuals of their property as will be prejudicial to the health, the morals, or the safety of the public, is not—and, consistently with the existence and safety of organized society, cannot be—burdened with the condition that the State must compensate such individual owners for pecuniary losses they may sustain, by reason of their not being permitted, by a noxious use of their property, to inflict injury upon the community.

Id. at 144-45 (citing Mugler v. Kansas, 123 U.S. 623, 668-69 (1887)).
28. Id. at 145 (citing Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962); Hadacheck v. Sebastian, 239 U.S. 394 (1915)).
29. Id.
30. Indeed, in the phrase where the term first appears, Justice Rehnquist calls it "[t]he nuisance exception to the taking guarantee." Id. It is hard to imagine why he chose the word "exception" if he did not mean to suggest a categorical exemption from the compensation requirement, applicable even in cases of total economic wipeout.
31. Id. at 144.
32. In addition, the dissent insisted that such a drastic rule could be justified only by the prevention of noxious uses. Justice Rehnquist observed in a footnote that "[e]ach of the cases cited by the Court for the proposition that legislation which severely affects some landowners but not others does not effect a 'taking' involved noxious uses of property." Id. at 145 n.8 (citing 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)).
ffects property value, so long as it is within the police power. Indeed, the Court left open the possibility that “a use restriction on real property may constitute a ‘taking’... if it has an unduly harsh impact upon the owner’s use of the property.”

In addition, the majority explicitly refuted the argument that the justification behind the Mugler line was that, in each case, the “government was prohibiting a ‘noxious’ use of land.” The Court observed that the uses at issue in these cases were perfectly lawful in themselves. They involved no “blameworthiness, ... moral wrongdoing or conscious act of dangerous risk-taking...” These cases are better understood as resting not on any supposed “noxious” quality of the prohibited uses but rather on the ground that the restrictions were reasonably related to the implementation of a policy—not unlike historic preservation—expected to produce a widespread public benefit and applicable to all similarly situated property.

Thus, the Penn Central majority dismissed the notion of a categorical nuisance exception.

B. Evaluating Justice Rehnquist’s Argument

The basis offered by Justice Rehnquist for the existence of a nuisance exception is a group of cases decided around the turn of the century (and one case decided in the 1960s) that I will call the “Mugler line”: Mugler v. Kansas, Reinman v. City of Little Rock, Hadacheck v. Sebastian, Miller v. Schoene, and Goldblatt v. Town of Hempstead. There are, however, two arguments against Justice Rehnquist’s interpretation of the Mugler line. First, because the cases did not deal with property rendered valueless by regulations, they cannot support the notion of a categorical exception. Second, even if the early cases supported a nuisance exception, the 1922 case Pennsylvania Coal v. Mahon definitively rejected the use of per se rules in deciding takings cases.

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33. The majority confined its mention of Mugler to the last entry in a string cite. Id. at 126.
34. Id. at 127.
35. Id. at 133-34 n.30. For a similar (and earlier) argument, see Joseph L. Sax, Takings and the Police Power, 74 YALE L.J. 36, 48-50 (1964).
37. 123 U.S. 623 (1887).
38. 237 U.S. 171 (1915).
39. 239 U.S. 394 (1915).
40. 276 U.S. 272 (1928).
41. 369 U.S. 590 (1962).
42. 260 U.S. 393 (1922).
(1) The Mugler Line

In each Mugler line case, a severe regulation was upheld as an exercise of a government's ability, under its police power, to abate nuisances. However, in none of these cases was there a total diminution in value of the claimant's property.

Mugler v. Kansas concerned a state law criminalizing the manufacture or sale of "intoxicating liquors." The Supreme Court upheld the law as a valid exercise of the police power, despite its observation that "if the statutes are enforced against the defendants the value of their property will be very materially diminished." However, no allegation of total diminution in value is discernible in the opinion. Furthermore, nothing in the opinion suggests that the property was unsuitable for other uses.

Reinman v. City of Little Rock concerned a city ordinance banning livery stables in a densely populated commercial district. The Court upheld the law despite the fact that a livery stable is not a nuisance per se, holding that "it is clearly within the police power of the state to regulate the business, and to that end to declare that in particular circumstances and in particular localities a livery stable shall be deemed a nuisance in fact and in law." Although the claimants alleged that enforcement of the law would mean "large expenditures made for improvements [would] be lost if [claimants were] compelled to cease to do business there," total diminution in value was not alleged, and economic deprivation was not a factor in the Court's reasoning.

In Hadacheck v. Sebastian, the activity at issue was the operation of a brickkiln, which violated a Los Angeles ordinance. Because the court below had found that "the occupants of the neighboring dwell-

43. Mugler v. Kansas, 123 U.S. 623, 655 (1887). In addition to fines and imprisonment, the law declared the place where liquor was manufactured or sold to be a common nuisance. Id. at 670.
44. Id. at 657. This material diminution in value was found because "[t]he buildings and machinery constituting these breweries are of little value if not used for the purpose of manufacturing beer." Id.
45. Reinman v. City of Little Rock, 237 U.S. 171, 174 (1915). The ordinance recited legislative findings that "the conducting of a livery stable business within certain parts of the city... is detrimental to the health, interest, and prosperity of the city." Id. at 172.
46. Id. at 176.
47. Id. at 173.
48. Hadacheck v. Sebastian, 239 U.S. 394, 404 (1915). The Court, in upholding the ordinance, took a broad view of the police power. "It is to be remembered that we are dealing with one of the most essential powers of government, one that is the least limitable.... A vested interest cannot be asserted against it because of conditions once obtaining. To so hold would preclude development and fix a city forever in its primitive conditions." Id. at 410.
ings are seriously incommoded by the operations" of the brickkiln, the Court applied the Reinman nuisance abatement rationale. Nothing in the Court's opinion indicates that diminution in value was an issue.

Miller v. Schoene, unlike other Mugler line cases, involved not a use prohibition but the destruction of claimants' ornamental red cedar trees pursuant to state law. The Court upheld the application of the act as a valid police power measure: "[W]here the public interest is involved preferment of that interest over the property interest of the individual, to the extent even of its destruction, is one of the distinguishing characteristics of every exercise of the police power which affects property." The Court grounded its decision in the police power and did not rely on a nuisance rationale to reach its result: "We need not weigh with nicety the question whether the infected cedars constitute a nuisance according to the common law; or whether they may be so declared by statute." Moreover, the value of the real property involved was only partially diminished, since the cedar trees were only one aspect of the claimant's bundle of rights.

One explanation for the charm of the Mugler line is an oft-quoted passage from Mugler itself which makes a forceful argument that the prohibition on uses harmful to the public is never a taking:

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.... The power which the States have of prohibiting such use by individuals of their property as will be prejudicial to the health, the morals, or the safety of the public, is not—and, consistently with the existence and safety of organized society, cannot be—burdened with the condition that the State must compensate such individual owners for pecuniary losses they may sustain, by reason of their not being permitted, by a noxious use of their property, to inflict injury upon the community.

Notwithstanding this strong language, the actual holdings of Mugler and its progeny do not provide a basis for a categorical "nuisance exception," exempting government regulation from takings

49. Id. at 409.
50. Id. at 410-11.
51. Miller v. Schoene, 276 U.S. 272 (1928). The trees were the host of a "communicable plant disease known as cedar rust," id. at 277, which destroys the fruit and foliage of apple trees, but does not harm its host plant, id. at 278. Virginia law declared that any cedar tree growing within a two-mile radius of an apple orchard was "a public nuisance, subject to destruction," id. at 277.
52. Id. at 279-80 (citing, inter alia, Hadacheck v. Sebastian, 239 U.S. 394 (1915); Reinman v. City of Little Rock, 237 U.S. 171 (1915); Mugler v. Kansas, 123 U.S. 623 (1887)).
53. Id. at 280.
54. Mugler, 123 U.S. at 668-69.
claims in cases of total economic wipeout. Moreover, the broad view of the nuisance justification in Mugler, Reinman, and Hadacheck was arguably narrowed by the balancing test set forth by Justice Holmes in Pennsylvania Coal v. Mahon.55

(2) Pennsylvania Coal v. Mahon

Mahon has been described as "a cornerstone of the jurisprudence of the Fifth Amendment's Just Compensation Clause."56 The case concerned a Pennsylvania statute that banned the mining of coal underlying habitable dwellings.57 Justice Holmes overturned the law,58 and in so doing established that takings questions are to be resolved by a fact-specific inquiry, in which the relevant public and private interests are balanced.59 This balancing approach amounts to a strict rejection of categorical, per se rules: "As we already have said, this is a question of degree—and therefore cannot be disposed of by general propositions."60 Indeed, Justice Brandeis's dissent, which argues strongly in favor of a nuisance exception,61 citing the Mugler line for support,62 emphasizes the Court's break with precedent.63

Catherine Connors described Mahon as a "definitive rejection of the qualitative Mugler test in favor of a new test balancing purpose against diminution in value. There is no indication in Justice Holmes' decision that anti-nuisance regulations were to be exempted from this balancing analysis."64

After Mahon, the notion of a categorical nuisance exception should have become moot. Yet, in 1977, the doctrine reappeared in the Penn Central case, in language that made it seem an established

55. 260 U.S. 393 (1922).
58. Id. at 414 ("It is our opinion that the act cannot be sustained as an exercise of the police power.").
59. "So the question depends upon the particular facts." Id. at 413. "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." Id. at 415.
60. Id. at 416.
61. Id. at 417 (Brandeis, J., dissenting) ("[R]estriction imposed to protect the public health, safety or morals from dangers threatened is not a taking.").
62. Id. at 418, 420.
63. See Florida Rock Indus., Inc. v. United States, 791 F.2d 893, 901 (Fed. Cir. 1986) (identifying Mahon as "[t]he case generally considered to have broken with" the judicial theory that "a valid 'police power' regulation could not also be an exercise of eminent domain"), cert. denied, 479 U.S. 1053 (1987).
64. Connors, supra note 19, at 178.
part of takings law. However, the reaction to the doctrine among the lower courts was skeptical.

C. Lower Court Reaction to Penn Central

In the wake of Penn Central, the circuit courts declined to accept Justice Rehnquist's argument that the Mugler line provides the basis for a categorical nuisance exception. In fact, the lower courts resisted the urge to rely on any categorical rules when deciding takings claims and instead adhered faithfully to the multi-factored balancing test prescribed by Justice Holmes in Mahon.

In Florida Rock Industries, Inc. v. United States, the Federal Circuit explicitly rejected the Mugler line of reasoning that "a valid 'police power' regulation could not also be an exercise of eminent domain." Rather, the court employed a balancing-of-interests test and suggested that a prohibition on mining limestone from the claimant's wetland property likely constituted a taking—despite the government's goal of preventing temporary pollution by turbidity.

In Price v. City of Junction, the court upheld an ordinance providing that junked cars constituted a public nuisance and were subject to removal by the city. In rejecting a takings claim, the court did not rely on a nuisance abatement argument, but rather cited Penn Central for the notion that a takings claim "presents a question which is not susceptible to solution by a set formula"—in other words, that such claims must be assessed by a multi-factored analysis.

Nonetheless, the doctrine had been revitalized Justice Rehnquist's dissent, and began to appear in subsequent Supreme Court opinions. Keystone Bituminous Coal Association v. DeBenedictis represented the closest the doctrine has come to actual adoption in a holding by the Court.

D. Keystone: The High Water Mark for the Nuisance Exception

Keystone again saw Justice Rehnquist dissenting from the Court's affirmation of a severe land use restriction—a subsidence prevention act remarkably like the law struck down in Mahon.

65. 791 F.2d 893 (Fed. Cir. 1986).
66. Id. at 901.
67. Id. at 894-96.
68. 711 F.2d 582 (5th Cir. 1983).
69. Id. at 585-87.
70. Id. at 591 (citing Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978)).
71. See supra note 11.
73. Pennsylvania's Bituminous Mine Subsidence and Land Conservation Act required mining companies to leave behind 50% of the coal underlying three categories of struc-
The *Keystone* majority employed strong nuisance-abatement language in the section of the opinion upholding the act's public purpose. The Court opened its discussion of nuisance cases with *Mugler* and quoted the very language so deliberately avoided by the *Penn Central* court.\(^7\) It cited the entire *Mugler* line.\(^7\) It quoted Justice Brandeis's *Mahon* dissent for the proposition that "the State has an absolute right to prohibit land use that amounts to a public nuisance."\(^7\) It observed that "[t]he special status of this type of state action [nuisance prevention] can also be understood on the simple theory that since no individual has a right to use his property so as to create a nuisance or otherwise harm others, the State has not 'taken' anything when it asserts its power to enjoin the nuisance-like activity."\(^7\) Finally, it noted that "[c]ourts have consistently held that a State need not provide compensation when it diminishes or destroys the value of property by stopping illegal activity or abating a public nuisance. It is hard to imagine a different rule that would be consistent with the maxim 'sic utere tuo ut alienum non laedas' (use your own property in such manner as not to injure that of another)."\(^7\)

Although this nuisance-heavy language suggested a categorical rule, the majority stopped short of explicitly holding that the abatement of nuisances constitutes a per se exception to the Just Compensation Clause.\(^7\) The Court did not base its holding on the nuisance

\(^7\) *Keystone*, 480 U.S. at 490.
\(^7\) *Keystone*, 480 U.S. at 492.
\(^7\) *Mahon*, 260 U.S. at 417 (citing *Pennsylvania Coal v. Mahon*, 260 U.S. 393, 417 (1922)). The Court went on to claim that Justice Holmes's opinion "did not contest that proposition, but instead took issue with Justice Brandeis's conclusion that the Kohler Act represented such a prohibition." *Mahon*, 260 U.S. at 413-14. This reading of the *Mahon* majority overlooks Holmes's plain language prohibiting reliance on "general propositions." *Mahon*, 260 U.S. at 413; see supra note 59 and accompanying text.
\(^7\) *Keystone*, 480 U.S. at 491 n.20.
\(^7\) *Id.* at 492 n.22 (citations omitted).
\(^7\) *Id.* at 493-97. Although this sounds as though the Court remained true to the *Mahon* balancing test, the phrasing suggests that the nuisance exception is a per se rule. The Court stated that "we need not rest our decision on this factor alone, because petitioners have also failed to make a showing of [total] diminution of value." *Id.* at 492-93. Nev-
exception alone, but rather employed a balancing analysis, finding insufficient diminution in value to constitute a taking.\textsuperscript{80} The majority ended its discussion of the nuisance exception by reaffirming the need to undertake "a weighing of private and public interests,"\textsuperscript{81} and stating merely that "the public interest in preventing activities similar to public nuisances is a \textit{substantial} one, which \textit{in many instances} has not required compensation."\textsuperscript{82}

Chief Justice Rehnquist dissented in \textit{Keystone}, backpedaling vigorously from his endorsement of the nuisance exception in \textit{Penn Central}. He affirmed the existence of a "nuisance exception," observing that "we have recognized that a taking does not occur where the government exercises its unquestioned authority to prevent a property owner from using his property to injure others without having to compensate the value of the forbidden use."\textsuperscript{83} Contrary to the strong language used in the \textit{Penn Central} dissent, and to the plain meaning of the word "exception," however, the Chief Justice maintained that the "exception" is not absolute: "[O]ur cases have never applied the nuisance exception to allow complete extinction of the value of a parcel of property."\textsuperscript{84}

\textit{Keystone} thus represents what should have been the high water mark in the life of the "nuisance exception." A majority of the Court gave its strongest endorsement yet of the nuisance rationale, but ultimately held that the theory is simply a "nuisance justification," and that a balancing-of-interests analysis was necessary to settle the claim.

\textbf{E. The Lower Courts' Reaction to \textit{Keystone}}

Following \textit{Keystone}, the circuit courts declined to extend the Court's endorsement of the nuisance rationale and instead held fast to the multi-factored balancing analysis. In \textit{Atlas Corp. v. United States},\textsuperscript{85} the Federal Circuit rejected a claim that the government effected a taking by forcing uranium producers to decontaminate and stabilize "mill tailings," a potentially hazardous by-product of uranium

\begin{itemize}
  \item \textsuperscript{80} Id. at 493.
  \item \textsuperscript{81} Id. at 492 (citing \textit{Agins v. Tiburon}, 447 U.S. 255, 260-61 (1980)).
  \item \textsuperscript{82} Id. (emphasis added).
  \item \textsuperscript{83} Id. at 511 (Rehnquist, J., dissenting) (citing \textit{Goldblatt v. Town of Hempstead}, 369 U.S. 590 (1962); \textit{Hadacheck v. Sebastian}, 239 U.S. 394 (1915); \textit{Mugler v. Kansas}, 123 U.S. 623 (1887)).
  \item \textsuperscript{84} Id. at 513. This is a curious reversal. In his \textit{Penn Central} dissent, Justice Rehnquist did not suggest that diminution in value is to be considered when the purpose of a regulation is nuisance abatement. \textit{See supra} text accompanying note 32.
  \item \textsuperscript{85} 895 F.2d 745 (Fed. Cir. 1990).
\end{itemize}
Despite the clear risk to public health, the court did not rest its holding on the ground that it was abating a nuisance-like condition. Rather, the "nature of the government action" was only one of three factors analyzed to find that no taking had occurred.\(^8\)

In *Yancey v. United States*,\(^8\) the Federal Circuit found a taking where a government quarantine forced the claimant to sell breeder turkeys for slaughter\(^8\) at a loss of over three-fourths of their value.\(^9\) Despite the health hazard, the court declined to invoke the nuisance exception, stating that *Keystone* "did not hold that the nature of governmental activity conclusively forecloses all claims for just compensation."\(^9\)

In *Esposito v. South Carolina Coastal Council*,\(^9\) the Fourth Circuit upheld a provision of South Carolina's Beachfront Management Act that prevented owners of coastal parcels from rebuilding dwelling structures if "'destroyed beyond repair' by natural causes or fire."\(^9\) The court held that the public purpose behind the Act was legitimate, but went on to evaluate the extent of diminution in value\(^9\) and the extent of interference with investment-backed expectations.\(^9\) The court ultimately rested its holding on the fact that the plaintiffs continued to use their property "precisely as they used it prior to the passage of the Act."\(^9\)

Two circuit courts, in *Whitney Benefits, Inc. v. United States*\(^8\) and *McDougal v. County of Imperial*,\(^8\) specifically declined to apply a nuisance exception and rejected the rationale upon which it is based. *Whitney Benefits* concerned a federal law prohibiting surface coal mining that would disrupt farming on irrigated alluvial valley floors.\(^9\) The Federal Circuit found a taking, holding that "[t]he government's

\(^{86}\) Id. at 747-48.  
\(^{87}\) Id. at 757. The other factors were "the economic impact of the regulation on the plaintiff" and "the extent to which the regulation has interfered with distinct investment-backed expectations." *Id.* (citing Connolly v. Pension Benefit Guar. Corp., 475 U.S. 211, 224 (1986)).  
\(^{88}\) 915 F.2d 1534 (Fed. Cir. 1990).  
\(^{89}\) Id. at 1536.  
\(^{90}\) Id. at 1539. The court distinguished Hadacheck v. Sebastian, 239 U.S. 394 (1915), in which the claimants alleged a 87.5% diminution, but no taking was found, observing that the takings analysis involves more than mere numerical loss. *Yancey*, 915 F.2d at 1541.  
\(^{91}\) *Yancey*, 915 F.2d at 1540.  
\(^{93}\) Id. at 167. A different provision of the Beachfront Management Act was challenged in *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886 (1992).  
\(^{94}\) *Esposito*, 939 F.2d at 169-70.  
\(^{95}\) Id. at 170.  
\(^{96}\) Id.  
\(^{98}\) 942 F.2d 668 (9th Cir. 1991).  
\(^{99}\) *Whitney Benefits*, 926 F.2d at 1170-71.
effort to visualize and then to apply to this case a ‘nuisance exception’
that would justify the total uncompensated destruction of Benefits’
investment-backed expectations . . . is twice flawed.”100 First, Supreme Court precedent did not stand for a per se nuisance excep-
tion;101 second, since the Act expressly allowed a significant amount of
“grandfather clause” surface mining in alluvial valley floors, “all
[such] mining was not in itself a ‘nuisance.’”102

McDougal concerned a floodway ordinance challenged as a tak-
ing of the claimant’s property. While not addressing the nuisance ex-
ception by name, the Ninth Circuit succinctly rejected the rationale
behind it:

We cannot agree that any legitimate purpose automatically trumps
the deprivation of all economically viable use, such that whenever a
regulation has a health or safety purpose, no compensation is ever
required even if the land owner is thereby denied all use of his prop-
erty. We read the Supreme Court as requiring us to balance the
strength of the public interest against the severity of the private
deprivation.103

Thus, the circuit courts have not been taken in by the Supreme
Court’s nuisance exception dicta, commonly argued by legal commen-
tators to have established a categorical exception to the Just Compen-
sation Clause.

II. Categorization of the Nuisance Exception in Lucas

Although the Supreme Court has never fully embraced the nui-
sance exception, and the circuit courts have uniformly and consist-
tently rejected it, Lucas v. South Carolina Coastal Council104 turned
the legal status of the nuisance exception on its head. Rather than
recognizing the proper place of the theory as only one factor among
many in the balancing test prescribed by precedent, the Lucas major-
ity transformed the nuisance exception into a true, categorical excep-
tion to the Takings Clause. The nuisance exception established in
Lucas is, however, severely restricted in scope—only the prevention
of common-law nuisances or other restrictions inherent in an owner’s
fee simple will fall within the exception. While this restriction of the
doctrine to common-law principles narrows its applicability, the cate-
gorical nature of the exception represents a disturbing trend in takings
jurisprudence.

100. Id. at 1176.
101. Id. The court pointed out that the Keystone Court considered both the nature of
the state interest and the extent of diminution in value. Id. (citing Keystone Bituminous
Coal Ass’n v. DeBenedictis, 480 U.S. 470, 470 (1987)).
102. Id.
103. McDougal v. County of Imperial, 942 F.2d 668, 676 (9th Cir. 1991).
A. Lucas

Lucas is a rare case: Not only did a claimant allege a total diminution in value, but his allegation was supported by the trial court’s factual findings. This unusual—some might say imaginary—factual posture allowed the Court to directly hold for the first time that the nuisance justification is a per se rule applicable even in cases of total diminution in value. The Court went on, however, to strictly limit the scope of the nuisance exception to traditional public nuisances and other common-law restrictions.

In 1986, South Carolina developer David Lucas bought, for nearly a million dollars, two of the remaining beachfront lots in a residential development he had helped to create on the Isle of Palms, a barrier island east of Charleston. Lucas and other developers had begun to develop the area in the late 1970s, at the same time that the state embarked on a regulatory program aimed at protecting the coastal zone. Although the scope of the law’s permit requirements was relatively narrow for the next nine years, the beach erosion that occurred over the same time period was substantial. In 1988, the South Carolina legislature finally passed a stricter regulation, the Beachfront Management Act, which expanded the protected zone landward and encompassed Lucas’s lots. Lucas sued, and the trial

105. Id. at 2896.
106. Justice Blackmun, in his dissent, sharply criticized the majority for accepting this factual finding. “This finding is almost certainly erroneous. . . . I question the wisdom of deciding an issue based on a factual premise that does not exist in this case, and in the judgment of the Court will exist in the future only in ‘extraordinary circumstance[s].’” Id. at 2908 (Blackmun, J., dissenting). Indeed, during oral argument Justice Blackmun asked Lucas’s attorney, “Are you saying Mr. Lucas’s land was ‘completely worthless’? . . . Would you give it to me?” The attorney replied, “Yes, if the taxes were paid on it.” Arguments Before the Court, 60 U.S.L.W. 3609, 3609 (Mar. 10, 1992).

In a separate statement, Justice Souter said he would have dismissed the writ of certiorari as improvidently granted: “Because the questionable conclusion of total deprivation cannot be reviewed . . . there is little utility in attempting to deal with this case on the merits.” Lucas, 112 S. Ct. at 2925 (Souter, J.).

107. Lucas, 112 S. Ct. at 2889. Each lot was sandwiched between parcels containing preexisting homes. Id.

111. Lucas, 112 S. Ct. at 2889. The Act prohibited the construction of dwelling structures and, in a crucial oversight, did not originally include a provision for variances or special exceptions. Id. at 2889-90. This failing was remedied by a 1990 amendment, but the amendment was deemed irrelevant to the case at bar. Id. at 2890-91.
court found that his property had been rendered "valueless" by the Act.\textsuperscript{112} The Supreme Court affirmed.

Speaking through Justice Scalia, the majority initially denied that suppressing nuisances has the force of a per se exception, observing that "it [is] self-evident that noxious-use logic cannot serve as a touchstone to distinguish regulatory 'takings'—which require compensation—from regulatory deprivations that do not require compensation."\textsuperscript{113} The Court then bolstered this assertion by citing the Keystone dissent for the proposition that "[n]one of [our cases] that employed the logic of 'harmful use' prevention to sustain a regulation involved an allegation that the regulation wholly eliminated the value of the claimant's land."\textsuperscript{114}

Based on these introductory remarks, one would expect the Court to hold, finally, that precedent does not support the notion that nuisance prevention provides a categorical exception to the takings guarantee. One might even expect a full return to the traditional weighing and balancing test.\textsuperscript{115}

But rather than expose the hollowness of the nuisance exception and do away with it altogether, the Court solidified the exception as a categorical rule. "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 title to begin with."\textsuperscript{116}

So, despite reluctance by both the majority and the dissent in Keystone to label nuisance prevention a per se exception, and despite the rhetoric questioning the validity of a per se exception in Lucas, the Court has, for now, decided that the nuisance exception does exist as a per se exception to the Just Compensation Clause, applicable to protect a regulation even if its effect is a total diminution in value.

But while the majority affirmed the categorical status of the nuisance exception with one hand, with the other it greatly restricted the range of uses that may be regulated with impunity. Perhaps in response to the broad language used to describe the nuisance justifica-
tion in *Keystone*, the *Lucas* Court narrowly circumscribed the kind of state action that could invoke a nuisance exception in the future: "Any limitation so severe cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership." Thus, the *Lucas* decision worked a double-edged change in takings law: It solidified the nuisance exception as a per se exception, but restricted its scope.

**B. Effect of *Lucas* on Takings Law**

In the wake of *Lucas*, government agencies defending inverse condemnation claims will likely resurrect a number of common-law doctrines that restrict land use. In addition to nuisance, three common-law theories with support in modern case law may qualify as "background principles" within the meaning of *Lucas*.

First is the public trust doctrine, which dictates that all lands submerged by tidal waters are held in trust for the public, and that the landowner's right to use or alter the land may be restricted by the states if the proposed use will impair public rights. This theory has been employed by modern state courts to uphold restrictions on the use of public trust lands and appears to be a viable and legitimate common-law theory likely to "survive" *Lucas*.

The second theory is the "natural state" rationale first suggested in *Just v. Marinette County*. Based on an expanded notion of the public trust doctrine, the theory holds that a state government may prevent a landowner from changing the natural character of the owner's land—for example, by filling wetlands—if such a change will harm the public interest in water and waterways. Although many

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117. In *Keystone*, the majority expanded the nuisance justification to include "nuisance-like" uses of land as well as traditional public nuisances. *Keystone*, 480 U.S. at 491-92. See supra notes 77-78 and accompanying text.

118. *Lucas*, 112 S. Ct. at 2900. It could have been expected that the wide latitude given the nuisance justification in *Keystone* would be pared back, but confining the nuisance exception to common-law nuisance and background principles was a surprise, evidently created ipse dixit. The Court cited no authority for this new rule, and throughout its discussion justifying the rule the Court cited cases only by analogy. See id. at 2899-900. Indeed, the source of the rule seems limited to the Court's own reasoning.


121. 201 N.W.2d 761 (Wis. 1972).

The third doctrine, known as the federal navigable water servitude, holds that the federal government may interfere with private ownership of lands adjacent to (or submerged beneath) navigable waterways.\footnote{See Bone v. United States, 944 F.2d 1489, 1494 (9th Cir. 1991); DAN TARLOCK, LAW OF WATER RIGHTS AND RESOURCES § 9.04[2][a] (1990).} This doctrine has also come under criticism, most notably in a 1986 Federal Circuit case, *Florida Rock Industries, Inc. v. United States*,\footnote{791 F.2d 893 (Fed. Cir. 1986), cert. denied, 479 U.S. 1053 (1987).} in which the court stated that "the old 'navigation servitude,' often used to excuse what looked suspiciously like takings, is no longer available for that duty in regulatory taking cases."\footnote{Id. at 900 (interpreting Kaiser Aetna v. United States, 444 U.S. 164, 172 (1979)).}

In addition, common-law theories have been used to impose servitudes on private coastal land. One commentator described four theories often used to protect the public's right of access to privately owned beaches: prescriptive easements (requiring continuous, "notorious," and adverse use of the beach by the public for a certain period of time); implied dedication (a quasi-contractual theory whereby the landowner's acquiescence to public use of the owner's beach implies an intent to dedicate the land, and the public's use implies acceptance); the public trust doctrine; and the customary rights doctrine (whereby a certain use on a defined area of land becomes legally established for that area after a long time).\footnote{Jo Anne C. Long, Note, McDonald v. Halvorson: Oregon's Beach Access Law Revisited, 20 ENVTL. L. 1001, 1005-13 (1990).}
ment rights; and (3) legislative findings that ground the restriction in some aspect of the common law, such as nuisance or the public trust doctrine.

But the lower courts, in an effort to anticipate where the Supreme Court is heading, often embrace Supreme Court takings cases with wide latitude. While most takings cases are decided on narrow grounds, and are ostensibly limited to their unique facts, their reasoning and dicta often spill across wide areas of takings law. Lower court cases decided in the wake of Nollan v. California Coastal Commission provide a prime example. Nollan concerned the validity of a Coastal Commission regulation conditioning the renovation of a shore home on a beach easement. The case was decided on the ground that no "nexus" existed between the perceived harm and the exaction imposed. Technically, this holding has little import for regulatory takings law, since most laws directly address the harm at which they are aimed. Indeed, the Court did not raise the "nexus" issue again until earlier this year in Dolan v. City of Tigard. But because Justice Scalia, writing for the majority, used the term "nexus" to refer to the idea that a land use law must substantially further a state interest, "speculation flourished as to whether this implied a stricter standard of judicial review and whether such a standard adheres to the narrow facts of the case, or whether it generally should be applied to regulatory takings cases." In response, the New York Court of Appeals "invented three separate types of per se takings categories based on Scalia's new language" in Nollan.

Given this tendency, Justice Blackmun's fear that "the Court's new policies will spread beyond the narrow confines of the present case" is well-founded. We can expect that common-law background principles of takings law will figure prominently in the balancing analysis undertaken in the majority of cases and, perhaps, will lead courts to find that a given regulation that falls short of a total taking is nonetheless invalid because its goals were not addressed at common law.

128. The grant of TDRs to Penn Cent. Transportation, while not dispositive, was an important factor in the Court's conclusion that no taking had occurred in that case. See Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 137 (1978).
130. Id. at 827.
131. Id. at 837.
133. Nolon, supra note 17, at 12 (citing Nollan, 483 U.S. at 825 n.3).
134. Id. at 12 (citing Seawall Assocs. v. City of New York, 542 N.E.2d 1059 (N.Y. 1989)).
This fear highlights one potential flaw with the precedent set by *Lucas*. Most of the regulations challenged on takings grounds today are based on concerns—with environmental protection, water pollution, fish and wildlife—that did not exist at common law or in the first century of our nation's development. The *Keystone* decision recognized this implicitly, and thus allowed the former nuisance justification to broaden into a “nuisance-like” justification, acknowledging that modern concerns call for modern legal solutions. In *Lucas*, however, Justice Scalia reined in the exception, and in all likelihood chilled the extent to which future courts will approve severe land use restrictions, regardless of the weight of their purpose.

**C. Categorization of Takings Law**

Far more disturbing than the risk that takings jurisprudence will, as a result of *Lucas*, become bogged down in common-law doctrines is the trend toward per se rules and categorization that the opinion represents. The categorization of takings law not only subverts (and essentially disregards) Justice Holmes's admonition against reliance on “general propositions” in *Mahon*, but it risks ossifying the state of the law.

Justice Scalia's predilection for categorizing constitutional law stands out as the dominant theme of the *Lucas* opinion. For example, he sets forth the “total diminution in value” test as a per se rule applicable to the merits of the case. He then undertakes a lengthy defense of the test, citing *Agins v. Tiburon*, but conceding, “[w]e have never set forth the justification” for the test. In support of the rule, Justice Scalia offers numerous citations to a dissenting opinion in *San Diego Gas & Electric Co. v. San Diego*, but after two pages of discussion he merely grounds the existence of the categorical rule on his belief that “there are good reasons” for the rule. It is hard to fathom why so much time was spent explaining the total diminution

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139. *Lucas*, 112 S. Ct. at 2899-900. As Justice Stevens succinctly observed in his dissent, “the Court is doubly in error. The categorical rule the Court establishes [the total diminution in value test] is an unsound and unwise addition to the law and the Court's formulation of the [nuisance] exception to that rule is too rigid and too narrow.” *Id.* at 2918 (Stevens, J., dissenting).
143. *Lucas*, 112 S. Ct. at 2895. Justice Stevens questioned the legitimacy of this effort: “Although in dicta we have sometimes recited that a law ‘effects a taking if [it] . . . denies an owner economically viable use of his land,’ our rulings have rejected such an absolute
test (since it was already an oft-cited factor in the balancing analysis) unless the purpose was to add it to the growing collection of categorical rules in the takings basket.

This desire to categorize takings jurisprudence explains the apparent 180-degree shift in the status of the nuisance exception manifested in *Lucas*. While both Supreme Court and lower court law could have easily sanctioned a movement back to the nuisance justification, and although Justice Scalia typically has aligned himself with landowners in takings cases, the *Lucas* decision provides regulators with a powerful weapon to defend tough land use restrictions. The reason for this unlikely move was that it allowed Justice Scalia to categorize yet another aspect of takings law.

The fundamental flaw with this categorization trend is that it is disingenuous. Contrary to categorization's ostensible purpose, judges are not bound to follow "the law" as expressed in a categorical rule because they themselves often decide which rule to apply to a given case. By choosing the rule, judges choose the outcome just as surely as if they had undertaken an explicit balancing analysis. The difference, under a rules-based system, is that the balancing occurs behind the scenes, making many outcomes appear deceptively simple while

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144. See, e.g., Id. at 2918-19 (Stevens, J., dissenting); *Agins* at 262.

145. Before *Lucas* this collection had included only one per se rule—that physical invasions caused by government actions always result in takings. *Loretto v. Teleprompter Manhattan CATV*, 458 U.S. 419, 426 (1982).

146. See *Lucas*, 112 S. Ct. at 2984-95 (Scalia, J.) (noting that "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"); *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 831 (1987) (Scalia, J.) ("To say that the appropriation of a public easement across a landowner's premises does not constitute the taking of a property interest ... is to use words in a manner that deprives them of all their ordinary meaning."); *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 318 (1987) (Scalia, J.) (joining a majority opinion by Chief Justice Rehnquist that states "'temporary' takings which, as here, deny a landowner all use of his property, are not different in kind from permanent takings, for which the Constitution clearly requires compensation").

147. Of course, it may be problematic to fit certain regulations, reflecting thoroughly modern concerns, into a common-law mold. But if this can be accomplished, regulators will have a trump card to defend future takings claims.

148. A good example of this phenomenon is Fourth Amendment interpretation. When deciding what constitutes a "search" the Court has, over the years, fashioned a body of per se rules—categories of government activity that do not implicate the Fourth Amendment's reasonableness and warrant requirements because they do not infringe on a citizen's "reasonable expectation of privacy." Thus, without having to obtain a warrant or otherwise demonstrate probable cause, the government may inspect garbage left at a curb, *California v. Greenwood*, 486 U.S. 35 (1988); enter and inspect "open fields," even if fenced off and posted with "no trespassing" signs, *Oliver v. United States*, 466 U.S. 170 (1984); make
concealing the true choices the judges have made between the competing interests in the cases. Under a true balancing analysis, on the other hand, judges explicitly weigh the competing interests, giving reasons for decisions that reveal the underlying value judgments.  

Justice Scalia’s categorical nuisance exception sets forth a deceptively simple test for noncompensable land use regulation: The restriction must fit into the common-law definition of nuisance, or another restriction inherent in the title. The difficulty, and balancing, will come when courts decide whether a given use restriction has existed long enough to “inhere in the title.” In the case of wetlands protection, which has been a concern for a few decades but probably not long enough to count as tradition, this inquiry would logically turn on the subjective opinion of the judge. If judges disapprove of the use, they can cite to the public trust doctrine, or to another common-law doctrine, and uphold the regulation. If, on the other hand, judges disapprove of the regulation, or feels it goes “too far,” they can simply observe that wetlands regulations did not exist at common law and therefore fall outside the exception, thereby overturning the law. Thus, the adoption of categorical rules in the takings area is a futile attempt to prevent balancing of interests because questions of interpretation lurk within every per se rule.

visual observations through the broken skylight of a greenhouse from a helicopter, Florida v. Riley, 488 U.S. 445 (1989); and require citizens to turn over examples of their handwriting, United States v. Mara, 410 U.S. 19 (1973), voice, United States v. Dionisio, 410 U.S. 1 (1973), or fingerprints, Davis v. Mississippi, 394 U.S. 721 (1969). The rationale behind these categorical exceptions is that these activities are not “searches” at all and therefore fall outside the scope of the Fourth Amendment. In fact, they represent situations in which the Court has balanced the citizen’s privacy interest, and the governmental intrusion into that privacy, against the administrative and law enforcement goals behind such activities and has concluded that the expectation of privacy is so low as to require no Fourth Amendment safeguards.

Thus, in a modern Fourth Amendment case, the judge may weigh the reasonableness of a search, or may hold that the domain invaded involved such a negligible expectation of privacy that no “search” occurred—in effect finding, without explicitly holding, that the police activity was in fact reasonable.  


150. Lucas, 112 S. Ct. at 2900.
Moreover, because an appellate judge will be limited to the facts found at the trial level\textsuperscript{151} when choosing among and applying categorical rules, those facts may be given undue weight.\textsuperscript{152} A judge conscientiously applying the rules to facts could be hamstrung into a certain decision, with a strange result: The ultimate constitutional interpretation in a given case could be determined by the finder of fact. This would subvert, or even nullify, the role of the appellate court in deciding questions of law.\textsuperscript{153} After Justice Scalia’s announcement of the per se “total diminution in value” test in \textit{Lucas}, for example, the outcome of the case was essentially settled by the trial court’s unreviewed finding that Lucas’s had been denied all economically viable use of his parcel. Under a system of constitutional interpretation structured by categorical rules, future reviewing courts will be bound by equally questionable findings.

\textbf{Conclusion}

It is significant that the strongest language in favor of a categorical nuisance exception appears in Supreme Court opinions (for both the majority and the dissent) in which the Justices ultimately argue that the exception does not apply. For example, in his \textit{Penn Central} dissent, Justice Rehnquist used a lengthy exposition of the nuisance exception as a counter-example to bolster his argument that a taking

\textsuperscript{151} See \textit{Fed. R. Civ. P. 52(a)} (“Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.”).

\textsuperscript{152} The appellate court would be bound by the trial court’s factual findings unless the independent judgment rule, currently used in the First Amendment context, were adapted to takings jurisprudence. The independent judgment rule requires an appellate court to render its own judgment with regard to facts decisive of a constitutional claim. See, e.g., Bose Corp. v. Consumers Union, 465 U.S. 505, 514 n.31 (1984) (defamation); Time, Inc. v. Pape, 401 U.S. 279, 284 (1971) (libel); see generally Henry P. Monaghan, \textit{Constitutional Fact Review}, 85 \textit{COLUM. L. REV.} 229, 239-47, 263-76 (1985) (discussing independent judgment and the First Amendment, and ultimately arguing that “constitutional fact review at the appellate level is a matter for judicial (and legislative) discretion, not a constitutional imperative”).

In the defamation context, for example, the existence of “actual malice” is considered a question of First Amendment law application, not one of historical fact. As such, the trial court’s determination is not given deference under Rule 52(a) and must receive independent judgment review by the appellate court. Likewise, in the takings context, the propriety of appellate review would hinge on whether the trial court’s finding that the claimant was deprived of all economically viable use of his land were characterized as one of historical fact (and thus governed by Rule 52(a)) or as one of Fifth Amendment law application (and subject to independent judgment review).

\textsuperscript{153} This idea was suggested by Professor David L. Faigman of Hastings College of the Law at a pre-symposium discussion held in February 1994.
had occurred. Likewise, in *Keystone* the majority's strong support of nuisance prevention was tempered by its refusal to establish an absolute exception, and by the balancing analysis ultimately used to justify the result. Finally, in *Lucas*, Justice Scalia's resurrection and strengthening of the nuisance exception was also used as a counter-example to show that Lucas's land had been taken. Despite Justice Scalia's strong rhetoric, the nuisance exception has yet to be successfully invoked to justify a confiscatory land use regulation.

The refusal of the Court to rest any case on the nuisance exception alone demonstrates its commitment to the balancing test. Such commitment should continue. The issues underlying most recent takings claims—such as the preservation of wetlands, open space, and coastal zones—have only recently become broad-based societal concerns. The categorization of takings law threatens to petrify the jurisprudence and to prevent the Court from exercising one of its essential functions: balancing public interests against private rights in unsettled, untested areas of law.

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157. Indeed, modern takings cases have consistently repeated Justice Holmes's admonition in *Mahon*. See, e.g., San Diego Gas & Elec. Co. v. San Diego, 450 U.S. 621, 649 (1980) (Brennan, J., dissenting) (stating the "general rule" in *Mahon* that determining a taking is a "question of degree"); United States v. Cent. Eureka Mining Co., 357 U.S. 155, 168 (1958) (stating that takings cases pose a "question properly turning upon the particular circumstances of each case").