

Hundredth Anniversary of Pennsylvania Coal vs. Mahon: How the Takings Clause Became the Primary Check on Government Power When SCOTUS Abandoned Review Under the Due Process and Contracts Clauses During the New Deal

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On the Twenty-Fifth Anniversary of *Lucas*: Making or Breaking the Takings Claim

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ABSTRACT: In Lucas v. South Carolina Coastal Council, the United States Supreme Court established the premier categorical regulatory takings standard with certain limited exceptions. The Lucas rule establishes that private property owners are entitled to compensation for a taking under the Fifth Amendment Takings Clause when a government regulation “denies all economically beneficial or productive use of land.” Today, Lucas remains the controlling law on categorical regulatory takings. But in application, how much does Lucas still matter?

In reviewing more than 1,700 cases in state and federal courts, we identified that Lucas claims were successful in just 1.6% of the cases. This does not mean Lucas is unimportant, however. The small Lucas claim success rate suggests the importance of being strategic in pleading takings claims. The problem of defining the denominator in the regulatory takings equation is essential to understand for litigants pursuing the Lucas categorical regulatory takings analysis. Based upon our research, we argue that Lucas’s holding incentivizes the private contractual agreements entered into by property owners to shrink the takings denominator and tilt the scales slightly in favor of the plaintiff. The ability of a property owner to reduce the denominator remains the loadstar for a Lucas case-winning strategy.

This is important for not only theorists but also for practitioners to know—those who litigate and conduct transactions in Lucas’s shadow.

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I. INTRODUCTION

In *Lucas v. South Carolina Coastal Council*, the Supreme Court established the premier categorical regulatory takings standard with certain limited exceptions.¹ The *Lucas* rule establishes that private property owners are entitled to compensation for a taking under the Fifth Amendment Takings Clause when a government “regulation denies all economically beneficial or productive use of land.”² The Fifth Amendment Takings Clause states that “private property [shall not] be taken for public use, without just compensation.”³ In determining whether the regulation at issue meets this standard, courts have traditionally used an “economic value fraction.”⁴ The numerator is the diminution in value of the private property attributable to the impact of the

1. See generally *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992).

2. *Id.* at 1015.

3. U.S. CONST. amend. V.

4. *Walcek v. United States*, 49 Fed. Cl. 248, 261-62 (2001), *aff'd*, 303 F.3d 1349 (Fed. Cir. 2002).

government regulation.⁵ The denominator is the entirety of the owner's rights in the "parcel as a whole."⁶ For a *Lucas* categorical taking, the denominator must be at least virtually equal to the numerator such that there is a deprivation of "all economically beneficial or productive use of land."⁷ As a result, property owners seek to characterize their property rights narrowly for as small a denominator as possible.⁸ The smaller the denominator, the more likely it is to be equal to the numerator. On the other hand, government regulators seek to characterize the property owner's property rights broadly for as large a denominator as possible.⁹ This creates a denominator that is much larger than the numerator signaling that the land still has economic benefit to the property owner.

Today, *Lucas* remains the controlling law on categorical regulatory takings.¹⁰ But in application, how much does *Lucas* matter? Our review of more than 1,700 cases in state and federal courts reveals only 28 cases in 25 years in which courts found a categorical taking under *Lucas*.¹¹ By percentage, that works out to a *Lucas*-claim success rate of just 1.6%. This does not mean *Lucas* is unimportant, however. Rather, the paucity of successful *Lucas* claims itself tells a significant story about the importance of pleading takings claims.

We contend that *Lucas*'s most enduring value is not its contribution to the positive law but rather its effect on how litigants shape their cases. A crucial aspect of

5. *Lost Tree Vill. Corp. v. United States (Lost Tree CFC II)*, 115 Fed. Cl. 219, 258, 262 (2014), *aff'd*, 787 F.3d 1111 (Fed. Cir. 2015); *see also Lucas*, 505 U.S. at 1016 n.7 ("Regrettably, the rhetorical force of our 'deprivation of all economically feasible use' rule is greater than its precision, since the rule does not make clear the 'property interest' against which the loss of value is to be measured.")

6. *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 130-31 (1978); *see also Lucas*, 505 U.S. at 1016 n.7 (describing "the 'property interest' against which the loss of value is to be measured"). For a discussion on the *Penn Central* test, *see infra* Part IV.

7. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015 (1992); *see also Palazzolo v. Rhode Island*, 533 U.S. 606, 631 (2001) (stating in the context of the *Lucas* total-takings analysis that "[a]ssuming 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"); *Lost Tree Vill. Corp.*, 787 F.3d at 1113 (finding that a taking resulted from 99.4% diminishment in value in claimant's land and "affirm[ing] that a *Lucas* taking occurred because the government's permit denial eliminated all value stemming from Plat 57's possible economic uses").

8. DOUGLAS T. KENDALL ET AL., *TAKINGS LITIGATION HANDBOOK: DEFENDING TAKINGS CHALLENGES TO LAND USE REGULATIONS* 170 (2000).

9. *See* Danaya C. Wright, *A New Time for Denominators: Toward A Dynamic Theory of Property in the Regulatory Takings Relevant Parcel Analysis*, 34 ENVTL. L. 175, 188 (2004) ("[W]hen the numerator is a small toothpick and the denominator is the entire bundle, the likelihood of the Court requiring compensation is small. Where the numerator is a large portion of the bundle, or cuts across every stick in the bundle, the likelihood of compensation increases until it becomes mandatory if certain core sticks or the entire bundle is taken.")

10. Wendie L. Kellington, *New Takes on Old Takes: A Takings Law Update*, LAND USE L., http://landuselaw.wustl.edu/takings_update.htm (last visited Apr. 29, 2017).

11. These 1,700 cases represent all cases available in the two major online databases (Lexis Advance and WestlawNext) that cited *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), through March 23, 2017. A total of 1,808 cases were drawn from a Lexis Shepard's report and 1,713 cases were drawn from a Westlaw Keycite report. *Compare Citing References for Lucas v. S.C. Coastal Council*, LEXIS ADVANCE (last visited Mar. 23, 2017), *with Citing References for Lucas v. S.C. Coastal Council*, WESTLAW (last visited Mar. 23, 2017).

the *Lucas* categorical regulatory takings analysis has been, and will continue to be, the problem of defining the denominator in the regulatory takings equation. Our research suggests that *Lucas*'s holding incentivizes the private contractual agreements entered into by property owners to shrink the takings denominator and tilt the scales slightly in favor of the plaintiff. The ability of a property owner to reduce the denominator remains the loadstar for a *Lucas* case-winning strategy.¹² Whether this is good or bad is a question we leave for another day. Our focus here is identifying the components of a successful *Lucas* claim and the implications of our findings for those who practice in this area. The *Lucas* rule, and how its many contours play out on the ground, is important for not only theorists but also for practitioners—those who litigate and conduct transactions in *Lucas*'s shadow.

The discussion proceeds as follows: Part II explores the intricacies of the *Lucas* decision and the guidance that emerges; Part III presents our empirical data, grouping the *Lucas* winners into the following categories: nuisance abatement cases, private agreements and the denominator, pyramidal segmentation, and delay theory; Part IV discusses lessons learned and the implications for practitioners, judges, government actors, and scholars. In the end, *Lucas* still matters, just not for the reasons we most tend to think.

II. TAKINGS CLAIMS À LA LUCAS

Understanding *Lucas*'s holding means understanding the categorical rule it announced, the exceptions to that rule, the denominator question, and parcel as a whole. We start with Justice Scalia's majority decision. We then turn to the opinions of the other Justices in the case and their prediction about the ambiguities created by the *Lucas* decision.

A. LUCAS AND ITS HOLDING

In 1986, David Lucas, a South Carolina real-estate developer, purchased two lots in one of his residential subdivisions located in South Carolina on the Isle of Palms.¹³ He planned to construct single-family homes on the lots; however, his plans were interrupted when, in 1988, the South Carolina Legislature enacted the Beachfront Management Act (the "Act"), which prohibited Lucas from placing "any permanent habitable structures" on the lots.¹⁴ Initially, the Act did not allow for any exceptions.¹⁵

Lucas sued, alleging that the Act's prohibition was a permanent, compensable taking of his private property.¹⁶ The South Carolina state trial court agreed and ruled that the Act's prohibition on construction of any permanent structure left the lots "valueless" and therefore constituted a total permanent taking of his property.¹⁷ The

12. See *infra* Part II.D.3.

13. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1006–08 (1992).

14. *Id.* at 1007.

15. *Id.* at 1010–13.

16. *Id.* at 1009.

17. *Id.*

South Carolina Supreme Court reversed.¹⁸ Important to the South Carolina Supreme Court's decision was Lucas's concession that the Act was valid and proper in its design to preserve the beaches in South Carolina, a public resource.¹⁹ The South Carolina Supreme Court held that when the State regulates to prevent uses of property that would otherwise result in serious harm to the public, the State has no duty to pay compensation under the Takings Clause of the Fifth Amendment of the United States Constitution, regardless of the severity of the effect of the regulation on the value of the private property.²⁰

The United States Supreme Court granted certiorari and reversed the South Carolina Supreme Court. In a 6–2 decision, the Court relied upon the South Carolina trial court's determination that Lucas's lots had been rendered valueless.²¹ In the process, the Court established two pivotal points of law in the jurisprudence of takings and fomented additional ambiguities about a third: (1) the categorical regulatory takings rule;²² (2) the exceptions to the categorical rule—nuisance and background principles defenses;²³ and (3) the denominator question.²⁴ The discussion now turns to these points.

B. THE CATEGORICAL REGULATORY TAKINGS RULE

The Supreme Court in *Lucas* articulated a categorical regulatory takings rule: private property owners were entitled to compensation under the Fifth Amendment Takings Clause when a government “regulation denies all economically beneficial or productive use of land.”²⁵ Anything less than a total deprivation would be analyzed under the *Penn Central Transportation Co. v. New York City* three-part balancing test—a test that considered the regulation's economic impact, the extent of the regulation's interference with the property owner's “distinct investment-backed expectations,” and the “character of the governmental action”—which is highly deferential to government decision-making.²⁶ Under *Lucas*, the *Penn Central* sort of balancing is unnecessary because *Lucas* established a *categorical* takings rule, and that is the benefit of *Lucas*. It is a one-part objective analysis: if no “economically beneficial or productive use of land” is left, then compensation is due.²⁷

1. The Nuisance and Background Principles Defenses

Lucas held that the categorical regulatory takings rule was subject to two exceptions. Both are inherent in the Supreme Court's admonition that “[a]ny

18. *Id.*

19. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1009–10 (1992).

20. *Id.* at 1010.

21. *Id.* at 1020.

22. *See infra* Part II.B.

23. *See infra* Part II.B.1.

24. *See infra* Part II.B.2–II.C.

25. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015 (1992).

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

27. *Lucas*, 505 U.S. at 1015.

limitation so severe” that it deprives a private property owner of “all economically beneficial use” of the owner’s property and “cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles of the State’s law of property and nuisance already place upon land ownership.”²⁸ The first *Lucas* exception is that government regulation is not a taking if the proposed use is contrary to traditional, long-established limitations on private property rights (the “background principles” exception).²⁹ The second *Lucas* exception is that a government regulation is not a taking, regardless of its impact, when the government regulates to prevent uses that otherwise would have been prohibited under the traditional law of nuisance (the “nuisance” exception).³⁰ Thus, the government can avoid paying compensation if it can prove that “the proscribed use interests were not part of [the owner’s] title to begin with.”³¹

Writing for the majority, Justice Scalia cautioned the South Carolina legislature that it could not create, through legislation, a new nuisance that would undermine long-established private property rights.³² To hold otherwise would compromise the limitations the Court had earlier placed on exercises of the police power without compensation.³³ With that, the Supreme Court remanded the case for a determination of whether the Act was consistent with background principles of South Carolina state law of property and nuisance (and therefore took no property interest), something the Court suggested was “unlikely.”³⁴

28. *Lucas*, 505 U.S. at 1029; see MELTZ ET AL., THE TAKINGS ISSUE: CONSTITUTIONAL LIMITS ON LAND-USE CONTROL AND ENVIRONMENTAL REGULATION 187-88 (1999) (indicating that only the traditional principles of nuisance constitute an exception to *Lucas*); Carol Nicole Brown, *The Categorical Lucas Rule and the Nuisance and Background Principles Exception*, 30 TOURO L. REV. 349, 359-70 (2014) (discussing the nuisance exception to the *Lucas* categorical rule and successful statutory nuisance abatement cases); David L. Callies & David A. Robyak, *The Categorical (Lucas) Rule: “Background Principles,” Per Se Regulatory Takings, and the State of Exceptions*, 30 TOURO L. REV. 371, 379-80, 383 (2014) (discussing select cases in which the nuisance exception was successfully applied to defeat the *Lucas* challenge).

29. *Lucas*, 505 U.S. at 1029; MELTZ ET AL., *supra* note 28, at 168.

30. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1027-28 (1992); Brown, *supra* note 28, at 359.

31. *Lucas*, 505 U.S. at 1027; see generally Callies & Robyak, *supra* note 28 (articulating categories of background principle defenses and surveying cases).

32. *Lucas*, 505 U.S. at 1029 (“We believe similar treatment must be accorded confiscatory regulations, *i.e.*, regulations that prohibit all economically beneficial use of land: Any limitation so severe cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles of the State’s law of property and nuisance already place upon land ownership. A law or decree with such an effect must, in other words, do no more than duplicate the result that could have been achieved in the courts—by adjacent landowners (or other uniquely affected persons) under the State’s law of private nuisance, or by the State under its complementary power to abate nuisances that affect the public generally, or otherwise.”).

33. *Lucas*, 505 U.S. at 1027 (citing *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922)).

34. *Id.* at 1031-32.

2. The Denominator Question

The denominator question asks: What is the relevant private property interest against which the regulatory impact will be measured?³⁵ One feature of *Lucas* is that the denominator is essential to the categorical takings claim yet the *Lucas* Court does not provide much guidance.³⁶ The Court acknowledges that the denominator calculation raises a “difficult question” and that there have been “inconsistent pronouncements” because of “uncertainty regarding the composition of the denominator.”³⁷ Noticeably, the Court declined to offer any guidance on how predictably to determine the denominator in the regulatory takings analysis. This is true despite the Court’s acknowledgment of the centrality of the denominator problem.

Justice Scalia does not raise the denominator issue as a central concern because the Court was constrained to accept the South Carolina Court of Common Pleas’ determination that the South Carolina regulation rendered Lucas’s lots valueless.³⁸ Justice Scalia addresses it in dictum, as does Justice Blackmun in his dissent.³⁹ To the Justices’ responses to Justice Scalia’s majority opinion, we turn next.

C. COMPLICATING THE PICTURE: THE DISSENTING AND SEPARATE OPINIONS

Justice Scalia’s majority opinion has been the subject of considerable judicial and scholarly commentary over the years. The majority opinion elicited a separate concurrence by Justice Kennedy, separate dissenting opinions by Justices Blackmun and Stevens, and a separate statement by Justice Souter.

Justices Blackmun and Stevens criticized the majority’s nuisance exception as limiting it to common-law nuisance and rejecting the application of statutory nuisance.⁴⁰ Justice Blackmun rejected any common-law limitation on the State’s authority to regulate, without compensation, under the nuisance doctrine. He argued that common-law courts frequently rejected such a limited understanding of the State’s power and that the Takings Clause imposes no such limitation.⁴¹ He rejected the majority’s narrowing of the nuisance doctrine in takings jurisprudence and instead relied upon precedent that recognizes the authority “for the legislature to interpose, and by positive enactment to prohibit a use of property which would be injurious to

35. For a recent decision that portends to challenge *Penn Central* as a seminal decision on the point of the relevant denominator see generally *Lost Tree Vill. Corp. v. United States*, 787 F.3d 1111 (Fed. Cir. 2015) (refusing to extend the parcel as a whole analysis to include developer’s disparate real-estate holdings in the denominator).

36. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1016 n.7 (1992) (“Regrettably, the rhetorical force of our ‘deprivation of all economically feasible use’ rule is greater than its precision, since the rule does not make clear the ‘property interest’ against which the loss of value is to be measured.”).

37. *Id.* at 1017 n.7.

38. *Id.*

39. *Id.*; *id.* at 1054–55 (Blackmun, J., dissenting).

40. *Id.* at 1053–56 (Blackmun, J., dissenting); *id.* at 1067–68 (Stevens, J., dissenting).

41. *Id.* at 1059–60 (Blackmun, J., dissenting).

the public.”⁴² Justice Blackmun also said that Lucas had not been deprived of all economic value in his lots because he retained the right of alienation and the lots “would have value for neighbors and for those prepared to enjoy proximity to the ocean without a house.”⁴³

Justice Stevens questioned the majority opinion given the elasticity of the concept of private property rights and the rational strategy of owners to manipulate the nature of their property interest—the denominator, post-*Lucas*—to improve the odds of a *Lucas* takings challenge. Justice Stevens explained:

[D]evelopers and investors may market specialized estates to take advantage of the Court’s new rule. The smaller the estate, the more likely that a regulatory change will effect a total taking. Thus, an investor may, for example, purchase the right to build a multifamily home on a specific lot, with the result that a zoning regulation that allows only single-family homes would render the investor’s property interest “valueless.” In short, the categorical rule will likely have one of two effects: Either courts will alter the definition of the “denominator” in the takings “fraction,” rendering the Court’s categorical rule meaningless, or investors will manipulate the relevant property interests, giving the Court’s rule sweeping effect.⁴⁴

He also wrote that “[t]he Court’s [decision] effectively freezes the State’s common law, denying the legislature much of its traditional power to revise the law governing the rights and uses of property.”⁴⁵

Justice Souter anticipated these nuisance abatement cases in his separate *Lucas* statement.⁴⁶ He wrote that the Court’s opinion assumes cases may arise in which nuisance abatement under state law could preclude all economically beneficial use of land.⁴⁷ Actually, Justice Souter doubted that regulations to prevent nuisances would cause total deprivations in most cases.⁴⁸ Emphasizing that nuisance law’s focus is conduct on the property and “not on the character of the property” itself, he wrote that nuisance remedies typically leave the owner with the right to engage in reasonable uses of the property.⁴⁹ “Indeed, it is difficult to imagine property that can be used only to create a nuisance, such that its sole economic value must presuppose the right to occupy it for such seriously noxious activity.”⁵⁰

42. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1059 (1992) (quoting *Commonwealth v. Tewksbury*, 52 Mass. (11 Met.) 55, 57 (1846)).

43. *Id.* at 1044; see John Echeverria, *Lost Tree Redux: How Do We Measure Economic Impact?*, TAKINGS LITIG. (June 4, 2015), <https://takingslitigation.com/2015/06/04/lost-tree-redux-how-do-we-measure-economic-impact> (writing in favor of environmental value, such as private recreational value to be considered in the *Lucas* takings analysis).

44. *Lucas*, 505 U.S. at 1065–66 (Stevens, J., dissenting) (footnote omitted).

45. *Id.* at 1068–69.

46. *Id.* at 1077–78 (Souter, J., separate statement).

47. *Id.* at 1077 (Souter, J., separate statement).

48. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1077 (1992).

49. *Id.*

50. *Id.* at 1078.

Together, Justices Blackmun, Stevens, and Souter raised substantial questions about how the Court's new rule in *Lucas* would play out.⁵¹ It is clear from their responses to the *Lucas* majority that Justices Stevens and Souter were concerned about an unhealthy amount of gamesmanship being inserted into the takings analysis by both property owners and courts.⁵² For *Lucas* critics, the decision further muddied the already murky regulatory takings waters, increasing the unpredictability and ambiguity in regulatory takings.⁵³ Next, this Article turns to the ambiguities remaining after *Lucas*.

D. AMBIGUITIES ABOUND

“Jerold Kayden, a senior fellow at the Lincoln Institute of Land Policy . . . [said] shortly [after *Lucas* was decided] that ‘the issue of what is the property interest at stake is going to be a whole new battleground. Defining what the property is determines whether the owner wins or loses.’⁵⁴ One question that arises after *Lucas* is the categorical takings rule and whether it turns on a denial of all economic *value* or denial of all economic *use*.⁵⁵ A second question is whether statutory nuisances count when considering the *Lucas* nuisance exception or only common-law nuisances.⁵⁶ Yet a third question is the denominator question—in other words, what is the relevant property interest against which the government’s regulatory impact should be measured?⁵⁷ Below, we discuss these lingering uncertainties surrounding the *Lucas* rule, the exceptions to that rule, and the denominator question.

1. The Categorical Regulatory Takings Rule

The first question that arises is whether the *Lucas* categorical rule turned on denial of economic *value* or economic *use*. In other words, if a regulation eliminated all use but left a property owner with non-speculative or even speculative value, would the *Lucas* analysis apply or would the *Penn Central* balancing test apply?⁵⁸ Recently,

51. See *supra* notes 38–45 and accompanying text.

52. *Lucas*, 505 U.S. at 1066 (Stevens, J., dissenting); *id.* at 1077–78 (Souter, J., separate statement).

53. See, e.g., Marc R. Poirier, *The Virtue of Vagueness in Takings Doctrine*, 24 CARDOZO L. REV. 93, 141–42 (2002) (“[T]here is an unfortunate tendency to understand the automatic, handwriting critique of vagueness in takings doctrine as automatically recommending clearer rules that favor protection of private property. An assumption that clear rules are always better should be resisted. Clarity is only one value within the Rule of Law, and while it may contribute to stability in many circumstances, it may not contribute to overall efficiency or fairness here.”); Carol M. Rose, Mahon *Reconstructed: Why the Takings Issue Is Still a Muddle*, 57 S. CAL. L. REV. 561, 566 (1984) (arguing that the analysis for regulatory takings “is deeply flawed”); Jed Rubenfeld, *Usings*, 102 YALE L.J. 1077, 1081 (1993) (stating that “[t]akings law is out of joint” and that “only the right of privacy [constitutional doctrine] can compete seriously with takings law for the doctrine-in-most-desperate-need-of-a-principle prize”).

54. Rebecca Retzlaff & Sarah Sisser, *Property Rights and Coastal Protection: The Case of Lucas v. South Carolina Coastal Council*, 29 PLAN. PERSP. 275, 286 (2014) (quoting David W. Dunlap, *Resolving Property ‘Takings,’* N.Y. TIMES (Aug. 23, 1992), <http://www.nytimes.com/1992/08/23/realestate/resolving-property-takings.html>).

55. See *infra* Part II.D.1.

56. See *infra* Part II.D.2.

57. See *infra* Part II.D.3.

58. See *supra* notes 25–27 and accompanying text.

the United States Court of Appeals for the Federal Circuit in *Lost Tree Village Corp. v. United States* held that *environmental value* should be disregarded for purposes of the *Lucas* taking claim and that only *economic value* should be considered.⁵⁹ However, the court did not distinguish between *value* and *use*.⁶⁰

The distinction between value and use has caused considerable confusion. In fact, courts and other legal authorities differ on this point. Some contend that the Court's opinion in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*⁶¹ endorses loss of value as the *Lucas* rule.⁶² In other words, "[a]nything less than a 'complete elimination of value,' or a 'total loss,' . . . would require the kind of analysis applied in *Penn Central*."⁶³ Other courts and scholars have argued in favor of the loss of use construction of the *Lucas* categorical takings rule.⁶⁴

An understanding of the *Lucas* categorical regulatory takings rule as only applying when a government regulation deprives an owner of all value would significantly heighten the already substantial impediments to property owners' ability to mount

59. *Lost Tree Vill. Corp. v. United States*, 787 F.3d 1111, 1116–17 (Fed. Cir. 2015).

60. *Id.*

61. *See generally* *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302 (2002).

62. *See* Richard J. Lazarus, *Lucas Unspun*, 16 SE. ENVTL. L.J. 13, 28 & n.99 (2007) (discussing the *Lucas* decision in the context of economic value and citing to the *Tahoe-Sierra* decision and others as interpreting the *Lucas* decision in the total diminution of all value context).

63. *Tahoe-Sierra*, 535 U.S. at 330 (quoting *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1019 n.8 (1992)); *see also, e.g.*, *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 539 (2005) ("In the *Lucas* context, of course, the complete elimination of a property's value is the determinative factor."); *Mayhew v. Town of Sunnysvale*, 964 S.W.2d 922, 935 (Tex. 1998) ("A restriction denies the landowner all economically viable use of the property or totally destroys the value of the property if the restriction renders the property valueless. Determining whether all economically viable use of a property has been denied entails a relatively simple analysis of whether value remains in the property after the governmental action." (citations omitted)); Daniel L. Siegel & Robert Meltz, *Temporary Takings: Settled Principles and Unresolved Questions*, 11 VT. J. ENVTL. L. 479, 498 (2010) ("*Lucas* turns on the loss of value, not the inability to use property.>").

64. *Palm Beach Isles Assocs. v. United States*, 231 F.3d 1354, 1357 (Fed. Cir. 2000) ("A 'categorical' taking is, by accepted convention, one in which *all* economically viable use, i.e., all economic value, has been taken by the regulatory imposition. Such a taking is distinct from a taking that is the consequence of a regulatory imposition that prohibits or restricts only some of the uses that would otherwise be available to the property owner, but leaves the owner with substantial viable economic use."); *Res. Invs., Inc. v. United States*, 85 Fed. Cl. 447, 493 (2009) ("[T]here appears to be no genuine issue of material fact that Corps' denial of plaintiffs' 404 permit application left plaintiffs without economically viable use of the project site. Thus, plaintiffs' claim falls under *Lucas* rather than *Tahoe-Sierra* and *Penn Central*, and the Corps' denial of the 404 permit may very well have left plaintiffs without economically viable use of their property."); *Chapel Hill Title & Abstract Co. v. Town of Chapel Hill*, 669 S.E.2d 286, 290 (N.C. 2008) (discussing *Lucas* takings in the context of denials of "practical use and reasonable value"); Ann T. Kadlecsek, *The Effect of Lucas v. South Carolina Coastal Council on the Law of Regulatory Takings*, 68 WASH. L. REV. 415, 427 (1993) ("The *Lucas* Court indicated two factors that are relevant to determining whether property has an economically viable use. The first is the remaining market value of the land. If a regulation renders property 'valueless', then no economically viable use remains. . . . The second factor is the remaining uses available to the landowner. The Court gave little specific guidance for the application of this factor, but did indicate that a regulation that requires land to be left substantially in its natural state deprives the owner of economically viable use.>").

successful *Lucas* challenges.⁶⁵ It is difficult to imagine a situation in which a speculator could not be found who would pay some de minimis amount for a property even if the property had been completely deprived of all development rights and even temporarily deprived of all rights of use.⁶⁶ The law is dynamic, and this dynamism, with the potential of favorable future regulatory change for a property owner, creates speculative value at some price point.⁶⁷ Moreover, if *Lucas* is understood as only applying when there is no value, so that even speculative value counts against the *Lucas* takings claim, then it truly is difficult to make the case of a *Lucas* categorical taking. In order to truly have no value, we would need to see the lack of development potential combine with other negative factors such as environmental remediation costs, holding costs, demolition costs, and property tax liability to create “negative value.”⁶⁸

2. The Nuisance Defense

A second question is whether both statutory nuisances and common-law nuisances count when considering the nuisance defense to a *Lucas* claim or, instead, whether common-law nuisances are the only ones that should be considered.⁶⁹ The difference between common law and statutory law matters. If the nuisance exception to a categorical *Lucas* taking is limited to only common-law nuisances, then the only nuisances that can defeat a plaintiff’s right to compensation under the *Lucas* categorical rule are those long-standing nuisances that we have already agreed on collectively as being nuisances. If statutory nuisances can also defeat a *Lucas* claim, then any legislature can pass nuisance statutes to “pull the rug” right out from under a plaintiff who has already proven a *Lucas* claim by establishing a total deprivation of economically beneficial or productive use of land as a result of government regulation.⁷⁰

One reading of Justice Scalia’s majority opinion is that by background principles of nuisance, the Court intended a narrow construction of nuisance doctrine in this instance to include only background principles of *common-law* nuisance. Justice

65. See, e.g., *Lost Tree Vill. Corp. v. United States*, 787 F.3d 1111, 1118 (Fed. Cir. 2015) (“To establish a per se claim under the government’s reading of *Lucas*, a landowner would have to demonstrate that a regulation destroyed all land value, regardless of its source [economic and non-economic value, i.e. environmental value]. Yet the fact that the landowner could make such a showing, according to the government’s hypothetical, would prompt speculation giving rise to post-regulation land value. In other words, speculators would value otherwise valueless land based solely on the possibility that a *Lucas* taking could be maintained and that a takings judgment could be won. Land value resulting from such speculation would defeat the very *Lucas* claim on which the speculation was based.”).

66. See *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1065 n.3 (1992) (Stevens, J., dissenting) (“*Lucas* may put his land to ‘other uses’—fishing or camping, for example—or may sell his land to his neighbors as a buffer. In either event, his land is far from ‘valueless.’”).

67. *Lost Tree Vill. Corp.*, 787 F.3d at 1118.

68. See *infra* notes 195–200, 248–56 and accompanying text (discussing cases where the courts found negative value).

69. For a more in-depth discussion of the nuisance exception defense, see generally Brown, *supra* note 28 (discussing categories of defenses and surveying cases).

70. See *Lucas*, 505 U.S. at 1027–28 (discussing the newly enacted State measures and the elimination of “all economically valuable use”).

Kennedy's concurring opinion addressed this reading of the majority opinion and, in fact, he wrote that our whole legal tradition must be considered.⁷¹ In his more expansive view of the nuisance exception, "[t]he common law of nuisance is too narrow a confine for the exercise of regulatory power" and the states "should not be prevented from enacting new regulatory initiatives" that respond to our interdependent, complex, and changing society.⁷² Moreover, he criticized the Supreme Court of South Carolina for citing general purposes supporting the enactment of the Beachfront Management Act without also making findings as to whether the regulation was consistent with the property owner's reasonable expectations of use.⁷³ Dissenting Justices Blackmun and Stevens also criticized the majority's nuisance exception as unduly elevating common-law nuisance over statutory nuisance.⁷⁴

A final ambiguity that surfaces in the nuisance defense area, and one discussed in depth in Part III, is that the successful *Lucas* cases in the nuisance abatement category involve statutory nuisances, and the applicable statutes mandated temporary closures of properties that were deemed nuisance properties under the statutes.⁷⁵ All of the cases in this category were decided before *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, in which the Supreme Court held that in cases of prospectively temporary takings, the takings analysis should occur under the *Penn Central* three-part balancing test and not the *Lucas* categorical takings test.⁷⁶

3. The Denominator Question and the Parcel as a Whole

The "denominator question" is the third question, and it asks, what is the "relevant parcel" against which the government's regulatory impact should be measured?⁷⁷ In determining whether a regulation meets the *Lucas* test of denying the property owner of all economically beneficial or productive use of land, courts have traditionally used an "economic value fraction."⁷⁸ The numerator is the loss of value of the private property attributable to the impact of the government regulation.⁷⁹ The denominator is the relevant parcel against which the regulatory impact should be judged.⁸⁰ For a *Lucas* categorical taking, the denominator must be at least virtually equal to the numerator⁸¹ such that there is a deprivation of "all economically beneficial

71. *Lucas*, 505 U.S. at 1035 (Kennedy, J., concurring).

72. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1035 (1992) (Kennedy, J., concurring).

73. *Id.*

74. *Id.* at 1052-53 (Blackmun, J., dissenting); *id.* at 1068-69 (Stevens, J., dissenting).

75. *See infra* Part III.A.

76. *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 331-32, 342 (2002).

77. *See Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 130-31 (1978).

78. *Walcek v. United States*, 49 Fed. Cl. 248, 261-62 (2001), *aff'd*, 303 F.3d 1349 (Fed. Cir. 2002).

79. *Id.*; *see also Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1016 n.7 (1992).

80. *Walcek*, 49 Fed. Cl. at 261.

81. *Palazzolo v. Rhode Island*, 533 U.S. 606, 631 (2001) (stating in the context of the *Lucas* total takings analysis that, "[a]ssuming 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"); *Lost Tree Vill. Corp. v. United*

or productive use of land.”⁸² As a result, property owners want to define their denominator so that it is as small as possible while the government wants to broadly define the regulated property to keep the denominator as large as possible.⁸³ Thus, the resolution of the denominator question is critical to the success or failure of a *Lucas* challenge.

Penn Central Transportation Co. v. New York City is the landmark relevant parcel decision.⁸⁴ In this case, the Supreme Court held that the relevant parcel in the denominator of the takings fraction is the entirety of the owner’s “rights in the parcel as a whole.”⁸⁵ The parcel as a whole approach tends to increase the property owner’s denominator, making the *Lucas* regulatory takings challenge less viable. Courts have rejected *Lucas* takings challenges by applying the parcel as a whole analysis.⁸⁶

States, 787 F.3d 1111, 1113–14 (Fed. Cir. 2015) (finding a 99.4% diminishment in value and “affirm[ing] that a *Lucas* taking occurred because the government’s permit denial eliminated all value stemming from Plat 57’s possible economic uses”).

82. *Lucas*, 505 U.S. at 1015.

83. KENDALL ET AL., *supra* note 8, at 170; Wright, *supra* note 9, at 191.

84. *See generally* Penn Cent. Transp. Co. v. New York City, 438 U.S. 104 (1978).

85. *Penn Cent.*, 438 U.S. at 130–31.

86. *See* Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Planning Agency, 535 U.S. 302, 331 (2002) (“Petitioners seek to bring this case under the rule announced in *Lucas* by arguing that we can effectively sever a 32-month segment from the remainder of each landowner’s fee simple estate, and then ask whether that segment has been taken in its entirety by the moratoria. Of course, defining the property interest taken in terms of the very regulation being challenged is circular. With property so divided, every delay would become a total ban; the moratorium and the normal permit process alike would constitute categorical takings. Petitioners’ ‘conceptual severance’ argument is unavailing because it ignores *Penn Central’s* admonition that in regulatory takings cases we must focus on ‘the parcel as a whole.’ We have consistently rejected such an approach to the ‘denominator’ question.” (quoting *Penn Cent.*, 438 U.S. at 130–31)).

The parcel as a whole analysis exists in contrast to a segmentation or “conceptual severance”⁸⁷ approach to property, whether vertical,⁸⁸ horizontal,⁸⁹ temporal,⁹⁰ or functional.⁹¹ Conceptual severance reflects the idea of real property as a bundle of rights consisting of many strands that can be severed or destroyed.⁹² Conceptual severance would include

vertical severance (division of subsurface, surface, and air rights); temporal severance (division of property based on the time regulation is in effect and not in effect—i.e. temporary takings); functional severance (division of property interests based on easements, rights of way, and servitudes); and

87. See *Dunes W. Golf Club, LLC v. Town of Mount Pleasant*, 737 S.E.2d 601, 615 & n.14 (S.C. 2013) (“The United States Supreme Court has indicated several times that ‘piecemeal’ various property interests is not permitted. . . . However, other United States Supreme Court decisions have implicitly acknowledged, though never explicitly held, that ‘conceptual severance’ of a parcel can be appropriate under the particular facts presented.” (citations omitted)); Margaret Jane Radin, *The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings*, 88 COLUM. L. REV. 1667, 1674 (1988) (reviewing some of the “salient” Supreme Court cases addressing conceptual severance); Angela Chang, Note, *Demystifying Conceptual Severance: A Comparative Study of the United States, Canada, and the European Court of Human Rights*, 98 CORNELL L. REV. 965, 966 (2013) (“Conceptual severance refers to plaintiffs’ attempts to conceptually sever their property physically, functionally, or temporally to show that a regulation diminishes a significant portion or 100% of the parcel’s value.” (footnote omitted)). See generally Dwight H. Merriam, *What is the Relevant Parcel in Takings Litigation?*, SC43 ALI-ABA 505 (1998) (describing the various ways in which courts separate parcels for takings analysis).

88. See *Dunes W. Golf Club*, 737 S.E.2d at 615 n.14 (describing vertical severance as “division of subsurface, surface, and air rights”); see also *Penn Cent.*, 438 U.S. at 137 (discussing the transferability of air rights).

89. See *Dunes W. Golf Club*, 737 S.E.2d at 615 n.14 (describing horizontal severance as “subdivision of parcel into smaller lots”); see also generally *Lost Tree Vill. Corp. v. United States*, 787 F.3d 1111 (Fed. Cir. 2015) (applying the appropriate takings framework to lots); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2011) (same).

90. See *Dunes W. Golf Club*, 737 S.E.2d at 615 n.14 (describing temporal severance as “division of property based on the time regulation is in effect and not in effect”); see also *Tahoe-Sierra*, 535 U.S. at 318–19 (discussing temporal segmentation in the moratorium context).

91. See *Tahoe-Sierra*, 535 U.S. at 318 (quoting *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Planning Agency*, 216 F.3d 764, 774 (9th Cir. 2000)) (“[T]he dimensions of a property interest may include . . . a functional dimension (which describes the extent to which an owner may use or dispose of the property in question)”); *Dist. Intown Props. Ltd. P’ship v. District of Columbia*, 198 F.3d 874, 880 (D.C. Cir. 1999) (stating that in defining the relevant parcel for the takings analysis, “the parcel should be functionally coherent. In other words, more should unite the property than common ownership by the claimant. Thus, a court must also consider how both the property-owner and the government treat (and have treated) the property”); *Dunes W. Golf Club*, 737 S.E.2d at 615 n.14 (“[F]unctional severance [is the] division of property interests based on easements, rights of way, and servitudes”); see also *Hodel v. Irving*, 481 U.S. 704, 717 (1987) (“[C]omplete abolition of both the descent and devise of a particular class of property may be a taking.”); *Kaiser Aetna v. United States*, 444 U.S. 164, 179–80 (1979) (holding that rights to exclude fall within a “category of interests that the Government cannot take without compensation”). As the cases illustrate, the concept of a functional dimension can be used in two different ways. In *Dist. Intown*, it means how the numerous parcels are used together. But in *Tahoe-Sierra*, it likely includes the potential for permitting.

92. See Chang, *supra* note 87, at 973.

horizontal severance (subdivision of a parcel into smaller lots).⁹³

The more factors courts include in the property owner's denominator as an expression of the extent and nature of the owners' rights in property impacted by regulation, the less viable the *Lucas* takings challenge becomes.⁹⁴

Justice Stevens expressed concern in his *Lucas* dissent about manipulating the denominator.⁹⁵ He said that *Lucas's* categorical rule would "likely have one of two effects: [e]ither courts [would] alter the definition of the 'denominator'" to neutralize the *Lucas* categorical rule, or property owners would alter the denominator by manipulating their property interests to reduce the denominator in the takings fraction, thereby giving the categorical rule broader effect than intended by the *Lucas* majority.⁹⁶

These concerns were given new life in the United States Court of Appeals for the Federal Circuit's decision in *Lost Tree Village Corp. v. United States*.⁹⁷ In response to the government's arguments about gaming to better the chances of a *Lucas* claim, the *Lost Tree* court stated "that if such strategic behavior presented itself, '[o]ur precedent displays a flexible approach, designed to account for factual nuances.'" ⁹⁸ Noted scholar John Echeverria wrote that the court's recent decision in *Lost Tree* "deepens the mystery surrounding the *Lucas per se* rule" and incorrectly "divorces takings analysis from the realities of the actual marketplace in land."⁹⁹ He opined that the takings analysis is "already subject to too much gamesmanship" and that it is likely to "become

93. *Dunes W. Golf Club, LLC v. Town of Mount Pleasant*, 737 S.E.2d 601, 615 n.14 (S.C. 2013); see also *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 318, (2002) ("Property interests may have many different dimensions. For example, the dimensions of a property interest may include a physical dimension (which describes the size and shape of the property in question), a functional dimension (which describes the extent to which an owner may use or dispose of the property in question), and a temporal dimension (which describes the duration of the property interest). At base, the plaintiffs' argument is that we should conceptually sever each plaintiff's fee interest into discrete segments in at least one of these dimensions—the temporal one—and treat each of those segments as separate and distinct property interests for purposes of takings analysis. Under this theory, they argue that there was a categorical taking of one of those temporal segments." (quoting *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 216 F.3d 764, 774 (9th Cir. 2000)); *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 330 (1987) (Stevens, J., dissenting) ("Regulations are three dimensional; they have depth, width, and length. As for depth, regulations define the extent to which the owner may not use the property in question. With respect to width, regulations define the amount of property encompassed by the restrictions. Finally, . . . regulations set forth the duration [or length] of the restrictions.").

94. See *supra* Part II.D.3.

95. See *supra* note 44 and accompanying text.

96. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1066 (1992) (Stevens, J., dissenting).

97. See generally *Lost Tree Vill. Corp. v. United States*, 787 F.3d 1111 (Fed. Cir. 2015). The factual details of *Lost Tree* are discussed in detail later. See *infra* Part III.B; see also *supra* text accompanying notes 42 and 90 (discussing Stevens's opinion that the effect of *Lucas's* categorical rule will be to incentivize courts and property owners to attempt to game the denominator in the takings equation).

98. *Lost Tree*, 787 F.3d at 1118 (quoting *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171, 1181 (Fed. Cir. 1994)).

99. Echeverria, *supra* note 43.

more random and unpredictable” if future courts follow the *Lost Tree* precedent.¹⁰⁰ It therefore should be unsurprising that the denominator problem is a recurring issue of contemporary significance.

How much do these lingering ambiguities matter? To the answer to that question, and the *Lucas* winners, we turn next.

III. SUCCESSFUL *LUCAS* TAKINGS CASES: EMPIRICAL DATA

This Part presents the results of an examination of approximately 1,700 *Lucas* cases filed across the United States. Of those 1,700 cases, only 27 were successful. What the *Lucas* winners had in common helps clarify *Lucas* in practice. In the discussion below, we group the *Lucas* winning cases into the following categories: (1) the nuisance abatement cases; (2) private agreements and the denominator; (3) public law and pyramidal segmentation; and (4) delay theory.¹⁰¹

While analyzing the *Lucas* winners, at times we compare and contrast several of the *Lucas* losers. There are almost 1,700 losers so we only discuss *Lucas* losers where we believe they can help us understand the winners. To a discussion of the cases, by category, we turn next.

A. THE NUISANCE ABATEMENT CASES (THE *LUCAS* EXCEPTION)

In this category, we can see the nuisance exception to the *Lucas* categorical rule play out. Several cases concretely make the point of the impact of the nuisance defense on the *Lucas* takings challenge: the less viable the nuisance defense (e.g., because statutory nuisances are deemed not to count for *Lucas* nuisance defense purposes or because when they do count, the government’s application is overly broad), the more viable the *Lucas* categorical claim.¹⁰² These four cases represent seven disputes because two of the four cases are consolidated cases with multiple disputes.¹⁰³

First, in *City of Seattle v. McCoy*, the City brought a proceeding to abate the McCoy’s operation of their lounge and restaurant (Oscar’s II) under a drug nuisance statute.¹⁰⁴ The McCoy’s property interest was a leasehold on the property on which

100. *Id.*

101. *See infra* Appendix (presenting the categories of *Lucas* winning cases).

102. *Supra* Part II.D.2.

103. *Keshbro, Inc. v. City of Miami*, 801 So. 2d 864, 866 (Fla. 2001) (consolidating two cases: *City of Miami v. Keshbro, Inc.*, 717 So. 2d 601 (Fla. Dist. Ct. App. 1998) and *City of St. Petersburg v. Kablinger*, 730 So. 2d 409 (Fla. Dist. Ct. App. 1999)); *State ex rel. Pizza v. Rezcallah*, 702 N.E.2d 81, 83–85 (Ohio 1998) (consolidating three cases, numbers 96-1894, 96-1895, and 96-1897).

104. *City of Seattle v. McCoy*, 4 P.3d 159, 163 (Wash. Ct. App. 2000). *McCoy* was the only nuisance exception case in which the owner restricted the denominator by acquiring only a leasehold interest. The *First English* dissent likely imagined this type of case when describing the qualities of temporary *Lucas* takings. *See First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 329 (1987) (Stevens, J., dissenting) (“A temporary interference with an owner’s use of his property may constitute a taking for which the Constitution requires that compensation be paid. At least with respect to physical takings, the Court has so held. Thus, if the government appropriates a leasehold interest and uses it for a public purpose, the return of the premises at the expiration of the lease would obviously not erase the fact of the government’s temporary occupation.” (citation omitted)). A leasehold of sufficiently short remaining duration and a sufficiently lengthy nuisance abatement closure—when combined with other

Oscar's II was located.¹⁰⁵ The trial court found Oscar's II to be a drug nuisance and ordered it closed for one year.¹⁰⁶ The trial court's order resulted in Oscar's II being placed in the court's custody pursuant to an applicable statutory provision.¹⁰⁷ On appeal, the court found that application of the nuisance statute to the McCoys was a temporary taking.¹⁰⁸ The court articulated the nuisance exception as "whether the common law of nuisance would have allowed abatement of the lawful business activity against an innocent owner for the illegal drug activities of unidentified business patrons which, when the activities occurred, were unknown and may not have been observable."¹⁰⁹ The court determined that the McCoys were innocent owners, that they acted reasonably to attempt to abate the nuisance, and that the common-law nuisance exception in that state was based upon whether the owners, given their constructive and actual knowledge, took reasonable steps to abate the nuisance.¹¹⁰ The court held that the City did not meet its burden of proving a common-law nuisance according to the *Lucas* exception.¹¹¹

Second, *City of St. Petersburg v. Bowen* involved application of a nuisance abatement statute to the property owner's 15-unit apartment complex.¹¹² Bowen owned the apartment complex that was ordered closed for one year after being found to constitute a statutory nuisance because of purported drug use by tenants and others who were on the property.¹¹³ The court found a temporary *Lucas* taking because the building could not be put to any economic use during the one-year closure period.¹¹⁴ The court stated that the *Lucas* exception limited the matter to common-law nuisances and that no common-law nuisance doctrine prohibited using a building for rental purposes.¹¹⁵

factors such as insufficient tailoring and acquiescence or participation by the owner in the nuisance activity—might be sufficient to overcome the *First English* dissent and the *Tahoe-Sierra* Court's caution against temporal segmentation in the application of the *Lucas* categorical rule and its nuisance exception. See *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 331 (2002) ("Thus, the District Court erred when it disaggregated petitioners' property into temporal segments corresponding to the regulations at issue and then analyzed whether petitioners were deprived of all economically viable use during each period. The starting point for the court's analysis should have been to ask whether there was a total taking of the entire parcel; if not, then *Penn Central* was the proper framework." (citation omitted)).

105. *McCoy*, 4 P.3d at 162.

106. *Id.* at 164.

107. *Id.* at 166.

108. *Id.* at 167.

109. *Id.*

110. *City of Seattle v. McCoy*, 4 P.3d 159, 168, 171-72 (Wash. Ct. App. 2000).

111. *Id.*

112. *City of St. Petersburg v. Bowen*, 675 So. 2d 626, 629 (Fla. Dist. Ct. App. 1996).

113. *Id.* at 627-28.

114. *Id.* at 631.

115. *Id.*

Third, *Keshbro, Inc. v. City of Miami*¹¹⁶ consolidated two cases, *City of St. Petersburg v. Kablinger*¹¹⁷ and *City of Miami v. Keshbro, Inc.*¹¹⁸ The property owners in the two cases owned an apartment complex and a motel, respectively.¹¹⁹ The court considered whether ordering the complete closure of the apartment complex for one year and the complete closure of the motel for six months for violation of public nuisance statutes deprived the owners of all economically beneficial use of their property.¹²⁰

The court found that the regulation in *Kablinger* resulted in a *Lucas* taking and that the *Lucas* nuisance exception did not apply.¹²¹ However, in *Keshbro*, the court said the nuisance exception did apply and was a defense to the property owner's claim of a *Lucas* categorical taking.¹²² The reason for the different results was the question of specific tailoring of the closure orders "to abate the objectionable conduct, without unnecessarily infringing upon the conduct of a lawful enterprise."¹²³ The temporary closing of the apartment in *Kablinger*, according to the court, was not attended by the same extensive record indicating that the nuisance (drug activity) had become inextricable from the operation of the motel in *Keshbro*.¹²⁴ Absent such a record, the court found the closure order for one year in *Kablinger* was not sufficiently tailored to benefit from the *Lucas* nuisance exception.¹²⁵ In contrast, the court found that the drug and prostitution activity at the Stardust Motel in *Keshbro* "had become part and parcel of the operation of the Stardust" and that the City of Miami had failed to eradicate this nuisance activity despite patient attempts.¹²⁶

Finally, the Ohio case of *State ex rel. Pizza v. Rezcallah* involved three consolidated cases in which the property interest was a fee simple absolute in residential property.¹²⁷ In all three cases, it was alleged that non-owner residents, while occupying three different residential properties, committed drug-related felonies.¹²⁸ Each property owner was found to have taken affirmative, good faith action to investigate and remove offending residents.¹²⁹ The court found that application of the nuisance abatement statute was a *Lucas* taking as it required, upon the finding of a nuisance, the issuance of a temporary, one-year closure order forbidding use of the property for any purpose.¹³⁰

116. See generally *Keshbro, Inc. v. City of Miami*, 801 So. 2d 864 (Fla. 2001).

117. See generally *City of St. Petersburg v. Kablinger*, 730 So. 2d 409 (Fla. Dist. Ct. App. 1999).

118. See generally *City of Miami v. Keshbro, Inc.*, 717 So. 2d 601 (Fla. Dist. Ct. App. 1998).

119. *Keshbro*, 801 So. 2d at 867-68.

120. *Id.* at 867-69.

121. *Id.* at 876-77.

122. *Keshbro, Inc. v. City of Miami*, 801 So. 2d 864, 876 (Fla. 2001).

123. *Id.*

124. *Id.* at 876-77.

125. *Id.* at 877.

126. *Id.* at 876.

127. *State ex rel. Pizza v. Rezcallah*, 702 N.E.2d 81, 85-86 (Ohio 1998).

128. *Id.*

129. *Id.* at 85.

130. *Id.* at 92-93.

In summary, each of these cases shows that when courts perceive that the statutory nuisance defenses are weak or unsupported, sometimes because they are inconsistent with common-law nuisance principles, then the likely result is that the *Lucas* claim will be successful. However, in these statutory nuisance cases, it bears noting that all of these cases were decided before *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, which held that temporary takings should be analyzed under *Penn Central* and not *Lucas*.¹³¹ For this reason, these nuisance abatement cases do not hold much potential for successful *Lucas* takings challenges in the future.

B. PRIVATE AGREEMENTS AND THE DENOMINATOR

This category consists of eight conceptual severance cases unified by private agreements such as restrictive covenants, lease agreements, and development plans that, in the context of public land use regulations, reduced the property owner's denominator.¹³² The decisions in these conceptual severance cases draw attention to the courts' demonstrable inclination to include the impact of private agreements in their denominator analysis.¹³³ As one scholar recognized,

[t]he Supreme Court has accepted some of these attempts at conceptual severance but has failed to provide a coherent theory justifying conceptual severance. As a result, confusion and debate ensue among courts and commentators on how best to determine the relevant parcel in a regulatory takings claim. Lower courts can and do accept the plaintiff's proffered denominator without intense scrutiny, sometimes avoiding the conceptual severance issue altogether.¹³⁴

These cases show the impact that private agreements can have: the stronger the private agreement, the stronger the *Lucas* claim.

This Part discusses five of the eight successful *Lucas* cases in this category in detail. The first is *Loveladies Harbor, Inc. v. United States*.¹³⁵ The second is *State ex rel. R.T.G., Inc. v. State*.¹³⁶ The third is *Lost Tree Village Corp. v. United States*.¹³⁷ The fourth is *Chapel Hill Title & Abstract Co. v. Town of Chapel Hill*.¹³⁸ The fifth case is the most recent *Lucas* success, *Love Terminal Partners v. United States*.¹³⁹

131. *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 331-32, 342 (2002).

132. *See infra* Appendix.

133. *See infra* Part III.B.

134. Chang, *supra* note 87, at 966 (footnotes omitted).

135. *See generally* *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171 (Fed. Cir. 1994), *abrogated by* *Bass Enters. Prod. Co. v. United States*, 381 F.3d 1360 (Fed. Cir. 2004).

136. *See generally* *State ex rel. R.T.G., Inc. v. State*, 780 N.E.2d 998 (Ohio 2002).

137. *See generally* *Lost Tree Vill. Corp. v. United States*, 787 F.3d 1111 (Fed. Cir. 2015).

138. *See generally* *Chapel Hill Title & Abstract Co. v. Town of Chapel Hill*, 669 S.E.2d 286 (N.C. 2008).

139. *See generally* *Love Terminal Partners v. United States*, 126 Fed. Cl. 389 (2016).

First, the complexity of the denominator possibilities are central to the United States Court of Appeals for the Federal Circuit's finding of a *Lucas* taking in *Loveladies Harbor, Inc. v. United States*.¹⁴⁰ The company developed 199 acres of a 250-acre tract before the United States Army Corps of Engineers' ("Corps") denial of the company's request for a Federal Water Pollution Control Act ("FWPCA") section 404 permit to fill wetlands.¹⁴¹ "The Government argue[d] that the proper denominator [was] the original 250 acre[s]."¹⁴² The court rejected this argument.¹⁴³ It held that the 199 acres developed or sold before the enactment of the FWPCA and the 38.5 acres that *Loveladies* essentially promised to New Jersey in exchange for permit permission from the New Jersey Department of Environmental Protection were not affected by the Corps' permit denial.¹⁴⁴ The Federal Circuit held the remaining 12.5 acres constituted the denominator and were left with de minimis value after the permit denial.¹⁴⁵ *Loveladies* demonstrated that intent to develop its property long before the state and federal regulatory environment changed was important to the court's conclusion that *Loveladies* had treated its acreage as legally separate parcels and that, for purposes of the relevant-parcel analysis, the entire 250 acres did not constitute the relevant parcel, as the government argued.¹⁴⁶

Second, in *State ex rel. R.T.G., Inc. v. State, R.T.G., Inc.* ("RTG") owned surface and coal rights in fee simple in approximately 200 acres, and it leased or owned coal rights in approximately 300 acres.¹⁴⁷ The state designated "a substantial portion of RTG's property" as unsuitable for mining ("UFM").¹⁴⁸ The Supreme Court of Ohio held that the UFM designation resulted in a *Lucas*

taking of RTG's coal that lies under the tracts of land in which RTG owned only coal rights and that are located within the UFM-designated area, as well as the coal rights that lie under the tracts of land that RTG owned in fee and that are located in the UFM-designated area.¹⁴⁹

Central to the court's takings analysis was the mineral rights law of Ohio, pursuant to which, "coal rights are severable and may be considered as a separate property interest if the property owner's intent was to purchase the property solely for the purpose of mining the coal."¹⁵⁰ In tackling the denominator issue, the court analyzed

140. *Loveladies Harbor*, 28 F.3d at 1173, 1183 (upholding a just-compensation award of \$2,658,000 issued by the United States Claims Court).

141. *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171, 1173 n.1, 1180–81 (Fed. Cir. 1994).

142. *Id.* at 1180.

143. *Id.* at 1181.

144. *Id.* (stating that the government failed to convince the court that the trial court was wrong in concluding that the land developed or sold before the regulatory environment existed should not be included in the denominator).

145. *Id.* at 1181.

146. *Id.* at 1183.

147. *State ex rel. R.T.G., Inc. v. State*, 780 N.E.2d 998, 1001 (Ohio 2002).

148. *Id.*

149. *Id.*

150. *Id.* at 1008.

the relevant parcel in the vertical and horizontal contexts.¹⁵¹ The court determined that in the vertical context, the coal rights were the relevant parcel for the regulatory takings analysis.¹⁵² And, in the horizontal context, the court rejected the state's argument that the relevant parcel was all 500 acres of RTG property pursuant to the parcel as a whole rule.¹⁵³ Of the 500 contiguous acres of RTG property, approximately 100 acres were "located outside the UFM-designated area."¹⁵⁴ These "fringe amounts of coal" outside of the UFM-designated area became economically impracticable for RTG to mine after the UFM designation prevented RTG from mining nearly 1.3 million tons of coal located within the UFM-designated area.¹⁵⁵ Thus, the court found the relevant parcel in the horizontal context to be limited to RTG's property located within the UFM-designated area because RTG could not economically mine the coal outside of the UFM-designated area independent of the coal reserves within the UFM-designated area.¹⁵⁶

The third and fourth cases, *Lost Tree Village Corp. v. United States*¹⁵⁷ and *Chapel Hill Title & Abstract Co. v. Town of Chapel Hill*,¹⁵⁸ are perfectly emblematic of the potential for private agreements to transform the denominator for purposes of the *Lucas* analysis. In the third case, *Lost Tree*, a Florida property owner and land developer, sought a section 404 permit from Corps to fill wetlands on a 4.99-acre parcel (Plat 57).¹⁵⁹ Plat 57, along with another parcel, Plat 55, and some scattered wetlands, were the remaining parcels from approximately 1,300 acres that *Lost Tree* purchased and developed over more than two decades.¹⁶⁰ *Lost Tree* built several homes around Plat 57 but did not consider developing Plat 57 until 2002, when the impetus for developing Plat 57 was to use mitigation credits that accrued because of improvements made by a neighboring landowner.¹⁶¹ It obtained all state and local approvals but the Corps denied *Lost Tree*'s wetland fill permit application because it said less environmentally damaging alternatives were available.¹⁶²

151. *Id.* at 1007-09.

152. *Id.* at 1009.

153. *State ex rel. R.T.G., Inc. v. State*, 780 N.E.2d 998, 1009 (Ohio 2002).

154. *Id.*

155. *Id.*

156. *Id.*

157. *See generally* *Lost Tree Vill. Corp. v. United States*, 787 F.3d 1111 (Fed. Cir. 2015) (holding that denying a wetland fill permit was a regulatory taking).

158. *See generally* *Chapel Hill Title & Abstract Co. v. Town of Chapel Hill*, 669 S.E.2d 286 (N.C. 2008) (holding that the town board was obligated to consider an environmental regulation when determining how a property owner might use the property).

159. *Lost Tree*, 787 F.3d at 1113-14.

160. *Id.*

161. *Id.* at 1113.

162. *Lost Tree Vill. Corp. v. United States*, 787 F.3d 1111, 1113-14 (Fed. Cir. 2015).

The government argued that the relevant denominator was the entire John's Island Community, about 1,300 acres previously developed by Lost Tree.¹⁶³ Lost Tree argued that the denominator was solely Plat 57.¹⁶⁴ As in *Loveladies Harbor*, the private agreements in *Lost Tree* that were critical to the success of the *Lucas* takings claim were Lost Tree's formal and informal development plans and its course of development over more than 20 years that resulted in the court treating Plat 57 as a separate economic unit from Lost Tree's other holdings.¹⁶⁵ The court evaluated Lost Tree's economic expectations with respect to its scattered holdings to determine which of Lost Tree's properties made up its denominator.¹⁶⁶ The court refused to extend the parcel as a whole analysis to include Lost Tree's disparate real-estate holdings in the denominator along with Plat 57 and instead chose "a flexible approach, designed to account for factual nuances."¹⁶⁷

The United States Court of Appeals for the Federal Circuit held that the denominator was Plat 57 alone and that Lost Tree's other holdings in the vicinity of Plat 57 could not be aggregated because "Lost Tree had [established] distinct economic expectations for . . . its scattered . . . holdings."¹⁶⁸ The court articulated the following three guidelines for establishing the denominator: "First, the property interest [that is] taken [should] not [be] defined in terms of the regulation being challenged . . ." ¹⁶⁹ Instead, "the takings analysis must focus on 'the parcel as a whole.'" ¹⁷⁰ Second, all of the property owner's disparate holdings and properties that are located "in the vicinity of the regulated property" are not to be included in the parcel as a whole.¹⁷¹ Finally, the critical issue in determining the relevant parcel is the economic expectations of property owners with regard to the regulated property when they own or have previously held other properties in the vicinity of the regulated property.¹⁷² If such property owners "treat[] several legally distinct parcels as a single economic unit, together they may constitute the relevant parcel" for the takings analysis.¹⁷³ "Conversely, even when contiguous land is purchased . . . the relevant

163. See *id.* at 1113–14; *Lost Tree Vill. Corp. v. United States (Lost Tree II)*, 707 F.3d 1286, 1291 (Fed. Cir. 2013). Lost Tree developed the John's Island community beginning in 1969 through the mid-1990s. *Lost Tree I*, 707 F.3d at 1288.

164. *Lost Tree I*, 707 F.3d at 1291.

165. *Id.* at 1293–94.

166. *Id.*

167. *Id.* at 1293 (quoting *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171, 1181 (Fed. Cir. 1994)).

168. *Id.* at 1294.

169. *Lost Tree Vill. Corp. v. United States (Lost Tree II)*, 707 F.3d 1286, 1292 (Fed. Cir. 2013) (quoting *Tahoe-Sierra Pres. Council, Inc. v. Tahoe-Sierra Reg'l Planning Agency*, 535 U.S. 302, 331 (2002)).

170. *Id.* (quoting *Tahoe-Sierra*, 535 U.S. at 331).

171. *Id.* at 1292–93.

172. *Id.* at 1293.

173. *Id.* (quoting *Forest Props., Inc. v. United States*, 177 F.3d 1360, 1365 (Fed. Cir. 1999)).

parcel may be a subset of the original purchase where the [property] owner develops distinct parcels at different times and treats the parcels as distinct economic units.”¹⁷⁴

On remand from the United States Court of Appeals for the Federal Circuit, the Court of Federal Claims concluded that the permit denial reduced the value of Plat 57 by 99.4%, from \$4,245,387.93 (the value of Plat 57 with the permit and ready for development as a home site) to \$27,500 (Plat 57’s nominal value without the permit).¹⁷⁵ The court said that such a diminution in value was a taking under the *Lucas* categorical framework.¹⁷⁶

When the government appealed the award in favor of Lost Tree in 2015, it argued that Lost Tree’s ability to sell the affected parcel left Lost Tree with an *economic use*, thereby precluding the per se *Lucas* treatment.¹⁷⁷ Rejecting this argument, the United States Court of Appeals for the Federal Circuit held that the *Lucas* decision did not stand for the proposition “that a land sale qualifies as an economic use.”¹⁷⁸ The court observed that typical economic uses would allow owners to benefit from their actual ownership of land instead of requiring the owner to sell the affected parcel to realize any benefit.¹⁷⁹ The court further noted that the government’s argument would lead to a circularity in which no landowner could ever win a *Lucas* challenge. According to the government’s framing, a landowner would have to demonstrate total deprivation by regulation of all land value, including speculative value, to win a *Lucas* challenge.¹⁸⁰ This showing would prompt land speculators to attribute value to the land that was otherwise valueless, based upon the potential viability of a winning *Lucas* claim.¹⁸¹ This attribution of land value based upon speculation would mean that “the very *Lucas* claim on which the speculation was based” would be defeated.¹⁸²

Fourth, *Chapel Hill Title & Abstract Co. v. Town of Chapel Hill* is another compelling example of the interplay of private agreements, public land regulation, and the challenges facing local government decision-makers.¹⁸³ In this case, it was the local government’s enactment of the Resource Conservation District (“RCD”) ordinance, in combination with the impact of private restrictive covenants that gave rise to the *Lucas* takings claim.¹⁸⁴ Chapel Hill Title and Abstract and Jonathan and Lindsay Starr (“Chapel Hill Title”) sought and were denied a variance from the Town of Chapel Hill and the Board of Adjustments to construct a home on a vacant lot zoned for

174. *Id.*

175. *Lost Tree Vill. Corp. v. United States (Lost Tree CFC II)*, 115 Fed. Cl. 219, 233 (2014).

176. *Id.* (stating that the diminution in value was also a compensable taking under the *Penn Central* framework).

177. *Lost Tree Vill. Corp. v. United States*, 787 F.3d 1111, 1117 (Fed. Cir. 2015).

178. *Id.*

179. *Id.*

180. *Id.* at 1118.

181. *Id.*

182. *Id.*

183. *See generally* *Chapel Hill Title & Abstract Co. v. Town of Chapel Hill*, 669 S.E.2d 286 (N.C. 2008).

184. *Id.* at 287.

residential use.¹⁸⁵ Most of the lot, 78.5%, was in the RCD and subject to an ordinance that prohibited construction within the RCD.¹⁸⁶ The remaining 21.5% was located outside of the RCD and was burdened by a restrictive covenant preventing construction of a home on this portion.¹⁸⁷ The combination of the RCD ordinance and the restrictive covenant meant that, absent a variance from the RCD ordinance, Chapel Hill Title would not be able to build on the lot.¹⁸⁸

The case was eventually appealed to the Supreme Court of North Carolina, which articulated the legal question as “whether the Board should consider the operation of the RCD ordinance independently, or in conjunction with, the effect of the private restrictive covenants, when determining if [Chapel Hill Title was] entitled to a variance.”¹⁸⁹ The court determined that the RCD ordinance required the Board of Adjustment “to consider the actual state in which the property is found—including both its physical and legal conditions—and how those conditions interact with the RCD ordinance, when determining if a variance is necessary to leave an owner with a ‘legally reasonable use’ of the property.”¹⁹⁰ Ultimately, the court held that the board of adjustment did not properly consider the available uses of the entire lot for the property owners within the context of the restrictive covenants and the RCD ordinance.¹⁹¹

Justice Brady, concurring, made the *Lucas* takings argument. He rejected the contention that the property outside of the RCD ordinance was developable because the argument failed to consider the impact of the restrictive covenants that burdened and ran with the land.¹⁹² He believed the restrictive covenants that were imposed more than 20 years prior to the RCD ordinance could not be separated from the other legal components of the parcel in the evaluation of the variance request.¹⁹³ He concluded that the Town of Chapel Hill had two options, either grant the variance or compensate the owners for a *Lucas* taking of their property.¹⁹⁴

The fifth case, *Love Terminal Partners v. United States*, is the most recent case in this category and represents a huge win for property owners with a just-compensation award of \$133,500,000.¹⁹⁵ The plaintiffs were leaseholders of property located at Dallas Love Field Airport when the federal government enacted the Wright Amendment Reform Act of 2006 (“WARA”).¹⁹⁶ The plaintiffs alleged that the

185. *Id.* at 286–87.

186. *Id.* at 287.

187. *Id.* at 288.

188. *Id.* at 287–88.

189. *Chapel Hill Title & Abstract Co. v. Town of Chapel Hill*, 669 S.E.2d 286, 288 (N.C. 2008).

190. *Id.*

191. *Id.*

192. *Id.* at 290 (Brady, J., concurring).

193. *Id.*

194. *Id.*

195. *Love Terminal Partners v. United States*, 126 Fed. Cl. 389, 440 (2016), *appeal docketed*, No. 16-2276 (Fed. Cir. Jun. 30, 2016).

196. *Id.* at 394.

enactment of WARA directly “prohibited the use of their property” for its highest and best use as a passenger air terminal, which also was the only use permitted under the master lease.¹⁹⁷ Specifically, one of the plaintiffs’ experts, whom the court found persuasive, testified that after the enactment of WARA, “there were ‘no other economical uses’” for the leasehold property, and he “defined economical use as whether revenue would exceed expenses.”¹⁹⁸ Essentially, he imagined a negative-value situation after enactment of WARA. The court concluded that because WARA prohibited the plaintiffs from using the leased property as a commercial airline terminal that was both the highest and best purpose of the leasehold and also the only use permitted under the master lease, the enactment of WARA left the property with no remaining economic value, thus, a *Lucas* categorical taking of the plaintiffs’ entire leasehold.¹⁹⁹ The United States appealed to the Federal Circuit in June of 2016.²⁰⁰

In summary, the winning *Lucas* cases represent a reinvigoration of the Takings Clause, albeit modest, as a check on government regulatory action against property owners.²⁰¹ The owners succeeded in establishing their development and economic expectations in such a manner that the courts were willing to treat the regulated parcels as separate economic units for the purpose of the *Lucas* categorical takings analysis. The *Lucas* losers help isolate what it takes to be a *Lucas* winner because the losers did not have what the *Lucas* winners had. Meaning, the owners in the losing cases did not establish sufficient factual underpinnings so that courts, looking behind the structure of their acquisitions and development plans, found an economic reality that warranted treating the regulated parcel as a separate economic unit.

There are three unsuccessful *Lucas* challenges in this category of private agreements and the denominator that are noteworthy for their potential to help focus the lens on the successful *Lucas* challenges. The first is *Appollo Fuels, Inc. v. United States*.²⁰² The second is *Forest Properties, Inc. v. United States*.²⁰³ The third is *National Lime & Stone Co. v. Blanchard Township*.²⁰⁴

At issue in the first case, *Appollo Fuels, Inc. v. United States*, was whether the government’s prevention of surface mining based upon a citizen petition pursuant to

197. *Id.*

198. *Id.* at 413 & n.17.

199. *Id.* at 418.

200. *Love Terminal Partners v. United States*, 126 Fed. Cl. 389, 440 (2016), *appeal docketed*, No. 16-2276 (Fed. Cir. Jun. 30, 2016).

201. See Richard A. Epstein, *The Seven Deadly Sins of Takings Law: The Dissents in Lucas v. South Carolina Coastal Council*, 26 LOY. L.A. L. REV. 955, 956 (1993) (describing Justices Scalia’s and Kennedy’s *Lucas* opinions as “efforts to rehabilitate the Takings Clause as a limit on government action in the teeth of an unbroken line of cases upholding state land use regulation from the days of *Village of Euclid v. Ambler Realty Co.* to the present.” (footnote omitted)). See generally Carol Necole Brown, *Justice Thomas’s Kelo Dissent: The Perilous and Political Nature of Public Purpose*, 23 GEO. MASON L. REV. 273 (2016) (discussing a check on government takings).

202. See generally *Appollo Fuels, Inc. v. United States*, 54 Fed. Cl. 717 (2002).

203. See generally *Forest Props., Inc. v. United States*, 177 F.3d 1360 (Fed. Cir. 1999).

204. See generally *Nat’l Lime & Stone Co. v. Blanchard Twp.*, Nos. 6-04-04, 6-04-05, 2005 WL 2840493 (Ohio Ct. App. Oct. 31, 2005).

section 1272 of the Surface Mining Control and Reclamation Act (“SMCRA”) effected a *Lucas* taking of the plaintiff’s property interests.²⁰⁵ Plaintiff’s property interests consisted of numerous “leases grant[ing] surface, deep, and auger mining rights” and other unspecified fee interests located both inside of and outside of the Creek watershed.²⁰⁶ The government’s regulatory activity was limited to the Creek watershed, which left the plaintiff with some areas it could mine without the government’s regulatory interference.²⁰⁷

The *Appollo* court rejected *Loveladies Harbor, Inc. v. United States* as providing support for the plaintiff’s description of the denominator as consisting only of the coal reserves mineable by surface that it held within the Creek watershed.²⁰⁸ The court found that, based upon the plaintiff’s acquisition of its property interests more than ten years after the passage of the SMCRA, the plaintiff’s development expectations formed *after* the “imposition of [the] regulatory framework” that it alleged created a taking.²⁰⁹ “The relevant parcel in *Loveladies* coincided with the area covered by the permit only because the remainder of plaintiff’s property was either developed before the imposition of the federal regulatory scheme or was required by the state to remain undeveloped wetlands.”²¹⁰ Relying upon factual nuances to distinguish the cases raised, the court stated that controlling case law required it to look “beyond the regulated portion of the property in determining the appropriate parcel as a whole”²¹¹ and “to consider [the] plaintiff’s overall business plan for the land at issue.”²¹²

Interestingly, the court reiterated what other federal courts have said: property owners may not engineer a successful *Lucas* claim.²¹³ While there was no direct indication that the plaintiff’s acquisitions and limitations were strategic for improving the odds of a *Lucas* claim, and while the plaintiff denied such, the court expressly noted that the plaintiff did not support its disclaimer with any evidence.²¹⁴

In the second case, the United States Court of Appeals for the Federal Circuit in *Forest Properties, Inc. v. United States* also found *Loveladies* inapplicable and rejected the property owner’s argument that the relevant parcel for the denominator was 9.4 acres of lake bottom.²¹⁵ Instead, the court held that the relevant parcel was the entire 62-acre tract, consisting of the 9.4 acres of lake bottom and 53 acres of upland

205. *Appollo Fuels*, 54 Fed. Cl. at 722.

206. *Id.* at 726.

207. *Id.*

208. *Appollo Fuels, Inc. v. United States*, 54 Fed. Cl. 717, 724, 726–27 (2002).

209. *Id.* at 727–28.

210. *Id.* at 727.

211. *Id.* at 725; *see also* *State ex rel. R.T.G., Inc. v. State*, 780 N.E.2d 998, 1006 (Ohio 2002) (adopting the definition of the denominator as consisting only of the regulated land).

212. *Appollo Fuels*, 54 Fed. Cl. at 730.

213. *Id.* at 727–28.

214. *Appollo Fuels, Inc. v. United States*, 54 Fed. Cl. 717, 727–28 (2002).

215. *Forest Props., Inc. v. United States*, 177 F.3d 1360, 1365 (Fed. Cir. 1999).

property.²¹⁶ The property owner had alleged a *Lucas* taking when the government denied a section 404 dredge and fill permit.²¹⁷

In both *Loveladies* and *Forest Properties*, the original purchase and the owners' economic intentions at the outset were critically important in establishing the relevant parcel through the denominator. Ultimately, what set *Forest Properties* apart from *Loveladies* was the *Forest Properties* court's perception that, from the beginning, the entire 62-acre project was one integrated, single project that was comprised of two tracts.²¹⁸ *Forest Properties* acquired interests in a total of 62 acres, though at separate times, but always with a single project of 62 acres in mind.²¹⁹ So, even though the two tracts were legally separate, for the *Forest Properties* court, they were a single economic unit and therefore properly constituted the relevant parcel of the denominator.²²⁰

In the third case, *National Lime & Stone Co. v. Blanchard Township*, the owner argued that the court should follow the precedent of *State ex rel. R.T.G., Inc. v. State*,²²¹ which held that pursuant to state law, "mineral rights are recognized . . . as separate property rights. Therefore . . . ownership of the coal is 'both severable and of value in its own right.'"²²² The property owner purchased approximately 235 acres of real property intending to convert it into a limestone quarry.²²³ The property had been previously farmed, and at the time of its acquisition by the plaintiff, there were no restrictive zoning ordinances in force.²²⁴ Approximately four months after the plaintiff acquired the property, the municipality passed a zoning resolution prohibiting use of the property as a limestone quarry.²²⁵

The court rejected *RTG* as binding precedent, relying upon the intent of the purchaser as controlling guidance.²²⁶ The court distinguished the facts in its case from those in *RTG*, noting that the coal company in *RTG* engaged in significant testing of the property for coal deposits and spent a substantial amount of money assessing the property's viability.²²⁷ Additionally, *RTG* had successfully mined coal for several years prior to the state designating the property as unsuitable and so had engaged in mining before the alleged taking, unlike the property owner.²²⁸ Based upon these findings, the

216. *Id.*

217. *Id.* at 1364-65.

218. *Id.* at 1365.

219. *Id.*

220. *Id.*

221. *Nat'l Lime & Stone Co. v. Blanchard Twp.*, Nos. 6-04-04, 6-04-05, 2005 WL 2840493, at *7 (Ohio Ct. App. Oct. 31, 2005).

222. *State ex rel. R.T.G., Inc. v. State*, 780 N.E.2d 998, 1008 (Ohio 2002) (citation omitted) (quoting *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 520 (1987) (Rehnquist, J., dissenting)).

223. *Nat'l Lime & Stone Co.*, 2005 WL 2840493, at *1.

224. *Id.*

225. *Id.*

226. *Id.* at *8- *9.

227. *Nat'l Lime & Stone Co. v. Blanchard Twp.*, Nos. 6-04-04, 6-04-05, 2005 WL 2840493, at *9 (Ohio Ct. App. Oct. 31, 2005).

228. *Id.*

National court concluded that RTG had done significantly more than the property owner.²²⁹

In sum, the difference between the *Lucas* winners and losers turns on the property owners' economic expectations, how those expectations shaped the owners' use of their property, and the owners' ability to profit from the use of their properties in the shadow of the regulatory scheme. The winners were able to establish from their acquisition, use, and development that the regulated property was a separate estate for purposes of defining the denominator and that their economic expectations pre-dated the regulation that they claimed resulted in a *Lucas* taking. In the losing cases, the economic reality underlying the property arrangements inclined the courts to see the regulated parcels as part of larger economic units that included other unregulated property, resulting in applying the parcel as a whole approach.

C. PYRAMIDAL SEGMENTATION AND PUBLIC LAW IMPACT

The parcel as a whole rule addresses the segmentation of possessory interests vertically,²³⁰ horizontally,²³¹ temporally,²³² or functionally.²³³ In contrast, what we call "pyramidal segmentation" describes segmentation of uses under the ubiquitous zoning pyramid. The zoning pyramid, often referred to as "cumulative" zoning, traces its roots back to the landmark Supreme Court decision, *Village of Euclid v. Ambler Realty Co.*²³⁴ In that case, the Village enacted its zoning ordinance in 1922, creating six use-zoning classifications that were based upon a pyramid of uses that increased in their inclusiveness as one moved down the pyramid.²³⁵ The least intensive use zones are at the very top of the zoning pyramid—e.g., single-family—and the most intensive use zones are at the bottom of the zoning pyramid—e.g., industrial.²³⁶

Downzoning is the process of changing the allowable density on a parcel by rezoning the property from a less restrictive use regulation category to a more restrictive use regulation category (moving up the zoning pyramid).²³⁷ Such rezoning, for example from commercial use to residential use, is called downzoning because, in theory, as one moves up the zoning pyramid, property becomes less valuable because fewer uses are permitted of the property.²³⁸ Upzoning is changing the allowable density

229. *Id.*

230. *See supra* notes 88, 151–52 and accompanying text.

231. *See supra* notes 89, 151, 153 and accompanying text.

232. *See supra* note 90 and accompanying text.

233. *See supra* note 91 and accompanying text.

234. *See generally* Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

235. *Id.* at 379–81.

236. *Id.* at 380–81.

237. Vicki Been et al., *Urban Land-Use Regulation: Are Homevoters Overtaking the Growth Machine?*, 11 J. EMPIRICAL LEGAL STUD. 227, 229 (2014).

238. *See id.* at 238 (“[F]or parcels initially zoned for commercial, business, or industrial uses (but not residential), as the difference between the estimated value of the property under an alternative zoning category and its existing value increases, so does the probability of it being rezoned.”).

on a parcel by rezoning the property from a more restrictive use regulation category to a less restrictive use regulation category further down the zoning pyramid—for example, moving from a single-family residential zoning classification to a multi-family residential zoning classification.²³⁹ Property owners typically do not object to upzoning because, in theory, property becomes more valuable as one moves down the zoning pyramid to permit more uses of the property and to impose fewer land use restrictions on the property.²⁴⁰

The 12 cases in this category show the impact of inclusionary zoning: the less inclusive the zoning classification (meaning the less intensive the permitted uses), the more viable the *Lucas* claim.²⁴¹ Of the 12 cases, this section discusses six. The first case is *State ex rel. Greenacres Foundation v. City of Cincinnati*.²⁴² The second case is *City of Sherman v. Wayne*.²⁴³ The third case is *Steel v. Cape Corp.*²⁴⁴ The fourth case is *Galleon Bay Corp. v. Board of County Commissioners of Monroe County*.²⁴⁵ The fifth case is *Ali v. City of Los Angeles*.²⁴⁶ And the sixth case is *Dunlap v. City of Nooksack*.²⁴⁷

First, in *State ex rel. Greenacres Foundation v. City of Cincinnati*, a charitable foundation applied for a demolition permit to remove an existing, dilapidated single-family home that had been uninhabited since 1961.²⁴⁸ The house, known as the Gamble House because it was once occupied by James N. Gamble, the son of one of the founders of Procter & Gamble, was located on a 2.85-acre portion of a 22-acre site owned by the Greenacres Foundation.²⁴⁹ The house was located on land zoned in a “single family residential district with no historic overlay.”²⁵⁰ After the demolition permit request, the Cincinnati City Council imposed historic district zoning on the acreage where the house was located.²⁵¹ Ultimately, the court concluded that the demolition permit application ought to have been processed pursuant to the law as it was pending when Greenacres applied for the permit.²⁵² Nearly three years after Greenacres applied for the demolition permit, the City of Cincinnati issued the

239. *Id.* at 244 & n.97.

240. *See id.* at 244 & n.97, 247 (describing upzoning as a process, after which, property can be developed at great density).

241. *See infra* Appendix, Table 3.

242. *See generally* *State ex rel. Greenacres Found. v. City of Cincinnati*, 56 N.E.3d 335 (Ohio Ct. App. 2015).

243. *See generally* *City of Sherman v. Wayne*, 266 S.W.3d 34 (Tex. Ct. App. 2008).

244. *See generally* *Steel v. Cape Corp.*, 677 A.2d 634 (Md. Ct. Spec. App. 1996).

245. *See generally* *Galleon Bay Corp. v. Bd. of Cty. Comm'rs*, 105 So. 3d 555 (Fla. Dist. Ct. App. 2012).

246. *See generally* *Ali v. City of Los Angeles*, 91 Cal. Rptr. 2d 458 (Cal. Ct. App. 1999).

247. *See generally* *Dunlap v. City of Nooksack*, No. 63747-9-I, 2010 WL 4159286 (Wash. Ct. App. Oct. 25, 2010).

248. *State ex rel. Greenacres Found. v. City of Cincinnati*, 56 N.E.3d 335, 337 (Ohio Ct. App. 2015).

249. *Id.*

250. *Id.*

251. *Id.* at 338.

252. *Id.* at 339.

permit, and it took nearly seven additional months from the issuance of the permit for the city to remove the historic district overlay designation from Greenacres' property.²⁵³ The court held that denial of Greenacres' application caused a *Lucas* temporary regulatory taking even though it was only part of a much larger property in single ownership because the house was uninhabitable and could not be used without incurring extensive expense, and use as a museum, as advocated by permit opponents, would have required additional millions of dollars for maintenance, rendering the property economically unviable and creating a property with negative value.²⁵⁴

Second, the property in *City of Sherman v. Wayne* had been used commercially as an armory and vehicle storage site when the municipality downzoned the property to a residential zone and then refused to grant the owner non-conforming use status.²⁵⁵ The court found that enforcement of the residential ordinance was a *Lucas* taking because the environmental remediation costs and the lack of demand for residential use resulted in the property having a negative value.²⁵⁶

Third, after the owner's property in *Steel v. Cape Corp.* was improperly downzoned from a residential classification to an open space classification, permitting no residences, the owner requested a rezoning to the original residential classification.²⁵⁷ The government denied the request on the basis that the rezoning to a residential classification would make the school facilities inadequate.²⁵⁸ The court found that a *Lucas* taking resulted from the combination of the zoning regulation and the adequate facilities ordinance that left the property unusable for viable economic purposes.²⁵⁹ Against a background of aberrational facts²⁶⁰—impermissible rezoning of property to an open space classification that did not include and was not intended to include viable economic residential or commercial uses except as an accessory to an already existing residential use—the court held that the statutory scheme resulted in a *Lucas* taking.²⁶¹

253. *Id.* at 339–40.

254. *State ex rel. Greenacres Found. v. City of Cincinnati*, 56 N.E.3d 335, 343–45 (Ohio Ct. App. 2015).

255. *City of Sherman v. Wayne*, 266 S.W.3d 34, 39–40 (Tex. App. 2008).

256. *Id.* at 46–47.

257. *Steel v. Cape Corp.*, 677 A.2d 634, 635–37 (Md. Ct. Spec. App. 1996). The downzoning occurred at the request of an entity that improperly alleged that it held an ownership interest in the subject property. *Id.* at 635–36.

258. *Id.* at 638–39.

259. *Id.* at 649.

260. *See id.* at 646 (“The hearing officer was not an owner of the property and there was no proper application before him for RLD. He had the authority to grant or deny that particular application, not some other application not made. We hold that to grant rezoning to a classification not applied for was improper. Moreover, in light of his comments, we hold that the hearing examiner/administrator, when he denied appellee’s request for rezoning and purported to grant to appellee an unsought for RLD classification, was attempting to create the new rezoning equivalent of the South Carolina new ‘special permit’ procedure adopted by that state to thwart the constitutional takings resolution.”).

261. *Id.* at 650–51.

Fourth, the plaintiff in *Galleon Bay Corp. v. Board of County Commissioners* owned 10.64 acres of land in fee simple.²⁶² Six of the acres were landlocked, subject to utility easements and roads, or restricted by perpetual conservation easements.²⁶³ Amendment of the Rate of Growth Ordinance in the Florida Keys Year 2010 Comprehensive Plan made it practically impossible for Galleon to build on the remaining 4.64 acres that were divided into 14 residential lots.²⁶⁴ The court of appeals found a *Lucas* taking, holding that the trial court erred in considering the plaintiff's separately platted subdivisions that had been developed decades earlier when the court determined the impact of the regulation on the plaintiff.²⁶⁵

Fifth, in *Ali v. City of Los Angeles*, the property owner applied for a permit to demolish his hotel after it "was substantially destroyed by fire in . . . 1988."²⁶⁶ The City thought the hotel was a single room occupancy ("SRO") hotel and denied the demolition permit because "the City had an ordinance [that] prohibit[ed] demoli[shing] . . . such low-income housing unless (1) it was infeasible to repair, or (2) the owner agreed to replace it with similar housing, or (3) the owner established extreme hardship for an exemption."²⁶⁷ Almost two years later, the City determined that the hotel "was not an SRO hotel" and issued the demolition permit.²⁶⁸ In the interim, the City contracted for security for the abandoned hotel and assessed the cost against the owner, pursuant to a City ordinance.²⁶⁹

On a previous appeal, the court held that the City's "delay in issuing the demolition permit" pursuant to "the SRO ordinance violated the Ellis Act" that forbade public entities from "compel[ling] . . . owner[s] of . . . residential real property to offer or to continue to offer" residential property for lease or rent.²⁷⁰ This court found that the wrongful denial and delay in issuing the demolition permit was not the type of "normal delay in the development process" that allows governments to escape takings liability.²⁷¹ The court noted that the SRO ordinance's inapplicability in light of the Ellis Act was evident from a 1988 Santa Monica rent-control ordinance case that involved similar requirements to this case.²⁷² And, because of the almost two-year delay during which Ali could not do anything with the property, the court found that Ali was temporarily deprived of all economically viable use and upheld the trial court's finding of a *Lucas* taking.²⁷³

262. *Galleon Bay Corp. v. Bd. of Cty. Comm'rs*, 105 So. 3d 555, 557 (Fla. Dist. Ct. App. 2012).

263. *Id.* at 557-58.

264. *Id.* at 562.

265. *Id.* at 567, 569.

266. *Ali v. City of Los Angeles*, 91 Cal. Rptr. 2d 458, 459 (Cal. Ct. App. 1999).

267. *Id.*

268. *Id.*

269. *Id.*

270. *Id.* at 460.

271. *Id.* at 465-66.

272. *Ali v. City of Los Angeles*, 91 Cal. Rptr. 2d 458, 464-65 (Cal. Ct. App. 1999) (citing *Javidzad v. City of Santa Monica*, 251 Cal. Rptr. 350 (Cal. Ct. App. 1988), *superseded by statute as stated in Lincoln Place Tenants Ass'n v. City of Los Angeles*, 66 Cal. Rptr. 3d 120 (Cal. Ct. App. 2007)).

273. *Id.* at 460, 465-66.

Interestingly, the *Ali* court did not decide the dispute on substantive due process grounds even though the court, citing *Landgate, Inc. v. California Coastal Commission*,²⁷⁴ found that the delay in issuing the demolition permit under the circumstances “was ‘so unreasonable from a legal standpoint’ as to be arbitrary[] [and] not in furtherance of any legitimate governmental objective.”²⁷⁵ Perhaps the answer lies in the fact that nearly 20 years prior to *Ali*, the United States Supreme Court said in *Agins v. City of Tiburon* that “[t]he application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests.”²⁷⁶ Six years after *Ali*, the Court in *Lingle v. Chevron U.S.A. Inc.* held that *Agins*’s “‘substantially advances’ formula . . . is not a valid method of identifying regulatory takings for which the Fifth Amendment requires just compensation.”²⁷⁷ So, these twists and turns in Supreme Court jurisprudence may undermine *Ali*’s precedential value in the eminent-domain context for future courts presented with similar facts.

Sixth and finally, a denial of an area variance was the *Lucas* taking precipitant in *Dunlap v. City of Nooksack*.²⁷⁸ The plaintiff owned separate 29.5-acre and 0.25-acre parcels in fee simple.²⁷⁹ The 0.25-acre parcel was zoned residential when the plaintiff requested an area variance to build a house and to retain a constructed fence.²⁸⁰ The court found the denial of the variance resulted in a *Lucas* taking of the 0.25-acre parcel.²⁸¹ According to the court, though the plaintiffs could build a 480-square-foot house on the parcel, it would not be economically viable, and the buffers rendered the remaining 95.6% of the lot useable.²⁸²

The essence of these winning *Lucas* cases in the pyramidal segmentation and public law impact category is that the *Lucas* claim gains more strength the more government restricts the use and development on property already situated in the least inclusive use zones. The difference between the *Lucas* winners and losers is that the winners frequently could point to some improper, erroneous, or aggressive application by the government of its zoning or permitting discretion that, in combination with the already restrictive zoning, left the property valueless.²⁸³ In many of the winning *Lucas*

274. See generally *Landgate, Inc. v. Cal. Coastal Comm’n*, 953 P.2d 1188 (Cal. 1998).

275. *Ali*, 91 Cal. Rptr. 2d at 464 (citation omitted).

276. *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980), *abrogated by* *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528 (2005).

277. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 545 (2005).

278. *Dunlap v. City of Nooksack*, No. 63747-9-I, 2010 WL 4159286, at *4-5 (Wash. Ct. App. Oct. 25, 2010).

279. *Id.* at *1.

280. *Id.*

281. *Id.* at *6.

282. *Id.*

283. See generally *Ali v. City of Los Angeles*, 91 Cal. Rptr. 2d 458 (Cal. Ct. App. 1999); *Steel v. Cape Corp.*, 677 A.2d 634 (Md. Ct. Spec. App. 1996); *State ex rel. Greenacres Found. v. City of Cincinnati*, 56 N.E.3d 335 (Ohio Ct. App. 2015). Denial of a certificate of appropriateness and the application of the Cumberland Historic Zoning Ordinance to the church to demolish a monastery was a *Lucas* taking because buildings were in serious disrepair and the refusal “require[d] the Church to maintain the Monastery at a

cases, the government seemed oblivious to the fact that the combination of the restrictive zoning classification and the refusal to exercise its discretion in the form of a variance denial, non-conforming use application denial, or other development denial left the property undevelopable and even with negative value.²⁸⁴ The losers in this category help isolate these distinguishing qualities of the winning *Lucas* cases. They make the point of the winning cases, just from the other side.

Next, we take a quick look at five pyramidal segmentation and public law impact cases that were unsuccessful in joining that small, inner circle of the winning *Lucas* cases in this category. The first is *Erb v. Maryland Department of the Environment*.²⁸⁵ The second is *Beyer v. City of Marathon*.²⁸⁶ The third is *Collins v. Monroe County*.²⁸⁷ The fourth is *Loewenstein v. City of Lafayette*.²⁸⁸ And the fifth is *Allegretti & Co. v. County of Imperial*.²⁸⁹

First, in *Erb v. Maryland Department of the Environment*, the property owner alleged a *Lucas* taking after being denied a permit for a septic system essential to developing his property.²⁹⁰ The court found the property owner had not established anything more than a great diminution in value from the present inability to build.²⁹¹ Further, there was evidence of alternative means of sewage disposal possibly available to the owner.²⁹² The court held that the owner had not presented sufficient evidence of a denial of all economically beneficial use to establish a *Lucas* taking.²⁹³ Additionally, unlike *Steel v. Cape Corp.*, in which the court found a *Lucas* taking after rejecting a nuisance abatement defense and under highly unusual facts in the form of an improper rezoning at the request of an entity with no legal interest in the rezoned property,²⁹⁴ the *Erb* court held that the Maryland Department of Environment's

safe standard of repair." *Keeler v. Mayor of Cumberland*, 940 F. Supp. 879, 888 (D. Md. 1996). The church estimated complete renovation costs at two million dollars, and the church estimated "[t]he cost to 'retain and adequately maintain' the shell" and minimal building interior temperatures at \$386,440. *Id.* The city "stipulated that 'no economically feasible plan can be formulated' for the preservation of the Church buildings." *Id.*

284. See generally *Del Monte Dunes at Monterey, Ltd. v. City of Monterey*, 95 F.3d 1422 (9th Cir. 1996), *aff'd*, 526 U.S. 687 (1999); *Galleon Bay Corp. v. Bd. of Cty. Comm'rs*, 105 So. 3d 555 (Fla. Dist. Ct. App. 2012); *Heaphy v. State*, No. 03-45407-AA, 2004 WL 5573602 (Mich. Cir. Ct. Apr. 28, 2004); *Moroney v. Mayor of Old Tappan*, 633 A.2d 1045 (N.J. Super. Ct. App. Div. 1993); *City of Sherman v. Wayne*, 266 S.W.3d 34 (Tex. App. 2008).

285. See generally *Erb v. Md. Dep't of the Env't*, 676 A.2d 1017 (Md. Ct. Spec. App. 1996).

286. See generally *Beyer v. City of Marathon*, 197 So. 3d 563 (Fla. Dist. Ct. App. 2013). The Beyers were allowed to camp on the property but not build. *Id.* at 565.

287. See generally *Collins v. Monroe County*, 118 So. 3d 872, 873 (Fla. Dist. Ct. App. 2013).

288. See generally *Loewenstein v. City of Lafayette*, 127 Cal. Rptr. 2d 79 (Cal. Ct. App. 2002).

289. See generally *Allegretti & Co. v. County of Imperial*, 42 Cal. Rptr. 3d 122 (Cal. Ct. App. 2006).

290. *Erb*, 676 A.2d at 1025-26.

291. *Erb v. Md. Dep't of the Env't*, 676 A.2d 1017, 1026 (Md. Ct. Spec. App. 1996).

292. *Id.*

293. *Id.* at 1027-28.

294. *Steel v. Cape Corp.*, 677 A.2d 634, 650-51 (Md. Ct. Spec. App. 1996).

sewage regulatory scheme did “no more than could be accomplished under the nuisance laws of [the] State.”²⁹⁵

In essence, the *Erb* court found that in *Steel v. Cape Corp.* the imposition of the zoning scheme left the property with no economic use, and the nuisance exception did not apply to provide a defense to the *Lucas* taking.²⁹⁶ In contrast, according to the *Erb* court, the property owner in that case did not meet his burden of showing a deprivation of all economic use and, even if he had met this burden and proven that the imposition of the regulatory scheme left his property “economically barren, no compensation would be due because the State has a right—and, indeed, an obligation—to regulate against the creation of nuisances.”²⁹⁷ In other words, the nuisance defense applied in *Erb* and would defeat a *Lucas* takings claim.

Next, the courts in two cases rejected attempts by property owners to bring their claims under the umbrella of *Galleon Bay Corp. v. Board of County Commissioners*.²⁹⁸ The second of the unsuccessful cases highlighted in this category is *Beyer v. City of Marathon* in which the government adopted a comprehensive plan and subsequently denied the property owners the right to engage in any development on their property.²⁹⁹ The owners sued, alleging a deprivation of all or substantially all economic use of the property.³⁰⁰ In ruling against the owners, the *Beyer* court distinguished this case from *Galleon Bay* in which the appeals court held that *Galleon* had suffered a *Lucas* taking after many years of unsuccessful attempts at approvals to improve and develop its property.³⁰¹ The *Beyer* court found that the points assigned to the property under the City’s Residential Rate of Growth Ordinance had a value of \$150,000 and constituted “reasonable economic use of the property” and that this value, coupled with the recreational uses permitted on the property, left the owners with economically beneficial use.³⁰²

Third, in *Collins v. Monroe County* the property owners filed a petition for a Beneficial Use Determination (“BUD”), which required that the property owners prove that the land development regulations and the comprehensive plan that were effective at the time of the BUD application deprived them of all reasonable use of the regulated property.³⁰³ The court found no *Lucas* taking and contrasted the situation of the property owners in *Collins* to the situation of the property owners in *Galleon Bay*.³⁰⁴ The *Collins* court stated that the property owners in *Galleon Bay* spent

295. *Erb*, 676 A.2d at 1026.

296. *Id.*

297. *Erb v. Md. Dep’t of the Env’t*, 676 A.2d 1017, 1026–27 (Md. Ct. Spec. App. 1996).

298. *See generally* *Galleon Bay Corp. v. Bd. of Cty. Comm’rs*, 105 So. 3d 555 (Fla. Dist. Ct. App. 2012).

299. *Beyer v. City of Marathon*, 197 So. 3d 563, 564 (Fla. Dist. Ct. App. 2013).

300. *Id.* at 565 (discussing the Beyers’ complaint which alleged a deprivation “of all or substantially all reasonable economic use of the property by virtue of the changes in land use regulations over the years”).

301. *Id.* at 566.

302. *Id.* at 565.

303. *Collins v. Monroe County*, 118 So. 3d 872, 873 (Fla. Dist. Ct. App. 2013).

304. *Id.* at 876.

hundreds of thousands of dollars pursuing reasonable investment-backed expectations and trying to develop the property.³⁰⁵ In contrast, the property owners in *Collins* were passive and did not invest much into the improvement or development of the regulated property other than their initial cost of purchase.³⁰⁶

In sum, the *Collins* property owners could not take advantage of the *Galleon Bay* precedent because they failed to explore the development options of their land that were available to them in a meaningful way prior to the regulatory impact.³⁰⁷ Without having made substantial efforts to explore their property's development potential over the decades of their ownership and in light of the fact that building permits were available to them under the regulatory framework, the *Collins* court found that the facts of the *Galleon Bay* case starkly contrasted the facts in *Collins*.³⁰⁸

In the fourth and fifth cases, the property owners in *Loewenstein v. City of Lafayette*³⁰⁹ and *Allegretti & Co. v. County of Imperial*³¹⁰ unsuccessfully attempted to bring their cases within the precedent of *Ali v. City of Los Angeles*,³¹¹ in which the court held that a “delay in demolition caused by the erroneous enforcement of [a single room occupancy] ordinance despite the prohibitions of the Ellis Act . . . temporarily deprived [the property owner] of all use of his property and . . . was a temporary regulatory taking.”³¹² The *Loewenstein* court distinguished its facts from those of *Ali* when it held that a two-year delay before denying a lot-line-adjust application did not constitute a taking.³¹³ The *Loewenstein* court noted that, unlike in *Ali*, the City did not violate a state law in denying the application and the resolution of the application was a normal delay in the land use permitting process.³¹⁴ Similarly, the court in *Allegretti* held that the County's restrictions on the property owner's ground water use did not constitute a *Lucas* taking and the case was not comparable to the *Ali* facts because the County's actions were “not objectively unreasonable” unlike *Ali* in which the court found the City's actions violated state law.³¹⁵

In summary, the properties in the successful *Lucas* cases were mostly owned in fee simple absolute and were zoned in the least inclusive zoning classifications—ones higher up the zoning pyramid.³¹⁶ The *Lucas* takings issues arose when governments enforced zoning ordinances and denied owners' requests for development approval or some other land use concession.³¹⁷ The *Lucas* takings resulted from the

305. *Id.* at 876 n.7.

306. *Id.* at 876 & n.7.

307. *Id.* at 876.

308. *Id.*

309. *See generally* *Loewenstein v. City of Lafayette*, 127 Cal. Rptr. 2d 79 (Cal. Ct. App. 2002).

310. *See generally* *Allegretti & Co. v. County of Imperial*, 42 Cal. Rptr. 3d 122 (Cal. Ct. App. 2006).

311. *See generally* *Ali v. City of Los Angeles*, 91 Cal. Rptr. 2d 458 (Cal. Ct. App. 1999).

312. *Id.* at 465.

313. *Loewenstein*, 127 Cal. Rptr. 2d at 92–93.

314. *Id.* at 93.

315. *Allegretti*, 42 Cal. Rptr. 3d at 139.

316. *See supra* Part III.A.

317. *See supra* Part III.C.

combination of the properties' classification in the least intensive zones of the zoning pyramid and governments' refusal to exercise their discretion to allow for deviations from the as-of-right uses.³¹⁸ Restrictive zoning policies and refusal by governments to exercise their zoning discretion are unifying themes in these cases.

D. DELAY THEORY

Normal delays in the permitting process are typically reviewed under the *Penn Central* takings framework and often will not result in compensable regulatory takings.³¹⁹ But, in the four cases in this category, the courts applied a *Lucas* takings framework because they involved something other than a normal development delay. Governmental bad behavior and a close hewing to common-law nuisance principles are unifying themes of the delay theory cases.

In the first and second cases, *People ex rel. Department of Transportation v. Diversified Properties Co.*³²⁰ and *Jefferson Street Ventures, LLC v. City of Indio*,³²¹ the courts found that unreasonable delay by the state in instituting its condemnation proceedings deprived the property owners of all of their development rights in commercially zoned properties, thereby rendering the restricted properties unmarketable.³²² In sum, the courts were willing to segment the denominator, moving away from a parcel as a whole approach, when they perceived government as essentially attempting to take property from a constitutional perspective but without the formal process of condemnation and payment of just compensation.³²³

First, in *Diversified Properties*, the property owner, Diversified Properties Co. ("DPC"), purchased more than 17 acres of land in fee simple for commercial development.³²⁴ Prior to completing the purchase, DPC was aware that the state had designated part of the land for a possible freeway right of way.³²⁵ A total of 4.5 acres were set aside to accommodate the state's future highway plans.³²⁶ The court found a *Lucas* taking resulting from the city's decision to block the development of the 4.5 acres until the state finalized its highway plans.³²⁷ Affirming the trial court's ruling, the

318. See *supra* Part III.

319. See *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 320-21 (2002) (rejecting a categorical rule that "the mere enactment of a temporary regulation that, while in effect, denies a property owner all viable economic use of her property gives rise to an unqualified constitutional obligation to compensate her for the value of its use during that period" and concluding that the *Penn Central* framework was the appropriate framework for analyzing the case); see also *supra* Part II.D.3 (discussing the "denominator question" found in the *Penn Central* framework).

320. See generally *People ex rel. Dep't of Transp. v. Diversified Props. Co. III*, 17 Cal. Rptr. 2d 676 (Cal. Ct. App. 1993).

321. See generally *Jefferson St. Ventures, LLC v. City of Indio*, 187 Cal. Rptr. 3d 155 (Cal. Ct. App. 2015).

322. See generally *id.*; *Diversified Props.*, 17 Cal. Rptr. 2d 676.

323. See generally *Jefferson St. Ventures*, 187 Cal. Rptr. 3d 155; *Diversified Props.*, 17 Cal. Rptr. 2d 676.

324. *Diversified Props.*, 17 Cal. Rptr. 2d at 678.

325. *Id.*

326. *People ex rel. Dep't of Transp. v. Diversified Props. Co. III*, 17 Cal. Rptr. 2d 676, 679 (Cal. Ct. App. 1993).

327. *Id.*

court of appeals said that the state “sat back” while the City, through use of its development restrictions, “bank[ed]” DPC’s property “presumably so that the State could, at a later date, condemn the subject property in an undeveloped (and, consequently, less costly) condition.”³²⁸

Second, in *Jefferson Street Ventures, LLC v. City of Indio*, the court found a *Lucas* taking of 11 acres of a 26.85-acre parcel when the City conditioned approval of the property owner’s application for development of a shopping center upon the owner “leaving approximately one-third of [the] property undeveloped [in order] to accommodate the reconstruction of a major freeway interchange that was in the planning stages.”³²⁹ The City could not acquire the property at the time of Jefferson’s application because it did not have the money.³³⁰ City staff explained to Jefferson during the application process that it would not approve development of the portion of the site designed for the freeway interchange because if the site were later taken for the interchange, “the City would incur additional costs” if it were developed as opposed to undeveloped.³³¹ Applying the reasoning of the *Diversified Properties* holding, the court said that this type of “banking” of property that was otherwise commercially viable and developable so that it could be condemned in the future at a cheaper price constituted a de facto taking that occurred prior to the direct condemnation and deprived the owner of the ability to obtain any economic value from the property.³³²

In both cases, the government’s decision to “bank” a portion of the owner’s total acreage was enough for the courts to essentially treat those banked portions as separate when applying the whole parcel analysis.³³³ So, the *Lucas* taking analysis occurred in the context of the banked acreage constituting the relevant parcel, the denominator, as the courts considered what value remained after the regulatory impact.

In the last two cases, *Monks v. City of Rancho Palos Verdes*³³⁴ and *Brost v. City of Santa Barbara*,³³⁵ the courts hewed closely to common-law nuisance principles in finding *Lucas* takings where governments imposed building moratoria that prohibited construction on residentially zoned property under the rationale that the properties were unstable because they were located in landslide areas.

In the first case, *Monks v. City of Rancho Palos Verdes*, the court found a *Lucas* taking where the government imposed a construction moratorium on 16 vacant lots located near where landslides had recently occurred.³³⁶ The properties were zoned for residential use, utilities including a sewer system had been installed, and the court

328. *Id.* at 682.

329. *Jefferson St. Ventures, LLC v. City of Indio*, 187 Cal. Rptr. 3d 155, 161 (Cal. Ct. App. 2015).

330. *Id.*

331. *Id.* at 162.

332. *Id.* at 176–78.

333. *See id.* at 178 (“[I]n this case, it is the City that has divided the Property into discrete segments.”).

334. *See generally* *Monks v. City of Rancho Palos Verdes*, 84 Cal. Rptr. 3d 75 (Cal. Ct. App. 2008).

335. *See generally* *Brost v. City of Santa Barbara*, No. B246153, 2015 WL 1361196 (Cal. Ct. App. Apr. 21, 2015).

336. *Monks*, 84 Cal. Rptr. 3d at 80.

agreed with the trial court that, at best, there was remaining uncertainty about the area's stability.³³⁷ Finally, the court found that the intended use of the vacant lots to build homes was not a common-law nuisance. According to the court, common-law nuisance principles rarely support prohibiting uses of land that are "essential."³³⁸ After engaging in a lengthy discussion of the government's nuisance argument, the court concluded that given the differing and, at times, conflicting views offered in the various reports and expert witness testimonies, it could not reach a definitive finding on the stability and safety factor.³³⁹ Absent such a definitive finding, the government failed to meet its burden of proof under *Lucas* and under state nuisance law.³⁴⁰

Finally, the California Court of Appeals in *Brost v. City of Santa Barbara* affirmed the lower trial court's finding of a *Lucas* taking when the City of Santa Barbara refused to amend Chapter 22.90 of its municipal code, permanently enjoining the plaintiffs from rebuilding their homes after being destroyed by the 2008 Tea Fire.³⁴¹ Chapter 22.90 permanently enjoined construction on land that was located entirely within Slide Mass C, an active landslide area.³⁴² The court of appeals affirmed the trial court's finding of a *Lucas* taking and rejected the state-law nuisance defense raised by the government.³⁴³ In doing so, the court of appeals said that the City's argument that the plaintiffs' development of their lots would cause significant harm to property or persons was undercut by the fact that owners of existing homes were allowed to remain in their homes and to repair damage to those homes caused by earth movement.³⁴⁴

One reading of *Monks* and *Brost* is that courts will insist on concrete evidence of actual harm and not merely speculative evidence of possible harm before they would apply the *Lucas* nuisance defense. Absent this type of concrete evidence, courts will be unwilling to find that building homes on residentially zoned property was a common-law nuisance.

IV. IMPLICATIONS

Having identified the successful *Lucas* cases and their foundational underpinnings, we consider *Lucas's* implications for the future and why *Lucas* matters. First, we discuss the jurisprudential implications of *Lucas*, focusing on lessons learned from our empirical study. Then we turn to *Lucas's* practical implications—how the case has transformed land use transactions between governments and property owners and the case's continuing influence on land use litigation.

337. *Id.* at 98.

338. *Id.* at 107-08.

339. *Id.* at 110.

340. *Monks v. City of Rancho Palos Verdes*, 84 Cal. Rptr. 3d 75, 110 (Cal. Ct. App. 2008).

341. *Brost v. City of Santa Barbara*, No. B246153, 2015 WL 1361196, at *8-9 (Cal. Ct. App. Apr. 21, 2015). Plaintiffs' lots were zoned for residential purposes. *Id.*

342. *Id.* at *8.

343. *Id.* at *12.

344. *Id.* at *10-11.

A. JURISPRUDENTIAL IMPLICATIONS

As we think about the winning *Lucas* cases in terms of prospective unique lessons, many of them are special circumstances cases in which an intervening act or situation enabled the successful *Lucas* takings claim. To be clear, there is no indication that these changes in circumstances or other limitations in ownership, operation, and use were strategic by the property owners for the purpose of improving the odds of a *Lucas* claim. And, in fact, the federal court in *Lost Tree* recently expressed doubt about the plausibility and likelihood that property owners would find strategies to manipulate the denominator and improve the likelihood of a *Lucas* taking.³⁴⁵ The court agreed with *Lost Tree*'s assertion "that '[i]n the real world, real estate investors do not commit capital either to undevelopable property or to long, drawn-out, expensive and uncertain takings lawsuits.'"³⁴⁶

Famously, the United States Claims Court stated in *Ciampitti v. United States* that

[t]he effect of a taking can obviously be disguised if the property at issue is too broadly defined. Conversely, a taking can appear to emerge if the property is viewed too narrowly. The effort should be to identify the parcel as realistically and fairly as possible, given the entire factual and regulatory environment.³⁴⁷

So, the federal courts have been clear that intentional efforts by property owners to manipulate their denominators are not to be countenanced.³⁴⁸

First, when it comes to the nuisance abatement cases, we can conclude that despite the apprehension about statutory nuisances that can be read into the *Lucas* majority opinion,³⁴⁹ subsequent courts and scholars seem to have accepted that the decision is not limited to common-law nuisances.³⁵⁰ The state courts' discussions of these statutory nuisance abatement cases, in the successful *Lucas* challenges, emphasize the breadth of the application of the nuisance statute (the extent to which non-nuisance activities are also prohibited) and the bona fides of the property owners.³⁵¹ The more the abatement statutes prohibited legal uses and the greater the bona fides of the owners, the more likely courts were to find the nuisance defense inapplicable to the *Lucas* takings claim.³⁵² Still, these nuisance abatement and *Lucas* exception cases are likely outliers and hold little precedential value because of the

345. *Lost Tree Vill. Corp. v. United States*, 787 F.3d 1111, 1118 (Fed. Cir. 2015).

346. *Id.*

347. *Ciampitti v. United States*, 22 Cl. Ct. 310, 318-19 (1991).

348. *Id.*

349. *See supra* Part II.A.

350. *See, e.g.*, Michael C. Blumm & Lucus Ritchie, *Lucas's Unlikely Legacy: The Rise of Background Principles as Categorical Takings Defenses*, 29 HARV. ENVTL. L. REV. 321, 331-33 (2005); *see supra* Part III.A.

351. *See supra* Part III.A.

352. *See supra* Part III.A.

Supreme Court's temporary takings jurisprudence that developed subsequent to the nuisance abatement cases.

Second, the private agreements and denominator case winners were able to shrink or limit the denominators in their takings fraction—sometimes through sheer luck, sometimes through sound business and development models, sometimes because of government fiat—so that the numerator and denominator were equal.³⁵³ While the role of private agreements in establishing the relevant denominator in the *Lucas* takings equation is unsettled in the state and federal courts,³⁵⁴ what is clear is that the denominator matters and courts have been willing to honor private property owners' restrictions on their property interests when ascertaining the denominator for *Lucas* takings purposes.

We suggest that *Lucas* has become the Higgs boson³⁵⁵ of takings law as it applies to the denominator issue. We know it exists and has had a discernable impact on judicial decision-making and perhaps more importantly, on strategies employed by landowners and developers; however, we still struggle to understand all that lies behind the decision. What seems somehow embedded in these successful private agreements and denominator *Lucas* cases are intentional or unintentional actions by property owners or accidents of ownership, laws and public regulation, that made the denominator in the takings fraction smaller and, in so doing, enabled courts to find a categorical *Lucas* taking. The most recent example is *Love Terminal Partners*, in which the federal court expressly accounted for the use limitations in the privately negotiated master lease in the first instance when determining the denominator and undertaking the *Lucas* takings analysis and then secondarily, in the just compensation analysis.³⁵⁶

Third, the pyramidal segmentation and public law impact winners' success can be attributed to two factors. The properties in this category were zoned in some of the least intensive use classifications on the Euclidean zoning pyramid, and government decision-makers refused to reasonably exercise their zoning and planning discretion to simultaneously protect the integrity of the community and neighboring lands while also leaving property owners with more than a pittance of value.³⁵⁷ These cases give life

353. See *supra* Part III.B; *infra* Appendix.

354. See Dwight H. Merriam, *Rules for the Relevant Parcel*, 25 U. HAW. L. REV. 353, 385 (2003); *supra* Part III.B.

355. Adam Mann, *Higgs Boson Gets Nobel Prize, But Physicists Still Don't Know What It Means*, WIRED (Oct. 8, 2013, 3:54 PM), <http://www.wired.com/2013/10/higgs-nobel-physics>.

More than a year ago, scientists found the Higgs boson. This morning, two physicists who 50 years ago theorized the existence of this particle, which is responsible for conferring mass to all other known particles in the universe, got the Nobel, the highest prize in science.

For all the excitement the award has already generated, finding the Higgs—arguably the most important discovery in more than a generation—has left physicists without a clear roadmap of where to go next.

Id.

356. See generally *Love Terminal Partners v. United States*, 126 Fed. Cl. 389 (2016).

357. See *supra* Part III.C; *infra* Appendix.

to Justice Rehnquist's dissent in *Penn Central Transportation Co. v. New York City*,³⁵⁸ which serves as a useful framework for understanding these successful *Lucas* cases. In his *Penn Central* dissent, Justice Rehnquist conceptualizes regulatory takings in terms of nonconsensual servitudes.³⁵⁹ He cites earlier Supreme Court precedent that in the non-noxious use setting "[p]roperty is taken in the constitutional sense when inroads are made upon an owner's use of it to an extent that, as between private parties, a servitude has been acquired."³⁶⁰ The burden is unique to the property owner and not offset by similar burdens, the so-called average reciprocities of advantage, placed upon a broad group of similar properties.³⁶¹

Finally, for the delay theory winners, government error in exercising its eminent domain powers or in meeting its burden of proof on the nuisance defense made the *Lucas* claims.³⁶² Bad faith on the part of government in delaying the exercise of its power of eminent domain is a hallmark of the cases in this category as well. The lesson to be learned from the delay theory cases is that failures in government decision-making can be the immediate precipitant of the *Lucas* taking. These cases are factually unique and the property owners' *Lucas* successes can be attributed almost entirely to failures in decision-making by government.³⁶³

Twenty-five years after the *Lucas* decision, articulating the denominator remains fact-intensive, uncertain, and variable. And, as long as the answer to the denominator question remains the key to measuring economic impact, the *Lucas* decision retains a centrality in takings jurisprudence that is perhaps unexpected if measured solely by the scarcity of successful *Lucas* challenges. *Lucas* incentivizes a struggle over the denominator question because the upside for property owners is significant: if the property owner wins, the property owner gets out from under the murky balancing test of *Penn Central*. And for this reason, the denominator question that *Lucas* pushes to the forefront makes the *Lucas* case important for not only the *Lucas* takings question but for *Penn Central* as well because economic impact is a central question under both tests.

B. PRACTICAL IMPLICATIONS

The United States Supreme Court heard oral argument on March 20, 2017, in *Murr v. Wisconsin*, a regulatory takings case that shines a spotlight on the parcel as a whole rule and the relevant-parcel question.³⁶⁴ The issue before the Court is whether contiguous parcels under common ownership should be treated as a single parcel for regulatory takings analysis, as was addressed by the United States Court of Appeals for

358. See generally *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104 (1978).

359. *Id.* at 143 (Rehnquist, J., dissenting).

360. *Id.* at 146 (quoting *United States v. Dickinson*, 331 U.S. 745, 748 (1947)).

361. *Id.* at 146-47.

362. *Supra* Part III.D.

363. *Supra* Part III.

364. See generally *Murr v. State*, No. 2013AP2828, 2014 WL 7271581 (Wis. Ct. App. Dec. 23, 2014), *review denied*, 366 Wis.2d 59 (Wis. 2015), *cert. granted*, 136 S. Ct. 890 (2016).

the Federal Circuit in *Lost Tree*.³⁶⁵ No one knows how much or how little guidance the Court will provide on this critical question. One knowledgeable commentator believes, based on what he heard at oral argument, there is a chance the Court will come up with a multifactor test.³⁶⁶ Regardless, *Murr v. Wisconsin* may impact the future viability of the *Lucas* claim and of government liability for regulatory takings more generally, for the reasons discussed in this Article.

As discussed above, we are perhaps standing in the forefront of a changing landscape—a shift in theorizing about how to construct the denominator in the takings equation. An implication of the changing landscape is that property owners may be more willing to try to make the *Lucas* claim than if they just considered the numbers. This is as opposed to seeing the *Lucas* claim as a type of second-class legal theory with little chance of success that is thrown into the takings mix after the *Penn Central* analysis has been thoroughly developed. The real news is that the *Lucas* winners and losers indicate that property owners retain an almost surprising amount of control in protecting their property rights, in ways we may not have expected. The most interesting part is the extent to which courts truly are open to legitimate efforts to protect those property rights. The *Lucas* losers and winners highlight two essential takeaways for practitioners.

First, establishing the regulated parcel as a separate economic unit from the larger property owners' holdings is critical to a winning *Lucas* strategy. Every plaintiff's attorney is trying desperately to get out from under the *Penn Central* analysis, or at least ought to be, because of the unpredictability of *Penn Central's* ad hoc approach and because property owners are at a dramatic disadvantage under *Penn Central*.³⁶⁷ While property owners rarely win on their *Lucas* challenges, the benefit of successfully articulating the *Lucas* categorical claim is that once an owner gets within the four corners of *Lucas*, as small a landscape as it is, the only question is how much compensation must be paid. For litigators, their lives will be made easier and they will appreciate every bit of what transactional attorneys do in the acquisition and development of real property to assist in making a winning case for reducing the denominator. Litigators need to frame their claims in ways that couch the denominator in the ways we described in this Article. Nevertheless, all litigators are limited by the facts presented to them. For example, the choice of what to acquire—fee simple or only leasehold; surface and subsurface estates; or only mineral estates—will go a long way toward making or breaking the litigator's *Lucas* claim.

Second and relatedly, courts are willing to consider private ordering in constituting the denominator as long as the ordering is predicated upon what the

365. *Murr v. Wisconsin*, No. 15-214 (U.S. argued Mar. 20, 2017).

366. Ilya Somin, *Thoughts on the Oral Argument in Murr v. Wisconsin*, WASH. POST: VOLOKH CONSPIRACY (Mar. 20, 2017), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/03/20/thoughts-on-the-oral-argument-in-murr-v-wisconsin/?utm_term=.e1ac0371ddab.

367. F. Patrick Hubbard et al., *Do Owners Have a Fair Chance of Prevailing Under the Ad Hoc Regulatory Takings Test of Penn Central Transportation Company?*, 14 DUKE ENVTL. L. & POL'Y F. 121, 141-44 (2003).

courts believe to be a legitimate factual basis.³⁶⁸ Owners need to have rationally treated the regulated parcel as a separate economic interest from the owners' larger holdings. This suggests that compartmentalization or separation of one's development plans and strategies may make sense from the start. In other words, it is never too early to think about protecting property interests from regulatory takings. The key to solving the mystery of the successful *Lucas* claim is to look behind the denominator to find the common denominator, and that may be the public or private law structuring that facilitates or even mandates segmentation. In an area where the law is so unclear, owners have a chance of winning by seriously making the *Lucas* takings claim because it is not clear that they should lose.

Earlier in this Article, we discussed the many ambiguities that abound in *Lucas's* wake.³⁶⁹ Analysis of the winning *Lucas* cases reveals that the property owners in those cases frequently won because they were able to play to these lingering ambiguities and uncertainties surrounding the *Lucas* rule, the exceptions to the rule, and the denominator question. In these *Lucas* winners, perhaps we see, albeit modestly, some "efforts to rehabilitate the Takings Clause as a limit on government action in the teeth of an unbroken line of cases upholding state land use regulation."³⁷⁰ What is interesting is how the law has evolved in the 25 years since *Lucas* was decided and without much guidance from the *Lucas* Court. Even though *Lucas* set out a categorical rule, the rule is so fact-intensive that the gravitational pull is back toward the *Penn Central* weighing. What does this say about the law? It says that the law is resistant to a categorical rule. It is just as resistant to a compensable taking post-*Lucas* as it was pre-*Lucas*.

V. CONCLUSION

The answer to why *Lucas* matters given so few *Lucas* successes lies in *Lucas's* contribution to the denominator question. Many thought the denominator question was resolved when the Supreme Court first articulated the parcel as a whole rule in *Penn Central* but the question was clearly not resolved as courts and property owners alike continue to think about and litigate around the proper resolution of the denominator in the regulatory takings equation.

Lucas's impact is understated if one focuses exclusively on the successful *Lucas* cases, which are few, because most takings cases proceed under the *Penn Central* analysis.³⁷¹ Even as the *Lucas* Court announced the categorical takings rule, it predicted that the categorical rule would apply in "relatively rare situations"³⁷² and only under the most "extraordinary circumstance[s]."³⁷³ Our review of all of the reported regulatory takings cases affirm that prediction.

368. *Supra* Part III.B.

369. *Supra* Part II.C.

370. Epstein, *supra* note 201, at 956.

371. *Home v. Dep't of Agric.*, 135 S. Ct. 2419, 2437 (2015) (Sotomayor, J., dissenting).

372. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1018 (1992).

373. *Id.* at 1017.

Successful *Lucas* challenges often have involved special circumstances in which an intervening act or event sets up the *Lucas* taking by reducing the denominator in the takings equation, offering a new perspective on these “extraordinary circumstances.” We contend *Lucas’s* significance is in its impact on how best to resolve the denominator issue for both *Lucas* and *Penn Central* cases. A favorable resolution of the denominator issue is the loadstar for every regulatory takings claim brought under *Lucas* or *Penn Central*, which will capture the majority of regulatory takings challenges. In the end, only by understanding how *Lucas* works in practice, and why, can we understand what the true significance of *Lucas* really is—a matter of importance for theory and practice alike.

Appendix
Successful *Lucas* Cases

The Nuisance Abatement Cases, The *Lucas* Exception

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|---|
| City of Seattle v. McCoy, 4 P.3d 159 (Wash. Ct. App. 2000) |
| City of St. Petersburg v. Bowen, 675 So. 2d 626 (Fla. Dist. Ct. App. 1996) |
| Keshbro, Inc. v. City of Miami, 801 So. 2d 864 (Fla. 2001). Two consolidated cases, only one was found to be a <i>Lucas</i> taking. |
| State <i>ex rel.</i> Pizza v. Rezcallah, 702 N.E.2d 81 (Ohio 1998) |

Private Agreements and the Denominator

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|---|
| Love Terminal Partners v. United States, 126 Fed. Cl. 389, 440 (2016), <i>appeal docketed</i> , No. 16-2276 (Fed. Cir. Jun. 30, 2016). |
| Bowles v. United States, 31 Fed. Cl. 37 (1994) |
| Loveladies Harbor, Inc. v. United States, 28 F.3d 1171 (Fed. Cir. 1994), <i>abrogated by</i> Bass Enters. Prod. Co. v. United States, 381 F.3d 1360 (Fed. Cir. 2004). |
| State <i>ex rel.</i> R.T.G., Inc. v. State, 780 N.E.2d 998 (Ohio 2002) |
| Vulcan Materials Co. v. City of Tehuacana, 369 F.3d 882 (5th Cir. 2004) |
| Ala. Dep't of Transp. v. Land Energy, Ltd., 886 So. 2d 787 (Ala. 2004) |
| Chapel Hill Title & Abstract Co. v. Town of Chapel Hill, 669 S.E.2d 286 (N.C. 2008) |
| Lost Tree Village Corp. v. United States, 707 F.3d 1286 (Fed. Cir. 2013), <i>aff'd</i> 787 F.3d 1111 (Fed. Cir. 2015) |

Pyramidal Segmentation and Public Law Impact

| |
|---|
| State <i>ex rel.</i> Greenacres Found. v. City of Cincinnati, 56 N.E.3d 335 (Ohio Ct. App. 2015) |
| City of Sherman v. Wayne, 266 S.W.3d 34 (Tex. App. 2008) |
| Del Monte Dunes at Monterey, Ltd. v. City of Monterey, 95 F.3d 1422 (9th Cir. 1996), <i>aff'd</i> , 526 U.S. 687 (1999) |
| Dunlap v. City of Nooksack, No. 63747-9-I, 2010 WL 4159286 (Wash. Ct. App. Oct. 25, 2010). |
| Moroney v. Mayor of Old Tappan, 633 A.2d 1045 (N.J. Super. Ct. App. Div. 1993) |
| Galleon Bay Corp. v. Bd. of Cty. Comm'rs, 105 So. 3d 555 (Fla. Dist. Ct. App. 2012) |
| Steel v. Cape Corp., 677 A.2d 634 (Md. Ct. Spec. App. 1996) |
| Keeler v. Mayor of Cumberland, 940 F. Supp. 879 (D. Md. 1996) |
| Lopes v. City of Peabody, No. 139663, 1995 WL 17215782 (Mass. Land Ct. March 31, 1995) |
| United States v. Hardage, No. 93-6099, 1993 WL 207380 (10th Cir. June 9, 1993) |
| Heapy v. State, No. 03-45407-AA, 2004 WL 5573602 (Mich. Cir. Ct. April 28, 2004) |
| Ali v. City of Los Angeles, 91 Cal. Rptr. 2d 458 (Cal. Ct. App. 1999) |

Delay Theory

| |
|---|
| People <i>ex rel.</i> Dep't of Transp. v. Diversified Props. Co. III, 17 Cal. Rptr. 2d 676 (Cal. Ct. App. 1993) |
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| Jefferson St. Ventures, LLC v. City of Indio, 187 Cal. Rptr. 3d 155 (Cal. Ct. App. 2015) |
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| Monks v. City of Rancho Palos Verdes, 84 Cal. Rptr. 3d 75 (Cal. Ct. App. 2008) |
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| Brost v. City of Santa Barbara, No. B246153, 2015 WL 1361196 (Cal. Ct. App. Apr. 21, 2015) |
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SWORD AND SHIELD

*A Practical approach to
Section 1983 Litigation*

FIFTH EDITION


AMERICAN BAR ASSOCIATION
State and Local
Government Law Section

Mary Massaron and
Josephine A. DeLorenzo
Editors

Chapter 8

The Taking of Private Property

Dwight Merriam

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In this chapter we consider the taking of private property for a public use or purpose under the U.S. Constitution and state constitutions. It is helpful in understanding the issues to provide some categorization.

I. A TAKINGS TAXONOMY

A. Direct and Indirect Takings

First, there are direct and indirect takings. Direct takings are through the process of eminent domain, sometimes also called condemnation, where the government uses its inherent sovereign power to acquire private property, acknowledges its obligation to provide just compensation for it, and devotes the property to a public use or purpose. The power to do this under the federal Constitution is impliedly recognized in just 12 words of the Fifth Amendment: “nor shall private property be taken for public use, without just compensation.”¹ Most state and local governments are subject to similar provisions in state constitutions. California’s constitution, for example, provides: “Private property may be taken or damaged for public use only when just compensation, ascertained by a jury unless waived, has first been paid to, or into court for, the owner.”²

Federal, state, and local governments all have the power of eminent domain, either by virtue of their sovereign natures, or by delegation. Public utilities, like the electric, gas, and telephone companies,³ are often delegated with governmental-like eminent domain powers and they too can take private property for public use when paying just compensation. The most significant issues involving direct takings through eminent domain are focused on whether the government’s taking is for a public use or purpose, and whether the compensation provided is “just.”

The U.S. Supreme Court addressed the question of public use or purpose most recently and dramatically in the notorious case of *Kelo v. New London*,⁴ in which the Court upheld the direct condemnation of Suzette Kelo’s “little pink house”⁵ and those of her neighbors and neighborhood businesses to assemble land to turn over to a private developer for redevelopment. Was it possible to take private property from an individual, even though you pay her just compensation, and flip it to a developer with the

hope that it will improve the local economy? The Court answered that in the affirmative—concluding that it would not deem such “economic development” takings unconstitutional as a matter of law, but leaving open the possibility that some of these cases may present facts that reveal an unacceptable level of private benefit—following precedent dating back half a century, but precipitating an outcry that resulted in 44 states amending their eminent domain laws by statute, regulation, and the adoption of new policies.⁶

There is sometimes confusion over the term “condemnation.” Government may condemn buildings to protect public health and safety when they become uninhabitable, such as when severely blighted or following a major fire. There, the government is not using its eminent domain power when it “condemns” a building in that way and it is not obligated to pay compensation because it is not acquiring property. Instead, it is exercising its police powers to protect the public health, safety, or welfare. It does not come into possession of the property, but it does preclude others from occupying it or using it. Condemnation in the eminent domain sense is different. When government uses its condemnation power to take ownership, it acquires all or part of the owner’s property interest, provided the acquisition is for some public benefit, *and* the government provides payment.

The other type of taking, which is the focus of this chapter, is indirect. It is sometimes called “inverse condemnation” because it is the inverse of the direct condemnation that comes with eminent domain, inverse in that the government has not recognized that it is acquiring property, nor does it acknowledge any obligation to provide compensation. Such claims usually arise in two major contexts: physical invasions and seizures, or “regulatory takings.” In invasions, the owner is ousted from possession by some event (the most common being government-induced flooding). In regulatory takings, the owner claims her use of property has been prohibited by the government’s regulations. Both claims are based on the notion that from the owner’s perspective, these events are the equivalent of an affirmative or direct taking by eminent domain, and, thus, just compensation must be provided.

With direct takings through eminent domain there is a statutory process with definitive steps. Though the federal law and state laws vary in

important respects, the general principles are the same. Government identifies the property it wants to take for a public use or purpose, such as a highway widening. The government notifies the property owner that the taking will occur and an offer of just compensation is often made. In some states the government may simply transfer title to the property while negotiations are ongoing over the amount of the just compensation. The title transfers and the property owner is left to sue the state for the compensation he believes is just, beyond what was offered and deposited in court on the property owner's behalf. In other states, the just compensation issue must be resolved before the government takes title. In all instances, there may be a dispute over whether the government's intended use is a public use or for a public purpose.

In inverse condemnation, however, an offer of just compensation is not made because the government has not recognized that it has "taken" property at all. The property owner is left to seek that compensation, typically through litigation, which litigation is very often brought under 42 U.S.C. § 1983 and grounded in an alleged violation of the Fifth Amendment requiring just compensation when the government takes property. When we use the term "the takings issue," we are most often referring to inverse condemnation, the taking of private property by the government without an offer of payment.

B. Takings by Overregulation

But in what way might the government take private property without even considering offering just compensation? Here we need more categorization to find our way to a fuller understanding of how the Fifth Amendment protects private property and imposes the obligation on the government to pay just compensation.

1. *Physical Takings by Regulation*

Indirect takings may be physical invasion or regulation alone. If the state highway department in widening the highway comes onto private property, regrades the area, paves it, and opens it to public access, there is a permanent physical invasion taking. Such physical invasions are per se takings. The compensation analysis is simple. If there is a per se taking, the only

question is how much is the just compensation. There is no subjective, multi-part analysis as in some other types of takings.

There are few hardline rules in this area. A *temporary* physical invasion might not be a taking, however. One of the areas where there is still some uncertainty is what happens when government dams water or releases water such that private property is physically invaded by the water? Can flooding cause a physical taking subject to compensation or is it merely a temporary taking and thus not compensable? In *Arkansas Game & Fish Commission*,⁷ the U.S. Supreme Court rejected the government's argument that a temporary physical invasion could never result in an obligation to pay compensation, and held that the release of water and resultant temporary flooding causing the destruction of trees could be compensable, even though the flooding was periodic and not permanent.

With climate change, there has come litigation over flood control retaining the water behind dams and levees causing upstream flooding or releasing large amounts of detained water to prevent the potential catastrophic failure of dams and levees, which releases have destroyed downstream properties. Are these temporary flooding events takings and compensable? Decisions have gone both ways, but they portend more litigation.⁸

Some per se physical invasion takings are more subtle and nuanced, perhaps not readily recognized as such. One of the best-known per se physical invasion-by-regulation takings cases—you will find it in every land use law casebook—is *Loretto v. Teleprompter Manhattan CATV Corp.*⁹ Jean Loretto purchased an apartment building in New York City in 1971 and discovered that her predecessor had allowed the cable company to run cables across and into her building to serve her tenants and others on down the line. After she purchased, the cable company sought to install more wiring and a junction box, the size of a shoebox, on her roof. She sued, claiming a permanent physical invasion taking by reason of the state's regulation allowing the cable company to install that wiring and box.

The U.S. Supreme Court held that “a permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve. Our constitutional history confirms the rule, recent cases do not question it, and the purposes of the Takings Clause compel its retention.”¹⁰ *Loretto* illustrates the strength of the per se physical invasion

taking rule. That little box presumably benefitted her and her tenants, the government's interest in enabling others to have cable access was significant, and the "invasion" on the rooftop was of no apparent physical consequence. Still, no matter how small, it was a per se taking and compensable. Loretto won \$1 of just compensation on remand.¹¹

Then, there is a pair of cases, *Nollan*¹² and *Dolan*,¹³ loosely linked not only by rhyming but more importantly by their having an aspect of physical invasion by overregulation. While they are probably better characterized as unconstitutional conditions or due process cases, the regulations in both instances enabled a physical invasion. In *Nollan*, the California Coastal Commission imposed an easement along the beach as a condition of approval for replacement of a small beach house with a much larger home. The requirement to provide such access was held unconstitutional as not enabled by state statute. In the *Dolan* case, as a condition of expanding a plumbing supply store, the Dolans were required to dedicate a bicycle path at the edge of their property along a creek, supposedly as a traffic mitigation measure, though the joke became no one has ever seen somebody leaving a plumbing supply store with a bathtub on the back of their bicycle. Justice Scalia during the oral argument offered: "There are a lot of bike paths around Washington, and I've never seen people carrying shopping bags on their bikes."¹⁴

Regardless, as with the *Nollan* case, the conditional approval failed, though not because the enabling statute did not allow a condition but because the condition had no essential nexus in mitigating the traffic impact of the store's expansion. Some people consider both *Nollan* and *Dolan* to be physical invasion taking cases, but as noted they might be more properly characterized as cases of involving unconstitutional conditions. They still serve as excellent illustrations of indefensible regulation and both could have turned on the permanent physical invasion without compensation.

The most recent U.S. Supreme Court case of a permanent physical invasion taking by regulation is *Knick v. Township of Scott*.¹⁵ There, Mary Rose Knick was subjected to a local ordinance requiring her to open her property during the day for anybody to come on it who wanted to look at some old gravesites there. The case ultimately turned on the preliminary question of

whether it was ripe for adjudication. The Court held it was ripe. *Knick* is another good example of where regulation may result in a per se taking.

2. *Categorical Regulatory Takings*

The permanent physical invasion per se taking is the easy one. Now the work begins with the two other types of regulatory takings, one that we call a partial regulatory taking, or a “*Penn Central* taking,”¹⁶ and the “categorical taking,” often labeled a “*Lucas* taking” after the case in which the idea found its way into takings jurisprudence.¹⁷ Neither the *Penn Central* partial regulatory taking nor the *Lucas* categorical taking involves physical invasions, but regulatory takings that result in a significant loss of use of property without compensation and as such are subject to challenge under the Fifth Amendment.

Let us dispense with the *Lucas* categorical taking first because it is akin in some respects to the physical invasion taking and also a bit of an outlier. You will not see many *Lucas* categorical takings because the Court’s test is very narrow. A recent study found that only about 1.6 percent of the *Lucas*-type claims ever prove successful.¹⁸ That is in part because the facts have to be extreme (property rendered economically useless or valueless) and many takings claims of all types are made as makeweight arguments piled onto ordinary zoning appeals, something to embellish them a bit, impress clients, and, hopefully, nudge the courts, usually to no avail. The fact is there are very few meritorious regulatory takings cases. The government mostly wins because of the difficult, subjective tests, as we will turn to shortly.

David Lucas was a developer who cashed out of his partnership by taking a couple of oceanfront lots near Charleston, South Carolina. The South Carolina Coastal Council, concerned about erosion in a few areas, prohibited some development in those areas, one of which included Lucas’s lots. He sued, claiming a regulatory taking, and the Coastal Council conceded that with the regulation there was no reasonable economic use remaining in the property. The U.S. Supreme Court based on those facts found the complete wipeout of value to be a categorical taking, the same as the permanent physical invasion taking like *Jean Loretto*’s and subject only to a determination of how much the compensation should be. Of course, there

was no physical invasion of Lucas's two lots, but because they were held to have been rendered valueless, they were treated the same as the permanent physical invasion.

3. *Partial Regulatory Takings*

The third and final type of regulatory taking, typical of the great majority of these challenges, is the partial regulatory taking, the *Penn Central* type. It can happen when the government regulates to the point where (1) the property value is severely diminished, (2) the reasonable investment-backed expectations of the property owner are adversely affected, and (3) the government is imposing an unfair burden on a private-property owner that properly should be paid for by the government, or the government's interest is insufficient to warrant regulation without compensation. Those considerations constitute the three-part test of *Penn Central*. First, is the diminution in economically beneficial use (or value¹⁹) so great that the regulation is the legal equivalent of a taking by an exercise of eminent domain, such that just compensation must be paid? That notion can be traced all the way back to the first U.S. Supreme Court decision regarding regulatory takings, *Pennsylvania Coal Co. v. Mahon*,²⁰ in which the Court held that regulation that "goes too far" effects a taking: "The general rule, at least, is that, while property may be regulated to a certain extent, if regulation goes too far, it will be recognized as a taking."

The perennial question is how far is too far and how much reduction in use or value is too much? There are no bright lines here and both property owners and the government have been frustrated all along on this issue. It is a broad spectrum. At one end of the continuum is a case like *HFH, Ltd.*²¹ where 80 percent of the property value was wiped out but no taking was found. At the other end of the continuum is *DeCook*, an airport approach overflights case where the diminution in value was a mere 3.5 percent or 6.14 percent, which the Minnesota Supreme Court found was enough for a compensable taking, though perhaps there is in the case an element of physical invasion and government enterprise that influenced the court.²² The takeaway is this: diminution in value, whatever value may mean, is the antithesis of a bright-line test.

II. MAKING TAKINGS CLAIMS

Now that we have an idea of the types of categories of takings—direct and indirect, and among the indirect takings, the physical invasion taking, the unusual *Lucas*-type categorical taking, and the *Penn Central* partial regulatory taking—we turn to the process by which challenges are brought.

A. The Very First Question to Ask

The very first question that must be asked and answered, and even experienced practitioners sometimes gloss over this, is whether what is being taken is a constitutionally protected property in the first instance.²³ Certainly, as in the case of *Rose Mary Knick*, allowing the public by regulation to freely enter private property is in derogation of the most fundamental property right, the right to exclude others.

But suppose there is potentially a partial regulatory taking based on the claim that the zoning requirement greatly restricting the development property has diminished the value of a contract to develop? Is that contract, by a developer to purchase and develop land, “property” protected by the U.S. or state constitution? It may not be. In *Kaiser Development Co. v. City & County of Honolulu*, the trial court considered the impact of a zoning amendment reducing development potential for property subject to a development agreement between the Bernice Pauahi Bishop Estate and Kaiser Hawaii Kai Development Co. to develop a new urban community: “In summary, the development agreement affords Kaiser the business opportunity to develop land at Hawaii Kai, including the priority right to lease land to build the first hotel. However, the agreement does not give Kaiser any protectable interest in the property it develops.”²⁴ Under Hawaii state law, the development agreement was not property.

B. The Relevant Parcel

In most takings cases, the property that is taken is sufficiently defined. It might be a single lot. However, the relevant parcel for determining whether there is a taking or not might extend to adjacent properties, even some in separate ownership, that are operated as a single, economic unit. It might

possibly include even properties that are not contiguous. It might include properties purchased long ago, and properties purchased after restrictive regulations were enacted. In considering property as a bundle of sticks, the relevant parcel might well include subsurface mineral rights, surface rights, airspace, and even the potential for transferring the development rights to other properties in the area or some distance away. Ask the question: what is the relevant parcel? It can make or break a takings case.²⁵

Once it is determined that there is a likelihood that a constitutionally protected property interest is at stake and the relevant parcel is clear, the claimant can proceed with the stepwise analysis, but only after considering the one astonishing governmental escape hatch that will cut off any taking claim.

C. The Police Power Exception

The police power is the power to promote and preserve the public's health, safety, and general welfare. It is the basis of land-use regulation, and all other public regulation that comes from the fundamental power of the state, granted to local governments through the enabling statutes and charters.

To protect the public, sometimes governments take actions that can wipe out private property but are protected from claims by the property owners as to constitutional takings because the police action is so entirely in the public interest. There have been dramatic examples over the years, from a convenience store destroyed by the police firing smoke bombs to drive a robber out of the store,²⁶ to the U.S. Army destroying a YMCA in Panama City, Panama.²⁷

The most recent case of its type has received wide publicity because of the dramatic facts and the finding of no taking by the Tenth Circuit Court of Appeals.²⁸ The Greenwood Village, Colorado, police were chasing an armed shoplifting suspect who took refuge in a suburban home at random to avoid capture. The standoff lasted 19 hours. The police and SWAT team used everything in their arsenal against the suspect, firing 40-millimeter rounds through the windows, throwing flash-bang grenades into the house, lobbing in tear gas bombs, blowing out the walls with explosives, and ultimately driving an armored vehicle through the doors.

In the end, the suspect was taken alive, but the house was destroyed. The city refused to pay the owner anything, other than \$5,000 for a temporary rental and an offset on the owner's insurance policy deductible. The owner sued for a taking. The case made its way ultimately to the Tenth Circuit, which held that the destruction of the private property was not compensable:

[W]hen the state acts pursuant to its police power, rather than the power of eminent domain, its actions do not constitute a taking for purposes of the Takings Clause. And we further hold that this distinction remains dispositive in cases that, like this one, involve the direct physical appropriation or invasion of private property.²⁹

Of the same genre are the firebreak cases in which no compensation is paid when private property is destroyed to stop fire from spreading. The same has been held in cases involving the destruction of crops to eradicate disease. Motels that are places of prostitution and drug dealing have been shut down for extended periods without the owners being able to claim compensation under the same theory of police power police action to protect the public. These cases, though somewhat rare, do occur. The police action defense may be useful for government and may present a bar to takings claims by property owners.

The minority rule, for example in Alaska and Florida state courts, and the Federal Circuit, is that police power necessity is a governmental affirmative defense, and the government has the burden to prove the measures taken were essential in protecting property.³⁰

D. Jurisdiction of the Court

It starts with getting into the courthouse. Does the court have jurisdiction? Most takings cases are brought under 42 U.S.C § 1983, covered extensively elsewhere in this book.³¹ Both federal and state courts have jurisdiction over § 1983 claims and most takings claims are brought as federal constitutional claims under the Fifth Amendment. The federal courts may abstain from deciding cases that combine typical land-use appeals with federal constitutional claims. On the other hand, the federal courts may take pendent jurisdiction over certain claims that might otherwise be tried in state courts.

A federal district court recently described ancillary and pendent jurisdiction principles in an inverse condemnation case:

Federal courts follow the principles of ancillary and pendent jurisdiction, under which a court's original jurisdiction over a federal claim "carries with it jurisdiction over state law claims that 'derive from a common nucleus of operative fact,' such that the relationship between the federal claim and the state claim permits the conclusion that the entire action before the court comprises but one constitutional 'case.'" *City of Chicago v. Int'l Coll. of Surgeons*, 522 U.S. 156, 164–65 (1997) (quoting *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 725 (1966)). These principles have been codified under a single "supplemental jurisdiction" statute at 28 U.S.C. § 1367. Under that statute, "in any civil action of which the district courts have original jurisdiction," district courts have supplemental jurisdiction "over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy" under Article III of the Constitution. 28 U.S.C. § 1367(a).

Supplemental jurisdiction is discretionary, however, and § 1367 reflects this discretion. Accordingly, a federal court may decline to exercise supplemental jurisdiction over a claim if 1) "the claim raises a novel or complex issue of State law," 2) "the claim substantially predominates over the claim or claims" subject to the district court's original jurisdiction, 3) "the district court has dismissed all claims over which it has original jurisdiction," or 4) "in exceptional circumstances, there are other compelling reasons for declining jurisdiction." *Id.* § 1367(d)(1)–(4).³²

Abstention and pendent jurisdiction have been issues all along, but are made more important as a consequence of the *Knick* decision, as described above and further addressed below.

Jurisdiction of the court also extends to the statute of limitations. Section 1983 statutes of limitations are generally those for tort actions as determined by the states. They vary from state to state and the character of the government's action may determine the running of the statute.

E. Vested Rights

As noted previously, it is important that the interest that is claimed to have been taken is property subject to constitutional protection. That requires that the interest in the property be vested as of the date of the alleged taking. A contract purchaser, for example, might not have a vested interest depending upon the state and the nature of the deal. Critically important in most cases in determining vested rights are the investment-backed expectations of the claimant. Is there evidence of sufficient investment either in absolute or relative terms, reasonably related to furthering the economic objectives of the property owner? If the answer is no, then there can be no taking because there was no protected property interest.

F. Challenge Based on State or Local Action

As noted above in considering the jurisdiction of the court, at this point in the analysis the court would need to determine if it will grant pending jurisdiction to claims that are state-based or whether it will abstain entirely from taking the case because the claim lacks any substantial federal basis.

G. The Nature of the Taking

This is where the understanding of the categories of physical invasion takings, *Lucas*-type categorical takings, and *Penn Central* partial regulatory takings comes into play because the analysis of the claim will necessarily follow one of three distinct paths.

1. *Physical Invasion Takings*

i. Causation

The initial question in these cases is whether the government's action caused the invasion or appropriation of the private property. The regulation in the *Knick* case, allowing the general public to visit Rose Mary Knick's property without limitation during daylight hours, was the result of government action.

Takings claims would probably not lie for a situation where a developer elected to take advantage of a density bonus provision for clustering development in return for providing an open space set aside with a conservation easement enabling some limited public access for passive recreation. While

there is an invasion here, it is part of an incentive regulation and voluntary with the property owner and thus not caused by the government.

ii. The Police Power Exception

As noted earlier, an important aspect of physical invasion takings is whether a police action was necessary to protect a critical public interest. If that is the basis for the invasion and appropriation, then there is no taking. Critical to this analysis is the duration or repetitiveness of the permanent physical invasion or appropriation, as in the flooding cases. A catastrophic storm event, for example, not reasonably forecast that results in occasional but infrequent flooding is not likely to be found to be the type of permanent invasion subject to payment of just compensation.

If the physical invasion, no matter how small, is indeed permanent, then it is a taking, as it was in the case of Jean Loretto and the shoebox-sized junction box on the roof of her apartment building. However, if the invasion or appropriation is infrequent, it still may be possible to proceed with a *Penn Central* partial regulatory taking claim applying the three-part test of that case.

iii. The Lucas Categorical Taking Variation

As noted, the *Lucas* categorical taking is largely an outlier. There are very few cases where no reasonable, beneficial use remains in the property, by any measure. *Lucas* claims may be made, like *Penn Central* partial regulatory takings claims, as mere appendages to otherwise routine land-use appeals. They become makeweight claims, designed to either intimidate the government into a speedy resolution or to comfort clients. Remember, with claims under § 1983, there is a companion attorneys' fees statute at § 1988 enabling recovery of attorneys' fees by successful plaintiffs in these cases based on constitutional and statutory violations. Thus, the § 1983 constitutional claims are often attempts to bootstrap land-use appeals for which there are no attorneys' fees into cases where fees might be recovered. The strategy seldom works, but it remains a dynamic in the litigation.

2. Penn Central Partial Regulatory Takings Path

i. The Nature of the Government's Action

It makes a difference whether the adverse effect on the property interest is indirectly the result of a broad-based, governmental program. If there is a

legislative determination that it is part of an adopted policy and regulations, applicable to all designated properties, and nondiscretionary, it is difficult to prove the taking and thus the claim is made “on its face.” A facial claim is one that is based on the allegation that the regulation nowhere would be defensible. They are difficult cases to win for the property owners because even some of the most onerous regulations may be found to be completely defensible in unusual circumstances.

Most takings claims are “as applied” claims where the taking is alleged to have impacted a single property. Having a direct impact on a property is an important foundational element for a successful takings challenge.

3. *Ripeness*

A court will not hear a takings claim until it is ready, for two reasons. First, for there to be a taking, the government must have reached the final determinative position on what uses it will allow. If the developer applies for 40 lots and that is denied without an indication of what might be approved, the developer must go back and make a second or even a third or fourth application until the government reaches its final, determinative position as to what it will approve. It is that final determination that forms the basis for determining whether there is a taking in the first instance, and if there is, it becomes the basis for measuring what the damages might be. This is the finality prong of the ripeness requirement.

Up until recently, there was a second prong, requiring that the claimant pursue compensation at the state level before proceeding in federal court. In 2019, the U.S. Supreme Court in *Knick v. Township of Scott*³³ overruled its prior position in *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*³⁴ and held that there is no requirement to seek compensation from the state first.

The finality requirement remains and can be burdensome for all stakeholders, but it is a necessary condition precedent in determining that the case is ready for trial.

4. *Time Limitation*

If the alleged taking is for limited period, such as the planning pause moratorium, it may not be a taking. The case law carves out an exception for takings where the impact is temporary. Moratoria are generally defensible

where the government need is substantial, the time is limited, there are exceptions that allow some use during the moratorium, and there is some local adjudicatory relief in special circumstances.³⁵

5. *Reasonable Economic Use*

This remains a hot topic in takings litigation. What is meant by a reasonable economic use? Unresolved is whether that means fair market value as an appraiser might determine or whether it is more practical, such that property may have speculative value in the marketplace, but is essentially unusable as regulated. In part, the issue of reasonable economic use reflects back on that first part of the three-part *Penn Central* test as to diminution in value, but there remains the ambiguity in defining value.

6. *Background Principles of Property and Nuisance Law*

Part of the impact of the *Lucas* decision is the establishment of exceptions to takings. Background principles of state law, such as the public trust, or nuisance law, may preclude the finding of a taking.

H. The Future of Takings Claims

The *Knick* decision may have altered the landscape for takings claims. While it takes many years to determine the full impact of U.S. Supreme Court decisions in takings cases, the decision in *Knick* suggests the following.³⁶

More cases are likely to be brought to federal court. How many more remains uncertain, but they are likely to include a broader range of claims for takings simply because the federal forum is now directly available.

Some practitioners have said they will still likely go to state court with their constitutionality issues under 42 U.S.C. § 1983 simply because they believe in some cases the state forum will be more favorable.³⁷ As Professor John Echeverria of Vermont Law School sees it:

In terms of practical implications for future takings litigation, the *Knick* decision unquestionably gives property owners significant new tactical advantages. In particular, the option to select either a federal or state forum will allow claimants to forum shop based on

which one offers the most favorable precedent or is more likely to provide a probable plaintiff-friendly judge.³⁸

A wider range of takings claims may be seen. Beyond an increase in the number of takings claims brought, the range of governmental activities claimed to effect a taking may widen, particularly with facial claims that avoid the finality prong of ripeness and do not require a federal court to apply the three-part *Penn Central* decision-making criteria for site-specific challenges.³⁹

The pleading process will become more complicated. “*Twiqbal*”⁴⁰ will become a watchword. It is the conjoining of *Bell Atlantic v. Twombly*⁴¹ and *Ashcroft v. Iqbal*.⁴² The user-friendly interpretation is that pleading in these post-*Knick* cases has likely moved beyond notice pleading along a continuum toward fact pleading in a realm labeled as one of “plausibility.”⁴³ It is plain that claimants are going to have to be more specific, and government lawyers need to be prepared to know what they can demand in pleading. If someone does not have a good taking claim, they should not bring it. If the government cannot defend its actions, it should settle. The pleading process can help both sides know where they are vulnerable and hopefully lead to resolutions short of trial. *Twiqbal* pleading may be able to help us get there.

More problems with pendent jurisdiction are inevitable. As federal courts increasingly hear local land-use cases with state law issues, more argument will be had on whether the court will take the pendant jurisdiction of the state claims.⁴⁴

A post-*Knick* case in federal court with a takings claim concluded with the court ruling against the taking claim and finding itself left with only state claims, over which it then chose to decline to exercise its supplemental jurisdiction.⁴⁵ There will be more cases like this and plaintiffs will find themselves headed ultimately to state court, wiping out any efficiency that may have been gained in going first to federal court.

Knick may only mean that takings plaintiffs will be able to lose their cases more quickly. This is glib, but glib can be true. There are few good takings cases because the *Penn Central*⁴⁶ three-part test is so difficult, and, as noted, most takings claims are added to routine zoning appeals to make the action appear more serious.⁴⁷

Abstention will be an issue more often. The dissent in *Knick* cited the Court's promotion of "practices of certification and abstention to put difficult state-law issues in state judges' hands" and then said that "[w]e may as well not have bothered" because the "decision sends a flood of complex state-law issues to federal courts."⁴⁸ That is to be seen. Certification and abstention are powerful tools of federalism, and perhaps *Knick* will usher in a new era of cooperative federal and state court efforts to divvy up those interesting property rights issues that straddle federal and state law.

There is no change in the tests for a taking. Because the tests for a taking are unchanged, there should be no noticeable change in the proportion of wins and losses, except to the extent that the types of cases brought are different. As suggested above, perhaps more takings cases that are less likely to be winners will be brought and, ultimately, lost.⁴⁹

Availability of compensation will preclude an injunction to invalidate a regulation. This is an interesting twist. The *Knick* Court said that "[g]overnments need not fear that our holding will lead federal courts to invalidate their regulations as unconstitutional." "As long as an adequate provision for obtaining just compensation exists, there is no basis to enjoin the government's action effecting a taking."⁵⁰

Professor Echeverria describes this as the "most interesting and consequential question going forward":

The most interesting and consequential question going forward is what *Knick* portends for the ability of property owners to sue to enjoin alleged takings that, in the Court's new terminology, "violate" the U.S. Constitution. The Court's opinion contains absolute statements that takings claimants will be limited to compensatory relief, and other statements that are more nebulous. For example, the Court said, "As long as just compensation remedies are available . . . injunctive relief will be foreclosed," but the Court also said, "Given the availability of post-taking compensation, barring the government from acting will *ordinarily* not be appropriate." To add to the uncertainty, Justice Thomas filed a concurring opinion arguing that injunctive relief should sometimes be available in takings litigation; he read the opinion of the Court, which he joined, as not foreclosing the application

of “ordinary remedial principles.” *Knick*, 139 S. Ct. at 2180 (Thomas, J., concurring).⁵¹

More 42 U.S.C.A. § 1983 actions will be brought. Federal constitutional and statutory claims are typically brought as § 1983 claims, but with the Court’s reference to the statute in the *Knick* case as the way to bring these claims, litigants will likely make more use of it. In 1871, Congress enacted § 1983 to provide an additional means of redress of 14th Amendment violations. Section 1983 provides that an action may be brought in federal court against any “person,” which includes local governments, “who, under color of” state law,

subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, [and such “person”] shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.⁵²

Claims for attorneys’ fees under 42 U.S.C. § 1988 will be front and center. Actions applying *Knick* include the greater use and the threat of successful plaintiffs recovering their attorneys’ fees under § 1988.⁵³ This threat will have a chilling effect on local government initiatives, particularly those novel programs where the defensibility of public regulation has been untested. The potential for having to pay attorneys’ fees has had a profound effect on local government decision making in matters where there have been threatened and actual claims under the Religious Land Use and Institutionalized Persons Act (RLUIPA).⁵⁴

Local adjudicatory review could protect local governments. A local adjudicatory process above and beyond the usual variance and enforcement appeals available with existing boards of appeal would enable the government to grant relief in the form of program changes or permit modifications and to award partial compensation as an alternative to abandoning what the government wants to achieve. It could save everyone from ending up in court. Also, as noted, the finality prong of *Williamson County* is unaffected and must be met. A takings claimant would have to exhaust the local adjudicatory process to reach finality, and that process with the potential for a

negotiated settlement could result in accommodation for both the property owner and the government.

Ombudsmen and special land-use courts may be considered. Another alternative is to create federal and state takings courts to streamline adjudication. Such courts have proven useful in resolving takings claims short of trial because they bring to the conflict resolution a level of expertise in land use matters not found in courts of general jurisdiction. The decision in *Knick*, if it does result in increased litigation or is even perceived that it will do so, may encourage claimants and governments to find ways to resolve claims early on. By way of illustration, Utah has a property rights ombudsman authorized to mediate takings claims.⁵⁵ Massachusetts, Oregon, and Connecticut are examples of states that have specialized land-use courts.⁵⁶

Mediation may be more favored. Most lawyers and planners involved in local land use disputes will agree that mediation is underutilized.⁵⁷ The threat of attorneys' fees with the § 1983 claims and the direct path to federal court may incentivize consideration of mediation.

Governments may give more consideration to buying their way out of the problem. The *Knick* case could have been avoided if the township negotiated the voluntary sale and purchase of an easement with definitive metes and bounds, restrictions on the terms of access, and hold harmless and insurance obligations assumed by the government. Rose Mary Knick had a reasonable concern that visitors could be injured walking across the property and that she would be liable.⁵⁸

Eminent domain, even as unpopular as it is after *Kelo*, could have been used if Knick refused to sell. The cost of the easement, either in a voluntary sale or under eminent domain, would have been far less than the cost of the litigation. In *Dolan*, discussed earlier, where dedication of a bicycle path along an undevelopable floodway was imposed as a condition on the approval of the expansion of a hardware and plumbing supply store, the easement was valued at \$15,000, a tiny fraction of what the litigation cost and about 1 percent of what the case ultimately settled for.⁵⁹

Incentives will likely be considered. Governments can incentivize the voluntary dedication, for example of an access easement as in the *Knick* case, by providing some type of relief from development restrictions, such as a density bonus, or by providing tax relief.

Jury trials will be had in § 1983 cases. The Court in *Monterey v. Del Monte Dunes at Monterey, Ltd.*, made clear that there is a right to a jury trial in federal court in these 42 U.S.C. § 1983 cases if there is a claim in excess of \$20 or more in compensation, but not if only equitable relief is sought.⁶⁰ The U.S. Supreme Court in *Knick* made clear that in eliminating the second state compensation prong of ripeness it expected claimants to proceed under § 1983.⁶¹

III. CONCLUSION

The takings landscape is ever changing . . . slowly. With the passage of time, the experience with existing takings precedent, and the changing composition of the Court, we may be on the eve of some new tests for takings.

ENDNOTES

1. U.S. CONST. amend. V. Conceptually, the Fifth Amendment is not a grant of power to the government, but a recognition that the power is inherent and an express limitation on its exercise:

As its text makes plain, the Takings Clause “does not prohibit the taking of private property, but instead places a condition on the exercise of that power.” *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 314 (1987). In other words, it “is designed not to limit the governmental interference with property rights *per se*, but rather to secure *compensation* in the event of otherwise proper interference amounting to a taking.” *Id.* at 315 (emphasis in original).

Lingle v. Chevron USA Inc., 544 U.S. 528, 536–37 (2002).

2. CAL. CONST. art. I, § 19.
3. See, e.g., GA. CODE ANN. §§ 22-3-20, 46-5-1 (2019).
4. *Kelo v. City of New London*, 125 S. Ct. 2655 (2005). See EMINENT DOMAIN USE AND ABUSE: KELO IN CONTEXT (Dwight H. Merriam & Mary Massaron Ross eds., 2007).

5. A book with that title and movie followed. JEFF BENEDICT, *LITTLE PINK HOUSE* (2009); *LITTLE PINK HOUSE* (Korchula Productions 2017).
6. The Castle Coalition has kept tabs on the changes. Castle Coalition, *50 State Report Card*, <http://castlecoalition.org/50-state-report-card> (last visited Jan. 16, 2021).
7. *Ark. Game & Fish Comm'n v. United States*, 568 U.S. 23 (2012).
8. *See In re Upstream Addicks & Barker (Texas) Flood-Control Reservoirs v. United States*, 146 Fed. Cl. 219 (Fed. Cl. 2020) (taking of an easement where U.S. Army Corps of Engineers knew or should have known retention would flood private property); *but see In re Downstream Addicks & Barker (Texas) Flood-Control Reservoirs v. United States*, 147 Fed. Cl. 566 (Fed. Cl. 2020) (no taking where U.S. Army Corps of Engineers released water from behind two large dams following Hurricane Harvey, damaging and destroying thousands of Houston homes).
9. 458 U.S. 419 (1982).
10. *Id.* at 426.
11. *Loretto v. Teleprompter Manhattan CATV Corp.*, 446 N.E.2d 428 (N.Y. 1983); *A \$1 Cable Fee for TV Hookup Upheld by State*, N.Y. TIMES, May 9, 1983, at B3.
12. *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987).
13. *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *see generally* TAKINGS: LAND DEVELOPMENT CONDITIONS AND REGULATORY TAKINGS AFTER *DOLAN* AND *LUCAS* (David L. Callies ed., 1996); ROBERT L. MELTZ ET AL., *THE TAKINGS ISSUE: CONSTITUTIONAL LIMITS ON LAND USE CONTROL AND ENVIRONMENTAL REGULATION* (1999).
14. *Dolan v. City of Tigard*, No. 93-518, at 27 (Mar. 23, 1994), *available at* https://www.supremecourt.gov/pdfs/transcripts/1993/93-518_03-23-1994.pdf.
15. 139 S. Ct. 2162 (2019).
16. Named after the case establishing the analysis to be followed. *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104 (1978).
17. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992). *See* Carol N. Brown & Dwight H. Merriam, *On the Twenty-Fifth Anniversary of Lucas: Making or Breaking the Takings Claim*, 102 IOWA L. REV. 101, 105 (2017).

18. Brown & Merriam, *supra* note 17, at 105.
19. The use versus value issue remains unresolved.
20. 260 U.S. 393, 415 (1922). *See generally* MELTZ ET AL., *supra* note 13; STEVEN J. EAGLE, REGULATORY TAKINGS (1996); Fred Bosselman et al., The Taking Issue (1973).
21. HFH, Ltd. v. Superior Court, 542 P.2d 237 (Cal. 1975).
22. DeCook v. Rochester Int'l Airport Joint Zoning Bd., 796 N.W.2d 299 (Minn. 2011) (Minnesota Supreme Court upheld the finding of a taking where an airport approach zone reduced the value of property valued at either \$2.77 or \$4.8 million property by \$170,000 (3.5 percent or 6.14 percent)). To some extent, Minnesota's takings doctrine is unique. *See* 25 MINNESOTA PRACTICE SERIES—REAL ESTATE LAW § 10.37 (Eileen M. Roberts ed., 2007) (many “not entirely consistent” standards for takings in Minnesota); Arthur G. Boylan, Case Note, *Property—Losing Clarity in Loss of Access Cases: The Minnesota Supreme Court's Muddled Analysis in Dale Properties, LLC v. State*, 29 WM. MITCHELL L. REV. 695, 708 (2002) (“governmental enterprise” rule in *McShane* is a “different approach”). *See also* Brenner v. New Richmond Reg'l Airport, 816 N.W.2d 291 (Wis. 2012) (“a taking occurs in airplane overflight cases when government action results in aircraft flying over a landowner's property low enough and with sufficient frequency to have a direct and immediate effect on the use and enjoyment of the property”).
23. *See, e.g.*, Wyatt v. United States, 271 F.3d 1090 (Fed. Cir. 2001) (no taking occurred when government denied plaintiff a permit to continue to operate a mine because the plaintiff had voluntarily relinquished its leasehold by not renewing the lease and thus had no valid property interest under which the plaintiff could assert a takings claim).
24. Kaiser Dev. Co. v. City & County of Honolulu, 649 F. Supp. 926, 933 (D. Haw. 1986), *aff'd*, 898 F.2d 112 (9th Cir. 1990).
25. Steven Eagle, *The Parcel and Then Some: Unity of Ownership and the Parcel as a Whole*, 36 VT. L. REV. 549 (2011); Dwight H. Merriam, *Rules for the Relevant Parcel*, 25 U. HAW. L. REV. 353 (2002/2003).
26. Customer Co. v. City of Sacramento, 10 Cal. 4th 368 (Cal. 1995) (property damage caused by police firing tear gas into a 7-Eleven store to apprehend a felon is not a taking).

27. The Court found:

The Constitution does not require compensation every time violence aimed against government officers damages private property. Certainly, the Just Compensation Clause could not successfully be invoked in a situation where a rock hurled at a policeman walking his beat happens to damage private property. Similarly, in the instant case, we conclude that the temporary, unplanned occupation of petitioners' buildings in the course of battle does not constitute direct and substantial enough government involvement to warrant compensation under the Fifth Amendment.

YMCA v. United States, 395 U.S. 85, 93 (1969).

28. Lech v. Jackson, No. 18-1051 (10th Cir. Oct. 29, 2019).

29. *Id.*

30. See TrinCo Inv. Co. v. United States, 772 F.3d 1375 (Fed. Cir. 2013); Brewer v. Alaska, 341 P.3d 1107 (Alaska 2014); Dep't of Agric. & Consumer Servs. v. Mid-Florida Growers, Inc., 521 So. 2d 101 (Fla. 1988); Dep't of Agric. & Consumer Servs. v. Bogorff, 35 So. 3d 84 (Fla. Dist. Ct. App. 2010).

31. See Chapter 1.

32. Clark v. City of Williamsburg, No. 17-2002-CM, slip op. at 5–6 (D. Kan. Feb. 14, 2018) (granting jurisdiction over pendent inverse condemnation claim upon amendment of the complaint).

33. 139 S. Ct. 2162, 2179–80 (2019).

34. 473 U.S. 172 (1985).

35. See generally Matthew St. Amand & Dwight H. Merriam, *Defensible Moratoria: The Law before and after the Tahoe-Sierra Decision*, 43 NAT. RESOURCES J. 703 (2003).

36. This section draws directly on Dwight Merriam, *Rose Mary Knick and the Story of Chicken Little*, 47 FORDHAM URB. L.J. 639–57 (2020). Other articles in that volume dedicated to the *Knick* decision are Robert H. Thomas, *Sublimating Municipal Home Rule and Separation of Powers in Knick v. Township of Scott*; Ilya Somin & Shelley Ross Saxer, *Overturing a Catch-22 in the Knick of Time: Knick v. Township of*

- Scott and the Doctrine of Precedent*; David A. Dana, *Not Just a Procedural Case: The Substantive Implications of Knick for State Property Law and Federal Takings Doctrine*; and Laura D. Beaton & Matthew D. Zinn, *Knick v. Township of Scott: A Source of New Uncertainty for State and Local Governments in Regulatory Takings Challenges to Land Use Regulation*. The issue is available at <https://ir.lawnet.fordham.edu/ulj/vol47/iss3/> (last visited Jan. 16, 2021).
37. This is the collective view of the many lawyers with whom I have discussed the impacts, particularly those fellow members of Owners' Counsel of America. See Owners' Counsel of America, *Homepage*, <https://www.ownerscounsel.com/> (last visited Jan. 16, 2021). It is believed that in some instances, federal courts will be less interested in what may be characterized as issues of local land use, and state courts may be more sympathetic to property owners. The decision on whether to bring the action in state or federal court will vary from state to state depending upon the culture and common law.
 38. John Echeverria, *Knick v. Township of Scott: A Procedural Boost for Takings Claimants*, ABA, Dec. 20, 2019, https://www.americanbar.org/groups/environment_energy_resources/publications/trends/2019-2020/january-february-2020/knick-vs-township/.
 39. Before the decision in *Knick*, courts were split on whether facial claims were exempt under the state-litigation requirements of *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985), but now both as-applied and facial claims are clearly exempt. *Petworth Holdings, LLC v. Bowser*, 333 F.R.D. 297 (D.D.C. 2019).
 40. Christine P. Bartholomew, *Twiqbal in Context*, 65 J. LEGAL EDUC. 744 (2016), available at https://digitalcommons.law.buffalo.edu/journal_articles/27.
 41. 550 U.S. 544 (2007).
 42. 556 U.S. 662 (2009).
 43. Bartholomew, *supra* note 40.
 44. *Marianist Province v. City of Kirkwood*, No. 18-3076 (8th Cir. Dec. 13, 2019) (declining to exercise pendent jurisdiction where all federal claims were resolved before trial considering judicial economy, convenience,

- fairness, and comity); *Little v. Mayor & City Council of Ocean City*, No. ELH-18-360 (D. Md. Sept. 26, 2019) (declining to exercise pendent jurisdiction where all federal claims were dismissed); *E&B Natural Res. Mgmt. Corp. v. County of Alameda*, No. 18-cv-05857-YGR (N.D. Cal. Apr. 12, 2019) (declining to exercise pendent jurisdiction where all federal claims were resolved before trial considering judicial economy, convenience, fairness, and comity).
45. *Funderburk v. S.C. Elec. & Gas Co.*, No. 3:15-cv-04660-JMC, 2019 WL 3504232 (D.S.C. Aug. 1, 2019).
 46. *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104 (1978).
 47. This is the point made to me and others by Michael M. Berger, who has argued four takings cases in the U.S. Supreme Court. He laments that local zoning lawyers often toss in a takings claim in their routine appeals. One might guess it is done to impress clients or maybe intimidate the government. In the end, it usually does neither. Most are not good claims, they do not go anywhere, and they are often abandoned along the way.
 48. *Knick v. Township of Scott*, 139 S. Ct. 2162 (2019). *See Potvin v. Auburn Water Dist.*, No. 2:18-cv-00046-NT, 2018 WL 2425926 (D. Me. May 25, 2018) (*Burford* abstention not appropriate in a takings case because relief is not discretionary); *see also Pae v. City of Lawton*, No. CIV-16-1198-M, 2017 WL 168910 (W.D. Okla. Jan. 17, 2017) (*Pullman* abstention rejected in § 1983 inverse condemnation case: “plaintiff has not shown that there is an uncertain issue of state law underlying his § 1983 claim, that the state issues are amendable to interpretation and such interpretation obviates the need for or substantially narrows the scope of his § 1983 claim, or that an incorrect decision of state law would hinder important state law policies. The Court further finds that the unresolved state law issue cited by plaintiff—whether defendant’s actions are governed by the Oklahoma Governmental Tort Claims Act—is an issue routinely addressed by the courts in the Tenth Circuit exercising supplemental jurisdiction over state tort claims.”); *Nimer v. Litchfield Township. Bd. of Trs.*, 707 F.3d 699, 700 (6th Cir. 2013) (“A district court may abstain under the *Younger* doctrine if three conditions exist: there are state proceedings that are (1) currently pending;

- (2) involve an important state interest; and (3) will provide the federal plaintiff with an adequate opportunity to raise his or her constitutional claims.”). England reservations will become more important as abstentions increase. *See* *Lumbard v. City of Ann Arbor*, 913 F.3d 585 (6th Cir. 2019).
49. As Robert Thomas has said in conversations with me and others: “Now we get to go to federal court and lose because *Penn Central* is still the standard.”
50. *Knick*, 139 S. Ct. at 2177. However, Justice Thomas in his concurring opinion rejected the argument that regulators should be free of the threat of injunctive relief. *Id.* at 2180 (Thomas, J., concurring).
51. Echeverria, *supra* note 38.
52. Aditya Bamzai & David N. Goldman, *The Takings Clause, the Tucker Act, and Knick v. Township of Scott*, YALE J. ON REG., Oct. 9, 2018, <https://www.yalejreg.com/nc/the-takings-clause-the-tucker-act-and-knick-v-township-of-scott-by-aditya-bamzai-david-n-goldman/>.
53. 42 U.S.C. § 1988.
54. *Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA)*, 42 U.S.C. § 2000cc *et seq.* Patricia E. Salkin & Amy Lavine, *The Genesis of RLUIPA and Federalism: Evaluating the Creation of a Federal Statutory Right and Its Impact on Local Government*, 40 URB. LAW. 195, 255 (2008) (“RLUIPA has had a chilling effect on local government’s ability to exercise the police power through zoning to ensure that community character is preserved and that the public health, safety, and welfare is protected.”).
55. UTAH CODE § 13-43-204 (2018).
56. John Martinez, *A Proposal for Establishing Specialized Federal and State “Takings Courts,”* 61 ME. L. REV. 467, 489 n.159 (2009).
57. For example:

In addition to necessary program modifications to encourage greater participation, a change in mindset by all stakeholders involved must develop. Despite the increased use of dispute resolution in land use matters, in some localities, there is still hesitation on the part of all parties: the public, the developers, the planners,

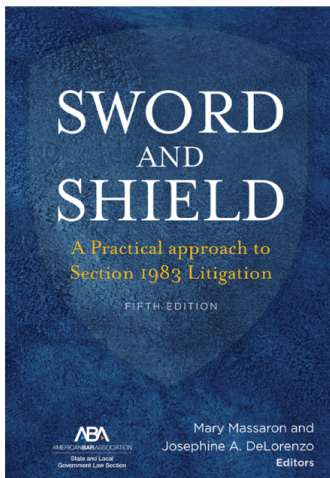
the lawyers, the local boards and the courts, to participate in a program that is a change from the traditional system. In the traditional system, commissioners feel pressure to make decisions quickly, and a collaborative approach is viewed as time consuming. Because all parties may lack an understanding of how the program works, they are hesitant to embrace mediation as an option.

SARA BRONIN & DWIGHT MERRIAM, RATHKOPF'S THE LAW OF ZONING AND PLANNING ch. 31, § 31:8 (4th ed. 2005).

58. Jessica Gresko, *Cemetery Case Puts Property Rights Issue before High Court*, AP, Oct. 4, 2018 (“Knick, 69, says her town’s ordinance wouldn’t protect her if people injure themselves on her land and sue.”), <https://apnews.com/86ec9d89d4d34579b528845f5f8c1642/Cemetery-case-puts-property-rights-issue-before-high-court>.
59. 512 U.S. 374 (1994) (statement of Professor Arthur C. Nelson on October 25, 2019, in Atlanta at a conference of the Growth and Infrastructure Consortium).
60. 526 U.S. 687 (1999); MARTIN A. SCHWARTZ, FEDERAL JUDICIAL CENTER, SECTION 1983 LITIGATION 5 (Kris Markarian ed., 3d ed. 2014), available at <https://www.fjc.gov/sites/default/files/2014/Section-1983-Litigation-3D-FJC-Schwartz-2014.pdf>.
61. *Knick v. Township of Scott*, 139 S. Ct. 2162, 2168 (2019).

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Sword and Shield: A Practical Approach to Section 1983 Litigation, Fifth Edition

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*The 100th Anniversary of Pennsylvania Coal v. Mahon:
How the Takings Clause Became the
Primary Check on Government Power*

Robert H. Thomas
Joseph T. Waldo Visiting Chair
in Property Rights Law
William & Mary Law School

Director, Property Rights Litigation
Pacific legal Foundation

December 7-8, 2023

inversecondemnation.com

property, regulatory takings,
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Happy Birthday, Regulatory Takings!

Pennsylvania Coal Co. v. Mahon,
260 U.S. 393 (Dec. 11, 1922)

Robert H. Thomas
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The Mahon home on December 11, 2022

This story might be said to have had its roots millions of years ago. It is about coal, after all. [Anthracite coal](#), to be exact. And the beginnings of the modern regulatory takings doctrine—that property may be regulated to some extent, but when that regulation “goes too far,” it will be deemed a *de facto* taking.

Yes, Sunday, December 11, 2022, was the 100th birthday of the U.S. Supreme Court’s landmark opinion in [Pennsylvania Coal Co. v. Mahon](#), 260 U.S. 393 (Dec. 11, 1922), the source of the famous Justice Holmes “too far” dictum. The Court had heard arguments a [mere 28 days previously](#) (the Supreme Court worked hard *and fast* in those days), and issued an 8-1 opinion in favor of Pennsylvania Coal Company, which had challenged the Commonwealth of Pennsylvania’s Kohler Act, a statute that required that in certain circumstances, to avoid surface subsidence, subterranean anthracite coal “pillars” must be left unmined and in-place.

It is no doubt true that what became known as the “regulatory takings” doctrine did not spring from whole cloth on December 11, 1922, but had been bouncing around in the common law for quite a while (see [here](#) and [here](#) for example). But if you want to mark an official birthday for the regulatory takings doctrine, you could not do better than *Pennsylvania Coal* (aka *Mahon*).

The case that launched a thousand academic tenure quests! The case that asks the oh-so-Holmesian question "how far is too far?" (and "too far" into what or from what—the owner's rights, the government's powers?). [The case responsible for instructional videos](#). For [law student cheat sheets](#). For [wikis](#). For [beaucoup online PowerPoint slide shows](#). For [flashcards](#), for heaven's sake.

A case cited nearly 10,000 times (thanks Westlaw):

Negative Treatment (32) History (2) Citing References (9,650) ▾

And still kicking, despite [calls for its overruling](#), and claims it has been *sub silentio* abrogated ("Abrogated?" I don't think so):

 Abrogation Recognized by *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 9th Cir.(Nev.), June 15, 2000

Eight-to-one, with only Justice Brandeis (predictably) in dissent.

We spent the day—a wet and snowy one—with a colleague (and now friend) at the actual property that gave rise to the litigation in Pittston, Pennsylvania, visiting the site, talking to the present and former owners of the Mahon home, and learning more about the case, the people involved, the arguments, and the history and process of anthracite coal mining that led to the dispute.

You know the short story as set out in the Supreme Court's opinion. But you may not know the backstory and the details.



The current view from what was, a century ago, Harold John Mahon, Esq.'s office (he was a lawyer you know, and along with co-counsel repped himself in the Supreme Court). We imagined that this might have been what he saw when he received the telegraph from Washington, D.C. on December 11, 1922, notifying him that the Court had ruled against him.



Before the day was through, we paid a visit to Mr. Mahon at the nearby cemetery, just to let him know that there are no hard feelings, and that the regulatory takings doctrine his case spawned is alive if not entirely well.



Here, at the Craig-Mahon family plot, he lies in repose with Mrs. Mahon.

Syllabus.

PENNSYLVANIA COAL COMPANY v. MAHON
ET AL.

ERROR TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA.

No. 549. Argued November 14, 1922.—Decided December 11, 1922.

1. One consideration in deciding whether limitations on private property, to be implied in favor of the police power, are exceeded, is the degree in which the values incident to the property are diminished by the regulation in question; and this is to be determined from the facts of the particular case. P. 413.
2. The general rule, at least, is that if regulation goes too far it will be recognized as a taking for which compensation must be paid. P. 415.
3. The rights of the public in a street, purchased or laid out by eminent domain, are those that it has paid for. P. 415.
4. Where the owner of land containing coal deposits had deeded the surface with express reservation of the right to remove all the coal beneath, the grantees assuming the risk and waiving all claim to damages that might arise from such mining, and the property rights thus reserved, and contracts made, were valid under the state law, and a statute, enacted later, forbade mining in such way as to cause subsidence of any human habitation, or public street or building, etc., and thereby made commercially impracticable the removal of very valuable coal deposits still standing unmined, held, that the prohibition exceeded the police power, whether viewed as a protection to private surface owners or to cities having only surface rights, and contravened the rights of the coal-owner under the Contract Clause of the Constitution and the Due Process Clause of the Fourteenth Amendment.¹ P. 413.

274 Pa. St. 489, reversed.

¹ The following summary of the statute involved is taken from the opinion of the Pennsylvania Supreme Court:

The statute is entitled: "An act regulating the mining of anthracite coal; prescribing duties for certain municipal officers; and imposing penalties."

Section 1 provides that it shall be unlawful "so to conduct the operation of mining anthracite coal as to cause the caving-in, collapse, or subsidence of (a) Any public building or any structure cus-

ERROR to a decree of the Supreme Court of Pennsylvania, for the defendants in error, in their suit to enjoin the Coal Company from mining under their property in such way as to remove supports and cause subsidence of the surface and of their house.

Mr. John W. Davis with whom *Mr. Frank W. Wheaton*, *Mr. Henry S. Drinker, Jr.*, and *Mr. Reese H. Harris* were on the brief, for plaintiff in error.

I. The statute impairs the obligation of the contract between the parties.

On August 26, 1921, the Mahons were bound by a valid covenant to permit the Coal Company, which had sold to them or to their ancestor the surface rights only in their lot, to exercise without objection or hindrance

tomarily used by the public as a place of resort, assemblage, or amusement, including, but not being limited to, churches, schools, hospitals, theatres, hotels, and railroad stations; (b) Any street, road, bridge, or other public passageway, dedicated to public use or habitually used by the public; (c) Any track, roadbed, right of way, pipe, conduit, wire, or other facility, used in the service of the public by any municipal corporation or public service company as defined by the Public Service Company Law; (d) Any dwelling or other structure used as a human habitation, or any factory, store, or other industrial or mercantile establishment in which human labor is employed; (e) Any cemetery or public burial ground."

Sections 2 to 5, inclusive, place certain duties on public officials and persons in charge of mining operations, to facilitate the accomplishment of the purpose of the act.

Section 6 provides the act "shall not apply to [mines in] townships of the second class [i. e., townships having a population of less than 300 persons to a square mile], nor to any area wherein the surface overlying the mine or mining operation is wild or unseated land, nor where such surface is owned by the owner or operator of the underlying coal and is distant more than one hundred and fifty feet from any improved property belonging to any other person."

Section 7 sets forth penalties; and § 8 reads: "The courts of common pleas shall have power to award injunctions to restrain violations of this act." P. L. 1921, p. 1198.

by them, its reserved right to mine out all the coal, without liability to them for damages occasioned thereby, which damages had been expressly waived as a condition for the grant. On August 27, 1921, the statute completely annulled this covenant, by giving them the right, by injunction, to prevent such mining. The fact that this contract was contained in a deed of conveyance does not make it any the less a contract within the constitutional protection. A deed is a contract between the parties thereto, even though the grantor is a sovereign State. *Fletcher v. Peck*, 6 Cr. 87, 137; *Ohio Trust Co. v. Debolt*, 16 How. 416, 432.

II. The statute takes the property of the Coal Company without due process of law.

Whenever the use of the land is restricted in any way or some incorporeal hereditament is taken away which was appurtenant thereto, it constitutes as much a taking as if the land itself had been appropriated. Tiedeman, State and Federal Control of Real and Personal Property, p. 702, § 143; *Pumpelly v. Green Bay Co.*, 13 Wall. 166; *Commonwealth v. Clearview Coal Co.*, 256 Pa. St. 238.

If an act would be unconstitutional which specifically required one-third of the coal to be left in place to support the surface, it is in no way saved by the subterfuge of permitting the mining, provided this does not cause the subsidence which will inevitably result unless the Coal Company provides artificial support at a cost exceeding the value of the coal. The theoretical right to remove the coal without disturbing the surface is, as a practical matter, no more available than was Shylock's right to his pound of flesh.

As pointed out in Justice Kephart's dissenting opinion, the courts of Pennsylvania have recognized three distinct estates in mining property: (1) The right to use the surface; (2) the ownership of the subjacent minerals; (3) the right to have the surface supported by the subjacent strata.

This third right, called the Third Estate, has been recognized as so distinct from the ownership of the surface or of the minerals that it may be transferred to and held or conveyed by one who was neither the owner of the surface nor of the coal. *Penman v. Jones*, 256 Pa. St. 416; *Charnetski v. Coal Co.*, 270 Pa. St. 459; *Young v. Thompson*; 272 Pa. St. 360.

III. The statute is not a *bona fide* exercise of the police power.

With the swing of the popular pendulum during recent years, the descendants of the able lawyers who, forty years ago, were employed to draft special legislation, are now employed in drafting laws to evade the restrictions of the state and federal constitutions. This legislation divides itself generally into two classes. In the first class fall those laws which are prompted by upright and public spirited progressives who, impelled by the need for the immediate adoption of the reforms which they advocate, are impatient at the constitutional restrictions on federal and state power, and are unwilling to await the enlargement of such powers by constitutional amendment. Examples of this class of law are the two recent Child Labor Acts.

The second class consists of laws passed at the insistence of a determined and organized minority, designed to confiscate for their benefit the rights of producers of property, and passed by a legislature in time of political stress, in its anxiety to secure the votes controlled by the advocates of the measure. Such a law, we submit, is the Kohler Act. To protect a complaisant public from such laws is one of the primary functions of the courts.

When it is asserted that a statute is not what the legislature sought to have it appear, it is necessary for those attacking its constitutionality to point, in the statute itself, to evidences which, viewed in the light of the court's knowledge of human nature and of legislative practice, are sufficient to demonstrate the position taken.

So tested, the Kohler Act is in reality what this Court in *Loan Association v. Topeka*, 20 Wall. 655, characterized as "not legislation," but "robbery under the forms of law."

It will be observed that the favored expedient of the draughtsmen of legislation of either of the classes to which we have alluded, is to dress up their statute in the garb of a statute properly coming within one of the recognized powers of the legislative body enacting it.

The Kohler Act speaks as a regulation of the mining of anthracite coal, to protect the lives and safety of the public. It begins with a vivid preamble, from which it would appear that a considerable part of the population of Pennsylvania is in immediate danger of the loss of life and limb by being incontinently projected into unexpected abysses formed by the sudden subsidence of the surface by reason of the mining of anthracite coal. In his dissenting opinion, however, Mr. Justice Kephart states that the actual damage to date is confined to a small portion of the City of Scranton. Anthracite mining, however, is conducted in nine counties under a surface area comprising 496 square miles. While this preamble may possibly be regarded as spontaneous expression by the legislature of the reasons for the passage of the act, we call attention to the fact that an honest and valid law needs no specious preamble to bolster up its constitutionality. Is it not an equally plausible explanation of the preamble that the framers of this act knew full well that it was not really a police regulation and were seeking to coerce the courts into holding it to be such merely by affixing to it a label?

The act also contains a clause emphasizing that it is remedial legislation and craving a broad construction, which, if the act is what it says it is, will not help it, but which, if it is really a confiscatory measure masquerading as a police regulation, merely serves to emphasize this

feature. The preamble and § 9 are the hand of Esau. Section 1 is the voice of Jacob. *Dobbins v. Los Angeles*, 195 U. S. 223; *Lawton v. Steele*, 152 U. S. 133.

Does the interest of the public generally, as distinguished from the private interest of Mr. and Mrs. Mahon, require that they shall be under no necessity of removing temporarily from their dwelling while the mining under their lot is going on, or of themselves making the necessary expenditures to repair their house and to fill up the cracks in their sidewalk and lawn after the subsidence is completed, using that part of the purchase money which they saved by buying the lot without the right of support?

Are the drastic prohibitions of § 1 reasonably necessary to protect the lives and safety of persons on the Mahon lot or are they unduly oppressive on the Coal Company?

The act shows on its face that its purpose is not to protect the lives or safety of the public generally but merely to augment the property rights of a favored few.

Genuine public streets or public property where the right of support is vested in the public, as well as private property, where such support has not been sold, have been amply protected. Under the Mine Law of 1891 (3 Purd. 2555), the Davis Act (Act of July 26, 1913, P. L. 1439; 6 Purd. 6626) maps of underground workings, both past and prospective, must be filed with State Inspectors and City and Borough Mine Bureaus. Any citizen can at any time determine whether his underlying support is jeopardized. Actual inspection is always available and injunctions easily obtainable. See *Scranton v. Peoples Coal Co.*, 256 Pa. St. 332; 274 Pa. St. 63. All this was true before the Kohler Act.

The only interests not heretofore fully protected both by the right to damages and to injunctive relief, were those individuals who were owners of surface rights merely, and whose right of subjacent support had been

withheld or waived, presumably for adequate consideration, or public or quasi-public bodies who, instead of condemning their streets or school buildings and thus paying for and securing the permanent support of the underlying coal, have obtained them at a bargain from parties who acquired only restricted title such as the Mahons possess. The right of such surface owners, the courts of Pennsylvania have properly held, can rise no higher than that of their grantor, no matter whether the present holder be a public service corporation operating water pipes, *Spring Brook Water Co. v. Pennsylvania Coal Co.*, 54 Pa. Super. Ct. 380; a school district which has erected its building on a lot acquired without the right of support, *Commonwealth v. Clearview Coal Co.*, 256 Pa. St. 328; or a city which has similarly acquired its streets by dedication from one who himself had no right of support, *Scranton v. Phillips*, 57 Pa. Super. Ct. 633.

Apart from the consideration that the lives and safety of such classes of persons and those whom they permit to come on their property need no protection other than a proper notice to remove temporarily until it becomes safe to return, it is obvious that the Kohler Act is not directed to the safety of the public, but is for the benefit solely of a particular class.

That there may be other private persons in a situation similar to that of these plaintiffs merely makes the act for the benefit of a particular *class* of individuals, and not for the benefit of the public generally.

A further feature of the Kohler Act which demonstrates that it was not enacted for the protection of the general public is that by its terms it does not apply to all those similarly endangered. The life or safety of a surface owner is obviously subjected to equal jeopardy irrespective of whether the hole into which he falls was formed by the mining of bituminous or anthracite coal, or, for that mat-

ter, of iron ore, quartz or gravel. The Kohler Act, however, applies only to subsidences caused by the mining of anthracite coal.

A further evidence that the act is disingenuous is found in § 5. If it were really to protect life and safety, the municipal authorities would naturally be empowered, in case of threatened subsidence, to rope off the endangered area and to compel the occupants to vacate the premises. Instead, they are merely empowered to shut up the mine and to exclude the workmen therefrom.

Further legislative evidence of the true purpose is found in the provisions of another statute, passed on the same day and conceded to be its twin measure. This is the so-called Fowler Act, discussed in the dissenting opinion. There could be no clearer demonstration than that afforded by the intrinsic evidence of these two interrelated acts, that the sole design of the framers of both was to coerce the coal companies either into donating to the surface owner sufficient coal in place to support the surface, or paying him the damages which, as a means of getting a cheap lot, he had expressly bargained away.

The means adopted by the Kohler Act are not reasonably necessary for the accomplishment of its ostensible purpose, and are unduly oppressive upon individuals.

IV. If surface support in the anthracite district is necessary for public use, it can constitutionally be acquired only by condemnation with just compensation to the parties affected. *Commonwealth v. Clearview Coal Co.*, 256 Pa. St. 328; *Raub v. Lackawanna County*, 60 Pa. Super. Ct. 462; *Chicago, Milwaukee & St. Paul Ry. Co. v. Wisconsin*, 238 U. S. 491.

The Barrier Pillar Law, involved in *Plymouth Coal Co. v. Pennsylvania*, 232 U. S. 531, in no sense operates to transfer, without compensation, a permanent property right or easement from one party to another. The compensation to each owner for the burden of maintaining

the pillar on his side is found in the reciprocal benefit from the pillar maintained by his neighbor. See *Bowman v. Ross*, 167 U. S. 548. Furthermore, it obviously has a direct relation to the lives and safety of men working in coal mines. The restriction imposed is but temporary and incidental; it applies to but a very small part of the coal at a point along the land line, where it may well be left in place without interfering with the operation until both mines are almost exhausted, whereupon, as the Court doubtless knows, the adjoining owners enter into an agreement to remove the pillar.

The Rent Cases (*Block v. Hirsh*, 256 U. S. 135; *Marcus Brown Holding Co. v. Feldman*, 256 U. S. 170; *Levy Leasing Co. v. Siegel*, 258 U. S. 242) are not authority for the proposition that a property right of one may under the police power be transferred to another without compensation, even in time of emergency. Quite the contrary.

The principle involved in these cases was, it is submitted, not the police power but that of eminent domain. When the State regulates railroad rates, the fair return which the Constitution guarantees to the stockholders is really, when analysed, the just compensation required in condemnation proceedings. Instead of condemning a perpetual lease on the railroad with a fair rental for the stockholders and then operating the road at cost for the use of the entire public, the government allows the stockholders to operate it but requires them to serve the whole public without discrimination and permits them to net only the reasonable return to which their fair rental would have amounted. There is thus an essential difference in kind between a safety appliance act and a rate regulation. The one is an exercise of the police power, a prohibition of something injurious to the public, without the transfer of any property or property right of another either with or without compensation. The other is in its

essence an exercise of the power of eminent domain, involving not only the requirement that it be for the public benefit as distinguished from that of a privileged class, but also the requirement of just compensation. Such were the Rent Laws. The majority opinion disclaimed the introduction of any new principle of constitutional law; it merely held applicable a recognized rule to the admitted facts of the case. There has never been any doubt that a railroad company can be prohibited from charging more than reasonable rates, or that it can be precluded from putting one passenger off its trains to make room for another who is willing to pay a higher fare. There was no suggestion in the arguments or in the minority opinion that the means adopted were not necessary and appropriate to remedy the existing evil or that any other method was available to produce the same result which would be attended with less hardship to the landlords. Nor was there any attempt by the law to require the landlord to give the use of his property for nothing, nor any thought that the tenant should get something for nothing. All that the law did was, in view of the temporary suspension of the law of supply and demand, temporarily to suspend the landlord's arbitrary right of extortion, the power to exercise which was the direct and temporary result of the national crisis.

Even if it appeared that the owners of all the coal under buildings having no contractual right of support, intended presently to remove it, there would be no analogy to the conditions on which the validity of the Rent Laws was based, since there is no thought or suggestion that all the available dwellings, theatres, hotels and cemeteries are situated over such mines.

The Rent Laws were merely a temporary measure. They provided reasonable compensation to the landlord; they constituted virtually a condemnation by the sovereign of the term to November 1, 1922, and a transfer of

this term to the tenant at a reasonable cost, the just compensation provided by the Constitution.

The Kohler Act, however, is a permanent provision. It transfers for all time the Third Estate,—the right to the perpetual use of this coal—in the Mahon lot from the Coal Company to private individuals, and that without any compensation whatever.

In the court below, counsel, in discussing the Rent Cases, contended that the justification for the Kohler Act is even stronger than for the Rent Laws, insomuch as the latter were merely to provide housing facilities, a necessity of life, whereas the Kohler Act is to “protect life itself.” The obvious answer to this specious argument is, first, that the Kohler Act is on its face unnecessary to protect the lives of Mr. and Mrs. Mahon, and will be effective to that end only in case they neglect to take the precautions for their own protection which their restricted rights in their property demand that they shall take. Second, there is no rule of law which entitles a State, even to protect life itself, to transfer the property of one citizen without compensation to another.

Just here comes into force the distinction between the police power and the power of eminent domain, so clearly stated in a recent decision by the writer of the majority opinion in the case at bar—*Jackman v. Rosenbaum Co.*, 263 Pa. St. 158, 166.

An owner of dangerous drugs may, under the police power, be restricted from selling them without a license, or without a prescription, or may even be prohibited from selling them at all. This would constitute an exercise of the police power.

In time of epidemic it is conceivable that a State might temporarily prohibit the hoarding of essential medicines and might require physicians and druggists to sell them at reasonable rates. Even at such a time, the drug-

gist could not be required to dispense his medicines for nothing, or a baker his bread, and that though people were dying or starving for want of drugs and food.

If every word in the preamble of the Kohler Act were true there would still be no justification for the uncompensated transfer of the beneficial use of the supporting coal from defendant to plaintiff. No emergency will justify the transfer of property or a tangible property right from one citizen to another without just compensation.

The Kohler Act is not a police regulation. It is not a valid exercise of the right of eminent domain because, first, it is not exercised for the benefit of the public generally, and second, because it provides no compensation whatever to the party whose property is taken.

Mr. W. L. Pace, with whom *Mr. H. J. Mahon* was on the brief, for defendants in error.

Mr. George Ross Hull, with whom *Mr. George E. Alter*, Attorney General of the State of Pennsylvania, was on the brief, for the State of Pennsylvania, by special leave of court, as *amici curiae*.

The problem presented to the legislature involved the interests of the public in the life, health and safety of persons living in the mining communities, in the wholesale destruction of surface property, and in securing the maximum yield of coal from the mines; the interest of the surface owner in his property and of the surface dweller in his own safety; the interest of the mine owner in his labor supply and in securing the maximum yield of coal from his property. This problem after elaborate investigation, and abortive attempts, was sought to be met by the "Fowler Act," 1921, P. L. 1192, establishing the State Anthracite Mine Cave Commission and the "Kohler Act," *id.* 1198, here involved.

As was said by Mr. Chief Justice von Moschzisker, in this case: "In determining whether the act is a reason-

able piece of legislation within the police power, we may 'call to our aid all those external or historical facts which are necessary for this purpose and which led to the enactment.' "

A reading of the Kohler Act involved in this appeal discloses that it is not directed to the reimbursement of surface owners for damage which may be caused either to persons or property, but is directed solely to the protection of human life. There are probably millions of dollars in surface improvements which are not reached and which were not intended to be reached by the provisions of this act. In view of the historical facts it is apparent that the good faith of this exercise of the police power is beyond question.

The legislative determination of the existence of a situation inimical to the public welfare which calls for an exercise of the police power, while it may be scrutinized by the courts, is not to be set aside unless it clearly appear that such determination was not well founded. *Lawton v. Steele*, 152 U. S. 133; *McLean v. Arkansas*, 211 U. S. 539; *Lower Vein Coal Co. v. Industrial Board*, 255 U. S. 144; *Nolan v. Jones*, 263 Pa. St. 124; *Levy Leasing Co. v. Siegel*, 258 U. S. 242.

The protection of the life, health and safety of the public in the anthracite mining communities is the primary purpose of the act. Its interference with property rights is merely incidental. *Commonwealth v. Alger*, 7 Cush. 84; *Holden v. Hardy*, 169 U. S. 392.

Land which is underlaid with coal is a kind of property which, by reason of operations conducted upon it or by reason of contracts made with respect to it, may become a grave menace to the life, health and safety of the public.

The dangers incident to operations conducted on coal lands have been met by extensive and elaborate codes of laws regulating coal mining. The constitutionality of these laws has long since been settled. The danger to

the public arising from the contracts entered into with respect to coal lands, however, was not clearly recognized until recent years.

As the law relating to coal lands developed prior to the enactment of the Kohler Act, it permitted the creation, by appropriate conveyances, of three distinct property rights or estates in lands: (1) the surface, (2) the coal, and (3) the right of support; and these estates might be vested in different persons at the same time. *Graff Furnace Co. v. Scranton Coal Co.*, 244 Pa. St. 592; *Penman v. Jones*, 256 Pa. St. 416; *Charnetski v. Coal Mining Co.*, 270 Pa. St. 459. Owners in fee of coal lands might part with their right to the surface, reserving to themselves the right to mine all of the coal without any obligation to support the surface and without liability for any damage resulting from its subsidence.

It is probable that when conveyances of surface rights were first made, the right to remove coal without liability to the surface owners was reserved merely as a safeguard against an occasional injury which might occur through first mining; and that second mining, or the removal of pillars, was not then in contemplation. The large extent of territory underlaid with anthracite coal, the large number of people living upon its surface, and the very obvious menace to the life, health and safety of these people, clothed these lands and these mining operations with a public interest which manifestly made them a proper subject for the exercise of the police power. If the public welfare be threatened by the existence or the certain occurrence of a grave public danger the legality of an exercise of the police power to prevent or to remedy cannot be questioned.

The exercise of the police power to regulate contracts relating to land has been sustained where the disaster threatened was of less serious consequence than that which is dealt with in the act now under consideration.

Block v. Hirsh, 256 U. S. 135; *Levy Leasing Co. v. Siegel*, 258 U. S. 242.

It will be urged, however, that these cases are not applicable to the case now under consideration, for the reason that in them the acts involved were emergency laws passed to meet an urgent temporary necessity and expressly limited by their terms to a brief period. Ordinarily the operation of economic laws regulates the supply of houses so that dwellings for rent are not clothed with such a public interest as would subject the contracts of landlord and tenant to the regulatory exercise of the police power. The nature of the property, the rights in it and the contracts relating to it, are such that regulation of the character contained in those acts could be justified only by the existence of extraordinary circumstances which the legislature and the courts knew must disappear when the emergency passed. But we do not understand the Court to mean that if a situation which threatened the public safety and welfare might be dealt with in an emergency, it could not be controlled by appropriate regulation if that emergency continued. The sound reason which sustained the validity of those acts during the period when the emergency was reasonably expected to continue will sustain as a permanent change an act which is intended to meet a permanent menace to the public. Accordingly the same fundamental principles of law which sustained the rent laws during the period of emergency, will sustain the Kohler Act.

It should be noted also in considering the application of the rent cases, that the case at bar falls within a class of cases which the dissenting opinion recognized as proper for the exercise of the police power. *Block v. Hirsh*, 256 U. S. 135, 167.

The Kohler Act is in line with numerous familiar cases wherein legislation involving the exercise of the police power has been sustained. The well established restric-

tion placed upon the right of public service companies to fix rates by contract, the power to forbid absolutely the sale of oleomargarine for the purpose of preventing possible frauds, the power to prevent the sale of unwholesome meats and other foods, the power to regulate or prohibit the manufacture of corn and rye into whiskey, the power to forbid mining to the boundary of a mine property without leaving a barrier pillar of sufficient thickness to prevent possible injury from the flooding of an adjoining mine, are familiar illustrations of the exercise of the police power enacted to avoid dangers which are neither so grave nor so certain as those which the Kohler Act seeks to prevent.

In its application to all coal lands where the right of surface support is still vested in the surface owner, the effect of the Kohler Act is to prevent the making of any valid contract whereby the right of support may be separated from the surface ownership in such manner as to permit the subsidence of any of the structures or facilities mentioned in the act. It must be remembered that there is a broad field in which the Kohler Act does thus operate. If the circumstances which now exist in the anthracite regions could have been foreseen and certainly predicted by the legislature a half century ago, it would clearly have been within its power to limit the owner's right to contract, by the enactment of such a regulatory measure as the Kohler Act. And we are confident that if it were not for the existence of contracts already entered into, the constitutionality of this act would not have been questioned.

It is an act, prospective in its operation, regulating the future conduct of mining for anthracite coal. It operates generally upon all mines, including those now being operated and all which may be opened and operated in the future. It operates without regard to any private contracts which may have been made relating to surface sup-

port. It operates alike upon lands where the surface owner still has the right of support, and upon those where the right of support has been separated from ownership of the surface and is held by the owner of the coal or by a third person.

But if the act in its operation upon lands where the right of support and the ownership of the surface have not been separated, be a constitutional exercise of the police power, it is equally valid in its operation upon lands where these interests are held by different persons.

Persons cannot remove their property from the reach of the police power by entering into contracts with respect to it. *Marcus Brown Holding Co. v. Feldman*, 256 U. S. 170.

All property within the State is held, and all contracts are entered into subject to the future exercise of the police power of the State. Every such agreement was entered into by the parties with full knowledge that whenever the existence of such contracts and the exercise of the license reserved should threaten the life, health or safety of the people, the Commonwealth in its sovereign power might interpose and restrict the use of those contract rights to such extent as might be necessary in the public interest. Owners of coal lands, who saw highways being laid out and improved, railroads and trolley lines built, sewers and gas mains laid, light, telephone and power wires stretched overhead, depots, stores, theatres, hotels and dwellings constructed, and who, perhaps as many of the coal companies did, laid out the surface in building lots dedicating streets and alleys to public use, selling the lots for the purpose of having dwellings erected thereon,—such owners were bound to know that whenever the time should come when the exercise of the license which they had reserved would threaten the welfare of the communities upon the surface, the police power of the State might be interposed to restrict their rights. *Scranton v. Public*

Service Commission, 268 Pa. St. 192; *Relief Electric Light, Heat & Power Company's Petition*, 69 Pa. Super Ct. 1, 8.

In *Russell v. Sebastian*, 233 U. S. 195, and *New Orleans Gas Light Co. v. Louisiana Light Co.*, 115 U. S. 650, no exercise of the police power was involved; in the latter, this Court recognized the principle which we have stated.

The Kohler Act does not take the property of the plaintiff in error. *Commonwealth v. Plymouth Coal Co.*, 232 Pa. St. 141; s. c. 232 U. S. 531. The act does not go as far as the Barrier Pillar Act. It contains no provision requiring any mine owner to leave coal in place. If natural support other than coal in the pillars be available, or if artificial support be provided, every pound of coal may be removed from the mines.

Nor does it transfer the right of support from the owner of the coal to the surface owner. This right, license or estate in the land is nothing more than an immunity from civil liability for damages to the surface owner. Under the Kohler Act, this immunity continues.

If the act were designed, as the plaintiff in error contends, for the protection of the property rights of the surface owners, and not as a *bona fide* and reasonable exercise of the police power, it would contain two features which are conspicuously absent from it: First, it would provide that the liability of the defendant for damages to the person or property of the plaintiffs which was released by the contract contained in the deed, should be restored; second, it would apply generally to all valuable structures upon the surface.

Notice to the surface owner to vacate his property is not sufficient to prevent injury to him or to the public. This same objection might have been made to the reasonableness of all of the legislation which has been enacted for the protection of persons employed in mines. Communities must exist in or near the vicinity of the mines or they cannot be operated, and it is a matter of concern to

the public that persons be permitted to dwell there in safety. Even if it were possible to remove whole cities from their present locations, and reconstruct them upon sites beyond the coal measures, those sites may be so distant from the mines and so separated by the topography of the country that access to and from the collieries would be impracticable and the mines would close for want of labor. Moreover, cities are built where nature affords an opportunity for them. Industrial communities cannot be perched upon the mountains nor in places inaccessible to roads and railroads. Nor is it always practicable or possible for the individual dweller upon the surface to find another house in which to live. Throughout the State of Pennsylvania and elsewhere in this and foreign countries there is an acute shortage of houses due to conditions prevailing during the war, and there is no doubt that this condition, which has elsewhere proven so serious as to give rise to the legislation reviewed in the Rent Cases (already cited), has been aggravated in the coal mining communities by reason of the very conditions which gave rise to the Kohler Act. Or it may be that the occupants of the dwelling will recklessly disregard the notice given and take the chance of escaping injury. The notice will not avail to prevent the disastrous results of his necessity or folly. See *Commonwealth v. Plymouth Coal Co.*, 232 Pa. St. 141, 146.

The only practicable way in which the life, health and safety of the public in these communities may be adequately safeguarded is by the enforcement of such restrictions as are contained in the Kohler Act, and for this reason those restrictions are reasonable even though they limit to some extent the rights of others.

Mr. Philip V. Mattes, by leave of court, filed a brief on behalf of the City of Scranton, as *amicus curiae*.

Mr. Philip V. Mattes, *Mr. Frank M. Walsh* and *Mr. Owen J. Roberts*, by leave of court, filed a brief on behalf

of the Scranton Surface Protective Association, as *amici curiae*.

Mr. C. La Rue Munson and *Mr. Edgar Munson*, by leave of court, filed a brief on behalf of the Scranton Gas & Water Company, as *amici curiae*.

MR. JUSTICE HOLMES delivered the opinion of the Court.

This is a bill in equity brought by the defendants in error to prevent the Pennsylvania Coal Company from mining under their property in such way as to remove the supports and cause a subsidence of the surface and of their house. The bill sets out a deed executed by the Coal Company in 1878, under which the plaintiffs claim. The deed conveys the surface, but in express terms reserves the right to remove all the coal under the same, and the grantee takes the premises with the risk, and waives all claim for damages that may arise from mining out the coal. But the plaintiffs say that whatever may have been the Coal Company's rights, they were taken away by an Act of Pennsylvania, approved May 27, 1921, P. L. 1198, commonly known there as the Kohler Act. The Court of Common Pleas found that if not restrained the defendant would cause the damage to prevent which the bill was brought, but denied an injunction, holding that the statute if applied to this case would be unconstitutional. On appeal the Supreme Court of the State agreed that the defendant had contract and property rights protected by the Constitution of the United States, but held that the statute was a legitimate exercise of the police power and directed a decree for the plaintiffs. A writ of error was granted bringing the case to this Court.

The statute forbids the mining of anthracite coal in such way as to cause the subsidence of, among other

things, any structure used as a human habitation, with certain exceptions, including among them land where the surface is owned by the owner of the underlying coal and is distant more than one hundred and fifty feet from any improved property belonging to any other person. As applied to this case the statute is admitted to destroy previously existing rights of property and contract. The question is whether the police power can be stretched so far.

Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law. As long recognized, some values are enjoyed under an implied limitation and must yield to the police power. But obviously the implied limitation must have its limits, or the contract and due process clauses are gone. One fact for consideration in determining such limits is the extent of the diminution. When it reaches a certain magnitude, in most if not in all cases there must be an exercise of eminent domain and compensation to sustain the act. So the question depends upon the particular facts. The greatest weight is given to the judgment of the legislature, but it always is open to interested parties to contend that the legislature has gone beyond its constitutional power.

This is the case of a single private house. No doubt there is a public interest even in this, as there is in every purchase and sale and in all that happens within the commonwealth. Some existing rights may be modified even in such a case. *Rideout v. Knox*, 148 Mass. 368. But usually in ordinary private affairs the public interest does not warrant much of this kind of interference. A source of damage to such a house is not a public nuisance even if similar damage is inflicted on others in different places. The damage is not common or public. *Wesson v. Washburn Iron Co.*, 13 Allen, 95, 103. The extent of

the public interest is shown by the statute to be limited, since the statute ordinarily does not apply to land when the surface is owned by the owner of the coal. Furthermore, it is not justified as a protection of personal safety. That could be provided for by notice. Indeed the very foundation of this bill is that the defendant gave timely notice of its intent to mine under the house. On the other hand the extent of the taking is great. It purports to abolish what is recognized in Pennsylvania as an estate in land—a very valuable estate—and what is declared by the Court below to be a contract hitherto binding the plaintiffs. If we were called upon to deal with the plaintiffs' position alone, we should think it clear that the statute does not disclose a public interest sufficient to warrant so extensive a destruction of the defendant's constitutionally protected rights.

But the case has been treated as one in which the general validity of the act should be discussed. The Attorney General of the State, the City of Scranton, and the representatives of other extensive interests were allowed to take part in the argument below and have submitted their contentions here. It seems, therefore, to be our duty to go farther in the statement of our opinion, in order that it may be known at once, and that further suits should not be brought in vain.

It is our opinion that the act cannot be sustained as an exercise of the police power, so far as it affects the mining of coal under streets or cities in places where the right to mine such coal has been reserved. As said in a Pennsylvania case, "For practical purposes, the right to coal consists in the right to mine it." *Commonwealth v. Clearview Coal Co.*, 256 Pa. St. 328, 331. What makes the right to mine coal valuable is that it can be exercised with profit. To make it commercially impracticable to mine certain coal has very nearly the same effect for constitutional purposes as appropriating or destroying it. This

we think that we are warranted in assuming that the statute does.

It is true that in *Plymouth Coal Co. v. Pennsylvania*, 232 U. S. 531, it was held competent for the legislature to require a pillar of coal to be left along the line of adjoining property, that, with the pillar on the other side of the line, would be a barrier sufficient for the safety of the employees of either mine in case the other should be abandoned and allowed to fill with water. But that was a requirement for the safety of employees invited into the mine, and secured an average reciprocity of advantage that has been recognized as a justification of various laws.

The rights of the public in a street purchased or laid out by eminent domain are those that it has paid for. If in any case its representatives have been so short sighted as to acquire only surface rights without the right of support, we see no more authority for supplying the latter without compensation than there was for taking the right of way in the first place and refusing to pay for it because the public wanted it very much. The protection of private property in the Fifth Amendment presupposes that it is wanted for public use, but provides that it shall not be taken for such use without compensation. A similar assumption is made in the decisions upon the Fourteenth Amendment. *Hairston v. Danville & Western Ry. Co.*, 208 U. S. 598, 605. When this seemingly absolute protection is found to be qualified by the police power, the natural tendency of human nature is to extend the qualification more and more until at last private property disappears. But that cannot be accomplished in this way under the Constitution of the United States.

The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking. It may be doubted how far exceptional cases, like the blowing up of a house to stop a conflagration, go—and if they go beyond the general rule,

whether they do not stand as much upon tradition as upon principle. *Bowditch v. Boston*, 101 U. S. 16. In general it is not plain that a man's misfortunes or necessities will justify his shifting the damages to his neighbor's shoulders. *Spade v. Lynn & Boston R. R. Co.*, 172 Mass. 488, 489. We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change. As we already have said, this is a question of degree—and therefore cannot be disposed of by general propositions. But we regard this as going beyond any of the cases decided by this Court. The late decisions upon laws dealing with the congestion of Washington and New York, caused by the war, dealt with laws intended to meet a temporary emergency and providing for compensation determined to be reasonable by an impartial board. They went to the verge of the law but fell far short of the present act. *Block v. Hirsh*, 256 U. S. 135. *Marcus Brown Holding Co. v. Feldman*, 256 U. S. 170. *Levy Leasing Co. v. Siegel*, 258 U. S. 242.

We assume, of course, that the statute was passed upon the conviction that an exigency existed that would warrant it, and we assume that an exigency exists that would warrant the exercise of eminent domain. But the question at bottom is upon whom the loss of the changes desired should fall. So far as private persons or communities have seen fit to take the risk of acquiring only surface rights, we cannot see that the fact that their risk has become a danger warrants the giving to them greater rights than they bought.

Decree reversed.

MR. JUSTICE BRANDEIS, dissenting.

The Kohler Act prohibits, under certain conditions, the mining of anthracite coal within the limits of a city in such a manner or to such an extent "as to cause the . . .

subsidence of any dwelling or other structure used as a human habitation, or any factory, store, or other industrial or mercantile establishment in which human labor is employed." Coal in place is land; and the right of the owner to use his land is not absolute. He may not so use it as to create a public nuisance; and uses, once harmless, may, owing to changed conditions, seriously threaten the public welfare. Whenever they do, the legislature has power to prohibit such uses without paying compensation; and the power to prohibit extends alike to the manner, the character and the purpose of the use. Are we justified in declaring that the Legislature of Pennsylvania has, in restricting the right to mine anthracite, exercised this power so arbitrarily as to violate the Fourteenth Amendment?

Every restriction upon the use of property imposed in the exercise of the police power deprives the owner of some right theretofore enjoyed, and is, in that sense, an abridgment by the State of rights in property without making compensation. But restriction imposed to protect the public health, safety or morals from dangers threatened is not a taking. The restriction here in question is merely the prohibition of a noxious use. The property so restricted remains in the possession of its owner. The State does not appropriate it or make any use of it. The State merely prevents the owner from making a use which interferes with paramount rights of the public. Whenever the use prohibited ceases to be noxious,—as it may because of further change in local or social conditions,—the restriction will have to be removed and the owner will again be free to enjoy his property as heretofore.

The restriction upon the use of this property can not, of course, be lawfully imposed, unless its purpose is to protect the public. But the purpose of a restriction does not cease to be public, because incidentally some private

persons may thereby receive gratuitously valuable special benefits. Thus, owners of low buildings may obtain, through statutory restrictions upon the height of neighboring structures, benefits equivalent to an easement of light and air. *Welch v. Swasey*, 214 U. S. 91. Compare *Lindsley v. Natural Carbonic Gas Co.*, 220 U. S. 61; *Walls v. Midland Carbon Co.*, 254 U. S. 300. Furthermore, a restriction, though imposed for a public purpose, will not be lawful, unless the restriction is an appropriate means to the public end. But to keep coal in place is surely an appropriate means of preventing subsidence of the surface; and ordinarily it is the only available means. Restriction upon use does not become inappropriate as a means, merely because it deprives the owner of the only use to which the property can then be profitably put. The liquor and the oleomargarine cases settled that. *Mugler v. Kansas*, 123 U. S. 623, 668, 669; *Powell v. Pennsylvania*, 127 U. S. 678, 682. See also *Hadacheck v. Los Angeles*, 239 U. S. 394; *Pierce Oil Corporation v. City of Hope*, 248 U. S. 498. Nor is a restriction imposed through exercise of the police power inappropriate as a means, merely because the same end might be effected through exercise of the power of eminent domain, or otherwise at public expense. Every restriction upon the height of buildings might be secured through acquiring by eminent domain the right of each owner to build above the limiting height; but it is settled that the State need not resort to that power. Compare *Laurel Hill Cemetery v. San Francisco*, 216 U. S. 358; *Missouri Pacific Ry. Co. v. Omaha*, 235 U. S. 121. If by mining anthracite coal the owner would necessarily unloose poisonous gasses, I suppose no one would doubt the power of the State to prevent the mining, without buying his coal fields. And why may not the State, likewise, without paying compensation, prohibit one from digging so deep or excavating so near the surface, as to expose the community to

like dangers? In the latter case, as in the former, carrying on the business would be a public nuisance.

It is said that one fact for consideration in determining whether the limits of the police power have been exceeded is the extent of the resulting diminution in value; and that here the restriction destroys existing rights of property and contract. But values are relative. If we are to consider the value of the coal kept in place by the restriction, we should compare it with the value of all other parts of the land. That is, with the value not of the coal alone, but with the value of the whole property. The rights of an owner as against the public are not increased by dividing the interests in his property into surface and subsoil. The sum of the rights in the parts can not be greater than the rights in the whole. The estate of an owner in land is grandiloquently described as extending *ab orco usque ad coelum*. But I suppose no one would contend that by selling his interest above one hundred feet from the surface he could prevent the State from limiting, by the police power, the height of structures in a city. And why should a sale of underground rights bar the State's power? For aught that appears the value of the coal kept in place by the restriction may be negligible as compared with the value of the whole property, or even as compared with that part of it which is represented by the coal remaining in place and which may be extracted despite the statute. Ordinarily a police regulation, general in operation, will not be held void as to a particular property, although proof is offered that owing to conditions peculiar to it the restriction could not reasonably be applied. See *Powell v. Pennsylvania*, 127 U. S. 678, 681, 684; *Murphy v. California*, 225 U. S. 623, 629. But even if the particular facts are to govern, the statute should, in my opinion, be upheld in this case. For the defendant has failed to adduce any evidence from which

BRANDEIS, J., dissenting.

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it appears that to restrict its mining operations was an unreasonable exercise of the police power. Compare *Reinman v. Little Rock*, 237 U. S. 171, 177, 180; *Pierce Oil Corporation v. City of Hope*, 248 U. S. 498, 500. Where the surface and the coal belong to the same person, self-interest would ordinarily prevent mining to such an extent as to cause a subsidence. It was, doubtless, for this reason that the legislature, estimating the degrees of danger, deemed statutory restriction unnecessary for the public safety under such conditions.

It is said that this is a case of a single dwelling house; that the restriction upon mining abolishes a valuable estate hitherto secured by a contract with the plaintiffs; and that the restriction upon mining cannot be justified as a protection of personal safety, since that could be provided for by notice. The propriety of deferring a good deal to tribunals on the spot has been repeatedly recognized. *Welch v. Swasey*, 214 U. S. 91, 106; *Laurel Hill Cemetery v. San Francisco*, 216 U. S. 358, 365; *Patson v. Pennsylvania*, 232 U. S. 138, 144. May we say that notice would afford adequate protection of the public safety where the legislature and the highest court of the State, with greater knowledge of local conditions, have declared, in effect, that it would not? If public safety is imperiled, surely neither grant, nor contract, can prevail against the exercise of the police power. *Fertilizing Co. v. Hyde Park*, 97 U. S. 659; *Atlantic Coast Line R. R. Co. v. Goldsboro*, 232 U. S. 548; *Union Dry Goods Co. v. Georgia Public Service Corporation*, 248 U. S. 372; *St. Louis Poster Advertising Co. v. St. Louis*, 249 U. S. 269. The rule that the State's power to take appropriate measures to guard the safety of all who may be within its jurisdiction may not be bargained away was applied to compel carriers to establish grade crossings at their own expense, despite contracts to the contrary; *Chicago, Burlington & Quincy R. R. Co. v. Nebraska*, 170 U. S. 57;

and, likewise, to supersede, by an employers' liability act, the provision of a charter exempting a railroad from liability for death of employees, since the civil liability was deemed a matter of public concern, and not a mere private right. *Texas & New Orleans R. R. Co. v. Miller*, 221 U. S. 408. Compare *Boyd v. Alabama*, 94 U. S. 645; *Stone v. Mississippi*, 101 U. S. 814; *Butchers' Union Co. v. Crescent City Co.*, 111 U. S. 746; *Douglas v. Kentucky*, 168 U. S. 488; *Pennsylvania Hospital v. Philadelphia*, 245 U. S. 20, 23. Nor can existing contracts between private individuals preclude exercise of the police power: "One whose rights, such as they are, are subject to state restriction, cannot remove them from the power of the State by making a contract about them." *Hudson County Water Co. v. McCarter*, 209 U. S. 349, 357; *Knoxville Water Co. v. Knoxville*, 189 U. S. 434, 438; *Rast v. Van Deman & Lewis Co.*, 240 U. S. 342. The fact that this suit is brought by a private person is, of course, immaterial to protect the community through invoking the aid, as litigant, of interested private citizens is not a novelty in our law. That it may be done in Pennsylvania was decided by its Supreme Court in this case. And it is for a State to say how its public policy shall be enforced.

This case involves only mining which causes subsidence of a dwelling house. But the Kohler Act contains provisions in addition to that quoted above; and as to these, also, an opinion is expressed. These provisions deal with mining under cities to such an extent as to cause subsidence of—

(a) Any public building or any structure customarily used by the public as a place of resort, assemblage, or amusement, including, but not being limited to, churches, schools, hospitals, theatres, hotels, and railroad stations.

(b) Any street, road, bridge, or other public passageway, dedicated to public use or habitually used by the public.

(c) Any track, roadbed, right of way, pipe, conduit, wire, or other facility, used in the service of the public by any municipal corporation or public service company as defined by the Public Service Company Law.

A prohibition of mining which causes subsidence of such structures and facilities is obviously enacted for a public purpose; and it seems, likewise, clear that mere notice of intention to mine would not in this connection secure the public safety. Yet it is said that these provisions of the act cannot be sustained as an exercise of the police power where the right to mine such coal has been reserved. The conclusion seems to rest upon the assumption that in order to justify such exercise of the police power there must be "an average reciprocity of advantage" as between the owner of the property restricted and the rest of the community; and that here such reciprocity is absent. Reciprocity of advantage is an important consideration, and may even be an essential, where the State's power is exercised for the purpose of conferring benefits upon the property of a neighborhood, as in drainage projects, *Wurts v. Hoagland*, 114 U. S. 606; *Fallbrook Irrigation District v. Bradley*, 164 U. S. 112; or upon adjoining owners, as by party wall provisions, *Jackman v. Rosenbaum Co.*, ante, 22. But where the police power is exercised, not to confer benefits upon property owners, but to protect the public from detriment and danger, there is, in my opinion, no room for considering reciprocity of advantage. There was no reciprocal advantage to the owner prohibited from using his oil tanks in 248 U. S. 498; his brickyard, in 239 U. S. 394; his livery stable, in 237 U. S. 171; his billiard hall, in 225 U. S. 623; his oleomargarine factory, in 127 U. S. 678; his brewery, in 123 U. S. 623; unless it be the advantage of living and doing business in a civilized community. That reciprocal advantage is given by the act to the coal operators.

The Kohler Act

THE KOHLER ACT.

(Act of May 27, 1921, P. L. 1198)

No. 445.

AN ACT.

Regulating the mining of anthracite coal; prescribing duties for certain municipal officers; and imposing penalties.

SECTION 1. Be it enacted, &c., That it shall be unlawful Mining of anthracite coal. for any owner, operator, director, or general manager, superintendent, or other person in charge of, or having supervision over, any anthracite coal mine or mining operation, so to mine anthracite coal or so to conduct the operation of mining anthracite coal as to cause the caving-in, collapse, or subsidence of—

(a) Any public building or any structure customarily used by the public as a place of resort, assemblage, or amusement, including, but not being limited to, churches, schools, hospitals, theatres, hotels, and railroad stations. Must not cause subsidence of certain lands and structures.

(b) Any street, road, bridge, or other public passageway, dedicated to public use or habitually used by the public.

(c) Any track, roadbed, right of way, pipe, conduit, wire, or other facility, used in the service of the public by any municipal corporation or public service company as defined by the Public Service Company Law.

(d) Any dwelling or other structure used as a human habitation, or any factory, store, or other industrial or mercantile establishment in which human labor is employed.

(e) Any cemetery or public burial ground.

SECTION 2. Every owner, operator, lessor, lessee, or general contractor, engaged in the mining anthracite coal within this Commonwealth, shall make, or cause to be made, a true and accurate map or plan of the workings or excavations of such coal mine or colliery, which shall be drawn to a scale of such size as to show conveniently Maps and plans of proposed operations.

The Kohler Act

and legibly all markings and numbers required to be placed thereon by the terms of this Act. Such maps or plans shall also show, in detail and in markings of a distinctive color, all contemplated workings which are intended to be undertaken or developed within the succeeding six months.

Filing.

Such maps or plans shall be deposited, as often as once in six months, with the mayor in cities where such coal mines or collieries are situated. In boroughs and townships of the first class, such maps or plans shall be filed with the county commissioners of the proper county. Such maps

Public records.

or plans shall be considered public records, and shall be open to the inspection of the public, and copies or tracings may be made therefrom. No mining shall be done which

Time of filing.

is not shown on the map or plan filed at least ten days previously.

Designation
of pillars.

SECTION 3. Every owner, operator, lessor, lessee, or general contractor, engaged in the mining of anthracite coal, or any president, director, general manager, superintendent, or other person in charge of, or having supervision over, any anthracite coal mine or mining operation in this Commonwealth, shall be, and is hereby required: (a) To designate, within a period of six months from the passage of this Act, and to keep designated by number, each and every pillar of anthracite coal beneath the surface still remaining in place at the time this Act goes into effect and all pillars thereafter created, the number of each pillar to be placed in a conspicuous position with white paint or some other equally durable and visible substance; and (b) to designate, or cause to be designated, by numerals of convenient and legible size, upon all maps or plans mentioned in Section Two of this Act, with the space on each map or plan designating any pillar of coal, the number of such pillar.

Certain officers
to have access
to mines.

SECTION 4. The mayor of cities, the burgess of boroughs, the boards of township commissioners of townships

The Kohler Act

of the first class, and such engineers and other agents as they may employ, shall, at all reasonable times, be given access to any portion of any anthracite coal mines or mining operations which it may be necessary or proper to inspect, for the purpose of determining whether the provisions of this Act are being complied with, and all reasonable facilities shall be extended by the owner or operator of such mine or mining operation for ingress, egress, and inspection.

SECTION 5. The mayor of cities, the burgess in boroughs, the board of township commissioners in townships of the first class, shall have the power to prevent the mining of anthracite coal beneath the surface in any mine or mining operation in which the pillars of coal shall not have been numbered and the numbers thereof designated by maps or tracings as provided by this Act; and where mining operations are being conducted in violation of this Act, they shall have the power to prevent any miner or laborer, other than those necessary for the protection of life and property, from entering the mine or mining operation, until such time as the provisions of this Act have been complied with.

Mining where pillars have not been designated.

Mining in violation of act.

SECTION 6. The provisions of this Act shall not apply to townships of the second class, nor to any area wherein the surface overlying the mine or mining operation is wild or unseated land, nor where such surface is owned by the owner or operator of the underlying coal and is distant more than one hundred and fifty feet from any improved property belonging to any other person.

To what cases act is in-applicable.

SECTION 7. Any owner, operator, lessor, lessee, or general contractor, engaged in the mining of anthracite coal, or any president, director, general manager, superintendent or other person in charge of, or having supervision over, any anthracite coal mine or mining operation, who shall violate any provision of this Act, shall be deemed

Violations.

Misdemeanor.

The Kohler Act.

Penalty. guilty of a misdemeanor, and, upon conviction, shall be sentenced to pay a fine of not more than five thousand dollars, or undergo imprisonment for not more than one year, both or either, at the discretion of the Court.

Injunction. SECTION 8. The Courts of Common Pleas shall have power to award injunction to restrain violations of this Act.

Remedial legislation. SECTION 9. This Act is intended as remedial legislation, designed to cure existing evils and abuses, and each and every provision thereof is intended to receive a liberal construction such as will best effectuate that purpose, and no provision is intended to receive a strict or limited construction.

Construction. SECTION 10. It is hereby declared that the provisions of this Act are severable one from another, and if, for any reason, this Act shall be judicially declared and determined to be unconstitutional so far as relates to one or more words, phrases, clauses, sentences, paragraphs, or section thereof, such judicial determination shall not affect any other provision of this Act. It is hereby declared that the remaining provisions would have been enacted notwithstanding such judicial determination of the validity in any respect of one or more of the provisions of this Act.

When effective. SECTION 11. This Act shall go into effect three calendar months after its final approval.

Repeal. SECTION 12. All acts and parts of acts inconsistent with this Act are hereby repealed.

Approved—The 27th day of May, A. D. 1921.

WM. C. SPROUL.

The foregoing is a true and correct copy of the Act of the General Assembly No. 445.

(Signed) CYRUS E. WOODS,
Secretary of the Commonwealth.

Penna Coal Co.
No.

Alexander Craig

This Indenture made the seventh day of February in the year of our Lord one thousand eight hundred and seventy eight Between the Pennsylvania Coal Company of the first part and Alexander Craig of Pittston Borough Luzerne County Penna of the second part witnesseth that the said Pennsylvania Coal Company for and in consideration of the sum of Six hundred Dollars lawful money of the United States of America unto them well and truly paid by the said Alexander Craig at and before the sealing and delivery of these presents the receipt whereof is hereby acknowledged have granted bargained sold aliened enfeoffed released and confirmed and by these presents do grant bargain sell alien enfeoff release and confirm unto the said Alexander Craig his heirs and assigns the surface or right of soil of the following described lot piece or parcel of land situate in the Borough of Pittston in the Township of Pittston County of Luzerne and State of Pennsylvania bounded and described as follows to wit Beginning at a corner of lands of the Butler Coal Co on a forty feet alley thence southwesterly by said alley about eighty feet to line of the north side of lot conveyed to Pittston Water Co prolonged to said Alley thence by said line about 294 feet to a forty feet street thence by said street about 90 feet to land of the Butler Coal Co and thence by said land about 295 feet to place of beginning containing 2500 square feet of land or thereabout.

Excepting and reserving to the said Pennsylvania Coal Company their successors and assigns all the coal and other minerals under in or upon said lot of land. And also the right and privilege of mining and removing all the coal and other minerals under and upon said lot of land and of making and driving tunnels passages and ways under the surface of said lot of land for the purpose of mining any coal owned by the said Pennsylvania Coal Company their successors and assigns on said land or any adjoining lands as fully and entirely as if the said Pennsylvania Coal Company their successors and assigns remained the owners in fee of said surface or right of soil - the said Pennsylvania Coal Company not to transport the coal and other minerals hereby reserved upon the surface of said lot but in all other respects to be at liberty to mine and remove the same and to make and drive tunnels passages and ways under said surface of said lot without objection or hindrance and not to be liable to the said Alexander Craig his heirs or assigns to or for any injury or damages that may occur by reason of mining and removing said coal or other minerals or by reason of making and driving said tunnels passages or ways.

And it is hereby expressly understood by the said party of the second part that the said party of the first part have before the date of this conveyance and before the date of the agreement in the presence of which this deed is made mined coal upon and under said lot and that the said party of the second part takes said lot as the same now is with all the risks attendant therefrom and waives all claim upon the party of the first part or their successors for any injury or damage that may hereafter arise from the mining out of said coal under said lot.

Together with all and singular the rights liberties hereditaments and appurtenances whatsoever therunto belonging or in any wise appertaining and the reversions and remainders rents issues and profits thereof and all the estate right title interest property claim and demand whatsoever of the said Pennsylvania Coal Company in law equity or otherwise howsoever of in and to the aforesaid surface or right of soil of said lot and every part thereof excepting and reserving as aforesaid


To have and to hold the said surface or right of soil of said lot hereditaments and premises hereby

granted or mentioned and intended so to be with the appertinances Excepting and reserving as aforesaid unto the said Alexander Craig his heirs and assigns to and for the only proper use and behoof of the said Alexander Craig his heirs and assigns forever.


And the said Pennsylvania Coal Company for themselves and their successors do by these presents covenant grant and agree to and with the said Alexander Craig his heirs and assigns that they the said Pennsylvania Coal Company and their successors all and singular the hereditaments and premises herein above describe and granted or mentioned and intended so to be with the appertinances unto the said Alexander Craig his heirs and assigns against them the said Pennsylvania Coal Company and their successors and against all and every person or persons whomsoever lawfully claiming or to claim the same or any part thereof by from through or under them the said Pennsylvania Coal Company shall and well warrant and forever defend Excepting and reserving as aforesaid

In witness whereof the said Pennsylvania Coal Company have hereunto affixed their corporate seal Dated the day and year first above written

Signed sealed and delivered
in presence of
William H. Clarkson

Geo A Boyt. 
President


Received the day of the date of the above written indenture of the above named Alexander Craig the sum of six hundred Dollars in full of the consideration money above mentioned

Witness present William H. Clarkson 

State of New York
City and County of New York } ss.

Be it remembered that on the seventh day of February A D one thousand eight hundred and eighty eight before me the subscriber a Commissioner appointed by the Governor of the State of Pennsylvania to take acknowledgements and proof of Deeds and other writings under seal in the City of New York to be used and recorded in the said State of Pennsylvania with full power and authority to administer oaths and affirmations personally appeared Geo A Boyt Esq President of the aforesaid Pennsylvania Coal Company and being duly sworn deposeth and saith that he was personally present at the execution of the above written indenture or Deed of conveyance and saw the common seal of the said Pennsylvania Coal Company duly affixed thereto and that the seal so affixed thereto is the common and corporate seal of the said Pennsylvania Coal Company and that the above written indenture or deed of conveyance was duly read and delivered by and as and for the act and deed of the said Pennsylvania Coal Company for the uses and purposes therein mentioned and that the name of this deponent subscribed to the said Deed as President of the said Corporation in attestation of the due execution and delivery of the said Deed is of this Deponents own proper and respective hand writing

Sworn and subscribed the day and year last aforesaid
before me Witness my hand and seal

Charles Nettleton 
Commissioner for Pennsylvania in New York.

114 Broadway N. Y. City

Geo A Boyt.

Recorded 21st Jan'y 1880

Excepting and reserving to the said Pennsylvania Coal Company their successors and assigns all the coal and other minerals under in or upon said lot of land. And also the right and privilege of mining and removing all the coal and other minerals under and upon said lot of land and of making and driving tunnels passages and ways under the surface of said lot of land for the purpose of mining any coal owned by the said Pennsylvania Coal Company their successors and assigns on said land or any adjoining lands as fully and entirely as if the said Pennsylvania Coal Company their successors and assigns remained the owners in fee of said surface or right of soil - the said Pennsylvania Coal Company not to transport the coal and other minerals hereby reserved upon the surface of said lot but in all other respects to be at liberty to mine and remove the same and to make and drive tunnels passages and ways under said surface of said lot without objection or hindrance and not to be liable to the said Alexander Craig his heirs or assigns to or for any injury or damages that may occur by reason of mining and removing said coal or other minerals or by reason of making and driving said tunnels passages or ways.

Scranton, Pa., Sept. 1, 1921.

To H. J. Mahon and Mrs. Margaret Craig Mahon,
7 Prospect Place,
Pittston, Pa.

DEAR SIR AND MADAM:

You are hereby notified that the mining operations of the Pennsylvania Coal Company, beneath your premises will by September 15th, have reached a point which will then or shortly thereafter cause subsidence and disturbance to the surface of your lot.

Although in the deed to Alexander Craig, under which you hold, we expressly reserved the right to remove the coal under your lot without liability for damages which might be caused thereby, we desire to notify you of the situation so as to enable you to take proper steps for the protection of your dwelling and for the safety of yourselves and the members of your household during the period when the disturbance will continue.

Yours very truly,

PENNSYLVANIA COAL COMPANY,
By W. A. MAY,
President.

Office Supreme Court, U. S.
WEST PHILADELPHIA
NOV 23 1922
WILLIAM S. GIBBS
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1922.

No. 549.

PENNSYLVANIA COAL COMPANY,
Plaintiff in Error,

vs.

H. J. MAHON and MARGARET CRAIG MAHON,
Defendants in Error.

**In Error to the Supreme Court of the
State of Pennsylvania**

BRIEF OF DEFENDANTS IN ERROR.

W. L. PACE,
H. J. MAHON,
Attorneys for Defendants in Error.

SCRANTON ASKS TO JOIN IN CAVE SUIT HEARING PUT OVER

The injunction proceedings filed by H. J. Mahon, of Pittston, and his wife, Margaret Craig Mahon, against the Pennsylvania Coal Company, to restrain further mining under property of the plaintiffs on Prospect place, Pittston, which in effect will test the constitutionality of the Kohler mine cave act, was due for a hearing this morning, but was continued until Friday, Sept. 10, at 2 p. m., to permit the bill being printed and the filing of an answer to the suit.

A feature of the case this morning was the appearance of City Solicitor E. S. Houck, of Scranton, and Attorneys Philip V. Mattes and Frank M. Walsh, counsel for the Surface Protective Association of Lackawanna County, who asked Judge Fuller to permit the Surface Association to intervene as a party plaintiff.

Ex-Judge F. W. Wheaton, who, with Attorney Reese Harris, of Scranton, appeared in the interest of Pennsylvania Coal Company, objected to the Surface Protective Association being permitted to intervene as a party plaintiff, as it had no interest in the property affected.

Judge Fuller took this view of the case, but said he would be glad to accept briefs from the outside attorneys and would permit them to participate in the arguments, as the court desired all the light possible on the case.

Then, at the request of Judge Wheaton, the hearing on the injunction was continued until Sept. 10 to permit the bill to be printed and the answer filed.

The request to permit the Scranton Surface Protective Association to intervene was made by Attorney Mattes, of Scranton, who stated that the Protective Association was vitally interested in the attack on the Kohler bill and wanted to be heard. On objections by Judge Wheaton that the Surface Protective Association had no direct interest in the property affected, Judge Fuller denied the request, saying that it would not be feasible to permit the association to intervene in the case. The judge added that the court would only be too glad to accept their briefs, and that they would be heard when the case was argued, and that they would be notified if any change was made as to the time of hearing.

The above brief arguments were made and the hearing put over before the arrival of Attorney H. J. Mahon and his counsel, W. L. Pace, in the court room, which aroused some suspicion on the part of the Scranton lawyers that the proceedings were somewhat amicable between Mr. Mahon and the Pennsylvania Coal Company. The latter explained that he was notified that the hearing would be continued pending time for printing the bill and filing the answer, and that he was delayed in reaching the Court House because he was looking up some law in the case.

Attorney Mahon stated that there was nothing amicable in the suit, that his object was sincere, that he desired to protect his property and sustain the provisions of the Kohler bill, if possible. He said he would welcome the assistance of counsel for the Scranton Protective Association as party plaintiff or otherwise in the case and would be glad of their co-operation.

It is understood that most of the coal companies are interested in the lawsuit and consider it a test case, as raising the constitutionality of the Kohler mine cave bill. An effort will be made to have it sent to the Supreme Court as soon as possible.

Judge Wheaton stated that if there is no delay and the case goes to final hearing on Sept. 10, and a decision promptly made by the local court, that the Supreme Court could be asked to pass upon the bill at the fall session to be held in Pittsburgh.

The effort of the Scranton Protective Association to intervene in the case was made in pursuance to a resolution of the Scranton City Council, instructing City Solicitor Houck to ask the Luzerne County Court to permit the protective association to become a party plaintiff in the Mahon suit.

There is considerable interest aroused in the case in Scranton, as the constitutionality of the Kohler bill is considered vital to the protection of that city from further mine caves and property damage.

No. 549

October Term, 1922.

In the
Supreme Court of the United States

Pennsylvania Coal Company

Plaintiff-in-Error,

vs.

H. J. Mahon and Margaret Craig Mahon

Defendants-in-Error.

In Error to the Supreme Court of Pennsylvania

**Exhibits in connection with Brief of
the City of Scranton, Intervenor**

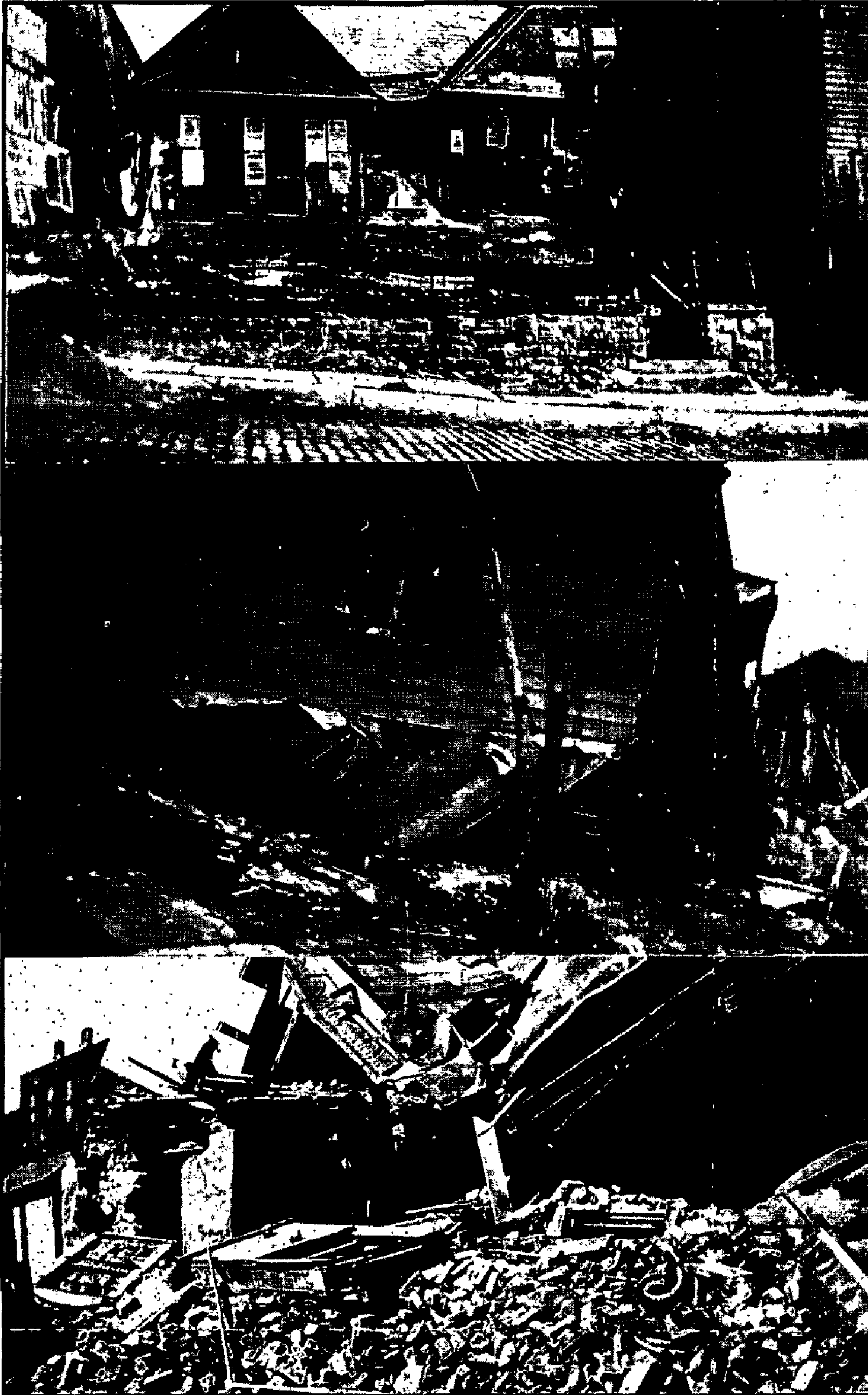
This envelope contains exact copies of the photographic representations of conditions in the mine cave areas which were in the hands of every representative and senator of the Pennsylvania Legislature during the hearings on the Kohler Bill.

PHILIP V. MATTES,

City Solicitor,

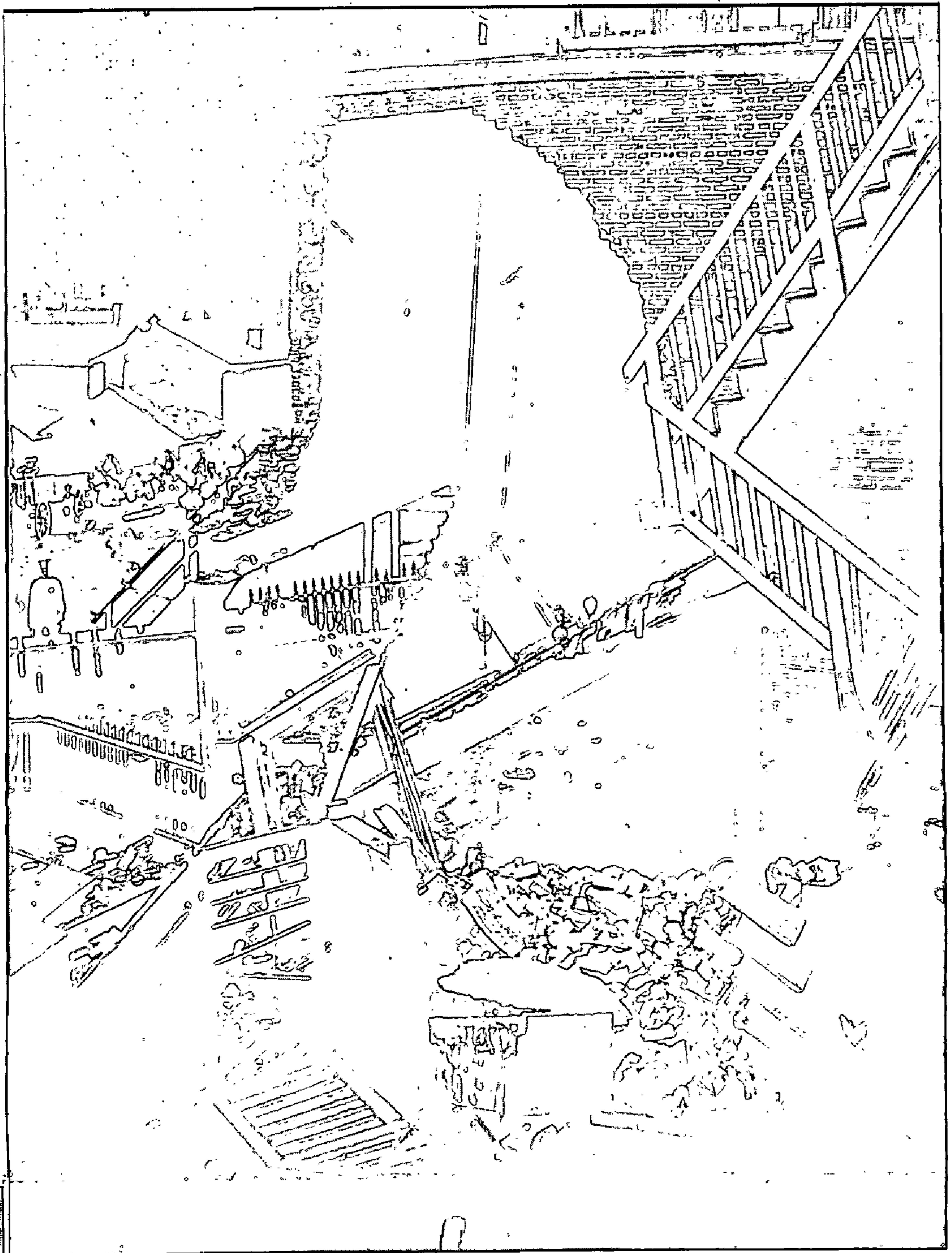
For the City of Scranton.

THREE GENERAL VIEWS OF MINE CAVE HAVOC, SCRANTON, PA.



The above pictures are typical of mine cave havoc in Scranton, Pa., where the people are insisting upon remedial legislation in order to protect their lives and their property.

AN OPPORTUNE HOUR OF DISASTER SAVED HUNDREDS



The World Theatre, Scranton, Pa., wrecked by a mine cave shortly after the audience had been dismissed for the night. Had this occurred shortly before the time of the collapse of the building, hundreds of lives would have been sacrificed to the greed of mining operators, now seeking to avoid remedial mine cave legislation.

THE PROSSER FAMILY HOME, NORTH SUMNER AVENUE, SCRANTON, PA.



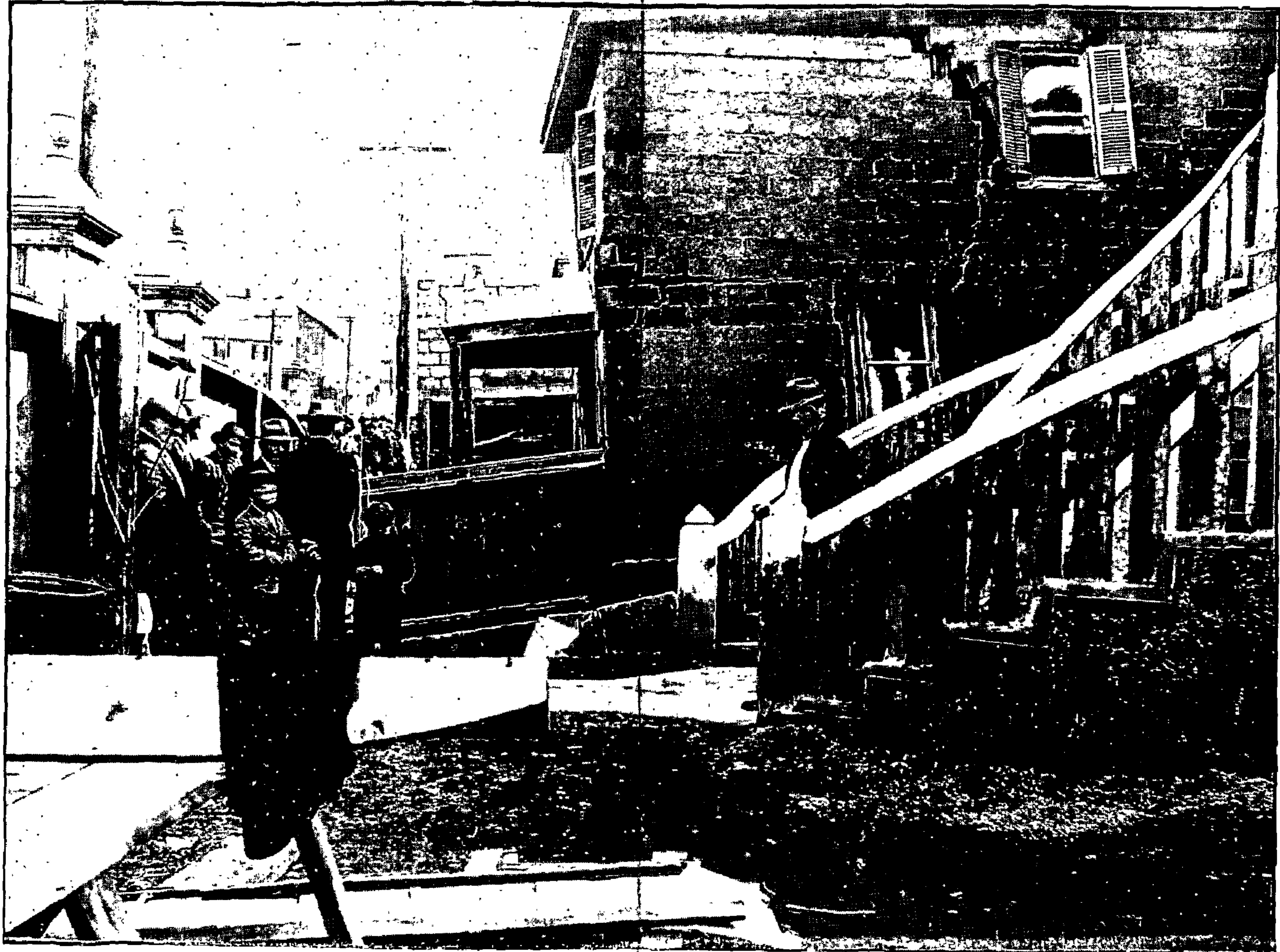
Extensive timbering being done to save the home of Mr. Prosser at Scranton after a mine cave had dropped the surface beneath the property. This is within a hundred feet of where Robert Warburton, aged 12 years, lost his life when the surface dropped and he was engulfed in a deep mine cave pit.

NO. 16 PUBLIC SCHOOL, SCRANTON, PA.



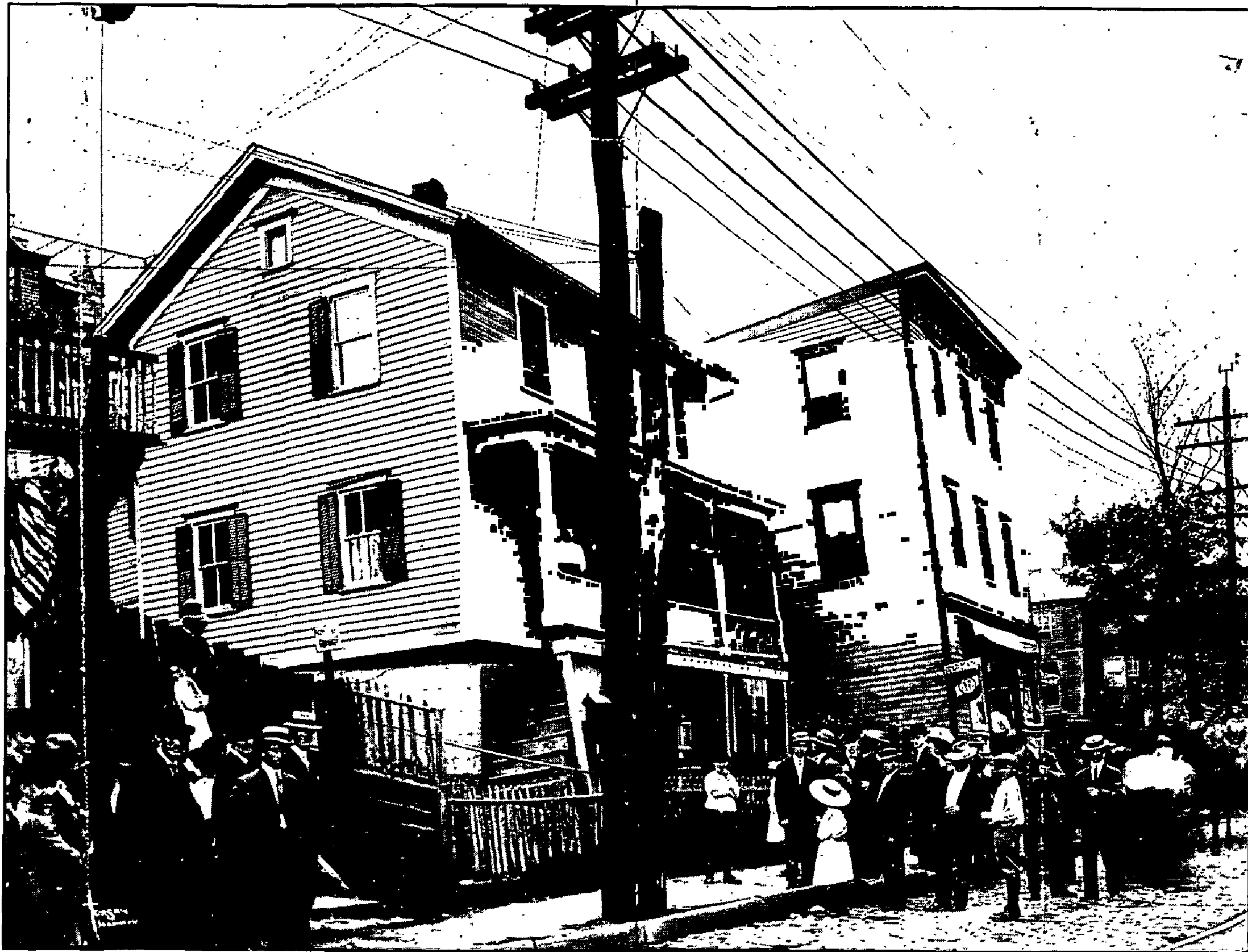
Wrecked by a mine cave on August 29, as school was to open a week later. Had this occurred a few days later, when 500 pupils were assembled for classes, a panic would have resulted. The total damage of this cave is estimated at \$50,000.

HOME ON RIPPLE STREET, SCRANTON, PA., WRECKED BY MINE CAVE



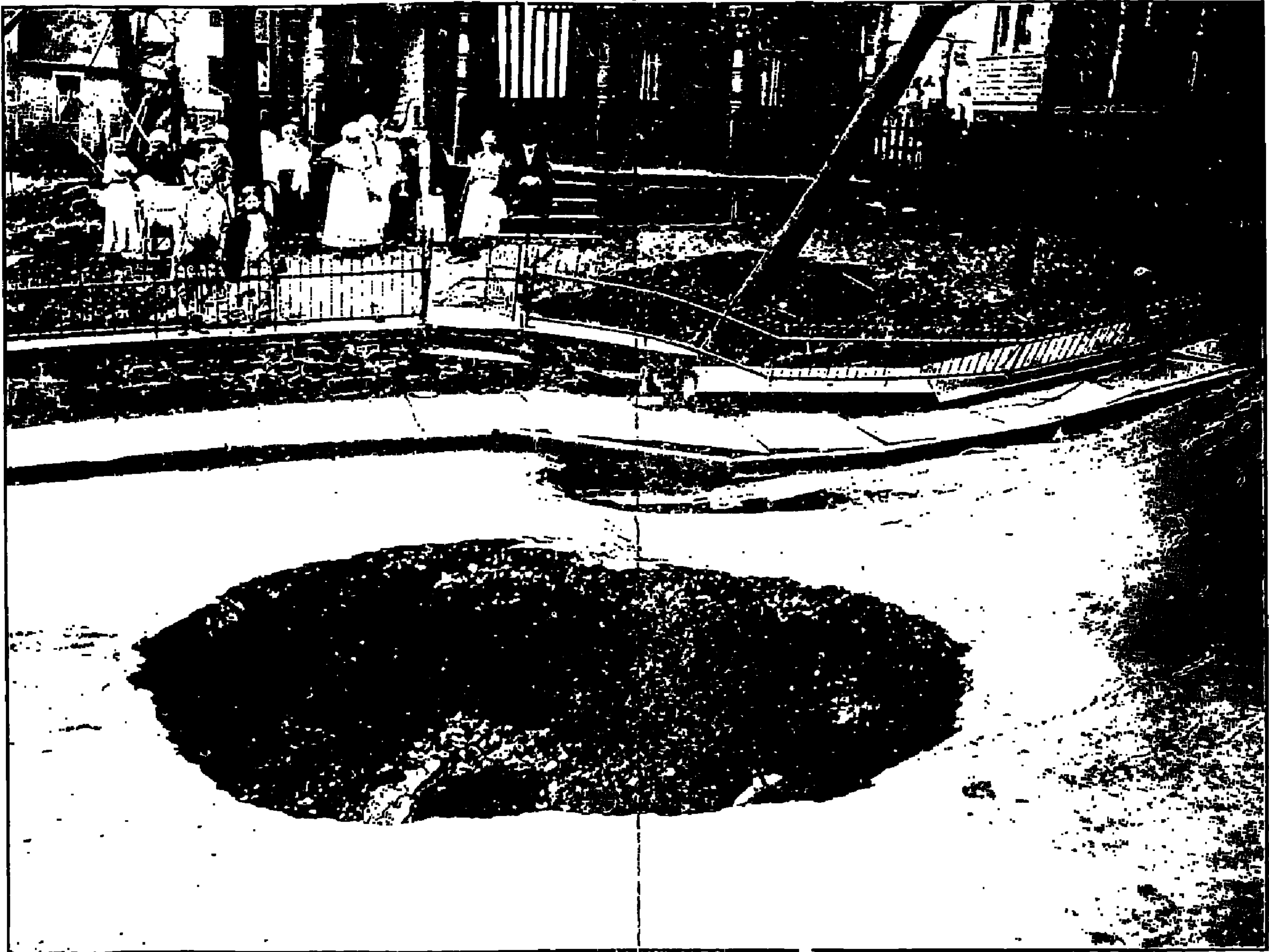
Another family driven into the street as a result of a mine cave such as menaces the life of the people in the anthracite region.

SCRANTON FAMILIES DRIVEN INTO THE STREET BY MINE CAVE



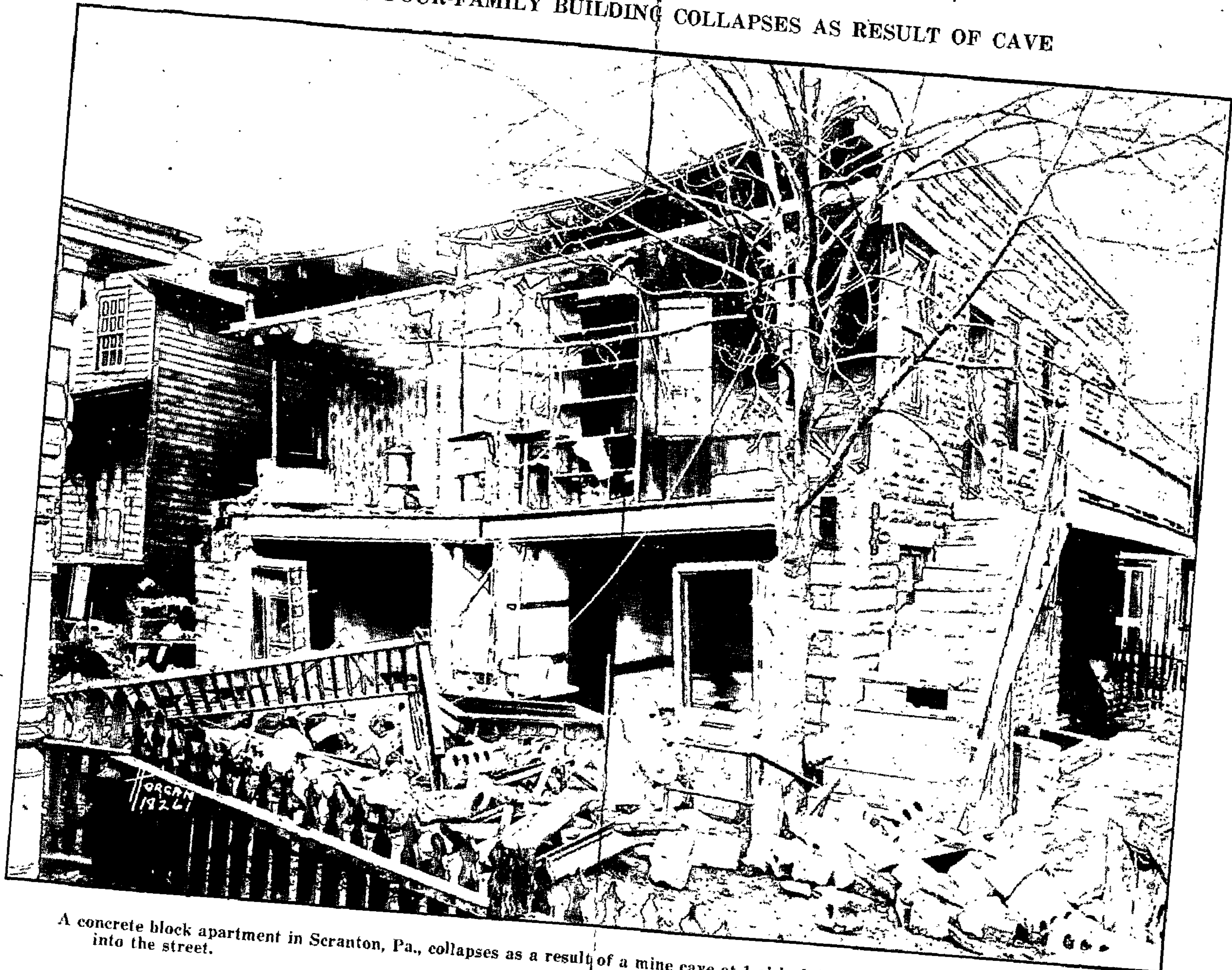
Scene along Robinson Street, West Scranton, where many homes have been wrecked by ruthless mining operations.

WHAT A FIRE TRUCK, RESPONDING TO AN ALARM, JUST MISSED



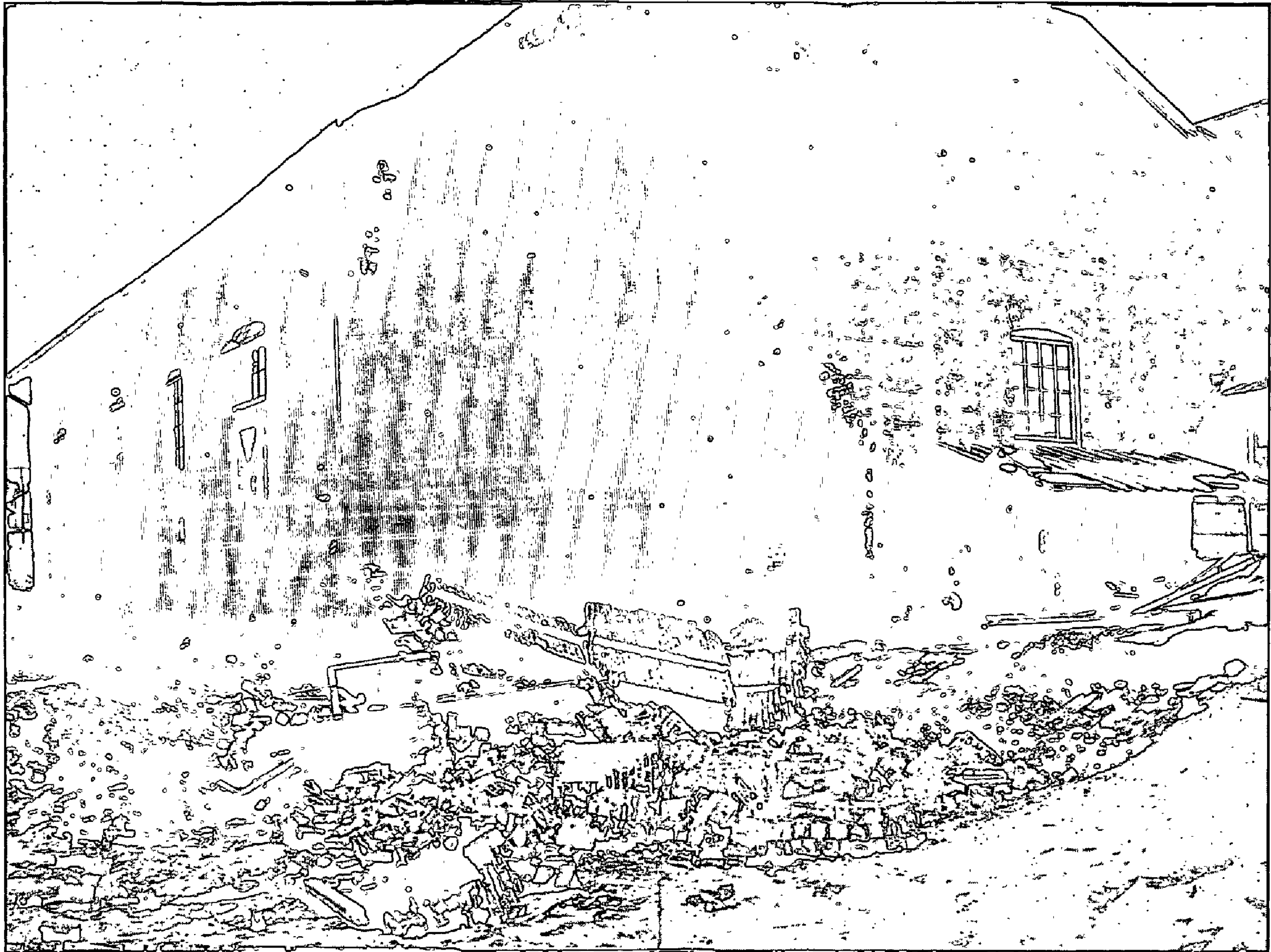
While responding to a fire alarm, William Frey, of Taylor, Pa., near Scranton, Pa., a truck driver, just missed dropping the fire fighting apparatus into this 30-foot pit on a main thoroughfare. Quick action on the part of the driver saved the lives of these firefighters.

FRONT OF FOUR-FAMILY BUILDING COLLAPSES AS RESULT OF CAVE



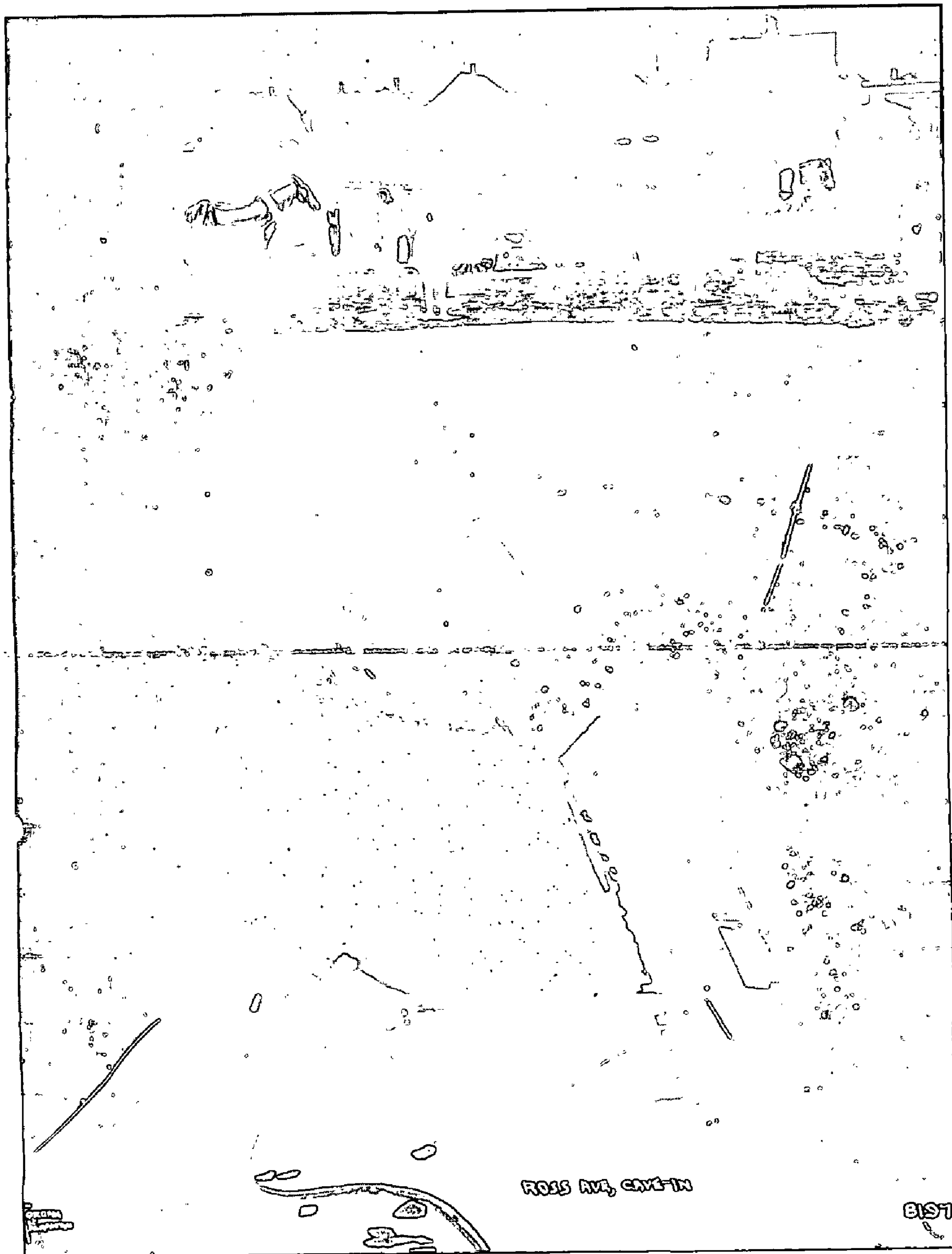
A concrete block apartment in Scranton, Pa., collapses as a result of a mine cave at 1 o'clock in the morning, driving all occupants into the street.

ONE OF SOUTH SCRANTON'S INDUSTRIAL PLANTS WRECKED



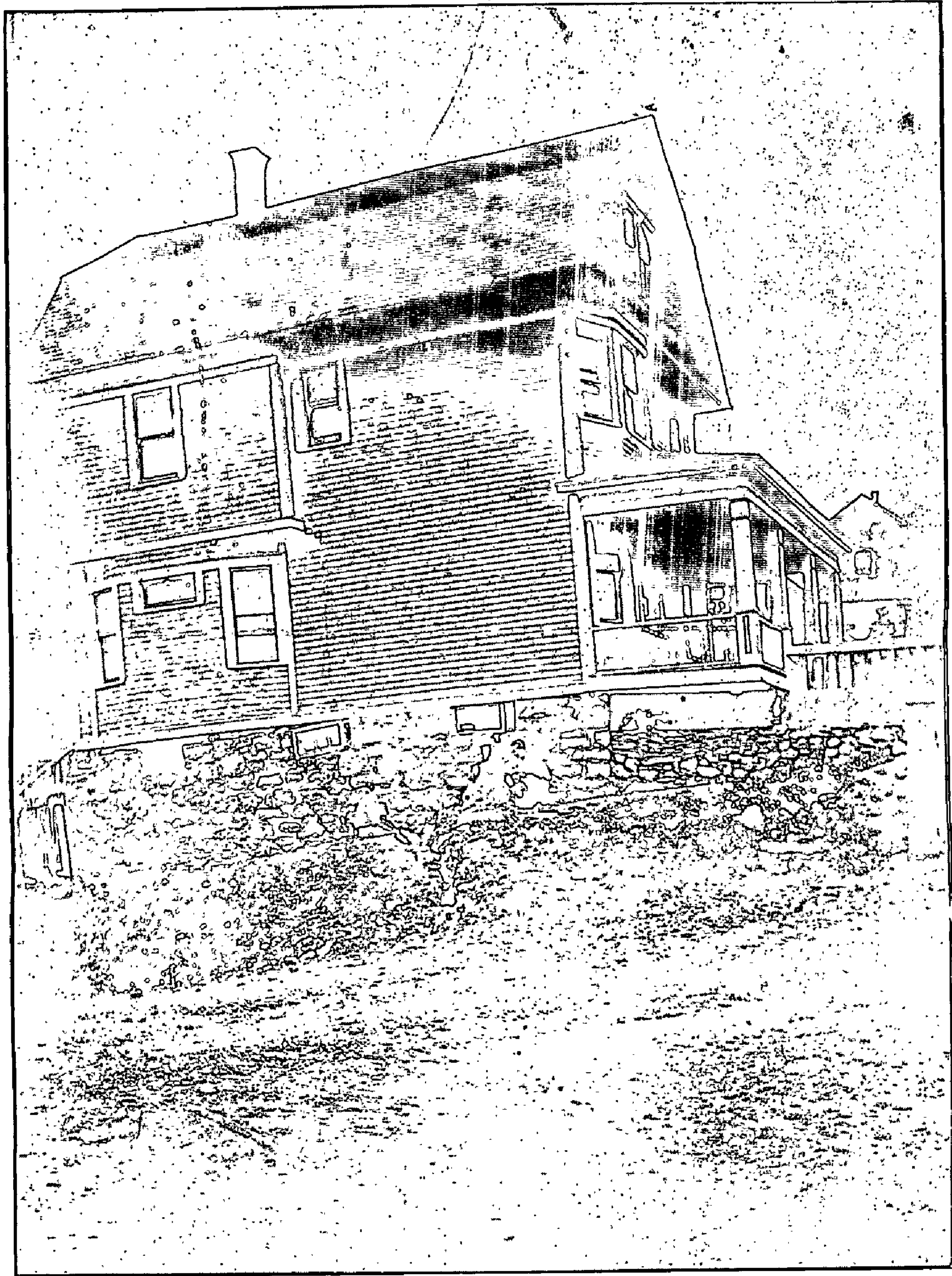
A mine cave almost completely wrecked this big industrial plant in South Scranton. The property damage was great and many were thrown out of employment.

LADDER FROM THIRD STORY WINDOW SAVED THESE LIVES



When the home of Mr. and Mrs. Buckley, Ross Avenue, Scranton, dropped into a mine cave at an early hour in the morning, they reached the surface by the means of a ladder from the attic window before flames destroyed the building and all of their possessions in the pit beneath. They saved their lives, but lost **THEIR ALL.**

THE FORERUNNER OF RUIN



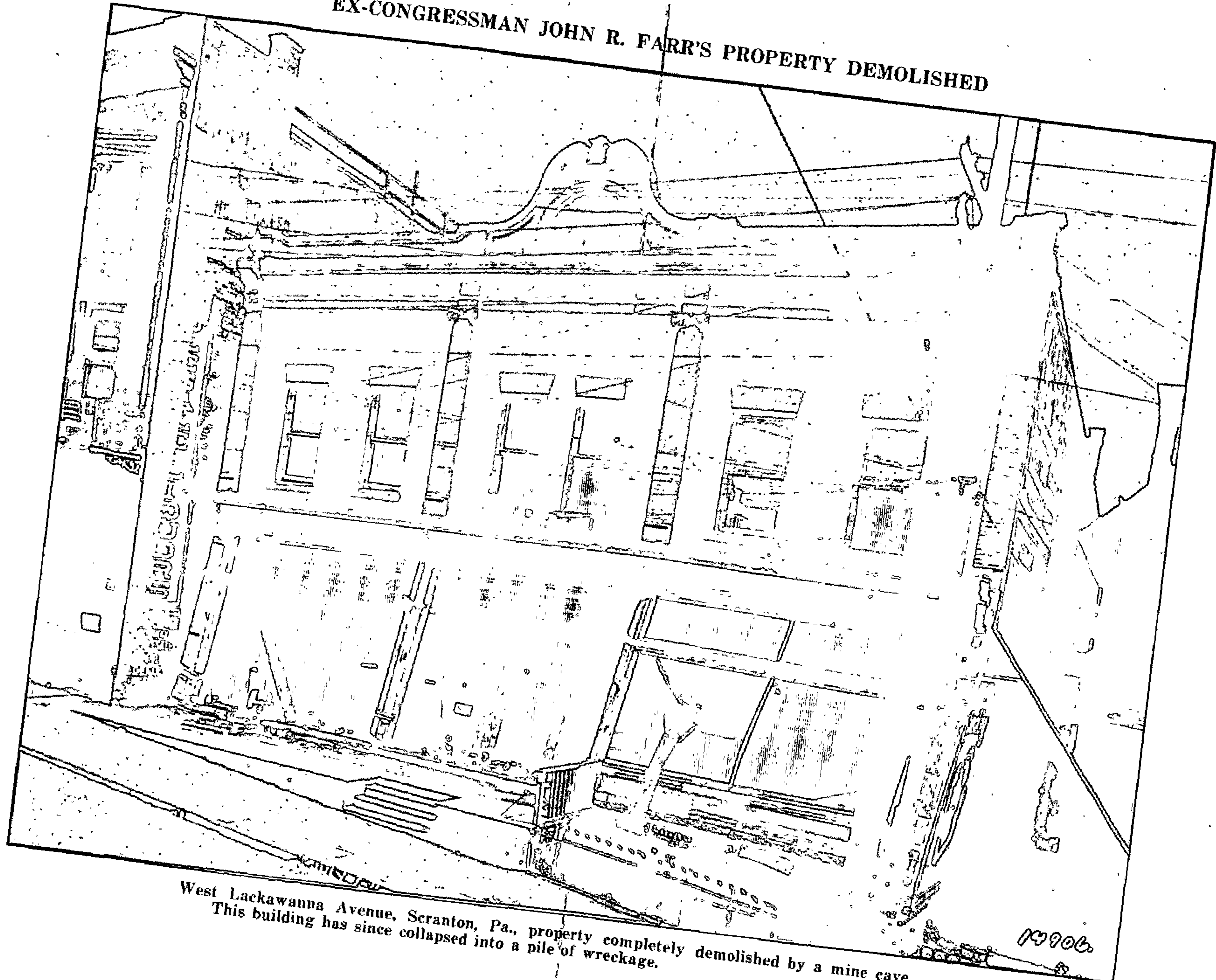
The home of Michael Crane, Ripple Street, Scranton, Pa., just as the surface began to settle.

THE LAVELL FAMILY HOME FOLLOWING A MINE CAVE



This Scranton, Pa., family were driven into the street because of a mine cave that wrecked their home.

EX-CONGRESSMAN JOHN R. FARR'S PROPERTY DEMOLISHED



West Lackawanna Avenue, Scranton, Pa., property completely demolished by a mine cave.
This building has since collapsed into a pile of wreckage.

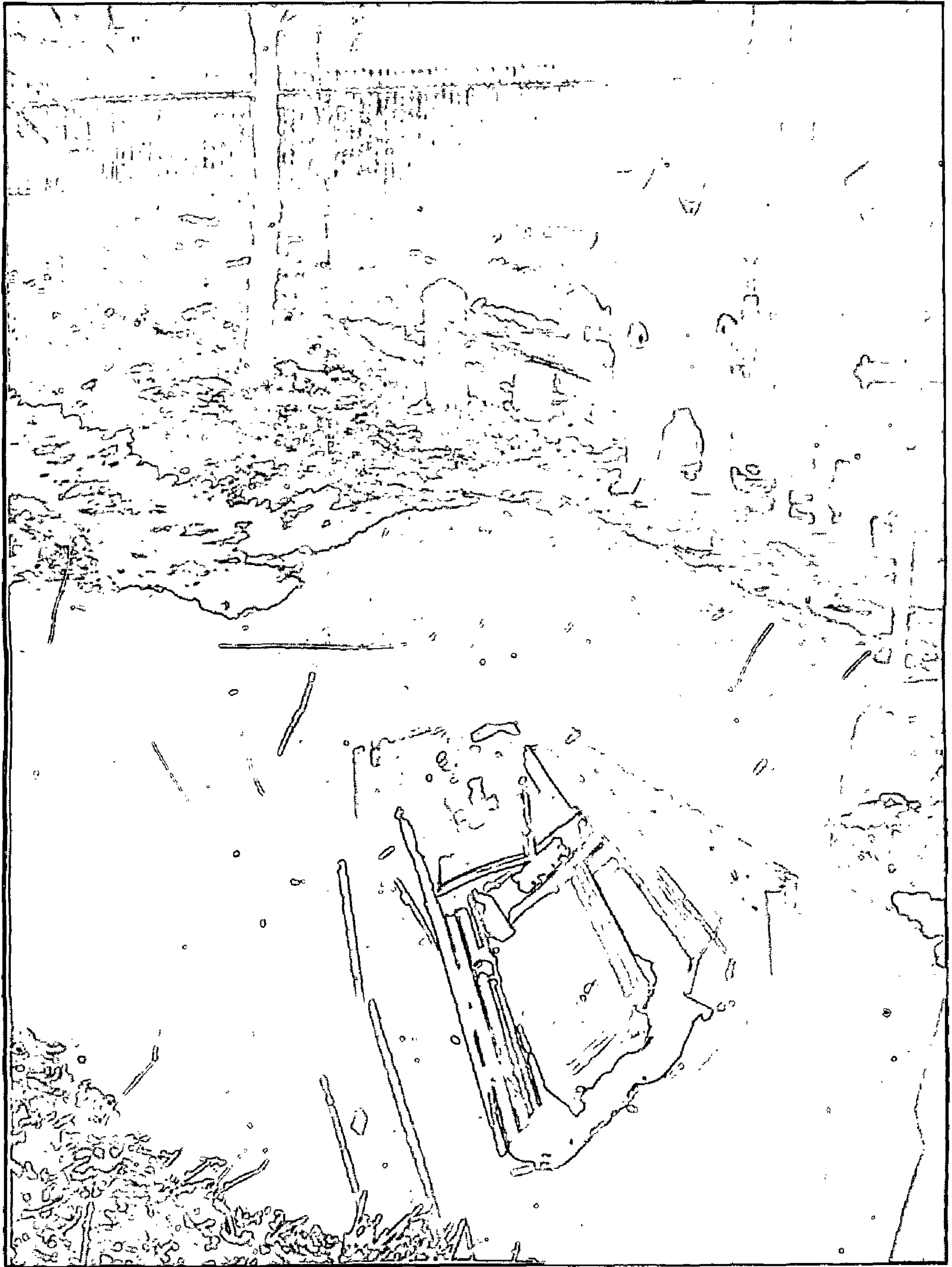
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HOUSER PROPERTY WRECKED BY GAS EXPLOSION FOLLOWING MINE CAVE



This property nearly adjoins the Park Theater, Scranton, Pa. It was demolished by an explosion of gas following a mine cave and the result thereof, a few minutes after the theater audience had been dismissed.

GRAVES OF THE DEAD ROCKED BY MINE CAVES



The last resting place of a well known Scranton, Pa., woman, whose grave was torn open, a few weeks after burial, by a mine cave, in Cathedral Cemetery, where hundreds of bodies have been dropped into the mine beneath. The casket is shown in the pit, torn asunder, and the hand of the corpse is seen protruding from the burial case.