I. Introduction:

   It was more than three centuries ago when political theorist John Locke first penned his treatises on government and two centuries have passed since his ideas were used as a basis for many of the concepts found in the United States Constitution.\(^1\) However, despite the age of these works they are by no means outdated. Many continue to read and analyze Locke’s writings, attempting to apply them to the world as it exists today. One of the most commonly referenced aspects of Locke’s work involves his belief about the origins of property. He writes, “We see in Commons, which remain so by Compact, that ‘tis the taking any part of what is common, and removing it out of the state of Nature leaves it in, which begins the property, without which the common is of no use. And taking of this or that part does not depend on the express consent of all the Commoners.”\(^2\) To Locke, once an individual puts in the labor, the property becomes his and it no longer matters whether his fellow men agree with this acquisition of property: the goods belong to him and cannot, under normal circumstances, be taken away.

   Locke contends that property is a right stemming not only from reason but from religion as well. He writes, “God, who hath given the World to Men in common, hath also given them reason to make use of it to the best advantage of Life, and convenience. The Earth, and all that is therein, is given to Men for the Support and Comfort of their being.”\(^3\) From this he proposes that the ownership of property supercedes the existence of government, occurring in the state of nature. He does this by pointing out that a common goal of man for all of history has been his

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3 Ibid., 286.
own self-preservation which Locke contends occurs through the acquisition of property. Therefore, it seems only logical for him to believe that no one, not even the government, should have the right to take away property from an individual. Locke’s only stipulation on this claim is that “there is enough, and as good left in common for others.” Thus Locke’s opinion regarding property ownership could conceivably go as far as stating that the government should not ever take away an individual’s property and that no justification exists for its attempt to do so. This, of course, would be the absolute extreme circumstances and it is probable that Locke would concede that there are certain situations where the government would need to take someone’s property for some pressing governmental purpose. However, Locke would most assuredly support the notion that individuals should be compensated for that seizure of property because allowing otherwise would give the government too much discretion regarding what and how much property they could take.

The Framers of the U.S. Constitution took the words of Locke into great consideration when writing the Fifth Amendment, which although oft cited for the protection it gives an individual from self-incrimination also deals with the ownership of property. The Amendment reads as follows:

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.

The last clause, commonly referred to as the “takings clause” has been the subject of much controversy and analysis over the course of the past two-hundred years. Interpretation by the courts has changed significantly in this century alone. The initial approach utilized during the 20th Century, sometimes termed a utilitarian-pragmatic approach, regarded the public interest as

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4 Ibid., 288.
5 United States Constitution. Fifth Amendment. (emphasis added).
the ultimate goal, while usually requiring compensation unless the activities of the property owner fell into the category of a public nuisance. After a lengthy period during which takings issues were rarely addressed by the Court, the rights of the government were expanded to an even greater extent during the 1970s. It was then that the Court frequently determined that as long as the government claimed that its actions furthered the common good, they were not required to compensate property owners. In the most recent shift, beginning in the late 1980s, Supreme Court Chief Justice William Rehnquist along with Associate Justice Antonin Scalia successfully moved towards a more “Lockean” approach to property as they protected the rights of property owners by holding the government to an intermediate standard to scrutiny in proving that its actions were beneficial to the community at large. The Justices support this interpretation because they, along with other conservative interest groups as well as presidents Reagan and Bush, saw it as a means for achieving their long term goals of deregulation, or removing control from the federal regulatory agencies, whom they felt had grown too much in both size and power, as well as privatization defined as, “when a resource, such as an environmental resource, is transferred from the commons to an individual or company that has a vested interest in the particular resource.”

By restricting the government’s discretion with respect to property these conservatives hoped to keep the government from interfering in the lives of their constituency.

The mere existence of the Fifth Amendment demonstrates that the Framers of the Constitution agreed with Locke, at least on some level, about the importance of property and one’s being able to utilize it without fear of government intervention. However, despite the inclusion of the takings clause, the brevity of the Framers on the subject has been cause for concern for the entire history of our country. One of the most confusing aspect which has arisen

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deals with the fact that technically two types of governmental takings exist: physical takings and regulatory takings. The Supreme Court, as well as the lower courts, debated for years as to whether these two distinct takings should be addressed in a similar fashion. To distinguish the two Frank Shepherd, an attorney who heads the Pacific Legal Foundation’s Atlantic Center in Coral Gables, Florida writes, “An obvious example of a governmental [physical] “taking” is the condemnation of private property to build a public road. But regulatory “takings” are trickier. The government does not actually take your land; it just bars you from doing anything with it.”7

Most frequently, at least in the cases discussed here, this barring can take the form of refusal of a building permit unless specific state mandated changes are incorporated into the building proposal. The distinction between these types of takings poses the question as to whether the government should have the right to instruct people on how to make use of their own private property. A physical taking, like the road example described by Shepherd, without compensation would be in clear violation of the Fifth Amendment: property was owned by a private individual and subsequently taken by the government for its own purposes. However, interpretation of regulatory takings is not so clear cut and even with the stance taken over the last two decades by conservative members of the Supreme Court, most notably in the case Nollan v. California Coastal Commission8 where they insisted that a strong “nexus” must exist between the government’s actions and the good of the public in order to a takings to occur lawfully, the debate continues, at least on some level, to date.

One crucial point which must be addressed prior to any further investigation is how should property be defined. Locke’s contention that one’s labor solidifies something as their

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7 “Court Ruling on Lost Tree Islands a Boon to Private Property Owners.” Accessed online at: http://www.pacificlegal.org/view_Commentaries.asp?ID=68&tTitle=Court+Ruling+on+Lost+Tree+Islands+a+Boon+to+Private+Property+Owners.

property seems a bit outdated in an age of such vast technological and mechanical advances, especially when it is taken into account that Locke felt that money would only be necessary so that perishable goods could be sold prior to spoilage.\footnote{Locke, 300-1.} Clearly Locke did not foresee an age in which all commodities and properties would be bought and sold on a somewhat regular basis. However, certain aspects of his ideas have made their way into the modern definition of property. \textit{Black’s Law Dictionary} defines property as, “….More specifically, ownership; the unrestricted and exclusive right to a thing; the right to dispose of a thing in every legal way, to possess it, to use it, and to exclude every one else from interfering with it…”\footnote{Black’s Law Dictionary with pronunciations. Abridged Sixth Edition. West Publishing Company: St. Paul, MN. 1991. 845-6.} The dictionary goes on to break the category of property down into various categories which coincide with various degrees and characteristics of ownership, but the main idea is made clear here: property can mean any item which has economic value of some sort which belongs solely to an individual or group of individuals who have the right to manage and utilize the property as they see fit without fear of it being taken away from them. As seen by this definition two of Locke’s most essential elements of property appear: that property entitles the owner to exclude others from using it and that the government cannot unjustly take the property away from the owner.

At first it may seem unnecessary to put such effort into defining something which presumably everyone is capable of defining on their own; however, there is a much bigger issue at hand here than merely a definition. Alfred P. Levitt explains, “Once the meaning of property is fixed, everything falling outside the definition is categorically excluded from Fifth Amendment protection.”\footnote{Levitt, Alfred P. “Taking on a New Direction: The Rehnquist-Scalia Approach to Regulatory Takings.” Temple Law Review. v. 66 (Spring 1993), 198.} This demonstrates just how crucial defining the term property can be under these circumstances because one disagreement over what should be considered property
can lead to an erroneous inclusion or exclusion of that “property” in the protective shield of the takings clause.

One very important component to the definition of property, which will be discussed at great length in further chapters, is the so-called bundle of property rights. Briefly stated this bundle refers to the notion that property ownership involves more than just the exclusive ability to, for example, physically inhabit the land. As explained by William G. Weaver, “Each stick in the bundle represents some right of the possessor or holder of good title to do something on, to, or with the property in question.” 12 For example, a owner of private property can, of course, enter his own property, but in addition he is entitled to potentially reaping economic profit from the property and excluding others from the property, among other things. Eventually the Supreme Court realized that it had to determine whether a takings violation occurred when one of these “sticks” was infringed upon or whether the entire bundle should be considered as a whole.13 Just how much of an individual’s property should he always have control over remains a major issue in the Court even today.

Justice William Rehnquist knew for years exactly how he thought the bundle of rights should be viewed but only recently has he been able to apply his ideas about the takings clause into the Court’s mentality. It took more than a decade before other more conservative justices joined the Court, most notably Justice Antonin Scalia but additionally Sandra Day O’Connor, Clarence Thomas, and Anthony Kennedy, who would presumably more receptive to Rehnquist’s common law takings analysis. Thus once he felt adequately supported by his fellow justices, Rehnquist began working towards making his viewpoint the standard. One notable method

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which Supreme Court justices have used in the past as a way to inflict changes in jurisprudence involves strategically granting certiorari to appealed circuit cases. The so-called “rule of 4” states that for a case to be placed on the U.S. Supreme Court’s docket, at least four of the nine justices must vote in favor of granting certiorari. As defined in Black’s Law Dictionary, the rule of four is a, “working rule devised by Supreme Court for determining if a case is deserving of review; the theory being that if four justices find that a legal question of general importance is raised, that is ample proof that the question has such importance.” The vote cast for or against granting certiorari in no way binds the justice to that vote in the ultimate decision, but it has been proven in a study which will be discussed later that a great deal of consideration on what the eventual outcome of the case will be goes into the justice’s decision on how to vote.

In order to reshape takings jurisprudence, it is my belief that Justices Scalia and Rehnquist, working in tandem with several of their more conservative counterparts, attempted to structure the Court’s docket in a manner so that they would have the opportunity to hear and decide on those circuit cases which did not follow the takings approach which they supported. In the past fifteen years the issue of takings interpretation, which for nearly sixty years prior had been muddled and unfocused, has solidified into a much more easily applicable doctrine used and accepted by a majority of courts throughout the system. In order to achieve such a feat, Justices Scalia and Rehnquist must have been diligent in their work as they tried to convince others on the Court that their approach was the most appropriate means by which to address the massive issue of just compensation for governmental takings. In this work I will investigate the components of the shift towards Justices Rehnquist and Scalia’s ideas, attempt to demonstrate the importance of the granting of certiorari to circuit court cases and discuss how these Justices used that method to their advantage.

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14 Black’s Law Dictionary, 925.
**Hypothesis:**

As far back as 1959, and most likely even before then, political scientists have wondered what motivation Supreme Court justices follow when voting on whether to grant certiorari. In his book *Quantitative Analysis of Judicial Behavior*, Glendon A. Schubert proposes, and subsequently confirms, his theory that justices are more likely to vote in favor of granting certiorari when they hope to reverse the lower court’s ruling and they believe that the merits of the case would allow them to do so.\(^{15}\) Despite the fact that his study is nearly five decades old, it contains many theories and observations which still prove accurate many years later. For example, Robert L. Boucher, Jr. and Jeffrey A. Segal took Schubert’s idea one step further, showing that there is “overwhelming evidence that Justices are reversal minded in their certiorari votes and [there is] strong evidence that many Justices strategically consider probable outcomes when they wish to affirm.”\(^{16}\) Therefore, a justice will vote to grant certiorari to affirm a lower court’s decision only if he believes that there is adequate support from fellow justices which would result in a favorable decision. This is most assuredly because, as Boucher and Segal point out, it is much less detrimental for the Court to affirm a lower court ruling that the justice did not agree with than for it to reverse a lower court decision of which the justice approved.\(^{17}\) In fact, an anonymous Justice agreed with these theories during an interview with *Time Magazine*. He commented that,

If I suspected a good decision by the lower court would be affirmed, making its application nationwide, I’d probably vote to grant. [However,] a decision may seem outrageously wrong to me but if I thought the Court would affirm it, then I’d

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\(^{17}\) Ibid., 836.
vote to deny. I’d much prefer bad law to remain the law of the Eighth Circuit of the State of Michigan than to have it become the law of the land.\footnote{\textit{The Supreme Court: Deciding Whether to Decide.} \textit{Time Magazine.} December 11, 1972, 77.}

Based on these findings, it is reasonable to assume that most Supreme Court justices formulate some type of strategy before deciding whether to grant certiorari to an appealed case. The likelihood that the justices would follow a similar voting pattern for granting certiorari to cases dealing with Constitutional issues should remain reasonably high. Those cases appealed on takings claims should be no exception. This is because, as previously mentioned, a Supreme Court ruling which goes against a Justice’s beliefs on a Constitutional issue would be considered substantially worse than a lower court ruling of the same nature. Therefore, Schubert’s study applies to the subject addressed here and it should be accepted as fact that many justices will vote to grant certiorari only when they wish to reverse a decision they disagree with unless they are almost certain that their fellow justices share their opinion and would vote to affirm the particular circuit case.

Although I was not able to locate any specific data chronicling the current members of the Supreme Court’s voting patterns regarding takings cases, there is a great deal of research that has been done in search of these patterns. Many of the results suggest the possible existence of voting blocs hence extremely strong alliances present on the Court and as well as alliances to a lesser degree not quite strong enough to constitute a bloc reflected by general agreement among Justices in various decisions. Brisbin discusses the importance of interpreting these votes as sending a message about a justice’s beliefs,

justices most commonly vote to send a message about the propriety of a litigant’s actions to other persons in the regime. Votes thus tell the story of a justice’s attitudes about the allocation of valued interest among the parties in a case. Also, because decisions of the Court often have a broad political impact, the vote
signals a justice’s support for a vision of the institutional structure of politics and a pattern of relations between the state and individuals.19

A brief investigation of data proving this point reveals that during the 1986-1992 terms Justices Scalia, Rehnquist, Clarence Thomas, and Sandra Day O’Connor all tended to vote following conservative ideals more than 60% of the time.20 Using this same data in addition to criterion developed by researcher John Sprague21, one discovers the presence of several conservative voting blocs throughout the 1986-1992 terms, a particularly crucial time for the takings shift in the Court. Perhaps most applicable to the subject of this paper, he states that from the mid-1987 term (the period during which Nollan was decided) to 1989 a majority bloc consisting of Rehnquist, Scalia, O’Connor, White and Kennedy formed.22 For a period of at least two years the conservative justices on the Supreme Court were able to control the outcome of decisions based on their policy preferences and beliefs, thus allowing them to implement a takings jurisprudence which they found to be the most favorable. Following the dissolution of this bloc it would be interesting to determine whether the minority justices were willing to accept the new takings ideas or whether they did offer some opposition by voting against granting certiorari for the cases which the conservative justices would have no doubt wanted to reverse, namely those cases in which the property owner’s rights were trumped by the actions of the government and yet their takings claim failed. Likewise an analysis of whether the Court was more willing to grant

20 Ibid., quoting data from Harold J. Spaeth. “United Stats Supreme Court Judicial Database, 1953-1992 Terms” (computer file), 5th release (East Lansing: Michigan State University, Department of Political Science (producer); Ann Arbor: Inter-University Consortium for Political and Social Research (distributor), 1994.
21 Sprague’s criteria is discussed at length in Brisbin: “To identify bloc voting within the Court, Sprague applied a criterion that measures the strength of agreement among the justices. It is calculated by averaging the percentage of agreement for all pairs of justices serving on a natural court. To this average, which he called a court cohesion percentage, one-half the difference between that score and 100 is added to determine the ‘Sprague criterion.’ When a subgroup of pairs of justices have a percentage of cohesion greater than the Sprague criterion for a natural court, a bloc is presumed to exist.” 68-9.
22 Ibid., 69.
certiorari to cases based on the character of the appellant’s party, whether they be government, corporation or individual/group, could reveal additional motivation prompting votes to grant certiorari. All of these factors taken together will create a picture detailing the actions of Justices Scalia and Rehnquist and how they managed to redefine takings jurisprudence in such a short period of time. Therefore, I hypothesize that by analyzing whether the Court granted certiorari to circuit court cases which made reference to Nollan v. California Coastal Commission 483 U.S. 825 in their decision, I will find that the pattern will appear that most cases in which the takings claim failed in the lower court will be granted certiorari and subsequently reversed while those lower court cases involving successful takings claims will be less likely to have been granted certiorari by the Supreme Court.

II. Early 20th Century Takings Jurisprudence and Application:

Arguably the most influential takings case of the early twentieth century was Pennsylvania Coal v. Mahon (1922). The case dealt with underground coal mining in Scranton, Pennsylvania, after the state legislature passed the Kohler Act in 1921. Briefly stated the Act prohibited Penn Coal or any other coal company from doing any mining which caused damage to structures standing at ground level. Because of the Act urban underground mining became essentially impossible. Compounding the effects of the Act was the manner in which the property in question was owned: the coal company owned the support estate as well as the mineral estate (the coal underneath the house) while the Mahon’s owned only the surface structure. Penn Coal claimed that this statute constituted a takings violation because the owners of the above ground structures had purchased their land with the understanding that Penn Coal would not be liable for any property damage. The government, however, argued that the

23 My explanation on why I have decided to select Nollan as my case of reference will be given later on in the paper.
legislation was police power in action and therefore did not require compensation.\textsuperscript{25} The Pennsylvania Supreme Court’s decision had, “acknowledged that the coal company had contract and property rights, but [stated that] such rights were nonetheless trumped by police power.”\textsuperscript{26} Thus one of the major questions that the Court had to deal with was whether this was merely police power and, if so, had it gone too far?

In his opinion Justice Oliver Wendell Holmes relayed his concerns that the expansion of police power to the extent proposed by the government in \textit{Mahon} would, without much question, lead to the extinction of private property. George Skouras explains further that, “if there is no limitation on the police power, the legislature is able to rapidly expand its power. The police power is so broad that at times it is viewed as being coterminous with the government itself. Justice Holmes recognized the need to place some limits on such power.”\textsuperscript{27} Clearly Holmes recognized the serious drawbacks of a government which could essentially behave however it pleased, constantly accounting for itself by citing its right to exercise police power. Something needed to be done that would both appease the government in future situations yet at the same time firmly protect the rights of private property owners. The solution Holmes came up with was, “if the diminution of property was \textit{great}, the reciprocity of advantage \textit{low}, and the commercial impracticability \textit{high}, then there was a takings…By emphasizing individual loss rather than governmental action, Holmes’s diminution of value test afforded greater protection to property rights…because diminution of value was property owner sensitive.”\textsuperscript{28} In other words, rather than looking solely at the government’s action and its relation to the public good, as recommended by Justice Harlan in the case \textit{Mugler v. Kansas} (1887) which had formerly been

\textsuperscript{25} Levitt, 203.
\textsuperscript{27} Skouras, 30.
\textsuperscript{28} Levitt, 204 (emphasis in original text).
seen as exemplifying the takings standard of review, Justice Holmes chose to analyze each case on an ad hoc basis so that all appropriate factors would be considered, an idea much more flexible than Harlan’s one size fits all approach to takings. Holmes’s envisioned a process which investigated the detriment in addition to the essentialness of the government’s actions before any type of ruling could be made. The Court subsequently called the Kohler Act unconstitutional because it sought to supercede a contract already in place between Penn Coal and the owner’s of the houses in question and as William Fischel points out, “Contract rights were long ago recognized by the Court as property rights that could not be taken without just compensation.”

Regardless of this seemingly tidy explanation, the impact of Mahon cannot be ignored as it continued to influence takings decisions for the next half century.

Four major theories came out of Justice’s Holmes opinion in Mahon: “[1] Property cannot be left without any reasonable use, [2] substantial interference with use – going ‘too far’ – so as to diminish the value of property can be a taking, [3] balancing of interests, and [4] average reciprocity of advantage.” Arguably the most influential, the balancing of interests occurred when Justice Holmes determined that the coal company had a greater interest in using the land in question – the support and mineral estates - than the Mahon’s did. To understand the test once must think of private property and police power as two interesting circles. The point of intersection represents the actions by the government which would require compensation. The remaining section of the police power circle would fall into Mugler’s “public nuisance” category which never requires compensation because the action effectively combats some significant public health or safety issue. Justice Holmes’s balancing test attempted to determine just how big the circles’ point of intersection was, or in other words, how far police power could rightfully

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29 Fischel, 18.
30 Skouras, 31.
go before they were required to compensate.\textsuperscript{31} Holmes’ way of thinking has been called a utilitarian-pragmatic approach to takings where rather than considering the category in which the taking could be classified as Justice Harlan proposed in \textit{Mugler} such as the public nuisance category, Justice Holmes considered the quantity of the taking.\textsuperscript{32} This decision undoubtedly supports the backbone of utilitarianism as written by John Stuart Mill: “actions are right in proportion as they tend to promote happiness, wrong as they tend to produce the reverse of happiness.”\textsuperscript{33}

Frank Michelman elaborates on this idea in his 1967 article “Property, Utility, and Fairness: Comments on the Ethical Foundations of ‘Just Compensation’ Law”. He contends that a utilitarian should consider efficiency gains, demoralization costs, and settlement costs are in order to determine whether a government action was indeed a takings that required compensation.\textsuperscript{34} Efficiency gains are “the excess of benefits produced by a [government’s] measure over losses inflicted by it, where benefits are measured by the total number of dollars which prospective gainers would be willing to pay to secure adoption, and losses are measured by the total number of dollars which prospective losers would insist on as the price of agreeing to adoption.”\textsuperscript{35} More simply stated, the difference between the benefits that will come about for one group of people if an action takes place and the losses which another group will suffer equal the efficiency costs. For example, if the government were to build a major highway and found it necessary to destroy several nearby houses, the efficiency costs would be the excess of benefits brought to all those able to utilize the new highway against the cost to those few families who will lose their homes.

\textsuperscript{31} Levitt, 208.
\textsuperscript{32} Skouras, 31.
\textsuperscript{34} Fischel, 144.
\textsuperscript{35} Michelman, 1214.
Michelman defines demoralization costs as “the total of (1) the dollar value necessary to offset disutilities which accrue to losers and their sympathizers specifically from the realization that no compensation is offered, and (2) the present capitalized dollar value of lost future production (reflecting either impaired incentives or social unrest) caused by demoralization of uncompensated losers, their sympathizers, and other observers disturbed by the thought that they themselves may be subjected to similar treatment on some other occasion.”

In other words, demoralization costs occur at two different levels. First, the people who are suffering losses by the initial carrying out of the action or, in the aforementioned highway example, the specific families forced to leave their homes. Secondly, demoralization costs affect those individuals who may choose not to act in the future for fear of suffering similar losses as the first group. For example, people may be apprehensive about spending large amounts of money building homes in areas near which a highway could be built because they fear losing their homes like the initial group of homeowners did.

Finally, settlement costs are “the dollar value of time, effort, and resources which would be required in order to reach compensation settlements adequate to avoid demoralization costs. Included are the costs of settling not only the particular compensation claims presented, but also those of all persons not obviously distinguishable by the available settlement apparatus.”

Therefore, settlement costs can be seen as including the cost of compensating all those people suffering from demoralization costs. This means that the government would be obliged to compensate the people who lost their homes and in turn that act of compensation would presumably alleviate the fear that others may have of losing their homes without compensation in the future.

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36 Ibid.
37 Ibid.
Based on these definitions, Michelman proposes that the government should be compelled to compensate when \((B - C) > S\), and \(S > D\), where \(B\) represents dollar benefits; \(C\), costs; \(S\), settlement costs; and \(D\), demoralization costs. Likewise the government should not be obligated to compensate if \((B - C) > D\), and \(D < S\).\(^{38}\) Using these equations Michelman presumes that the settlement costs will always be greater than the demoralization costs because otherwise those suffering demoralization costs would not believe that they had been adequately compensated for their losses. However, the decision of whether to compensate hinges on these two variables’ relationships to the efficiency costs less the total costs (settlement costs and demoralization costs combined). William Fischel further explains this notion, stating, “If net benefits are positive and greater than either settlement or demoralization costs (or both), the lower of \(S\) or \(D\) should be endured by the government. If settlement costs are lower than demoralization costs, compensation should be paid in order to avoid the greater cost (demoralization).”\(^{39}\) The entire formula truly does little more than reiterate Mill’s ideas regarding utilitarianism but by converting them in numerical values. Compensation for takings only when the benefits surpass the settlement costs which in turn are lower than demoralization costs easily fits into Mill’s framework of allowing the greatest number of individuals to benefit from each action. Because Mill contends that, “utility includes not solely the pursuit of happiness, but the prevention or mitigation of unhappiness” it is crucial when calculating this formula that the acts of the government cause those suffering from demoralization costs to believe that their losses were not all for naught.\(^{40}\)

Mahon echoes Michelman’s rationalization regarding just compensation in that the demoralization costs suffered by Penn Coal were so great that they exceeded any benefits which

\(^{38}\) Fischel, 146.
\(^{39}\) Ibid.
\(^{40}\) Mill, 143.
could come from allowing the Mahons to maintain their home. Thus the settlement costs required for allowing Penn Coal to continue its excavation as outlined in its original contract with the Mahons would be substantially greater than the efficiency costs brought about by the existence of the Kohler Act. However, those efficiency costs would also be much lower than the demoralization costs which Penn Coal would suffer were their project to be terminated. Thus in this situation, using Michelman’s approach, the government should endure the settlement costs and let Penn Coal continue its mining undisturbed. The Court went one step further, however, and ruled that the Kohler Act was unconstitutional. As far as Holmes could see the greater good would come from upholding the original contract between Penn Coal and the Mahons, ergo causing slight harm to the Mahons, rather than creating a large scale problem in the form of demoralization costs for Penn Coal as well as their associates in the coal mining industry who may have become reluctant to initiate mining projects near any residential areas in the future for fear that they could cause damage to a standing structure thus violating the Kohler Act. In other words the amount of compensation that would be necessary to alleviate the demoralization costs to Penn Coal, or the settlement costs, would be worth allowing the coal companies to continue their work without interference and thus giving up expected efficiency costs.

III. Revisiting Mahon: Penn Central v. New York City

Two major concerns which revert back to the aforementioned bundle of property rights appear when attempting to apply the Mahon standard. As Levitt points out,

[should] the diminution of value be calculated by reference to the particular extinguished right or with reference to the collective ‘bundle of rights.’ For example, if government extinguishes my right to exclude others, has it taken my entire property right to exclude, (e.g., a 100% diminution of value) or only one of my many property rights? This question must be answered in order to calculate the diminution of value. Second, the diminution of value test fails to articulate just how much diminution is necessary before a regulation becomes a taking. Thus, while it is clear that any regulation extinguishing all expectations effects a
taking, and any regulation extinguishing no expectation does not, the line between these two extremes is ambiguous. Holmes believed this question would be resolved sensibly, case-by-case, with reference to his other factors. In other words, Levitt, and many others, were questioning how the demoralization costs would be calculated if the diminution of property was not all or nothing. Did Penn Coal suffer a total loss of property rights because they were prohibited from excavating one specific portion of their property or should that one lot, which amounted to a mere 3% of the company’s expected profits, be considered one of many sticks in a bundle? According to Holmes’ interpretation the support structure was evidently such an important stick that the loss of it was substantial enough to be considered a loss of the property as a whole, something completely inexcusable. Elaborating on this idea, Levitt’s second concern, if the loss should be considered merely a single stick, how would that be transferred into a numerical demoralization cost and when would that cost be seen to surpass the settlement cost in value? For example, Levitt would wonder how Holmes came to the conclusion that the ability to mine the support structure was such a crucial stick whereas something else would be considered a lesser offence. While the economically and mathematically based utilitarian approach described by Holmes and Michelman makes sense, Justice Holmes unfortunately left these questions posed by Levitt wide open to interpretation when he neglected to adequately address these economic issues in Mahon. As the years passed not all justices agreed completely with his viewpoint of how takings cases should be analyzed. Justice Holmes’ basis for interpretation did hold up for several years though and the next significant takings case at the Supreme Court level did not occur until the 1970s with the acceptance of Penn Central Transportation Company v. New York City onto the docket.

Penn Central revolved around the owners of the Grand Central Terminal’s wish to build an addition on top of the building in New York City. The City had denied the permit request

41 Levitt, 205.
stating that the terminal was a historical landmark and as such no additions or changes, other than restoration efforts, could be made to the structure. The owners, however, believed that they were entitled to use the air space above the terminal which they owned and that refusal to let them proceed as they wished without just compensation was a takings violation.\textsuperscript{42} The Supreme Court affirmed the lower court’s ruling that no takings violation had occurred. Justice William Brennan cited three major reasons for this decision, which created a three-part balancing test:

\[1\] The character of the government action. Does it, for example, cause usually compensable physical invasions, or does it abate noncompensable nuisances?\textsuperscript{[2]} [2] Interference with ‘investment-backed expectations.’ Is the loss entirely prospective, or has the property owner sunk a lot of irreplaceable investment in the project?\textsuperscript{[and 3]} The extent of the diminution of value. Is there a reasonable residual of profitability left?\textsuperscript{43}

To answer these questions in regard to \textit{Penn Central} the Court decided that 1) the regulation prohibiting an extension to Grand Central Terminal in no way interfered with the owner’s ability to conduct business as they were still able to operate and profit from the terminal in the same manner which they had previously enjoyed; 2) that the law did not explicitly restrict the use of the air space completely, it merely disallowed the plan put forth in \textit{Penn Central’s} proposal; and 3) that through an existing transferable development rights program it would be possible for \textit{Penn Central} to transfer the development rights of the air space not permitted to be used above Grand Central Station to other neighboring properties which they may own thus resulting in the potential for additional profits.\textsuperscript{44} Essentially the main point emphasized by the Court was that because \textit{Penn Central’s} primary business function was to run a train station and the legislation in no way prohibited them from pursuing that endeavor and also did not strictly prohibit them from

\textsuperscript{43} Fischel, 50.
\textsuperscript{44} \textit{Penn Central v. NYC.}
all possible uses of the air space just the plan which they had proposed, then there was no basis for which this action could be construed a takings violation.

Many scholars contend that this decision may have actually taken steps back in the Court’s goal of establishing a firm approach to takings interpretation. By applying the nuisance exception in the first prong of the test to justify any alleged state interest, as opposed to merely those noxious ones as proposed in Mugler, the Court gave entirely too much discretion to the government, allowing them to pursue their own goals unchecked. In the Court’s opinion, Justice Brennan wrote, “More importantly for the present case, in instances in which a state tribunal reasonably concluded that ‘the health, safety, morals, or general welfare’ would be promoted by prohibiting particular contemplated uses of land, this Court has upheld land-use regulations that destroyed or adversely affected recognized real property interests.”45 This reference to the “health, safety, morals, or general welfare” demonstrates a clear application of the nuisance exception46 as adopted by the Mugler Court which rules that, “police power is properly used to stop nuisances irrespective of the costs in doing so.”47 Curiously, however, the Penn Central Court goes on to cite Mahon and Justice Holmes balancing test as an effort to compare the

46 The Penn Central Court does acknowledge that it may seem as though they are invoking the ‘nuisance exception’ yet they contend that they are not. Footnote 30 contains the statement that, “Appellants attempt to distinguish these cases on the ground that, in each, government was prohibiting a "noxious" use of land and that in the present case, in contrast, appellants' proposed construction above the Terminal would be beneficial… These cases [Hadacheck v. Sebastian, 239 U.S. 394 (1915), Miller v. Schoene, 276 U.S. 272 (1928), and Goldblatt v. Hempstead, 369 U.S. 590 (1962) – all cited within the Penn Central opinion and all notable applications of the ‘nuisance exception’] 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.” This effort to reject distinguishing Penn Central from Mugler should be considered weak at best in that the language used which seeks to protect “health, safety, morals, or general welfare” comes straight out of Mugler thus making it clear that the nuisance exception can only be invoked when a public health or safety issue is at risk, something which is not the case in Penn Central.

47 Skouras, 117.
diminution of value of the property in question with the alleged public benefit. Quoting Mahon, Brennan writes,

We now must consider whether the interference with appellants' property is of such a magnitude that ‘there must be an exercise of eminent domain and compensation to sustain [it].’ That inquiry may be narrowed to the question of the severity of the impact of the law on appellants’ parcel, and its resolution in turn requires a careful assessment of the impact of the regulation on the Terminal site.\textsuperscript{48}

Here Justice Brennan asks whether the economic value lost on Penn Central’s property is great enough to warrant compensation. This emphasizes one of the concerns regarding use of the Mahon test in the first place because this marks a situation in which the taking is only one stick in the bundle, the right to build the proposed building using the owned air space, yet it remains unclear as to whether this offense is great enough so that it requires the government to compensate Penn Central for their losses. However, the previous reference to Mugler leads to confusion over whether Brennan intended to invoke the nuisance exception to allow any governmental action or if he planned to focus on the extent to which Penn Central lost its property. It is clearly contradictory to attempt to do both.

After finding that the statute did not qualify as a takings violation, Justice Brennan attempted to redefine this new approach introduced in Penn Central. He wrote, “A ‘taking’ may more readily be found when the interference with property can be characterized as a physical invasion by Government…than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good.”\textsuperscript{49} This statement essentially rejected the entire category of takings labeled regulatory takings in favor of physical takings. Additionally Brennan’s opinion set a dangerously broad standard for what governmental actions were permissible by requiring rather vaguely that they somehow serve

\textsuperscript{48} Penn Central, at Headnote 2D.
\textsuperscript{49} Penn Central.
some public interest. This furthered the debate regarding takings which had been recently been brought back to existence after nearly a five decade absence. By making a distinction between the amount of sticks affected in the economic loss, the Court rejected by notion that any diminution of property value should automatically be construed as a takings violation. They do so by applying the *Mugler* test for the public nuisance exception subsequent to the *Mahon* analysis, if that test indicates that a taking has occurred, creating two barriers which the property owner must get past before they can be compensated for their losses. Thus the *Penn Central* Court ignored the fact that the *Mahon* test was created as an alternative to the nuisance test. As Levitt explains, the main flaw in the Court’s reasoning is that,*

*Mugler* and its progeny involved government action predicated on preventing a public nuisance. But, because New York’s Landmark Law was not enacted in reaction to a public nuisance, *Mugler* and its progeny were inapposite...The nuisance exception to the Takings Clause should be invoked only when the contested behavior threatens public safety, health, or morals.\(^{50}\)

The City’s desire was to maintain a pleasant view of the Terminal for tourists, the loss of which could hardly be seen as a public nuisance: *Mugler* was clearly not applicable.

Fischel agrees that this ruling did little to further the application of the Takings Clause because this new test made very little sense economically and as a result created an open-ended standard extremely difficult for lawyers to interpret and allowing the justices too much discretion. He states, “the fundamental flaw is that the Court gave no indication of the weight that each criterion is to be given by a trial judge or jury. Attorneys with clients need rules better than ‘the character of the government action’ and ‘the extent of the diminution of value.’”\(^{51}\) By creating this confusing and unfocused standard, the Court managed to not only muddle their own takings interpretation, but they made it even more difficult for others, particularly lower courts

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\(^{50}\) Levitt, 205-6.

\(^{51}\) Fischel, 51.
and lawyers, to determine which cases could potentially qualify as examples as takings violations. The problems would not end until the Court issued straightforward guidelines for takings analysis.

William Rehnquist, at the time still an Associate Justice, wrote a dissenting opinion in *Penn Central* which foreshadowed many of the takings ideas which he would later implement as the new standard. Understanding the distinction between the *Mugler* nuisance exception and *Mahon*, he contended that the City’s regulation was not an attempt to “prevent a nuisance, but instead [was] forcing the company to preserve the landmark ‘for the benefit of sightseeing New Yorkers and tourists.’” To include prohibiting tourists and sightseers from adequately enjoying the architecture of Grand Central Terminal within the context of the nuisance exception demonstrated much too broad a reading of an exception designed to prohibit property owners from causing undue harm to the safety or health of the public. According to Rehnquist, because the prohibition by the Landmark Preservation Commission of the City placed “an affirmative duty on Penn Central to maintain the Terminal in its present state and in ‘good repair’” the City is obligated to compensate Penn Central for these rigid restrictions on the use of its property.

This belief marks a stark contrast to those expressed in Brennan’s majority opinion in that while Brennan disregards all takings not of a physical nature, Rehnquist recognizes and supports the existence of regulatory takings which cause as much, if not more, property loss to owners despite the fact that the government does not actually physically occupy a portion of the private property. Control of one’s property does not always have to mean in a direct sense and in Rehnquist’s opinion forcing an individual to operate their property in a manner different from

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52 Myers, 532 quoting Rehnquist’s dissent in *Penn Central*.
53 *Penn Central* (Rehnquist dissent).
how they would like constitutes just as much of a violation as physically seizing the property and using it for governmental purposes.

The disagreement between Justices Rehnquist and Brennan brings to light an important question which was addressed in future cases: What is the standard of protecting the public interest which the Court should require the government’s actions to meet in order to determine which policies are permissible and which ones require compensation? As explained by David Myers,

In *Penn Central*, Justice Rehnquist *primarily* viewed the provision as protection against unreasonable interferences with private property expectations. The focus here is predominantly on the impact of the law from the vantage point of the affected landowner. Justice Brennan *primarily* interpreted the provision as a guard against appropriation of property by collective action to further public objectives in arbitrary or unjust ways. This focus is predominantly on the nature of the government activity under review, although not exclusively so.54

Justice Brennan would state that an action would very rarely constitute a takings when the government is manipulating “the benefits and burdens of economic life to promote the common good.”55 By turning the Court’s attention to the governmental action rather than the landowner he maintains a more objective view in regards to the owner’s intentions to utilize said property – it does not matter what the owner wanted as long as the government’s actions somehow contribute to the common good.

This view is rather broad when compared to Rehnquist’s belief that “a taking does not become a noncompensable exercise of police power simply because the government in its grace allowed the owner to make some ‘reasonable’ use of his property.”56 This more narrowed view of governmental actions not requiring just compensation gives more flexibility to private property owners so that they can utilize their property in accordance with their own wishes as

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54 Myers, 538. (emphasis in original text).
55 *Penn Central*.
56 Ibid., (Rehnquist’s dissent).
opposed to the wishes of the government. Rehnquist felt that a regulation which forced the
landowner to do something they did not want to do should be thoroughly inspected as a potential
takings violation regardless of the common good which the government may claim to be
furthering. Of course the nuisance exception would still exist and those circumstances would
continue to fall outside the realm of compensable takings but for Rehnquist the government
should be held somewhat accountable for its actions, at least more so than Brennan would believe based on the *Penn Central* opinion. By not allowing the government to justify its actions under the massive umbrella of promoting the “common good”, Rehnquist revealed the roots of the nexus test holding the government to an intermediate level of scrutiny which will eventually be conceptualized in *Nollan*.

**IV. Justices Rehnquist and Scalia and the Conservative Takings Approach:**

The Supreme Court took its first, albeit minor, step towards embracing the takings view supported by Justices Rehnquist and Scalia as well as several key interest groups, which will be discussed at length in future sections, in the 1986 case *Keystone Bituminous Coal Association v. DeBenedictis*. Ironically, however, both Justices Rehnquist and Scalia cast their votes in dissent of the majority opinion, perhaps foreseeing many the complications which would arise due to this ruling. In a decision thought by many to reverse the Court’s ruling in *Mahon*, despite Justice John Paul Stevens’ tremendous effort to distinguish the cases, the Court took many steps in attempting to shape a functional takings approach which would replace the ad hoc analysis which had become the standard for review. First, they established a two-prong test designed to determine whether statutes which could potentially lead to takings violations were lawful. The Court stated, “We have held that land use regulation can effect a taking if it ‘does not substantially advance legitimate state interests, . . . or denies an owner economically viable use
of his land.”

The first prong of this test could be viewed as an attempt to limit governmental interference in private property but unfortunately the Court chose not to elaborate further on what should be considered a “legitimate state interest”. The only additional statements made on this issue referenced Mugler in upholding the notion that “governmental interference that had an effect of abating nuisance was sanctioned.” More than sixty years earlier, in his Mahon dissent, Justice Louis Brandeis had invoked the “nuisance exception” as a means by which to justify the Kohler Act. In 1922 that idea was rejected and yet in Keystone the majority willingly adopted it. Unfortunately without explicit criteria on what should be considered legitimate state interests, the Keystone test did little to alleviate the confusion on the issue of takings interpretation stemming back to Penn Central. In the second prong, the Court made the distinction between destruction of total property value and destruction of “only one ‘strand’ in the petitioner’s bundle of property rights…[which is] not significant enough to conclude that a taking has occurred,” thus excluding from the list of compensable takings anything which did not create a total loss of property value. The dissenting conservatives on the Court would no doubt take issue with this outrageous sentiment.

In the Keystone dissent, written by Rehnquist, he and Scalia challenged the decision to uphold a law requiring coal-mining firms to prevent subsidence by leaving 50 percent of the coal when mining below surface structures and cemeteries. Rehnquist contended that the law was a taking and not a reasonable regulation of property to prevent a public nuisance. He argued that the law destroyed an interest in a substantial amount of property by preventing the mining of the coal, and that compensation should be afforded to the firm.

58 Skouras, 59.
59 Myers, David A. “Some Observations on the Analysis of Regulatory Takings in the Rehnquist Court.” Valparaiso University Law Review. v. 23 (Spring 1989), 543.
60 Brisbin, 286-7.
Although both Scalia and Rehnquist would presumably support the stronger requirements placed on the government to prove the state interest furthered by the potential takings violation by the two-pronged Keystone test, they both concluded that within the facts of *Keystone*, the government had not substantially proven that interest. As stated by George Skouras, “the conservatives on the Court, imbibing Chicago School political philosophy, attempted to reduce government to a minimal level.” As it turns out, Rehnquist and Scalia turned out to be correct in their ascertain that *Keystone* was poorly decided because the problems with the ruling began to appear almost immediately.

On first inspection this test appears to settle the problem of regulatory takings once and for all: compelling the government to further legitimate state interests while at the same time ensuring that personal property not be rendered completely useless economically makes sense and places adequate responsibility on the government to keep its actions in check. Unfortunately, as Alfred P. Levitt points out, *Keystone* led to a variety of problems when it became necessary to enforce this new test. Most notably he writes, “a broadly read nuisance exception allowed the exception to swallow the rule,…a distorted reciprocity of advantage test turned the notion of compensation in kind into a generalized abstraction,…and the Court allowed directionless decisions to destroy the Clause’s underlying goals.”

Essentially the Court had allowed Justice Holmes’s police power circle expand to the point that almost anything could be classified as a public nuisance while at the same time making the compensable intersection smaller and smaller. By allowing the destruction of the various sticks in the bundle of rights without requiring compensation, many began to wonder just how many sticks had to be destroyed before the Court would take action. Clearly the Supreme Court needed to elaborate

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61 Skouras, 59.
62 Levitt, 213.
further on this new interpretation of the takings clause in order to get the results they desired. It was less than one year later that they had the opportunity to reshape the *Keystone* test into a standard which would be more easily decipherable in addition to giving some rights back to the property owners.

*Nollan v. California Coastal Commission* (1987) marked a turning point in the Supreme Court’s interpretation of the takings clause for a number of reasons. Because the case dealt with a mixture of both regulatory takings and physical takings, it required a very specific approach in order to determine whether compensation was necessary. The Nollans were a retired couple who owned a lot which sat approximately one quarter mile away from an oceanside public park. In 1982 the Nollans submitted an application to the California Coastal Commission for a permit which would allow them to demolish an existing structure which sat on their property and had fallen into a state of disrepair and in turn replace it with a three-story house. The Commission rejected their application unless the Nollans included an easement in their plans which would give the public access to the nearby beach. The Nollans argued that by refusing to grant the permit unless they agreed to give up a portion of their property for public use, constituted a takings and that either the stipulation should be removed from the permit or that they should be compensated for both the construction of the easement and the lessening of property value. After several hearings and appeals the case reached the Supreme Court.63 Referring back to the bundle of rights, the Court explained that, “We have repeatedly held that, as to property reserved by its owner for private use, ‘the right to exclude [others is] ‘one of the most essential sticks in the bundle of rights that are commonly characterized as property.’”64 Thus, by forcing the Nollans to provide public access to the beach on their own private property, the government was

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64 Ibid., 9.
depriving them of one of the most necessary elements of that private property. The Court concludes that the value of private property drops considerably the instant that it ceases to be utilized and enjoyed only by the owners and those to whom the owners give explicit permission. The Court goes on to state that,

The evident constitutional propriety disappears, however, if the condition substituted for the prohibition utterly fails to further the end advanced as the justification for the prohibition. When that essential nexus is eliminated, the situation becomes the same as if California law forbade shouting fire in a crowded theater, but granted dispensations to those willing to contribute $100 to the state treasury...In short, 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.’

With this assertion, the Court altered the test put forward in Keystone by heightening the level of scrutiny which the government should be subjected to in cases consisting of a takings claim. As George Skouras writes, “substantial government purpose requires more than minimal judicial review, but not as high as the compelling governmental purpose standard of strict scrutiny.” Therefore, by holding the government to this intermediate standard of scrutiny, the Court made the possibility of a takings violation being found much greater. The previous idea of the nuisance exception could no longer serve as the government’s absolution for all its actions and the conservative Court had taken crucial steps towards instilling their takings philosophy as the law of the land.

There are several reasons why I selected Nollan as the case on which this paper will focus. First, it marks the initial application of Rehnquist and Scalia’s takings jurisprudence stemming from the majority opinion of a case. Prior to Nollan, the conservative justices had only been able to set forth their ideas regarding the takings clause in dissenting opinions, but now they had finally been able to convince the majority of the Court that their ideas had merit

65 Ibid., 13-4.
66 Skouras, 61.
and should be utilized. The most crucial change which *Nollan* brought about in interpreting takings claims involved the bundle of rights. Previously Court rulings had deemed that a takings violation occurred only when the viability of the entire bundle was affected whereas in *Nollan* the Court accepted the notion that “the government owes the property owner compensation regardless of the extent of the invasion, or the public goal motivating the action.”

This rejected the *Keystone* ascertain that all economic use of land must be destroyed before the action can be considered a taking, an opinion which Rehnquist and Scalia felt gave too much discretion to the government. As Laura Hatcher writes, “[*Nollan* was] one of the more important cases, according to property rights advocates..., in which the Supreme Court announced that economic viability could be a factor in determining when a taking had occurred…”

Finally, I have chosen *Nollan* as the case to Shephardize and thus focus my research on because although it has been almost two decades since the case was decided, aside from a few minor alterations along the way, the doctrine has remained relatively in tact. This demonstrates its thoroughness as a standard for all the courts in the United States and proves what a vital decision it was.

**V. History of the Conservative takings approach:**

Locke’s ideas continued to influence scholars long after the writing of the Constitution and one of the most famous adaptations of his insights has been labeled the Chicago School of Law and Economics (referred hereafter as the Chicago School). Skouras provides a brief overview of the Chicago School philosophy stating that “The main point...is that [Richard] Epstein and his Chicago School colleagues believe that the common law schema is a bulwark

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67 Levitt, 214.
69 Shepardization is a function available at Lexis-Nexis Academic Universe. If one indicates the Court assigned number of a particular case the program will bring up all the cases which referenced that case in their opinion. The search can be limited by year, court, or how referenced in the opinion. For my reference purposes, I limited the cases to only those occurring in one of the federal circuit courts between 1987 and 2002.
against statist redistributional schemes. And it should not be jettisoned or replaced with statist regulatory schemes.\footnote{Skouras, 74.} This contention, more simply stated, holds that the government should not be allowed to interfere needlessly in the lives of private individuals. Proponents of the Chicago School want fundamental ideas such as those of Locke to continue to ensure that the private property rights of individuals are not violated rather than allowing the government to take over this role by implementing additional regulations. According to Laura Hatcher,

\begin{quote}
[Epstein] maintains that all transactions between the state and the individuals should be treated as transactions between private individuals. Therefore, he argues, the constitutional test to determine whether a taking falls under Fifth Amendment protection is quite simple: “Would the government action be treated as a taking of private property if it had been performed by some private individual?” If it is, then the taking must be compensated or deemed unconstitutional.\footnote{Hatcher, 42.}
\end{quote}

Ellen Frankel Paul is cited as another Chicago School supporter, in addition to Epstein, whose Lockean influence is blatantly obvious in her work. She favors “an anti-utilitarian approach to property rights and takings,” stating that “property rights are fundamental” and “pragmatic considerations of efficiency and the like cannot touch fundamental rights. That is, the right to property stands on higher moral ground than considerations of efficiency.”\footnote{Skouras, 75.} This type of thinking began to gain popularity during the 1970s when economists began claiming that this type of behavior, eventually coined “deregulation”, made sense from an economic standpoint in that “regulators all too often encourage or approve unreasonably high prices, inadequate service, and anticompetitive behavior. The cost of this regulation is always passed on to the consumer. And that cost is astronomical.”\footnote{Derthick, Martha and Paul J. Quirk. The Politics of Deregulation. The Brookings Institution. Washington, D.C.: 1985, 41 quoting a memo that future Supreme Court Justice Stephen Breyer wrote to Ted Kennedy on May 20, 1974.}
began accepting a more conservative approach to takings and interest groups began forming to champion similar causes and to push both the courts and the legislature for significant changes.

The Pacific Legal Foundation (PLF) was one of the forerunners proposing change in the realm of regulatory takings. Perhaps not surprisingly the PLF’s ties to conservative politics were more than just ideological: two of its founders Ronald Zumbrun and Raymond Momboisse were both members of then California governor Ronald Reagan’s administration.74 Taking the private individual’s property rights very seriously, they contend on their website that:

Until 30 years ago, individual Americans were without an effective voice in the courts to speak out on their behalf against the representatives of centralized control and group-based special interests. Common sense and balance were concepts without a forum, and individual and economic liberties were the unintended victims of that void. The result: increased government intrusion in our lives, regulatory infringements on private property and individual rights and assaults on free enterprise. On March 5, 1973 government regulators found a foe; mainstream Americans found a friend; freedom in America found new meaning. On that day, Pacific Legal Foundation was established turning the voices that wouldn’t be heard into the voices that couldn’t be silenced. Since then, the PLF has filled the void and has proven itself as a potent representative in the courts for Americans who have grown weary of overregulation by big government, over-indulgence by the courts, and excessive interference in the American way of life.75

The PLF has remained true to their word and frequently petitions the Supreme Court to grant certiorari to cases in which property owner’s rights have been overlooked in favor of government regulation. If those cases are granted certiorari the PLF often files amicus briefs detailing exactly why the property owners should prevail. They also fund a variety of other activities ranging from legal research, moot court sessions, and monitoring government administrative proceedings, many of which seek to educate the public on their rights and remedies in the takings realm.76 Recently the PLF has refocused their attention on the California Coastal Commission

74 Hatcher, 37.
76 Hatcher, 38.
accusing them of taking steps to avoid following the guidelines laid forth by the Supreme Court in *Nollan*. PLF attorney James Burling writes,

> In 1987 the United States Supreme Court ruled that the Commission’s practice of forcing landowners to give up land in exchange for building permits was an ‘out-and-out plan of extortion.’ Instead of being chastened, the Commission continues to enforce pre-1987 land thefts and to this day tries to find ways to slide around the Supreme Court decision and demand land for permits.\(^7\)

Lobbying by the PLF for CCC reform seems to have been relatively successful in recent years as California’s 9th Circuit Court produces by far the most appealed takings cases to the United States Supreme Court.\(^8\) However, the PLF’s platform is not entirely based on the notion of preserving individual liberties. As Laura Hatcher points out, “they remain focused on economic interests. This is informed by their belief that economic liberty remains at the heart of individual freedom.”\(^9\) By incorporating economical motives into their agenda the PLF wisely expands their appeal by supporting their ideas with a substantive argument rather than just an opinion about the importance of personal rights. Their audience could now included a vast number of those who originally conceived the idea of deregulation.

Soon with the growing success of the PLF many other interest groups working for similar changes began to appear. Perhaps most notably the Institute for Justice (IFJ) who joined them in their crusade in 1991. William H. Mellor’s speech to the Heritage Foundation announcing the creation of this new organization contained several referenced to the works of John Locke, thus solidifying his position as one of the new foundation’s chief influences. Mellor commented that

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77 Burling, James S. “Fix the California Coastal Commission Now.” Accessed online at: http://pacificlegal.org/view_Commentaries.asp?id=73&Title=Fix+the+California+Coastal+Commission+Now.

78 This observation is based on my data set. Of the 32 circuit cases studied almost half of them originated in the 9th Circuit, which includes California. I will go into slightly more detail later on in the paper about this but felt it should be mentioned here to demonstrate some of the PLF’s successes in bringing blatant takings violations into the public perspective.

79 Hatcher, 38.
“Natural rights theories profoundly influenced the framers of the Constitution. While the overall influence of natural rights can be debated, it is quite clear that key provisions of the Constitution are derived from natural rights. Unfortunately, such basic beliefs fell out of favor with the rise of legal positivism and utilitarianism.” He went on to say, “We will represent people whose right to enjoy the fruits of their labor – their property – has been taken from them by oppressive government regulation and outright expropriation…For these people yearn only for what Thomas Jefferson referred to in his first Inaugural Address – to be left “free to regulate their own pursuits of industry and improvement.” These brief statements are an excellent example of how Mellor and his colleagues at the Institute for Justice feel about the subject of takings. He condemns the period leading up to the late 1970s where he believes that the justice system failed in property interpreting takings arguments because their judgment was clouded by the use of an improper jurisprudence. Although technically the IFJ formed as a right libertarian group it “proclaims itself as the truest defender of civil rights and liberties in public interest law on both sides of the spectrum” aligning it indirectly with PLF despite the fact that they are not at all affiliated with each other. To make jurisprudential changes dealing with Constitutional issues like takings, however, interest groups alone are not enough: these groups rely on the presence of allies in the judicial and legislative branches of government who are able to formally adopt and implement the new ideologies. Despite the PLF and IFJ’s similar causes they disagree on the role that the judiciary plays in making the proposed changes. The PLF, Hatcher writes, “does not advocate judge-made law, but instead argues that judges should show restraint and act as interpreters of the laws legislators make” whereas the IFJ “views the judge as an active participant in the law-making

80 Mellor, 5.
81 Ibid., 6.
82 Hatcher, 39-40.
process, reviewing and striking down any legislation that is unconstitutional.”

Regardless of the exact way by which the judiciary works, their influence and importance is undeniable when discussing the changes for which both the PLF and IFJ have lobbied. The election of Ronald Reagan in 1980 gave members of these types of interest groups much hope in that presumably any judicial appointments he made would have decidedly conservative ideals and thus support the proposed notion of deregulation. As Derthick and Quirk comment,

Given the intense commitment to deregulation associated with the conservative Republican administration of Ronald Reagan, the inclusive sweep of its deregulatory goals, which encompassed the new regimes of health, safety, and environmental regulation, and the election results of 1980, which produced a Republican Senate, one would have predicted extensive gains for deregulation beginning in 1981. Expectations of Reagan’s presidency proved extremely accurate when in 1986 he elevated Supreme Court Justice William Rehnquist to the position of Chief Justice and subsequently nominated D.C. Circuit judge Antonin Scalia to join the High Court as an Associate Justice.

When Congress approved Scalia’s promotion to the Supreme Court in 1986 his thoughts on private property and deregulation were already rather well-known in part due to his years of service on the D.C. Circuit Court. As Richard Brisbin writes, “unconcerned with issues of economic inequality on legislative prerogative, he has defended the individual property owner against the allegedly passionate, factional demands of the majority.” Since his appointment, Scalia has taken further steps to promote this belief, perhaps most notably in his dissenting vote in *Keystone* and his *Nollan* majority opinion. With Chief Justice Rehnquist, with whom he agreed more than 85% of the time from his initial appointment through the 1992 term, Scalia has managed to become a formidable player in the redefinition of takings jurisprudence which

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83 Ibid., 43.
84 Derthick, 207-8.
85 Brisbin, 283.
86 Ibid., 66-8.
occurred in the last years of the twentieth century. Describing the approach to takings interpretation as taken by Justices Scalia and Rehnquist, Skouras calls it, “a return to common law principles of property law,” and he goes on to cite Scalia’s close association with Richard Epstein, who is affiliated with both the Chicago School and the IFJ. This Scalia-Epstein connection emphasizes the importance of sharing ideologies with prominent members of the judiciary in order for interest groups to push for desired changes. Therefore it should come as no surprise that since its creation the IFJ has filed amicus briefs to the Supreme Court for every significant takings or property rights issue, many of those briefs penned by Epstein himself.

Further evidence of Justices Rehnquist and Scalia’s agreement with the philosophies with groups such as the PLF and the IFJ becomes clear in that when referring to Rehnquist’s Keystone dissent, David Myers identifies, “a traditional, formalistic approach for reviewing the constitutionality of the statute…[C]onventional perceptions of property rights are a primary focus. Common law distributions of rights in land are accepted as natural and legislative decisions to alter these rights are viewed with suspicion.” This marks a reference to Locke’s beliefs concerning natural rights as well as the desire by Chicago School proponents to maintain the common law schema rather than allowing big government to take control. Together the presence of Justices Scalia and Rehnquist on the Supreme Court as well as the increasing influence of interest groups championing similar ideals, the conservative takings jurisprudence which became the standard in Nollan gained ground rather rapidly as the preservation of the individual’s private property rights was identified as being of utmost importance.

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87 Skouras, 85.
89 Myers, 551.
IV. Introduction of data set and tests performed:

Merely sharing an opinion, however, is not nearly enough to make changes in Constitutional jurisprudence at the Supreme Court level. A great deal of consideration must be devoted to planning an appropriate strategy designed to implement said changes. Of course it also must be taken into account that some members of the Court may not have supported the conservative movement and thus steps needed to be taken to neutralize that opposition. The purpose of this paper is to identify the means by which Justice Scalia and Rehnquist accomplished this feat and as a result successfully made their desired changes in the realm of takings jurisprudence.

In order to test my hypothesis that the conservative Supreme Court Justices, namely Justices Rehnquist and Scalia, acted in a calculated basis to change the Court’s interpretation of the takings clause by granting certiorari to only those circuit cases which they hoped to reverse, I’ve created my own data set using the circuit court cases citing Nollan which were subsequently appealed to the Supreme Court. Using this data set I have chosen a series of tests which will hopefully help to prove my hypothesis regarding the strategies used by the Justices when granting certiorari was such that they would have the opportunity to rule on the takings cases which they hoped to reverse, those that disagreed with the logic of Nollan.

I have two major concerns regarding the state of my data set. First, because I have created my own data set rather than using a more comprehensive one compiled by professional researchers, I may not have the extensive diversity of variables necessary to prove my hypothesis. For example, I have no variable representing the justices’ individual voting patterns for granting certiorari or their subsequent vote to decide the case. Additionally I lack information showing who filed amicus briefs for the private property owners in each case,
something which could prove even greater alignment between certain interest groups and the justices. However, I decided to create my own data for a number of reasons: because my topic is so precise that the likelihood that a data set already existed regarding the specific cases which I needed to analyze was extremely low, because I wanted to have control over how the qualitative variables were converted into quantitative variables rather than relying on someone else’s discretion to make those changes, and finally because of my relative unfamiliarity with the empirical research process I decided that a smaller more compact data set would be less overwhelming and cumbersome to deal with in the stages of creating tests, running those tests, and subsequently analyzing the results of those tests.

Second, my hypothesis deals with a rather small number of circuit court cases, thirty-two, thus my data set represents variables concerning only these thirty-two cases. I am somewhat worried that this small size will decrease the likelihood that I will find any statistical significance with my tests because I have already narrowed down the field of research to such a great extent. In a statistical sense, the larger and more diverse the pool of data, the more likely that tests showing similarities will be significant. For example, if asking ten people who live on the same street what their opinion on a local issue is and then asking two hundred people who live in scattered locations throughout the same city the same question can produce vastly different results. However, more significance will occur if many people in the group of two hundred share the same opinion than if 9 out of the 10 in the first group have similar beliefs. Seemingly the way to alleviate this problem would be to expand one’s data set but as previously mentioned the body of usable cases is limited to those that reference Nollan so that is not possible. Therefore, I imagine that my Chi Squared Tests for statistical significance will very rarely, if ever, be successful and as a result rather than focusing on whether my p values are lower than .05 I will
have to rely on analysis of the actual tables and percentages themselves for patterns. I do not imagine this will present any substantial problems in that my hypothesis revolves around locating a general trend among the Justices and not any specific behavior or attitudes.

Since 1987 and ending in 2002, more than 400 circuit court cases have referred to *Nollan* in their opinion, this may include in the majority or concurring opinion, the dissenting opinion, and harmonizing or distinguishing the case with respect to *Nollan*. Of those hundreds of cases, a very small number, only thirty-nine, were appealed to the United States Supreme Court. These are the circuit court cases with which I began putting together my data set. The thirty-nine cases in question range in subject from a criminal case and the imposition of the death penalty to several cases which seem nearly identical to *Nollan*. After reading and analyzing each case I eliminated an additional seven of the thirty-nine cases which did not contain a the claim of a takings violation and had mentioned an aspect of *Nollan* not directly relating to its takings ruling. Thus thirty-two cases remained for use in my data set which contained two common threads: that the circuit court decision made reference to *Nollan* in regards to a takings claim made by one of the parties to the case and that the case was subsequently appealed to the U.S. Supreme Court.

I renamed each of the thirty-two variables using their circuit court assigned number. For example, case variable one became “56F.3d375”. This was done primarily to keep the variables in a more manageable form by referring to them in a more identifying manner as opposed to assigning a random number. Then I created a number of variables which give basic information about each of the cases, such as “Circuit” and “HowManyJudges”, the former indicates the circuit court of origin for each case while the latter represents whether the case was heard en banc or by a three judge panel. While both of these variables, especially “Circuit”, could prove to be informative in the analytical stage of this paper, they were created solely to describe the
types of environments in which these cases were originally heard. It is likely that none of these three variables will appear in the results section of this paper and will only be included if they happen to show some type of significance with regards to the actions of the Supreme Court, something which would be rather surprising.

Because “Circuit” and “HowManyJudges” were my only variables which dealt with quantitative values, the information for the remainder of my qualitative variables were assigned a numeric value, which can be found in the Code Book portion of the Appendix. By making this change I will be able to perform tests with which I am more familiar and which will likely be more successful with a data set of this small size. With this in mind I created the variables “Party1” and “Party2” to represent the characteristics of the two parties in each case. If the party is the government then the value assigned was 0, if it is a private individual or organization the value was 1, and if it is a corporation then the value was 2. “Party1” will represent the party that appealed the case to the circuit court and “Party2” will represent the respondent in the circuit court case. A third variable, added later in the process, “PartySupreme” used the same numerical values to indicate which party subsequently appealed the case to the Supreme Court, in most cases the loser of the circuit court case. This variable will likely prove to be the most important of the three in that I will be able to tabulate it against the variable “GrantedCert” (to be further discussed in the following paragraph) to determine whether the justices were more sympathetic to appeals made by parties of a particular character. Based on what has already been discussed regarding Justices Scalia and Rehnquist’s approach to takings claims, it is reasonable to hypothesize that the granting of certiorari would be more likely for cases appealed to the Supreme Court by private individuals rather than those appealed by the government.
The first variable created with the intention to directly test my main hypothesis was “TakingsClaim”. This variable shows whether the circuit court accepted the takings claim brought forth by one of the parties in the suit. Three different quantitative values represent how the circuit court dealt with the takings claim: a value of 0 means that the court dismissed the claim as unripe, a value of 1 means that the court accepted the claim, and a value of 2 means that the court rejected the claim. I will use this variable to run a number of tabulations to find patterns while also using the Chi Squared Test in order to prove statistical significance. The second significant variable, called “GrantedCert” answers the inquiry as to whether the Supreme Court agreed to hear the appealed circuit case by granting certiorari. If the Court did grant certiorari then it will be indicated with a 1 value and if they did not, a 0 value will be entered. In most tests, this variable will represent my dependent variable which I predict will vary based on the different independent variables with which I tabulate it. If my hypothesis proves correct then my statistical tests will reveal that the Supreme Court granted certiorari more often when the “TakingsClaim” value is 2, or that the claim was unsuccessful, while the granting of certiorari will occur less often when the value of “TakingsClaim” is 0 or 1 (unripe and successful, respectively). Once again the Chi Squared Test will confirm the statistical significance of any trends which may be identified in the tabulation.

I predict that the variable “HowReferenced” will also play an important role in my statistical tests and analysis. Because there are so many ways by which a circuit court can reference a case, I have chosen to collapse those types of references into two categories: those that applied Nollan (by citing in the majority or concurring opinion, by harmonizing, by following and thus contributing additional aspects to the approach, and by explaining) were given a value of 0 and those cases where the dissenters made reference to Nollan, often stating
that the majority had not property made use of the standard it set received a value of 1. For the purposes of creating this variable, I chose not to include those cases which distinguished themselves from *Nollan* as the courts found that they were not similar enough to enact the same types of analysis. The one exception to this would be if in addition to being distinguished in the main opinion, *Nollan* were to be referenced in some other manner (i.e. in the dissenting opinion or the concurring opinion, etc.). In situations where this has occurred the case will be assigned the value for the second reference to *Nollan*, the one other than distinguishing it. In addition, I have also chosen not to include any cases which rightly should be assigned both a value of 0 and of 1 (referenced in both the majority opinion and the dissenting opinion). My prediction for the tests using this variables is that the cases with a value of 1 will be granted certiorari more often than those cases with values of 0. This is because the Supreme Court would presumably want to apply the *Nollan* standard as the Circuit dissenter recommended rather than go along with the majority opinion which made no reference to the case while conducting its analysis.\(^9\) This variable will be used as an independent variable in a tabulation with “TakingsClaim”. Hopefully that test will prove my assumption that a case with a value of 0 for “HowReferenced” would be more likely to result in a takings claim victory (and thus a value of 1 for “TakingsClaim”) whereas a case with a value of 1 for “HowReferenced” probably indicates a failed takings claim for the private property owner. If this test is successful, I will tabulate “HowReferenced” with “GrantedCert” in order to determine whether my aforementioned belief about the relationship of these two variables should be considered accurate.

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\(^9\) This assertion ties in with Glendon Schubert’s research as mentioned in an earlier section of this paper. The justices would be more inclined to grant certiorari to the cases citing *Nollan* in the dissenting opinion because they are reverse-minded whereas there is always the possibility that a case citing and properly applying *Nollan* at the circuit level could be granted certiorari to the Supreme Court and subsequently reversed which would not bode well for property owners at all.
V. Results and discussion:

The first test performed using Intercooled Stata 7.0 gives a brief overview of the cases of which the data set consists by tabulating the variables “Circuit” and “Year”. As shown in Table A titled “Breakdown of cases by circuit and year” the greatest number of cases (almost 50%) in the data set originated in the 9th Circuit, consisting of California, Oregon, Washington, Arizona, Montana, Idaho, Nevada, Alaska, Hawaii, Guam and the Northern Mariana Islands.

Table A:

<table>
<thead>
<tr>
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<th></th>
</tr>
</thead>
<tbody>
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<td>1</td>
<td>2</td>
<td>3</td>
<td>0</td>
<td>0</td>
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<td>1</td>
<td>1</td>
<td>1</td>
<td>2</td>
<td>1</td>
<td>15</td>
</tr>
<tr>
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<td>2</td>
<td>5</td>
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<td>1</td>
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<td>1</td>
<td>2</td>
<td>2</td>
<td>2</td>
<td>32</td>
</tr>
</tbody>
</table>

This discovery makes sense when one takes into account that “the California Supreme Court during the 1970s did its best to read the just compensation remedy out of the U.S. Constitution when regulatory takings were at issue.” As previously contended by members of the PLF, California’s regulatory commissions often totally disregarded the rights of property owners and apparently the state’s courts were working very hard to justify the actions of agencies such as the CCC. Because the Supreme Court interpretation of regulatory takings created more confusion than doctrine, there was no means by which to rectify what was happening in California until after Nollan when regulatory takings were officially recognized along side physical takings as warranting just compensation. This decision likely prompting an onslaught of appeals to the Supreme Court when California landowners finally saw a remedy for the years of takings.

91 Fischel, 230.
violations which they had been forced to endure without redress. Likewise this chart reveals that the regularity of cases remained rather consistent throughout the fifteen year period studied with the range being from 0 cases per year (1993, 1999, and 2002) to 5 cases a year (1991 and 1996). This will prove to be potentially important in future tests because although the rate of circuit court cases addressing takings issues remained relatively stable, the Supreme Court’s granting of certiorari may reflect a trend which changes over the years (perhaps relating to the aforementioned conservative voting bloc).

Elaborating on the questions raised by the first test, the second test sought to determine whether the Court’s trend towards granting certiorari changed throughout this period of time by tabulating the variables “GrantedCert” and “Year”. In other words, were there any years, or series of years, in which the Court was more likely to grant certiorari than they had been in previous years. My hypothesis would suggest that a possible trend would show a higher rate of granting certiorari to cases from earlier years due in part to the conservative bloc. However, another possibility is that the likelihood of granting certiorari would rise as the years passed due to an eventual acceptance of the new takings jurisprudence by other justices on the Court. Table B “The years affect on granting of certiorari” shows the results of this test:

<table>
<thead>
<tr>
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<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
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<td>2</td>
<td>2</td>
<td>5</td>
<td>3</td>
<td>0</td>
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<td>4</td>
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<td>2</td>
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<td>2</td>
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<td>100%</td>
<td>100%</td>
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<td>80%</td>
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<td>50%</td>
<td>100%</td>
<td>84.38%</td>
</tr>
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<td>0</td>
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<tr>
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<td>0.00</td>
<td>0.00</td>
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<td>0.00</td>
<td>20%</td>
<td>0.00</td>
<td>0.00</td>
<td>50%</td>
<td>50%</td>
<td>50%</td>
<td>15.63%</td>
</tr>
<tr>
<td>Total</td>
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<td>2</td>
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<td>5</td>
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<td>3</td>
<td>5</td>
<td>2</td>
<td>2</td>
<td>2</td>
<td>2</td>
<td>32</td>
<td></td>
</tr>
<tr>
<td></td>
<td>100%</td>
<td>100%</td>
<td>100%</td>
<td>100%</td>
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<td>100%</td>
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<td>100%</td>
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</tr>
</tbody>
</table>

Pearson chi2(11) = 12.6578  Pr = 0.316

Unfortunately due to the small number of cases from each year, it is rather difficult to ascertain whether a pattern does in fact exist. However, the slight trend which does seem to appear is that
the Court seems to have been a bit more willing to grant certiorari during the later years investigated than they had been during the earlier years. Of course, the Chi Squared Test shows no statistical significance as its value .31 is much greater than the acceptable .05 so it is possible that this trend happened by chance. In a related test the correlation between these two variables was found to be .23, which although relatively low from a statistical standpoint, indicates the presence of a slight positive relationship between these two variables. This means that as the year variable got higher the likelihood that a case would be given a 1 (granting of certiorari) rather than a 0 (denial of certiorari) increased a very small amount. Despite these statistically insignificant results, I have conceptualized two possible explanations for this slight trend. First, that the justices who had not formed the conservative bloc of the late 1980s finally decided to go along with the new takings jurisprudence and wanted to begin addressing the issue more often in the Supreme Court. The second possibility is that those same justices saw an opportunity to change Rehnquist and Scalia’s takings interpretations and were voting to grant certiorari to cases whose circuit decisions followed the conservative framework in the hopes of reversing them. Unfortunately because I had no access to records detailing which justices cast each of these votes granting certiorari neither explanation cannot be tested and must remain suggestions rather than substantive conclusions.

One test which came within .008 of proving statistically significant, one of the closest any of the tests performed, analyzed the relationship between the Supreme Court’s tendency to grant certiorari based on the character of the party acting as the appellant in the circuit court case. As shown below in Table D “Granting of certiorari based on circuit respondent”, in 30 of the 32 cases, the government acted as the appellant in the circuit court case with an individual or

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92 This chart can be viewed in the Appendix. It is labeled “Table C: Granting of certiorari based on year”.

45
corporation presumably charging them with violating the takings clause. Of those cases, the
Supreme Court granted certiorari 13.33% of the time.

<table>
<thead>
<tr>
<th>GrantedCert</th>
<th>Govt.</th>
<th>Ind.</th>
<th>Corp.</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>No</td>
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<td>0</td>
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<td>27</td>
</tr>
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<td>84.38%</td>
</tr>
<tr>
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<td>4</td>
<td>1</td>
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<td>5</td>
</tr>
<tr>
<td></td>
<td>13.33%</td>
<td>100.00%</td>
<td>0.00</td>
<td>15.63%</td>
</tr>
<tr>
<td>Total</td>
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<td>1</td>
<td>32</td>
</tr>
<tr>
<td></td>
<td>100.00%</td>
<td>100.00%</td>
<td>100.00%</td>
<td>100.00%</td>
</tr>
</tbody>
</table>

Pearson chi2(2) = 5.7047  Pr = 0.058

The significance lies in the fact that in the one case in which the “Party2” variable is 1, representing an individual or group of individuals, the Court voted to grant certiorari whereas the trend with variable values of 0 and 2, representing government and corporation respectively, the trend was overwhelmingly to not grant certiorari. Whether this test actually demonstrates any concerted effort on behalf of the Court to grant certiorari to those cases based on the circumstances of the circuit court will probably remain unknown until the results of the test involving the variable “PartySupreme” and “GrantedCert” are analyzed. If the Supreme Court tends to grant certiorari more often when a party other than the government has appealed the case, it will be reasonable to combine the results of these two tests and deem them significant for my purposes.

To perform the tabulation of “PartySupreme” and “GrantedCert” I made the decision to only assign values to the variable “PartySupreme” to those appealed cases which had “TakingsClaim” variables of 1 or 2, successful or not successful, thus excluding all those circuit court cases with values of 0, those dismissed as unripe. I chose to do this because none of those unripe cases were granted certiorari, presumably because the Supreme Court agreed with the circuit court’s decision that all available avenues of redress had not yet been pursued. If by
including those unripe cases in the “PartySupreme” variable the results of any tests conducted would be skewed due to the artificial inflation of the size of the group of cases which were denied certiorari. This would indicate that the certiorari decision was based on the appealing party when in actuality the unripeness of the claim was the most influential factor in the Court’s decision to deny certiorari. This tabulation produced Table E “Granting of certiorari based on appellant to the Supreme Court”:

<table>
<thead>
<tr>
<th>GrantedCert</th>
<th>PartySupreme</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Govt.</td>
<td>Ind.</td>
</tr>
<tr>
<td>No</td>
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<td>10</td>
</tr>
<tr>
<td></td>
<td>60%</td>
<td>83.33%</td>
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<tr>
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<td>2</td>
</tr>
<tr>
<td></td>
<td>40%</td>
<td>16.67%</td>
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<td>Total</td>
<td>5</td>
<td>12</td>
</tr>
<tr>
<td></td>
<td>100%</td>
<td>100%</td>
</tr>
</tbody>
</table>

Pearson chi2(2) = 1.6146  Pr = 0.446

Not surprisingly once analyzed this test also failed to show statistical significance. The only way that this test could have really shown any significant patterns would be if the absence of the seven unripe cases had somehow affected the data because they were not adding cumbersome data to the individual and corporation categories of “PartySupreme”. However, this did not prove to be the case and it seems that by decreasing the already small pool of cases, the burden to achieve significance became much higher thus making significance nearly impossible.

One of the tests which I had predicted would be the most important in proving my hypothesis was the tabulation of the variables “GrantedCert” and “TakingsClaim”. The results of this test show whether the accepting or rejecting of the takings claim by the circuit court had any bearing on the Supreme Court’s decision to grant certiorari. My suspicion was that the likelihood of granting certiorari would be much higher when the takings claim was not successful (giving that variable a value of 2) than when the lower court either declared the claim
unripe (variable of 0) or the claim was successful (variable of 1). Table F “Granting of certiorari based on the circuit takings decision” shows the results of this test:

<table>
<thead>
<tr>
<th>GrantedCert</th>
<th>Unripe</th>
<th>TakingsClaim</th>
<th>No Success</th>
<th>Total</th>
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</thead>
<tbody>
<tr>
<td>No</td>
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<td>27</td>
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<td></td>
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<td>71.43%</td>
<td>83.33%</td>
<td>84.38%</td>
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<td>2</td>
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<td>6</td>
</tr>
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<td>0.00</td>
<td>28.57%</td>
<td>16.67%</td>
<td>15.63%</td>
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</tr>
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<td></td>
<td>100%</td>
<td>100%</td>
<td>100%</td>
<td>100%</td>
</tr>
</tbody>
</table>

Pearson chi²(2) = 2.2011  Pr = 0.333

According to this test the Court granted certiorari more often (28.57%) to those circuit court cases which ruled in favor of the takings claim than they did to those cases in which the courts had rejected the takings claim (16.67%). However, the percentages are rather close and the p value far higher than .05 so although this observation does not outright prove my hypothesis, it does not outright reject it either. There are several possible ways to explain the results of this test. First, perhaps Rehnquist and Scalia do not follow Schubert’s pattern for granting certiorari which finds many justices to be reversal oriented. Rather than granting certiorari to the circuit court cases which they hoped to reverse, they found it more efficient to reinforce the decisions with which they agreed, thus establishing a national standard which the lower courts would have to follow. This seems possible seeing as how Table D shows that the government is more likely to appeal a case to the Supreme Court. Similarly, the government is always the party accused of violating the takings rights of other individuals or corporations. Therefore, if the government were to lose a case and subsequently appeal it to the Supreme Court, the justices may have been forced to take that opportunity to grant certiorari and affirm a takings interpretation rather than waiting for a property owner to appeal an unsuccessful takings claim to the Court. A second
explanation is that the Court granted certiorari to only the cases in which they felt the party making the takings claim had the strongest argument, which may or may not have prevailed at the circuit level. This would account for the spread of certiorari grants between successful and not successful takings claims because some of the successful claims may have involved a relatively weak takings claims which the circuit court judges sanctioned. Therefore, Rehnquist and Scalia may have feared that their counterparts on the Supreme Court would not be as willing to accept those weaker arguments used to justify these claims.

The next test produced Table G “Circuit takings decision based on how they referenced Nollan” and addressed the aforementioned issue of whether the way by which the circuit court referenced Nollan had any impact on how that court eventually ruled on the takings claim.

<table>
<thead>
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<td>0.00</td>
<td>29.17%</td>
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<td>0.00</td>
<td>29.17%</td>
</tr>
<tr>
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<td>9</td>
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<td>100%</td>
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Pearson chi2(2) = 1.4609  Pr = 0.482

The one case in which the dissenters cited Nollan resulted in a failed takings claim but because a higher percentage of the takings claim failed overall (41.67%) this occurrence is not statistically significant. It is interesting to note, however, that of the 23 cases which positively cited Nollan, the spread is relatively even over the result of the takings claim with only a slightly higher percentage being unsuccessful (39.13% as opposed to 30.43%). This observation directly contradicts what I predicted because it reveals that circuit courts were referencing principles put
forth in *Nollan* and then subsequently rejecting the taking claims of these property owners. One way to account for this, and most likely what actually happened, is that the circuit courts were applying *Nollan* and finding the essential nexus between the government’s actions and the public interest, thus these takings claims were not strong enough to pass muster.

Although the previous test did not end up producing the predicted results between “HowReferenced” and “TakingsClaim” the results of this final test are interesting when analyzed on their own. I had originally hoped to prove that “HowReferenced” would have a definite effect on the value of “TakingsClaim” and then perhaps would have a similar effect on “GrantedCert”, demonstrating a relationship between the three variables. Ironically this final test tabulating the variable “GrantedCert” with “HowReferenced” was the only one to prove statistical significance with a p value lower than .05. The test generated Table H “Granting of certiorari based on how circuit referenced *Nollan*”:

<table>
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<td></td>
<td></td>
<td></td>
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<td>19</td>
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<tr>
<td></td>
<td>82.61%</td>
<td>0.00</td>
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<td>79.17%</td>
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<tr>
<td>Yes</td>
<td>4</td>
<td>1</td>
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<td>5</td>
<td></td>
</tr>
<tr>
<td></td>
<td>17.39%</td>
<td>100%</td>
<td></td>
<td>20.83%</td>
<td></td>
</tr>
<tr>
<td>Total</td>
<td>23</td>
<td>1</td>
<td></td>
<td>24</td>
<td></td>
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<tr>
<td></td>
<td>100%</td>
<td>100%</td>
<td></td>
<td>100%</td>
<td></td>
</tr>
</tbody>
</table>

Pearson chi2(1) = 3.9652  Pr = 0.046

It is reasonable to assume that this chart is significant without even looking at the p value because the one case in which *Nollan* was referenced in the dissent was granted certiorari while only 17.39% of the rest of the *Nollan* citations were granted certiorari. Although the presence of only one case in this category makes it a bit lofty to conclude that my hypothesis about this test was correct it seems highly likely that something more than chance is at work here. To state that those cases which cited *Nollan* in the dissent would be those that presumably had not followed
Nollan in the circuit court’s ruling and that the Supreme Court would grant certiorari to these cases so that they could rightly apply Nollan could be an accurate conclusion.

**VI. Conclusion**

Unfortunately only one of the tests performed produced results with statistical significance. I do not, however, believe that this completely nullifies my hypothesis as a number of confounding variables and external factors may have contributed to the seemingly unimpressive results of these tests. As previously mentioned the small number of cases which qualified for inclusion in the data set, those that made reference to Nollan and that were appealed to the Supreme Court, raised the standard for statistical significance to an almost impossibly high level. Had the data set been larger there would have been a greater chance that some sort of decisive pattern would have been located. Therefore, I further contend that by expanding my data set to include circuit cases references to Supreme Court decisions other than but still including Nollan would greatly increase the likelihood of finding statistical significance were these same tests to be performed again. Many scholars have recently pinpointed cases which continue the Rehnquist-Scalia interpretation initially conceived in Nollan. According to Alfred Levitt, “The Rehnquist-Scalia approach is perhaps best exemplified in the recent decision of Lucas v. South Carolina Coastal Commission.”

Additionally, David Myers writes, “Chief Justice Rehnquist further refined his own views on just compensation doctrine in the second significant opinion by the Court in 1987, First English Evangelical Lutheran Church of Glendale v. County of Los Angeles.” Lastly, Christine Harrington and John Brigham make reference to Dolan v. City of Tigard, a case from 1994 in which the Court ruled that the City had not managed to show a strong enough nexus between their actions and the public interest, clearly

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93 Levitt, 213.
94 Myers, 544.
another example of Justices Rehnquist and Scalia’s takings interpretation at work. These cases should be among those considered for references were this data set to be expanded.

Another addition to the data set which may have proved beneficial would be an indication of which justices cast votes for and against granting certiorari for each of the relevant thirty-two cases. If that information were known one would be able to consider whether the justices appeared to be following Schubert’s reversal oriented voting framework or not. This would have been very important when analyzing results such as Chart E which showed if, and how, the takings outcome in the circuit court affected the Supreme Court’s decision to grant certiorari. Knowing which justices cast votes for certiorari and then being able to analyze that circuit decision could have helped in identifying a pattern on the motivation behind the individual justices when granting on certiorari, rather than being forced to rely on looking at the justices as one body as was done in this work. Finally, I contend that because Nollan is such a recent decision when the tremendous history of the Supreme Court is taken into account, that not nearly enough time has passed during which the lower courts have had the time to interpret it and incorporate it into their decisions. After all it took nearly half a century before Mahon was understood to the point that all of its strengths and weaknesses could be identified. Thus it is possible that much more than fifteen years will have to pass before Nollan and the later decisions which clarified its ideas will truly be accepted as the law of the land and as such enforced by all of the United States’ courts.

The impact of Nollan is undeniable in that the Court had finally taken a stand against governmental interference in the ownership of private property by assuring landowners that arbitrary claims of protecting the public interest would no longer be permitted to justify any and

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all of the government’s actions. In a much more recent ruling Palazzolo v. Rhode Island96, the Court extended, “the right to compensation for those other than the direct victims of an illegal taking.”97 Interestingly the lawyer arguing on behalf of Palazzolo was James S. Burling, the PLF attorney who has been so vocal recently about changing the behavior of the CCC. Although the Court found the takings claim ripe, contrary to the state court’s decision, they still ruled that,

Petitioner is correct that, assuming a taking is otherwise established, a State may not evade the duty to compensate on the premise that the landowner is left with a token interest. This is not the situation in this case, however. A regulation permitting a landowner to build a substantial residence on an 18-acre parcel does not leave the property ‘economically idle’98.

Thus although the Court does allow for a larger group of individuals to make takings claims Palazzolo did not lose all economic viability of his property and therefore does not fall into this newly expanded category. This decision reflects the PLF’s belief that the Court has yet to bring its takings jurisprudence far enough along into the realm where economic deprivation is classified as a taking. Laura Hatcher writes, “many conservatives…have argued that private property owners should be compensated when the government acts in such a way that profitability is upset just as individuals could be sued if their actions infringed upon the private property rights of others.”99

The IFJ expressed similar concerns following the Court’s ruling in Tahoe Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency100, one of the cases included in the data set for this paper. The central issue of the case was whether a temporary regulation prohibiting use of property constitutes a violation of the takings clause. The 9th circuit found no takings violation and the Supreme Court granted certiorari to decide the issue themselves. To the

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97 Brigham, 31. (emphasis in original text).
98 Palazzolo v. Rhode Island.
99 Hatcher, 150.
dismay of the IFJ, however, the Court ruled against the individual landowners in favor of the planning authority. Regarding the decision, IFJ co-founder William Mellow commented, “[This] will make it more difficult for individuals to hold governments accountable when they strategically and unjustifiably use procedural maneuvers to prevent people from building homes on property that is rightfully theirs.” 101 The circuit court had cited First English, which defined a temporary taking as one which was subsequently invalidated by the courts. Perhaps most importantly was the idea that the taking was temporary not the regulation. 102 While one can imagine the astonishment that must have been felt by members of the IFJ when the Supreme Court upheld this idea, on closer analysis it becomes understandable why the Court would be reluctant to demand compensation for temporary takings, an allowance which would lead to the slippery slope of deciding just how to define “temporary”.

Taking these two very recent rulings into account would indicate one of two conclusions: first, that the conservatives on the Court are losing influence in the realm of takings decisions or second, that they are shifting their perspective yet again in order to accommodate more members of the Court. These small ideological shifts will no doubt continue until the Court is satisfied with its creation of an acceptable takings doctrine which, members of the conservative movement would hope, permits private property owners to manage and develop their land as they see fit without major governmental interference. This has not yet been accomplished, but with expansions of jurisdiction in rulings such as Palazzolo and refinements of recent ideas potentially designed to appease all members of the Court such as in Tahoe Sierra, it may be a possibility in the not-too-distant future.

101 “Institute for Justice Expresses Disappointment in Supreme Court Decision Against Property Owners in Takings Case.”
Appendix A: Code Book for Variables

GrantedCert:

1 = Yes
0 = No

Circuit:

0 = U.S. Court of Appeals – Federal Circuit
1 = U.S. Court of Appeals – First Circuit
2 = U.S. Court of Appeals – Second Circuit
3 = U.S. Court of Appeals – Third Circuit
4 = U.S. Court of Appeals – Fourth Circuit
5 = U.S. Court of Appeals – Fifth Circuit
6 = U.S. Court of Appeals – Sixth Circuit
7 = U.S. Court of Appeals – Seventh Circuit
8 = U.S. Court of Appeals – Eighth Circuit
9 = U.S. Court of Appeals – Ninth Circuit
10 = U.S. Court of Appeals – Tenth Circuit
11 = U.S. Court of Appeals – Eleventh Circuit
20 = U.S. Court of Appeals – D.C. Circuit

TakingsClaim

0 = Unripe
1 = Successful (meaning ruling in favor of party claiming takings violation or remanding to the district in order to consider takings claim again)
2 = Unsuccessful

HowManyJudges

3 = 3 judge panel
11 = hearing en banc by entire circuit

Party1 (who appealed to Circuit court)

0 = Government
1 = Private individuals or organizations
2 = Corporation

Party 2 (defendant in Circuit court hearing)

0 = Government
1 = Private individuals or organizations
2 = Corporation
PartySupreme (who appealed case to the Supreme Court)

0 = Government
1 = Private individuals or organizations
2 = Corporation

HowReferenced (in what context *Nollan* was referred to in the case)

0 = *Nollan* cited in court’s opinion, concurring opinion, harmonized by, or explained by
1 = *Nollan* cited in dissenter’s opinion
### Table A: Breakdown of cases by circuit and year

*tabulate Circuit Year, chi2*

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*Pearson chi2(77) = 83.5556  Pr = 0.285*

### Table B: The years affect on granting of certiorari

*tabulate GrantedCert Year, col chi2*

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*Pearson chi2(11) = 12.6578  Pr = 0.316*

### Table C: Granting of certiorari based on year

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Pearson chi2(2) = 5.7047 Pr = 0.058

Table E: Granting of certiorari based on appellant to the Supreme Court

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Pearson chi2(2) = 1.6146 Pr = 0.446

Table F: Granting of certiorari based on the circuit takings decision

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Pearson chi2(2) = 2.2011 Pr = 0.333
Table G: Circuit takings decision based on how circuit referenced *Nollan*

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<td>29.17%</td>
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Pearson chi2(2) = 1.4609  Pr = 0.482

Table H: Granting of certiorari based on how circuit referenced *Nollan*

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<th>HowReferenced</th>
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Pearson chi2(1) = 3.9652  Pr = 0.046
Bibliography


Shepherd, Frank. “Court Ruling on Lost Tree Islands a Boon to Private Property Owners.” Accessed online at: http://www.pacificlegal.org/view_Commentaries.asp?id=68&title=Court+Ruling+on+Lost+Tree+Islands+a+Boon+to+Private+Property+Owners.


Case List


