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**BUNDLED RIGHTS AND GREAT EXPECTATIONS:
APPLYING THE *LUCAS* CATEGORICAL TAKING RULE TO SEVERED MINERAL
PROPERTY INTERESTS:**

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I. INTRODUCTION

[O]ur “takings” jurisprudence . . . has traditionally been guided by the understandings of our citizens regarding the content of, and the State's power over, the “bundle of rights” that they acquire when they obtain title to property We think the notion . . . that title is somehow held subject to the “implied limitation” that the State may subsequently eliminate all economically valuable use is inconsistent with the historical compact recorded in the Takings Clause that has become part of our constitutional culture.

*Lucas v. South Carolina Coastal Council*¹

The expectations that accompany fee simple ownership of land are many and varied. It is fair to say that the breadth of those expectations is directly proportional to the multitude of sticks contained in a property owners’ “bundle of rights.” In *Lucas v. South Carolina Coastal Council*, the Supreme Court embraced an apt metaphor associated with its traditional takings jurisprudence - “bundle of rights” - the metaphor expresses the high level of expectation attendant citizen ownership of land held in fee simple absolute - the interest before the Court in *Lucas*. The Court deemed those expectations worthy of creation of a new *per se* takings rule that extends heightened protection to the expectations of fee simple land owners.

Ownership of land in this nation has always been a highly valued attribute of American Democracy. So important, in fact, that it is one of the specific values extended protection by our Constitution’s “Bill of Rights.”² The notion that a woman’s home is her castle does, in fact, reflect a deeply rooted societal value. But citizen’s rights to organize into a government empowered by law to protect the public health and safety and advance the general welfare are also a deeply rooted societal value. Whether these competing values are best protected by *Lucas*’ categorical takings rule has been the subject of considerable debate since it was decreed almost two decades ago. In this debate it seems appropriate to ask whether the values inherent in ownership of less than fee simple interests in land give rise to citizen expectations that bear any substantial resemblance to interests advanced by “the historical compact recorded in the Takings Clause that has become part of our constitutional culture.”³ The following discussion explores the expectations of one type of ownership interest - the right to extract minerals from land – a

¹ 505 U.S. 1003, at 1027-1028

² The Fifth Amendment to the Constitution provides in relevant part:

No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. Amend. V.

³ *Lucas*, 505 U.S. at 1028.

right of property less than the fee simple interest from which it was severed by grant or reservation.

Whether the expectations of various forms of mineral ownership deserve the additional protection of Lucas' categorical rule seems problematic considering the historic limited expectations of severed mineral ownership. Restricting the application of the *Lucas* categorical takings rule to claims of government taking of the entire economic value of fee simple land ownership does not immunize government regulation and allow it to "plunder" the rights of a mineral interest owner.⁴ On the contrary, limiting application of the categorical takings rule to claims of fee simple owners of land does no more than allow courts to consider the character of the government regulation and the claimants' investment-backed expectations when a total taking of mineral interests is alleged. Courts would simply continue to apply the regulatory takings analysis first expressed in the seminal takings case, *Pennsylvania Coal v. Mahon*⁵, as synthesized later in *Penn Central* as it has evolved over almost a century of Supreme Court takings jurisprudence.⁶

II. THE *LUCAS PER SE* TAKINGS RULE⁷

A. South Carolina's Land Use Regulation and the Lucas Land

Real estate developer David Lucas purchased a fee simple interest in two residential lots on a South Carolina barrier island in 1986 with the intention of building on the lots single-family homes like those on immediately adjacent parcels. At that time of Lucas' purchase, his lots were not subject to the State's coastal zone building permit regulations. Two years later, in 1988, the South Carolina legislature enacted the Beachfront Management Act⁸ ("BMA"), that had the effect of prohibiting Lucas from building any permanent habitable structures on his land.⁹

⁴ Lucas, 505 U.S. at 1028, n. 14. ("... a regulation *specifically directed to land use* no more acquires immunity by plundering landowners generally than does a law specifically directed at religious practice acquire immunity by prohibiting all religions.")

⁵ *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922).

⁶ See, *Penn Central Transportation Company v. City of New York*, 438 U.S. 104, 104 (1978) ("... the Court's decisions have identified several factors that have particular significance. The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations. So, too, is the character of the governmental action.") (citations omitted).

⁷ 505 U.S. 1003 (1989).

⁸ S. C. Code Ann. § 48-39-10 *et seq.* (1987).

⁹ Justice Scalia's opinion for the Court in *Lucas* observed:

The Beachfront Management Act brought Lucas's plans to an abrupt end. Under that 1988 legislation, the Council was directed to establish a "baseline" connecting the

Lucas subsequently filed suit in state court against the South Carolina Coastal Council, the state regulatory agency tasked with enforcing the BMA. Lucas contended the ban on construction deprived him of all “economically viable use” of his land thus affecting a “taking” under the Fifth and Fourteenth Amendments. Lucas argued that “total wipeout” of the value of his land necessitated payment of “just compensation,” notwithstanding the fact that the enactment may have substantially advanced an important and valid public interest.¹⁰ The South Carolina trial court agreed, holding that the ban rendered Lucas' parcels “valueless.”¹¹ Judgment was entered by the trial court in Lucas favor in an amount exceeding \$1.2 million.¹²

landward-most “point[s] of erosion . . . during the past forty years” in the region of the Isle of Palms that includes Lucas's lots. S.C.Code Ann. § 48-39-280(A)(2) (Supp.1988). In action not challenged here, the Council fixed this baseline landward of Lucas's parcels. That was significant, for under the Act construction of occupiable improvements was flatly prohibited seaward of a line drawn 20 feet landward of, and parallel to, the baseline. § 48-39-290(A). The Act provided no exceptions.

Lucas v. Carolina Coastal Council, 550 U.S. 1003, 1009-1010, 112 S.Ct 2886, 2889-2890, quoting, 304 S.C. 376, 379, 404 S.E.2d 895, 896 (1991).

The Act permitted construction of non-habitable improvements including “wooden walkways no larger in width than six feet,” and “small wooden decks no larger than one hundred forty-four square feet.” S.C.Code Ann. §§ 48-39-290(A)(1) and (2).

¹⁰ *Lucas*, 550 U.S. 1003.

¹¹ The trial Court found that “at the time Lucas purchased the two lots, both were zoned for single-family residential construction and ... there were no restrictions imposed upon such use of the property by either the State of South Carolina, the County of Charleston, or the Town of the Isle of Palms.” *Lucas* at 505 U.S. at 1110, quoting App. to Pet. for Cert. 36. The trial court also found the BMA permanently banned on Lucas's lots, and that this prohibition “deprive[d] Lucas of any reasonable economic use of the lots, ... eliminated the unrestricted right of use, and render[ed] them valueless.” *Id.*, quoting App. to Pet. for Cert. at 37. The court held that Lucas's land had been “taken” by operation of the Act and ordered the Coastal Council to pay “just compensation” in the sum of \$1,232,387.50. *Id.*

¹² The state court held that Lucas' land had been “taken” by operation of the Act and ordered the Coastal Council to pay “just compensation” in the sum of \$1,232,387.50. *Id.* *Lucas* dissenters and many commentators questioned the trial court’s finding that the value of Lucas’ property had been wiped out. See, e.g., Richard J. Lazarus, *Putting The Correct “Spin” On Lucas*, 45 Stan. L.Rev. 1411(1993). Professor Lazarus observed:

The Supreme Court based its ruling for the landowner on the factual assumption that the challenged developmental restriction had deprived the landowner of the entire economic value of his property. But no member of the Court seemed to believe that this assumption was valid. Four Justices explicitly questioned its accuracy, and the majority opinion carefully avoided any intimation to the contrary. (citations omitted).

On appeal the South Carolina Supreme Court reversed.¹³ “It found dispositive what it described as Lucas’s concession ‘that the Beachfront Management Act [was] properly and validly designed to preserve ... South Carolina’s beaches.’ ”¹⁴

The Supreme Court’s refusal to recognize the legitimacy of Lucas’ taking claim was based in significant degree upon long-established precedent holding that when a regulation is designed to prevent “harmful or noxious uses” of property akin to public nuisances, no compensation is due under the Takings Clause.¹⁵

B. The Supreme Court’s Holding in *Lucas*

Reduced to its’ essence, the holding of *Lucas* is that “*when . . . a regulation that declares ‘off-limits’ all economically productive or beneficial uses of land goes beyond what the relevant background principles would dictate, compensation must be paid to sustain it.*”¹⁶ In assessing whether *Lucas*’ categorical taking rule applies to mineral interests like coal, oil and gas and other mineral substances, the definition of the “land” referenced in the Court’s holding is obviously a crucial inquiry. *Lucas*, and indeed all of the Court’s modern taking cases, requires the property alleged to have been taken be specifically identified before a judicial assessment is made as to whether compensation is required.

Fundamental principles of Supreme Court adjudication and the limits of Article III’s case or

Id. at 1412.

¹³ *Lucas v. South Carolina Coastal Council*, 304 S.C. 376, 379, 404 S.E.2d 895, 896 (1991).

¹⁴ *Lucas v. Carolina Coastal Council*, 550 U.S. 1003, 1009 -1010.

The State Supreme Court emphasized that *Lucas* “admittedly fails to attack the validity of the Act, and therefore concedes the validity of the legislative declaration of its “findings” and “policy” embodied in [the BMA]. The South Carolina Court thus considered itself “. . . in no position to question the legislative scheme or purpose.” at 896.

¹⁵ *Lucas v. South Carolina Coastal Council*, 304 S.C. 376, 383, 404 S.E.2d 895, 899 (1991), citing, *Mugler v. Kansas*, 123 U.S. 623, 8 S.Ct. 273, 31 L.Ed. 205 (1887) (prohibition on the manufacture and sale of intoxicating liquors); *Hadacheck v. Sebastian*, 239 U.S. 394, 36 S.Ct. 143, 60 L.Ed. 348 (1915) (ordinance prohibiting the manufacture of bricks near residents in Los Angeles); *Miller v. Schoene*, 276 U.S. 272, 48 S.Ct. 246, 72 L.Ed. 568 (1928) (state action destroying diseased cedar trees of certain property owners to prevent the infection of apple orchards); and *Goldblatt v. Hempstead*, 369 U.S. 590, 82 S.Ct. 987, 8 L.Ed.2d 130 (1962) (prohibition against excavating below the water table in order to extract gravel).

¹⁶ 505 U.S. at 1030. *Lucas* defined “relevant background principles” as “the restrictions that background principles of the State’s law of property and nuisance . . . place upon land ownership” including the State’s common law of private and public nuisance. *Id.* at 1029.

controversy limit on federal judicial power require the scope of the *Lucas per se* takings rule to necessarily be limited to the case actually decided by the Court. The property David Lucas claimed had been taken was a fee simple absolute interest in two lots --- an interest that included all of the strands or sticks that comprise a fee simple owner's interest in real property.¹⁷ As explained below, a fee simple absolute interest in land is fundamentally different than severed and segmented interests in mineral underlying land. The *Lucas* Court holding applies, *inter alia*, only after a judicial determination has been made that an unencumbered fee simple interest in land has been rendered valueless by a government regulation.

The question of whether *Lucas*' categorical takings rule applies to severed and segmented mineral interest is easy to answer. In footnote 7, the Court identifies "uncertainty" in the Court's regulatory takings jurisprudence as it relates to how a court should identify "the property interest against which the loss of value is to be measured." That "uncertainty" was resolved by *Lucas* only when, as did David Lucas, a taking claimant owns a fee simple interest in land:

. . . we avoid this difficulty *in the present case*, since the "interest in land" that Lucas has pleaded (a fee simple interest) is an estate with a rich tradition of protection at common law, and since the South Carolina Court of Common Pleas found that the Beachfront Management Act left each of Lucas's beachfront lots without economic value.¹⁸

Thus, *Lucas* explicitly left unresolved the issue how to identify "the property interest against which the loss of value is to be measured." Therefore, one cannot argue that *Lucas*' holding including its' categorical is precedent and *must be applied* in the event that a takings claimant alleges a total taking of a severed/segmented mineral interest. *Lucas*' new "categorical" or "*per se*" takings rule is narrowly limited to the "relatively rare," indeed, extraordinary circumstance" when a government regulatory initiative eliminates all economic value *in a fee simple estate in land*.¹⁹ As explained, below, subsequent cases may attempt to extend the holding of *Lucas* and

¹⁷ See *Lucas*, 505 U.S. at 1016 (" . . . in the present case . . . the "interest in land" that Lucas has pleaded [is] a fee simple interest . . .") (parentheses omitted). The Federal Circuit has described the characteristics of a fee simple estate: ". . . (1) it is a present estate in land that is of indefinite duration; (2) it is freely alienable by deed inter vivos, by will post-mortem and involuntarily by execution or judicial sale; (3) it carries with it the right of possession; (4) the holder may make use of any portion of the freehold without being beholden to any person except to the extent that the sovereign has not limited such right of use. *Cienega Gardens v. U.S.*, 331 F.3d 1319 (Fed. Cir 2003), *citing*, 2 George Lefcoe & David A. Thomas, *THOMPSON ON REAL PROPERTY* § 17.02 (David A. Thomas ed., 2d ed. 2000).

¹⁸ 505 U.S. at 1016 (citations omitted) (emphasis in original).

¹⁹ It is worthy of note that, while the *Lucas* Court identified a categorical taking rule applicable in any case where regulation totally devalues a particular piece of land held in fee simple, the Court did not find that David Lucas had suffered a compensable taking of his two lots. Rather the Court remanded the case to the South Carolina court with the admonition that ". . . South

apply its' *per se* takings rule to ownership of less than fee simple interests including mineral interests. The efficacy of extending the *per se* takings rule to total takings of mineral interested is discussed below.

C. Lucas' Per Se Rule Significantly Alters The Penn Central Takings Equation

One important consequence of application of the *Lucas* categorical takings rule is that it arguably eliminates several important components of *Pennsylvania Coal Co. v. Mahon* and *Penn Central Transportation Co. v. New York City's*, almost century-old takings equation,²⁰ making it more difficult for a public body to resist a takings compensation claim.²¹ In *Penn Central* the Court delineated considerations courts examine in determining whether a compensable taking has occurred:

. . . the Court's decisions have identified several factors that have particular significance. The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with *distinct investment-backed expectations* are, of course, relevant considerations. So, too, is *the character of the governmental action*. A "taking" may more readily be found when the interference with property can be characterized as a physical invasion by government than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good.²²

Carolina must identify background principles of nuisance and property law that prohibit the uses he now intends in the circumstances in which the property is presently found." *Lucas*, 550 U.S. at 1131-1132. "Only on this showing" said the opinion, "can the State fairly claim that, in proscribing all such beneficial uses, the Beachfront Management Act is taking nothing." *Id.*

²⁰ 438 U.S. 104 (1978).

²¹ The premise is arguable, at least insofar as *Lucas* can be seen as eliminating from a court's categorical takings analysis consideration of a landowners' "distinct investment backed expectations." Some post-*Lucas* judicial decisions have read *Lucas* to eliminate inquiry into a takings claimant's economic expectations. Persuasive arguments have been made by courts and commentators that *Lucas*' holding did not eliminate from judicial consideration this central component of the Penn Central takings test. *See generally*, Kristine Tardiff, Expectations: *The Final Lucas Frontier*, 11th annual CLE Conference On Litigating Regulatory Takings And Other Challenges To Land Use And Environmental Regulation (Stanford, CA., November 6-7, 2008). *See also*, *Good v. United States*, 189 F.3d 1355, 1361 (Fed. Cir. 1999) (" . . . the Supreme Court in *Lucas* did not mean to eliminate the requirement for [reasonable investment-backed expectations] to establish a taking."). *Good v. United States* did, however, recognize that the *Lucas per se* rule bars courts from balancing "the importance of the public interest advanced by the regulation against the regulation's imposition on private property rights," ie., the character of the governmental action. *Id.* at 1361.

²² *Penn Central Transportation Company v. City of New York*, 438 U.S. 104, 124 (1978) (emphasis supplied).

However, once a court has determined that a “total taking” of land has occurred, that is, when a regulation denies a fee simple owner “all economically beneficial or productive use” *Lucas* requires a judicial inquiry very different than the *ad hoc*, case by case analysis of takings claims outlined by Justice Holmes in *Pennsylvania Coal v. Mahon* and articulated in *Penn Central*.

The judicial examination of a land owners' “distinct investment-backed expectations” and the “character of the government interest involved” components of the *Penn Central* takings equation are jettisoned under *Lucas* categorical taking inquiry:

The “total taking” inquiry we require today will ordinarily entail . . . analysis of, among other things, the degree of harm to public lands and resources, or adjacent private property, posed by the claimant’s proposed activities and their suitability to the locality in question . . . and the relative ease with which the alleged harm could be avoided through measures taken by the claimant and the government (or adjacent private land owners).²³

Once a court has determined that one hundred percent of the value of a takings plaintiff’s fee simple interest in land has been wiped out, *Lucas per se* rule narrowly limits the subsequent judicial inquiry. Court are restricted to determining whether the government regulation is based upon “restrictions that background principles of the State's law of property and nuisance already place upon land ownership” – restrictions on uses that inhered in the title of the property when it was acquired by the takings claimant.²⁴

D. Lucas Dictum

Writing for the *Lucas* majority, Justice Scalia alluded to “numerous occasions” on which the Court had previously said that “the Fifth Amendment is violated when land-use regulation . . .

Mahon first articulated broad contours of an essentially *ad hoc* regulatory taking inquiry:

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.

260 U.S. 393, at 413. The *Penn Central* considerations mentioned in the text above are a synthesis of the Court’s post-*Mahon* regulatory takings principles.

²³ *Lucas*, 505 U.S. at 1031.

²⁴ *Lucas*, 505 U.S. at 1029.

“denies an owner economically viable use of his land.”²⁵ Following this observation, Justice Scalia inserted into the opinion what Professor David Callies has termed “the infamous footnote 7.” Footnote 7 is almost completely *dictum*.²⁶ It begins:

Regrettably, the rhetorical force of our “deprivation of all economically feasible use” rule is greater than its precision, since the rule does not make clear the “property interest” against which the loss of value is to be measured. . . . Unsurprisingly, this uncertainty regarding the composition of the denominator in our “deprivation” fraction has produced inconsistent pronouncements by the Court.²⁷

Thus, the footnote identifies “uncertainty” in the Court’s regulatory takings jurisprudence as it relates to how a court should identify “the property interest against which the loss of value is to be measured” - and suggests the answer to this “difficult question”:

. . . *may* lie in how the owner's reasonable expectations have been shaped by the State's law of property - *i.e.*, whether and to what degree the State's law has accorded legal recognition and protection to the particular interest in land with respect to which the takings claimant alleges a diminution in (or elimination of) value.²⁸

That the statements in footnote 7 are *dictum* is not subject to dispute. The note ends with the

²⁵ *Lucas*, 505 U.S. at 1016, *citing*, *Agins v. Tiburon*, 447 U.S., at 260, 100 S.Ct., at 2141 (emphasis in original).

²⁶ David L. Callies, *After Lucas and Dolan: An Introductory Essay*, in *TAKINGS: LAND-DEVELOPMENT AND REGULATORY TAKINGS AFTER DOLAN AND LUCAS*, at 15 (David L. Callies, ed. 1996) . Although there is considerable debate in the academy regarding the appropriate definition of “dictum” as distinguished from “holding,” the most common and widely accepted understanding defines “holding” as “[a] court's determination of a matter of law pivotal to its decision; a principle drawn from such a decision”) and “obiter dictum” as “[a] judicial comment made while delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential”), *BLACK'S LAW DICTIONARY* 749 and 1102 (8th ed. 2004). See generally, Michael Abramowicz & Maxwell Stearns, *Defining Dicta*, 57 *Stan. L. Rev.* 953, 966 (2005); Michael C. Dorf, *Dicta and Article III*, 142 *U. Pa. L. Rev.* 1997 (1994); Henry Paul Monaghan, *Stare Decisis And Constitutional Adjudication*, 88 *Colum. L. Rev.* 723 (1988).

²⁷ *Id.* (citations omitted). Footnote 7 also included the observation that “[w]hen, for example, a regulation requires a developer to leave 90% of a rural tract in its natural state, it is unclear whether we would analyze the situation as one in which the owner has been deprived of all economically beneficial use of the burdened portion of the tract, or as one in which the owner has suffered a mere diminution in value of the tract as a whole.” Understood literally, this comment applies only to a fee simple estate in land that, of course, was the subject of the case presented by the facts in *Lucas*.

²⁸ 505 U.S. 1016 (citations omitted) (emphasis supplied).

Court’s disclaimer that it “avoids the difficulty in the present case” because the “interest in land” involved was a fee simple.²⁹ Moreover, commentators have recognized footnote 7 as *dictum*, observing that “Justice Scalia’s ruminations . . . might well be seen as judicial encouragement to litigants to revisit the denominator issue in future regulatory takings cases.”³⁰ Importantly, “with the exception of Justice Scalia’s dictum in *Lucas*, the Court has uniformly taken the view that the denominator in regulatory cases should be viewed expansively . . .”³¹

Thus, while this *Lucas dictum* may have been intended to encourage application of the majority’s new categorical rule in cases where less than a fee simple interest in land is the basis for a takings claim, the holding of the Court is not precedent requiring this result. At least as far as severed/segmented mineral interests are concerned, the *Lucas*’ holding clearly does not *require* application of its *per se* rule. Notwithstanding this fact, lower courts may respond to Justice Scalia’s “encouragement to revisit the denominator issue” in cases involving severed mineral interests. As discussed below, there are cogent reasons to question the application of the *per se* rule to claims of takings of severed/segmented mineral property interests.

III. TAKINGS AND SEVERED MINERAL INTERESTS

A. A Paucity Of Takings Cases Addressing Severed Mineral Interests

As discussed above, David Lucas owned his two lots on a South Carolina beachfront in fee simple. With a nod in footnote 7 of its’ opinion to the “difficult problem” of determining “the property interest against which the loss of value is to be measured” the Court emphasized that it was “avoid[ing] this difficulty *in the present case, since the “interest in land” that Lucas has pleaded (a fee simple interest) . . .*”³² The *dictum* of Lucas’ footnote 7 has had some resonance within at least one lower court decision wherein the *Lucas per se* rule was applied to mineral interests comprising less than a fee simple estate in land.³³ Interestingly, since beginning of the Court’s regulatory taking jurisprudence in *Pennsylvania Coal Co. v. Mahon*, few takings cases have involved claims of loss of all value of certain severed mineral interests. It is worthwhile to briefly review these cases.

²⁹ 505 U.S. at 1016 (citations omitted).

³⁰ R. Meltz, D. Merriam, And R. Frank, THE TAKINGS ISSUE (1999) at 146.

³¹ *Id.*

³² 505 U.S. at 1016, n. 7.

³³ *Cane Tennessee, Inc. v. United States* and *Wyatt v. United States*, 60 Fed. Cl. 694 (2004) (*Cane V*). For an thorough exposition of these complex consolidated cases that spawned a combined total of eight separate opinions from the Court of Claims and the Federal Circuit, See Kristine Tardiff, *Expectations: The Final Lucas Frontier*, n. 21 , *supra*, at 12 - 18.

Pennsylvania Coal v. Mahon is has often been characterized as the Supreme Court’s first “regulatory takings” case.³⁴ Notwithstanding the fact that *Mahon* is considered the seminal regulatory takings decision, it is only one of two Supreme Court cases that have addressed takings claims related to a taking of mineral interests severed from a fee simple estate in land. The other case, decided sixty-five years after *Mahon*, is *Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U.S. 470 (1987). These cases, however, provide scant assistance for one seeking to determine the efficacy of applying the *Lucas* categorical takings rule to mineral interests carved from a fee simple interest in land. Indeed, the *Lucas* court’s “infamous footnote 7” highlighted *Mahon and Keystone* as the quintessential example of the Court’s “inconsistent pronouncements . . . regarding the composition of the denominator in our “deprivation” fraction.”³⁵

There is one important distinction between *Mahon* and *Keystone* that may be relevant to the issue of whether the *Lucas* categorical rule should be used in takings cases involving mineral interests severed from a fee simple estate in land. In *Mahon*, the Court found that a state law prohibiting mining under occupied dwellings resulted in a total taking of Pennsylvania Coal Company’s property --- property that included only a reserved coal seam and attendant mining rights.³⁶ The

³⁴ Some commentators have challenged the assertion that *Pa. Coal v. Mahon* was a case involving the just compensation clause, arguing that Justice Holmes’ opinion for the Court was actually grounded in a version of the later discredited substantive due process doctrine of *Lochner v. New York* and its’ progeny. See, e.g., Robert Brauneis, *The Foundation Of Our ‘Regulatory Takings’ Jurisprudence: The Myth And Meaning Of Justice Holmes’s Opinion In Pennsylvania Coal Co. v. Mahon*, 106 Yale L.J. at 613 (1996). Professor Brauneis opined:

Justice Holmes and the 1922 Supreme Court shared three key points of understanding about *Mahon*, all of which have since been lost. First, Holmes and the 1922 Court understood *Mahon* to be a Due Process and Contract Clause case, not a Takings Clause case. Second, rather than viewing *Mahon* as a seminal case, they understood the decision as one among many that incrementally established the limits of the police power. Although *Mahon* was part of a trend toward accepting that the constitutionality of nontrespassory regulations could turn on the provision of compensation, it was not the first case to so hold. Third, both Holmes and the Court recognized and accepted *Mahon’s* use of a historical method that looked to traditional legal principles and categories, and that considered both the purpose and effect of legislation important to the constitutional inquiry.

Id. at 666.

³⁵ The Court invited comparison of *Mahon*, which it characterized as involving a law restricting subsurface extraction of coal held to effect a taking, with *Keystone Bituminous Coal Assn. v. DeBenedictis*, a case *Lucas* described as a “nearly identical law held not to effect a taking.” 505 U.S. at 1016.

³⁶ *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922).

Court opined that the Pennsylvania coal mine subsidence statute (the “Kohler Act”) made “it commercially impracticable to mine certain coal” and that had “very nearly the same effect for constitutional purposes as appropriating or destroying it.”³⁷

The Court eschewed a bright-line categorical taking test of the kind embraced seventy years later in *Lucas*. Rather, *Mahon* emphasized that “. . . the question depends upon the particular facts . . . this is a question of degree-and therefore cannot be disposed of by general propositions.”³⁸ Nevertheless, the Court found the Pennsylvania law effected a compensable taking because it extinguished all economic value of the company’s severed coal estate and because “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.”³⁹

As indicated above, *Penn Central* identified several “significant factors” that guided *Mahon* and subsequent taking cases for almost a century.

. . . whether a particular restriction will be rendered invalid by the government's failure to pay for any losses proximately caused by it depends largely “upon the particular circumstances [in that] case.” In engaging in these essentially ad hoc, factual inquiries, the Court's decisions have identified several factors that have particular significance. The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations. So, too, is the character of the governmental action.⁴⁰

The *Penn Central* Court also was called upon to identify the “property interest” against which *Penn Central*’s loss of value was to be measured. The *Penn Central* Company asserted that a New York City historic landmarks preservation ordinance affected a taking because it barred the use of airspace above the company’s Grand Central Station to construct a high-rise building. The takings claim was based upon the theory that one hundred percent of the economic value of the airspace had been taken as a result of the historic preservation law, notwithstanding the fact that *Penn Central* owned the entire tract in fee simple.⁴¹ The Court made short shrift of the

³⁷ *Pa. Coal v. Mahon*, 260 U.S. at 414 – 415.

³⁸ *Mahon*, 260 U.S. at 413 and 416.

³⁹ *Mahon*, 260 U.S. 393.

⁴⁰ *Penn Central*, 328 U.S. 104, 124.

⁴¹ The Court characterized the company’s argument as follows:

They first observe that the airspace above the Terminal is a valuable property interest, citing *United States v. Causby, supra*. They urge that the Landmarks Law has deprived them of any gainful use of their “air rights” above the Terminal and that, irrespective of the value of the remainder of their parcel, the city has “taken” their right to this

company's argument:

. . . the submission that appellants may establish a "taking" simply by showing that they have been denied the ability to exploit a property interest that they heretofore had believed was available for development is quite simply untenable. . . "[t]aking" jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated.⁴²

A decade after *Penn Central*, the Court confronted a takings claim similar to that made by Pennsylvania Coal Company in *Mahon* in *Keystone Bituminous Coal Assn. v. DeBenedictis*. Once again the Court was asked to determine whether a Pennsylvania law prohibiting the undermining of an occupied dwelling constituted a compensable taking. The *Keystone* Court found that the contemporary Pennsylvania mine subsidence prevention law furthered broad and important public interests while the Kohler Act at issue in *Mahon* "involve[d] a balancing of the private economic interests of coal companies against the private interests of the surface owners."⁴³ The *Keystone* Court, relying on *Penn Central*, found it easy to distinguish *Mahon* and justify a contrary result:

The holdings and assumptions of the Court in *Pennsylvania Coal* provide obvious and necessary reasons for distinguishing *Pennsylvania Coal* from the case before us today. The two factors that the Court considered relevant have become integral parts of our takings analysis. We have held that land use regulation can affect a taking if it ". . . denies an owner economically viable use of his land". . . *Penn Central Transportation Co. v. New York City*. . . . Application of these tests to petitioners' challenge demonstrates that they have not satisfied their burden of showing that the Subsidence Act constitutes a taking.

First, unlike the Kohler Act, the character of the governmental action involved here leans heavily against finding a taking; the Commonwealth of Pennsylvania has acted to arrest what it perceives to be a significant threat to the common welfare. Second, there is no record in this case to support a finding, similar to the one the Court made in *Pennsylvania Coal*, that the Subsidence Act makes it impossible for petitioners to profitably engage in

superadjacent airspace, thus entitling them to "just compensation" measured by the fair market value of these air rights.

Id. at 130.

⁴² The opinion observed that "[w]ere this the rule this Court would have erred not only in upholding laws restricting the development of air rights, but also in approving those prohibiting both the subjacent and the lateral development of particular parcels. (citing, *Welch v. Swasey*, 214 U.S. 91(1909); *Goldblatt v. Hempstead*, 369 U.S. 590 (1962); and *Gorieb v. Fox*, 274 U.S. 603, (1927), respectively).

⁴³ *Keystone*, 480 U.S. at 485.

their business, or that there has been undue interference with their investment-backed expectations.⁴⁴

Thus, until *Lucas, Mahon's ad hoc*, non-categorical takings analysis provided the core principles underlying seventy years of the Supreme Court's regulatory takings jurisprudence including *Penn Central* and *Keystone*.⁴⁵

After *Lucas* was decided, a complex consolidated case involving fee simple interests in surface land and coal as well as less than fee interests in coal, oil and gas was litigated and ultimately resolved in a series of decisions of the Court of Claims and the Court of Appeals for the Federal Circuit.⁴⁶ The case, captioned as *Cane Tennessee, Inc. v. United States* and *Wyatt v. United States*, involved takings claims brought by a number of separate holders of fee and mineral interests (coal, oil and gas) in thousands of acres of lands in eastern Tennessee.⁴⁷

The ownership interests in fee simple of the huge 10,000 acre tract were purchased in 1953 by Wilson W. Wyatt, Sr. and his wife. In 1979 Mr. and Mrs. Wyatt sold their fee interest to Cane,

⁴⁴ 480 U.S. 470, 484-485 (citations omitted).

⁴⁵ While cases addressing severed mineral interest are few and far between, some courts have addressed claims involving government regulations that significantly devalue, but do not wipeout the value of mineral interests. None of these cases, however, involve mineral interests severed from a fee simple estate in land. See, *Goldblatt v. Hempstead*, 369 U.S. 590 (1962); *Whitney Benefits, Inc. v. United States*, 18 Cl.Ct. 394, 20 Env'tl. L. Rep. 20,610 (1989); *Cane Tennessee, Inc. v. United States* and *Wyatt v. United States*, 60 Fed. Cl. 694 (2004) (*Cane V*); *M & J Coal Co. Inc. v. United States* M & J Coal Co. v. U.S., 47 F.3d 1148 (Fed. Cir. 1995). *Cane I*, 44 Fed. Cl. 785 (1999); *Cane II*, 54 Fed. Cl. 100 (2002); *Cane III*, 57 Fed. Cl. 115 (2003); *Cane IV*, 62 Fed. Cl. 481 (2003); *Cane V*, 60 Fed. Cl. 694 (2004) (Wyatt claims); *Cane VI*, 62 Fed. Cl. 703 (2004) (Wyatt claims); *Cane VII*, 63 Fed. Cl. 715 (2005); *Cane VIII*, No. 00-513L, slip op. (Fed. Cl. Oct. 27, 2005), *aff'd per curiam*, 214 Fed. Appx. 978, 2007 WL 188155 (Fed. Cir. 2001). Earlier takings claims involving the same property are discussed in *Wyatt v. United States*, 271 F.3d 1090 (Fed. Cir. 2001), *rev'g Eastern Minerals International, Inc. v. United States*, 36 Fed. Cl. 541 (1996).

⁴⁶ See, *Id.*. The original tracts from which mineral interests were later sold or severed by the Wyatt children's parents entailed 9400 acres of surface land and 8400 acres of minerals. See, K. Tardiff, *supra* n. 21 at 13, n.9. The total purchase price for all of these lands and mineral rights was \$87,000.

⁴⁷ *Id.* The takings claimants in the consolidated cases included Cane Company Ltd. (subsequently "Cane Tennessee, Inc.") that purchased a fee simple interest in the land and minerals; Eastern Minerals International, Inc, Cane's coal lessee; the Wyatt trust established by their Wyatt parents for their children; and the three Wyatt children to whom their parents conveyed a non-participating royalty interest in the coal underlying a several thousand acre tract. See, K. Tardiff, *supra* n. 21, at 13 - 15.

reserving a 3½ % non-participating royalty interest in the gross sales price of all coal mined by the grantee and its successors in interest.⁴⁸ When the Wyatts sold their interests to Cane, they divided their royalty interest in half and conveyed one half to the Wyatt Trust for the benefit of their three children.⁴⁹ In 1991, the Wyatt parents conveyed their retained 3.5% coal royalty interest in the subject property directly to their three children in equal, undivided 1/3 shares.⁵⁰

The regulatory takings claims of the various parties were based on allegations that permitting delays and later, a Department of the Interior Office of Surface Mining (“OSM”) decision designating much of the tract conveyed to Cane as unsuitable for all types of coal mining affected a taking of both Cane’s fee interests in the land and the Wyatt Trust and Wyatt children’s 3½ % non-participating royalty interest.⁵¹ Curiously, when all was said and done after

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.* The Federal Surface Mining Control and Reclamation Act of 1977 (“SMCRA”) contains provisions allowing OSM pursuant to citizen petition or on its own motion to designate lands incapable of reclamation as unsuitable for all or some types of coal mining. SMCRA §522 (a), 30 U.S.C. §1272(a). That section provides in relevant part:

30 U.S.C. §1272

(a) Establishment of State planning process; standards; State process requirements; integration with present and future land use planning and regulation processes; savings provisions

(1) To be eligible to assume primary regulatory authority pursuant to section 1253 of this title, each State shall establish a planning process enabling objective decisions based upon competent and scientifically sound data and information as to which, if any, land areas of a State are unsuitable for all or certain types of surface coal mining operations pursuant to the standards set forth in paragraphs (2) and (3) of this subsection but such designation shall not prevent the mineral exploration pursuant to the chapter of any area so designated.

(2) Upon petition pursuant to subsection (c) of this section, the State regulatory authority shall designate an area as unsuitable for all or certain types of surface coal mining operations if the State regulatory authority determines that reclamation pursuant to the requirements of this chapter is not technologically and economically feasible.

(3) Upon petition pursuant to subsection (c) of this section, a surface area may be designated unsuitable for certain types of surface coal mining operations if such operations will—

(A) be incompatible with existing State or local land use plans or programs; or

(B) affect fragile or historic lands in which such operations could result in significant damage to important historic, cultural, scientific, and esthetic values and natural systems; or

(C) affect renewable resource lands in which such operations could result in a substantial loss or reduction of long-range productivity of water supply or of food or fiber products, and such lands to include aquifers and aquifer recharge areas; or

almost a decade of takings litigation only the Wyatt children's shares of the 3 1/2 % royalty interest were found by the Court of Claims to have been taken as a result of OSM's unsuitability designation. Application of the Lucas categorical rule most likely explains this odd result.

The court using a variety of analytical techniques arrived at the conclusion that the interests of Cane and the Wyatt trust did not suffer a total taking of their interests. Cane did not suffer a total taking because it owned a fee interest and still could exploit its surface development rights; the Court then analyzed its taking claim using the Penn Central doctrine and found that when Cane purchased its fee interest in the tract it could have expected SMCRA might have interfered with coal mining operations - including the designation of lands as unsuitable provision of 30 U.S.C. § 1270(a). Moreover, the court also found that OSM's designation "did not constitute a sufficiently 'serious financial loss' to constitute a taking [.]"⁵²

(D) affect natural hazard lands in which such operations could substantially endanger life and property, such lands to include areas subject to frequent flooding and areas of unstable geology.

(4) To comply with this section, a State must demonstrate it has developed or is developing a process which includes— **(A)** a State agency responsible for surface coal mining lands review; **(B)** a data base and an inventory system which will permit proper evaluation of the capacity of different land areas of the State to support and permit reclamation of surface coal mining operations; **(C)** a method or methods for implementing land use planning decisions concerning surface coal mining operations; and **(D)** proper notice, opportunities for public participation, including a public hearing prior to making any designation or redesignation, pursuant to this section.

(5) Determinations of the unsuitability of land for surface coal mining, as provided for in this section, shall be integrated as closely as possible with present and future land use planning and regulation processes at the Federal, State, and local levels.

(6) The requirements of this section shall not apply to lands on which surface coal mining operations are being conducted on August 3, 1977, or under a permit issued pursuant to this chapter, or where substantial legal and financial commitments in such operation were in existence prior to January 4, 1977.

(c) Petition; intervention; decision

Any person having an interest which is or may be adversely affected shall have the right to petition the regulatory authority to have an area designated as unsuitable for surface coal mining operations, or to have such a designation terminated. Such a petition shall contain allegations of facts with supporting evidence which would tend to establish the allegations the regulatory authority shall issue . . . a written decision regarding the petition, and the reasons therefore.^[1] In the event that all the petitioners stipulate agreement prior to the requested hearing, and withdraw their request, such hearing need not be held

⁵² *Cane VII*, 71 Fed. Cl. at 464 (quoting, *Cienega Gardens v. United States*, 331 F.3d 1319, 1341 (Fed. Cir. 2003)).

The Wyatt Trusts fared no better than Cane with its takings claim. The trial court found “the relevant parcel (or “denominator”) to be the fee simple interest in approximately more than 2,000 acres of land transferred to the trusts in 1973 and 1974. After SMCRA was enacted the trusts sold their fee simple estates in most of these lands to Cane for a million dollars and retained only the coal royalty interest. Because the Court determined the fee simple estate acquired by the trust in 1973 and 1974 was the relevant parcel determination, it found the 1979 million dollar sale to Cane was value derived by the trust from the “relevant parcel and therefore the trust had not suffered a total taking triggering the *per se Lucas* analysis or a compensable taking under *Penn Central*.⁵³ *Cane V*, 60 Fed. Cl. at 703-706. The Wyatt children, by contrast, were found by the court to have suffered a total diminution of the value of their non-participating 3 ½ % royalty interest. The trial court found the “relevant parcel” to be the coal royalty interest conveyed to them by their parents in 1991.⁵⁴

Applying the *Lucas per se* rule to the total taking of the royalty interest, the court found the children’s economic loss to be a compensable taking.⁵⁵ The court rejected the government’s argument that *Lucas* does not prevent judicial consideration of a taking claimant’s reasonable investment-backed expectations when a less than fee simple is the focus of the claim.⁵⁶ Indeed, the trial court held the Federal Circuit had previously rejected the government’s position that investment-backed expectations may be considered in the assessment of categorical taking claims under *Lucas*.⁵⁷ Moreover, because the court applied *Lucas per se* rule, it did not consider the character of the government’s action as it would have been required under *Penn Central*.

As one commentator has cogently asked about the result in the Cane-Wyatt case: Is this a fair result? Is it a just result? Is it a result contemplated by the Supreme Court when it first announced its categorical rule in *Lucas*?⁵⁸ This question will be explored in Parts II and IV below.

B. Comparison of the Expectations of Owners of Fee Simple Interests in Land Protected By The *Lucas* Categorical Taking Rule With Expectations of Owners of Severed Mineral Interests.

⁵³ See, *Cane V*, 60 Fed. Cl. at 703-706.

⁵⁴ *Cane V*, 60 Fed. Cl. 694, 702-703 (2002).

⁵⁵ *Cane V*, at 702-703 (2002).

⁵⁶ *Cane VI*, 62 Fed. Cl. at 711-716.

⁵⁷ See *Cane VI*, 62 Fed. Cl. at 716, citing, *Palm Beach Isles Associates v. United States*, 208 F.3d 1374 (Fed. Cir., 2000).

⁵⁸ K. Tardiff, *supra* n. 21, at 17.

1. The “Great Expectations” Arising From The “Bundle of Rights” Attendant Ownership of Land

A close examination of the Court’s opinion in *Lucas* provides insight into the rationale for the categorical rule it establishes for judicial review of takings claims relating to a fee simple interest in land. *Lucas* explains that its categorical rule applied to a “total taking” or “wipeout” of fee simple interests in land as being in accord with its long-established takings jurisprudence.⁵⁹ That jurisprudence, the Court maintained “has traditionally been guided by the understandings of our citizens regarding the content of, and the State’s power over, the ‘bundle of rights’ that they acquire when they obtain title to property.”⁶⁰ This statement does not seem unreasonable when referring to fee simple ownership of a parcel of land that, in most circumstances, can be used for a multitude of purposes. The human imagination provides the only limit to ways fee simple land may be utilized by its owner - as long as the fee owner complies with the ancient common law maxim – *sic utere tuo ut alienum non laedas* – “so use your own as not to injure another’s property.”

Even when Euclidean zoning limits the use of fee simple land to a single “use” - residential, industrial, commercial, recreational – the “bundle of rights” of ownership are numerous indeed.⁶¹ In a commercial zone, for example, land may be used in many ways – a shopping center, a large or small store, a restaurant; similarly, industrial land may be employed by a fee owner for a wide variety of purposes --- a steel mill, software manufacturing, petroleum refining or any of thousands of other facilities or a combination of uses like manufacturing consumer products, warehousing the products on site and parking a fleet of vehicles used to transport product. An owner of fee land in a residential zone may have fewer development options, but protection of the value of her land from the vagaries of free-wheeling development provides the “average reciprocity of advantage” that sustains such land use restrictions.⁶² Consistent with the common law definition of a fee simple interest in property that includes vertical ownership of land from the center of the earth to the heavens --- for fee simple land owners, the sky is literally the limit to their rights.

2. Lowered Expectations of the Owner of Severed Mineral Interests

Lucas also reflects on the expectations of fee simple property owners, opining that “[i]t seems to us that the property owner necessarily expects the uses of his property to be restricted, from time

⁵⁹ *Lucas* 550 U.S. at 1027.

⁶⁰ *Id.*

⁶¹ “Euclidean zoning” is the term generally descriptive of zoning by land use districts advanced by the first Model Zoning Enabling Act whose constitutionality was established in *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

⁶² See, *Pennsylvania Coal Co. v. Mahon*, 260 U.S., at 415, 43 S.Ct., at 160. See also, *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

to time, by various measures newly enacted by the State in legitimate exercise of its police powers.”⁶³ Again, this observation appears to be an obvious unexceptional conclusion that anyone can draw from the everyday experience of life. However, when the property owned is a mineral interest that includes only one stick of the fee simple land owner’s bundle of rights, it is reasonable to assume, based upon common experience that her reasonable expectations relating to exercise of the police power are problematic and demonstrably lower.⁶⁴ This is especially true of ownership of fragments of fee interests in minerals. It makes good sense to consider just what right(s) attach to the mineral owners’ unbundled “stick.”

When *Lucas* speaks of a citizen’s “understanding” of the “bundle of rights” attendant “title” to property, the Court surely cannot be referring to mineral interests severed from a fee simple estate.⁶⁵ With a conveyance or reservation of a possessory interest in coal or oil and gas, for example, goes but one stick in the bundle of rights of fee simple ownership. The now proverbial “bundle of rights” of fee simple land ownership bears no substantial resemblance to a right accruing from ownership of fractional interests in minerals and non-possessory mineral interests – like the Wyatt children’s 3 ½ % non-participating royalty interest in the sale price of coal mined from a tract owned by Cane Tennessee Inc. discussed above.

While there are exceptions, as a general rule, one who has a possessory interest in coal has, at most, the “right” to use the surface to access the reserve, to extract the fuel from the land and to transport it to market for sale. When the coal is mined, to exhaustion, the miner “owner” owns nothing and his right of access to the land is extinguished. Similarly, a stick of oil or gas interest allows the owner of that form of property access to surface land to drill for and extract liquid or gaseous fuel. When the well goes dry, the owner of the oil and/or gas right becomes a trespasser on the surface previously used in exploration, extraction and transportation of petroleum. In both cases the mineral interest owners rights are correlative to the rights of the owner of the surface and to the rights of owners of other minerals, interests and encumbrances of the land.

For owners of non-possessory or non-executor interest in minerals such as property interest “owned” by the Wyatt children, the single stick of right(s) is narrowly limited to entitlement to a small percentage of the sale price of a mineral extracted from the land and carried to market - such owners do not even possess the right to walk freely upon the land from whence the mineral may be mined or pumped. Such ownership is comprised solely of the right to pocket a percentage of the monies a willing buyer will pay for the mineral – but the “right” is illusory

⁶³ *Lucas*, 505 U.S. at 1016.

⁶⁴ *Lucas* recognizes that owners of certain types of property have always had lower expectations as to the scope of the police power and its’ ability to adversely affect the economic value of their property: “And *in the case of personal property* he ought to be aware of the possibility that new regulation might even *1028 render his property economically worthless.” 505 U.S. at 1027-1028. (emphasis supplied).

⁶⁵ On its’ face, the plural term “bundle of rights” itself – is consistent with much greater expectations than those that would attach to “limited rights” or a “solitary right.”

unless and until the mineral is actually mined or the gas and oil captured and pumped from the ground.⁶⁶

3. Expectations of Ownership of Fee and Severed Minerals

Most forms of mineral extraction are fraught with possibilities of injury to adjacent land and land owners as well as interference with rights of the public. One need not think hard or long about the problematic nature of owning a single mineral strand severed from the multitude of rights in the fee simple bundle to appreciate just how different are expectations of fee simple land owners and broken stick owners like the Wyatt children.

Use of explosives to fragment soil and rock, blasting apart hundreds of feet of Appalachian ridges to reach thin coal seams, ripping boring through aquifers to reach oil and gas strata, encountering geologic formations containing elements that can cause poisonous water pollution are just a few of the problems that have long inhibited mineral extraction and lowered expectations of mineral ownership.

Professor Mark Squillace has described the breadth of the externalized damage wrought by irresponsible coal mining operations in the process of executing the mineral property rights:

[Prior to federal regulation imposed by the SMCRA] coal mining has disturbed almost two million acres of land; only half of that has been reclaimed even to minimum standards. More than 264,000 acres of cropland, 35,000 acres of pasture, and 127,800 acres of forest have been lost. In a 1977 report, Congress estimated the cost of rehabilitating these ravaged lands at nearly \$10 billion. . . . more than 11,000 miles of streams have been polluted by sediment or acid from surface and underground mining combined. Some 29,000 acres of reservoirs and impoundments have been seriously damaged by strip mining. Strip mining has created at least 3000 miles of landslides and left some 34,500 miles of highwalls. [By 1977] two-thirds of the land that had been mined for coal had been left unreclaimed.⁶⁷

⁶⁶ It is true that such a non-executory interest in minerals such as a royalty interest may have considerable value in place. But that value is often speculative. The myriad practical, economic, geologic, technical challenges that frequent the “oil/gas patch” and the “coalfields” are daunting. Indeed, it is fair to say that government regulation may often be the least of the obstacles limiting the expectations of those investing in modern mineral extractive industries.

⁶⁷ M. SQUILLACE, *THE STRIP MINING HANDBOOK: A COALFIELD CITIZENS’ GUIDE TO FIGHT BACK AGAINST THE RAVAGES OF STRIP MINING AND UNDERGROUND MINING* at 10-12 (Environmental Policy Institute & Friends of the Earth 1990). See generally, Patrick C. McGinley, *Environmental Justice in the Coalfields: From Pick and Shovel to Mountaintop Removal*, 34 *ENTL LAW* 21 (2004).

Professor Squillace lamented: “Grossly underregulated coal mining in the 1960’s and 1970’s spawned one of the greatest abuses of the environment in the history of the United States. The statistics of strip mine abuse numb the mind and overwhelm the spirit.”⁶⁸

SMCRA and the Clean Air and Clean Water Acts have not diminished the harm that can accompany even the most well meaning of mineral extractors. Air pollution from coal and oil combustion and attendant concerns about the contribution made by use of fossil fuels today have dramatically lowered the expectations of the return on investment that will accrue from ownership of mineral rights.⁶⁹

Moreover, additional magnified problems and concomitant lowered expectations accompany modern American coal mining methodologies. Today, coal is extracted using advanced technology unthinkable when coal and the right to mine it were severed from fee simple ownership, often a century ago. New technologies used in underground, “longwall mines” cut vast swaths under the earth — often 1000 feet wide and a mile or more long — through thick coal seams. On the surface, strip miners using high explosives to blast apart mountain ridge tops in Kentucky, West Virginia and Virginia. The blasts, part of the new extraordinarily large-scale “mountaintop removal” mining method, allow coal to be scooped from the broken mountaintops by twenty story tall “draglines.” Dragline booms may extend 300 feet or more and their buckets are big enough to hold five Jeep Cherokees or more at a time. An enormous amount of rock and debris — the remains of what were high mountain ridges — are shoved into valleys burying headwater streams creating “valley fills.” In the western coalfields of Montana and Wyoming huge chunks of land in the western coalfields are gouged from underneath fragile soils leaving deep depressions and impacting underground aquifers that have supplied life supporting water for millennia.

Unsettled expectations attendant ownership rights relating to oil and gas production has been a fact of life from the beginning of the *Age of Petroleum* in the verdant valleys of northwestern Pennsylvania surrounding the City of Titusville where the first productive oil well was drilled in 1859. An early treatise on the law of petroleum and natural gas written in 1898, dedicated the entire chapter to the application of public and private nuisance law to oil and gas operations.⁷⁰ Harms accruing from the exploration, production and refining of oil and gas included emission of noxious and offensive smells and vapors from oil and gases stored in a refineries, escape of oil from a pipeline, percolation into the premises of a neighboring property owner and corruption of groundwater wells by fluids percolating from a well site, emissions from coke ovens, injuries to growing crops on adjoining farms, pollution of a domestic spring used for water supplies

⁶⁸ *Id.*

⁶⁹ See generally, Patrick C. McGinley, *Climate Change and Coal: Exploring the Dark Side*, in CLIMATE CHANGE: A READER (Carolina Academic Press, 2009), at 434-438.

⁷⁰ George Brian, THE LAW OF PETROLEUM AND NATURAL GAS, at 319-330 (George T. Bisel, Philadelphia, 1898).

resulting from oil stored in a warehouse leaking from barrels, leakage of crude oil kept for fuel into the soil and then into a public sewer causing gases in the sewer to escape into commercial establishments and pollution of streams from well drilling and oil pipeline breakage.⁷¹ Like coal mining, modern oil and gas production can cause harms far beyond those common to earlier generations of oil and gas production. For example the ability to tap natural gas contained in the Marcellus shales of the Northeast offer to add huge new capacity to domestic oil and gas reserves, but attendant environmental hazards present an enormous obstacle to the development of the resource.

A very recent New York Times editorial recently outlined the clash of mineral property rights with the right of the public to protect itself from the hazards of modern oil and gas drilling and production:

Natural gas is vital to the nation's energy needs and can be an important bridge between dirty coal and renewable alternatives. The process of extracting it, however, is not risk-free. Known as hydraulic fracturing, it involves shooting a mix of water, sand and chemicals — many of them highly toxic — into the ground at very high pressure to break down the rock formations and free the gas. The technique is used in 90 percent of the oil and gas operations in the United States. And while most drilling occurs without incident, “fracking” has been implicated in hundreds of cases of impaired or polluted drinking water supplies in states from Alabama to Wyoming.

The dangers are particularly acute in the Marcellus Shale, which, unlike the relatively shallow formations found elsewhere, lies miles underground. Getting the gas out will require far more water and heavy doses of chemicals. While the rules would require drillers to take special precautions in the watershed, there are too many points — from the delivery of the fluid to the drilling site to the removal of spent fluid after it surfaces — where poisoned water could escape into the water supplies.

Quarantining the watershed also makes economic sense. The shale contains only one-tenth of the gas in the southern tier. One big accident could undo everything the city and state have done — buying up property, creating buffer zones around the reservoirs — to protect the watershed from development and pollution. State officials worry that if they deny landowners the right to lease the mineral resources under their property — 70 percent of the watershed is privately owned — they will face expensive “takings” claims. But the state has a right and responsibility to prevent drilling that poses a clear danger to public health.⁷²

⁷¹ Id. at 319-326.

⁷²NY Times (October 17, 2009), (online ed., <http://www.nytimes.com/2009/10/17/opinion/17sat1.html>). Also, very recently 38 miles of Dunkard Creek flowing back and forth along the Mason Dixon line through southwestern Pennsylvania and northern West Virginia was rendered ecologically dead as a result of Marcellus shale drilling fluids being injected into an abandoned underground deep mine later being pumped

From these examples then, it should be obvious that the expectations arising from single stick mineral property ownership are quite unlike the bundle of rights enjoyed by an owner of land who enjoys the benefits of a vast array of bundled rights. Surely, the differences in ownership expectations cannot be equated. What then does this significant distinction in expectations portend in so far as application of *Lucas* categorical takings rule?

IV. CONCLUSION: THE EFFICACY OF APPLYING LUCAS CATEGORICAL TAKINGS RULE TO SEVERED MINERAL OWNERSHIP

It is obvious that there are dramatic differences between the expectations of owners of a fee simple interest in land and the expectations of owners of severed and often fragmented mineral interests. The question that has not been resolved two decades after *Lucas* was the one the “infamous footnote 7” left unanswered: “. . . the rule does not make clear the “property interest” against which the loss of value is to be measured.”⁷³ It is submitted that *Lucas* itself points the way to the answer to this elusive question:

The answer to this difficult question may lie in how the owner's reasonable expectations have been shaped by the State's law of property - *i.e.*, whether and to what degree the State's law has accorded legal recognition and protection to the particular interest in land with respect to which the takings claimant alleges a diminution in (or elimination of) value.⁷⁴

This statement, however, begs the question. State law of property, like the Fifth Amendment's taking clause, applies to all forms of property. The question then is not whether state law has accorded legal recognition of property interests severed from fee simple ownership, for “property” is *a fortiori* that which property law governs. Rather, the question as *Lucas* frames it is whether the expectations of owners of property that contains meager indicia of the rights bundled in fee simple ownership should be afforded the heightened protection of *Lucas* categorical takings rule.

Lucas makes clear that with regard to some property – personal property – the owner's expectations are so low that she reasonably may expect an exercise of the police power to render her property economically worthless:

And in the case of personal property, by reason of the State's traditionally high degree of control over *commercial dealings*, he ought to be aware of the possibility that new

out of the mine into the stream. See, Don Hopy, “Sudden death of ecosystem ravages long creek: “Everything is being killed” --- 161 aquatic species have died along Dunkard Creek”, Pittsburgh Post-Gazette (September 20, 2009) (Online ed. at, <http://www.post-gazette.com/pg/09263/999458-113.stm#ixzz0W0157QOh> .

⁷³ *Lucas*, 505 U.S. 1016, n. 7.

⁷⁴ *Id.*

regulation might even render his property economically worthless (*at least if the property's only economically productive use is sale or manufacture for sale*).⁷⁵

It is submitted that severed and fragmented mineral property interests are much more like private property interests that are not entitled to the same level of protection the *Lucas* affords fee simple ownership of land. According to the *Lucas* Court, the historic compact that fee simple owners of land have relied on to protect their interests from government confiscation is not one that gives rise to the same expectations in owners of personal property where “the property's only economically productive use is sale or manufacture for sale.”⁷⁶ Consider then, the striking similarity between severed mineral owners property expectations and those of personal property owners who are on notice that they may lose all economic value as a result of government regulation. Is not the essence of mineral property transactions *commercial dealings*? Are not coal, oil, gas and other minerals comparable to personal property in so far as their *only economically productive use is sale or manufacture for sale*?

Thus, the explicit distinctions made between fee ownership and personal property ownership identified in *Lucas* provide the key to resolving the quandary explained in footnote 7. Because severed mineral interests have all the characteristics of personal property to which the *Lucas* categorical taking rule *does not apply*, the single stick of mineral property rights inherent in mineral interest ownership similarly should not qualify for *per se* protection under *Lucas*. The consequence is not catastrophic for owners of mineral property owners. On the contrary, they may still prevail on a regulatory takings claim as did the Plaintiffs in *Witney Benefits v. United States* that found them, using the Penn Central takings calculus, to be entitled to tens of millions of dollars of compensation for lost use of coal property.⁷⁷ The difference is simply that the public's interest in sustaining a regulation will be factored into the court's taking analysis under that has long been extant since *Pennsylvania Coal v. Mahon*.

⁷⁵ *Lucas*, 505 U.S. at 1027-1028, *citing*, *Andrus v. Allard*, 444 U.S. 51, 66-67 (1979).

⁷⁶ *Id.* (emphasis supplied).

⁷⁷ 18 Fed. Cl. 394 (1989)