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When 'Private Rights' Meet 'Public Rights': Problems of Labelling Regulatory Rulings

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**WHEN "PRIVATE" RIGHTS MEET "PUBLIC" RIGHTS: THE
PROBLEMS OF LABELING AND REGULATORY TAKINGS**

MARLA E. MANSFIELD*

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I. INTRODUCTION

Woody Guthrie's anthem heralds that "[t]his land is your land, this land is my land This land was made for you and me."¹ Most people agree when they contemplate a sunset over a cloud-veiled mountain or vast sweep of sage-scented range. Their affirmation is strongest when the lands observed are federally owned. Nevertheless, when others view the same landscapes they emphasize the "my" of the refrain. These observers see "their" mining claim or "their" grazing allotment. The mantra of "private property" is superimposed on the lands. Controversies about prospective uses of the so-called "public lands"² exemplify the discordance between "ours" and "yours." Some style this contest as a conflict between private rights and public rights.

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1. WOODY GUTHRIE, *This Land is My Land* (Ludlow Music 1956).

2. Currently, the term "public lands" is statutorily applied to Bureau of Land Management ("BLM") lands. 43 U.S.C. § 1702(e) (1988). This article, however, will consider not only these "public lands," but also those lands federally owned and accessible to the public, namely national parks, national forests, and national wildlife refuges. See generally Marla E. Mansfield, *A Primer of Public Land Law*, 68 WASH. L. REV. 801 (1993).

Labeling these spheres "public" and "private," however, can result in a misleading dichotomy. For example, there may be no "public" divorced from individual concerns. A more correct dichotomy, therefore, would be collective or non-consumptive interests versus exclusionary or developmental desires. Regardless of labels, a conflict between different goals for the lands does exist. Recognizing that non-use is also a use, what weight or dignity do the rights of proponents of each proposed use of the public lands deserve? An examination of the definition of property delineates the core nature of both types of rights.

Property serves two masters: the individual and society. Even considering only the individualistic sphere, which emphasizes that property is an "expectation" of drawing an "advantage" from the object in question,³ both "public" and "private" players have "property" interests. The mining claimant and the grazing permittee have what most agree at least would approximate traditional property interests,⁴ but looked at through the expectation lens, the bird watcher, the wilderness advocate, and the downstream water user also have property interests in the individualistic sense. In addition to individual expectations and advantages, the public lands offer social or communal benefits, which emphasize the second property penumbra, the enhancement of society. After delineating the dignity of rights to collective benefits, the essay then turns to the question of how to resolve conflicts between more traditional private property rights and these collective rights. These conflicts generally emerge when new development is proposed or old uses are recognized as harmful to the ecosystem. The public land managing agency must then determine what regulatory activity is appropriate, with the possibility of quelling the private activity as an option.

This essay posits that balancing with a sliding scale is required to determine which "right" should be forwarded on any particular lands. Neither the developmental nor the non-consumptive interest may prevail automatically absent legislation so demanding.⁵ If development is precluded, a taking that requires compensation may result or it may not. First, even if there is a total diminution of value, the "nuisance" exception to compensation for the denial of economic use of property still persists after *Lucas v. South Carolina Coastal Council*.⁶ This exception, however, requires a strong look at the benefits from development, and does not concentrate solely on the perceived affronts to the environment or public health. Nuisance is an *unreasonable* use of property that *unreasonably* impacts the property of another. The value of the private use must be considered. Additionally, in two footnotes to *Lucas*, Justice Scalia acknowledges the continuing

3. See JEREMY BENTHAM, THEORY OF LEGISLATION 112-13 (4th ed. 1882).

4. Both are peculiar species of "property." See *infra* notes 235-37, 275-76 and accompanying text.

5. The Endangered Species Act, for example, protects endangered species by a rule of inalienability. 16 U.S.C. §§ 1531-1544 (1988 & Supp. IV 1992). See generally Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1092 (1972).

6. 112 S. Ct. 2886 (1992).

importance to takings jurisprudence of analyzing expectations⁷ and property boundaries. The latter inquiry includes defining both the extent of tracts and legal rights that a regulation may have impacted.⁸ Expectations and property delineation may be more important in determining whether a taking has occurred in the public lands context than determining whether a regulation mimics nuisance law and therefore does not require compensation.

Lucas, therefore, did not preclude agency flexibility in public land use regulation. To explicate this conclusion, Part I briefly reviews the history of public land law, with a concentration on the Bureau of Land Management ("BLM"). Part II then examines the meaning of "public" rights. It identifies both individually-oriented and collective interests, both of which are among the "public" values the public lands serve. In Part III, the dual nature of property is examined, with the argument that the "expectation" strand normally associated with individualistic analysis may also apply to some of the "public rights." The impact of classifying previously labeled "public rights" as property rights is considered. Part IV examines how the land managing agency itself should consider the conflict in rights. Next, the question of takings is considered in Part V. This part concentrates on the *Lucas* case, putting it both in historic perspective and examining not only the nuisance exception, but also ways to determine whether "total" diminution of property has resulted. Part VI anticipates how this takings law could be applied to decisions impacting the public lands, using a grazing permit and an unpatented mining claim as paradigms. Paradoxically, the grazing permittee—who by statute has no "right, title, interest or estate in or to the lands"⁹—may have a greater equitable claim to compensation under expectation analysis than the owner of the mining claim.

II. AN ENCAPSULATED HISTORY OF PUBLIC LAND LAW

The public lands in the United States have a distinct historical and legal status, making them neither truly common property nor property owned by no one. Originally, the label "public domain" applied to all federally-owned lands which were acquired by treaty from other nations, including Native Americans, or lands ceded to the federal government by the thirteen original states.¹⁰ The special legal status of the lands arises because the Constitution places in Congress the "Power to dispose of and make all needful Rules and Regulations re-

7. *Id.* at 2894 n.7.

8. *Id.* at 2895 n.8.

9. 43 U.S.C. § 315(b) (1988).

10. *Barker v. Harvey*, 181 U.S. 481 (1901). The public domain contrasts with acquired lands, which had been owned by private parties or the states prior to federal acquisition. Disposition systems may differ for acquired lands. *See, e.g.*, Acquired Lands Act of 1947, 30 U.S.C. §§ 351-359 (1988). For management under the Federal Land and Policy Management Act ("FLPMA"), the distinction is abolished. 43 U.S.C. § 1702(e) (1988).

specting the Territory or other Property belonging to the United States."¹¹ The Supreme Court has confirmed that this power is plenary, and includes the power of a sovereign as well as a proprietor.¹² No overriding "trust" responsibility to a particular vision of the public good fetters congressional authority over these lands.¹³

There is no requirement to retain the lands in public ownership unless Congress so chooses. In fact, the initial attitude toward these lands was just the opposite: a secondary meaning of the term public domain was that it encompassed lands open to entry and settlement.¹⁴ As the Supreme Court put it, traditional public land laws were statutes "governing the alienation of public land."¹⁵ Therefore, "private" rights to these lands were inevitable and, initially, public land law provided the method through which minerals and lands were placed in private hands. Any current agenda about the management and direction of public land policy must acknowledge the legacy of this history.

A vivid example of the historical focus of public land law is the first statute assigning duties to the Secretary of the Interior. The Secretary was:

[t]o perform all executive duties appertaining to the surveying and sale of the public lands of the United States, or in anywise respecting such public lands, and, also, such as relate to private claims of land, and the issuing of patents for all grants of land under the authority of the Government.¹⁶

The statute emphasized land disposition. Early cases explicated the lands' status. No one could wrongfully exclude others from the public lands,¹⁷ but they were

11. U.S. CONST. art. IV, § 3, cl. 2. The Enclave Clause of Article I provides another source of authority over public lands. It states that Congress may:

exercise exclusive Legislation in all Cases whatsoever, over [the District of Columbia] and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-yards, and other needful Buildings.

U.S. CONST. art. I, § 8, cl. 17. See generally Mansfield, *supra* note 2, at 803.

12. Kleppe v. New Mexico, 426 U.S. 529 (1976).

13. See Light v. United States, 220 U.S. 523, 537 (1911):

[I]t is not for the courts to say how that trust shall be administered. That is for Congress to determine. . . . [Rights to establish and disestablish reserves] are rights incident to proprietorship, to say nothing of the power of the United States as a sovereign over the property belonging to it.

Cf. Illinois Cent. R.R. Co. v. Illinois, 146 U.S. 387 (1892) (public trust doctrine may restrain ability to alienate navigable waters and submerged lands forming harbors); see also Marla E. Mansfield, *On the Cusp of Property Rights: Lessons from Public Land Law*, 18 *ECOL. L.Q.* 43, 84-88 (1991) (public trust doctrine does not create a separate substantive duty for Congress with regard to public lands but provides an interpretive guide to courts when Congress is less than clear).

14. *Newhall v. Sanger*, 92 U.S. 761, 763 (1875).

15. *Udall v. Tallman*, 380 U.S. 1, 19 (1965). By 1934, the disposition of land, as opposed to resources such as minerals, was slowed. See Mansfield, *supra* note 2, at 822.

16. 43 U.S.C. § 2 (1988); see also *American Colloid Co. v. Hodel*, 701 F. Supp. 1537, 1542-43 (D. Wyo. 1988) (requiring BLM to make initial decisions on mineral patent applications).

17. See e.g., *Camfield v. United States*, 167 U.S. 518 (1897); *Buford v. Houtz*, 133 U.S. 320 (1890); *United States ex rel. Bergen v. Lawrence*, 848 F.2d 1502 (10th Cir. 1988), *affg.*, 620 F. Supp. 1414 (D. Wyo. 1985); *United States v. Curtis-Nevada Mines, Inc.*, 611 F.2d 1277 (9th Cir. 1980).

to be exploited.¹⁸ The Secretary had a duty to verify that public land laws were complied with, and that invalid claims were not asserted against these commonly-held lands.¹⁹

Obviously, when lands are open to disposition laws, individuals and states can deprive the federal government of the lands and resources by complying with these laws. Therefore, from time to time either Congress or the executive would "reserve" lands for special purposes or "withdraw" lands from the operation of the disposition laws.²⁰ Many of the modern public land management systems—the national forests,²¹ wildlife refuges,²² and the national monuments²³—originated in such executive action either before or in conjunction with similar congressional action.²⁴ These reservations acknowledged that some lands should not be disposed of under the general laws. The reservations did not, however, necessarily mean that private rights to resources were being ignored.

From the time, close to the National Forest Service's inception, that Gifford Pinchot took the reins of the Forest Service, the forests were laboratories to implement conservation theory, which embraced wise use of resources in both present and future generations.²⁵ Moreover, according to the Supreme Court, the purposes of the national forests were watershed protection and timber produc-

18 . See, e.g., *Buford*, 133 U.S. at 326:

[T]here is an implied license, growing out of the custom of nearly a hundred years, that the public lands of the United States, especially those in which the native grasses are adapted to the growth and fattening of domestic animals, shall be free to the people who seek to use them where they are left open and unenclosed, and no act of government forbids this use

This provision not only recognizes grants of rights by "custom," but also equates public land with exploitation.

19 . See *Best v. Humboldt Placer Mining Co.*, 371 U.S. 334 (1963); *Cameron v. United States*, 252 U.S. 450, 460 (1920); *Knight v. United States Land Ass'n*, 142 U.S. 161, 177-82 (1891).

20 . See generally Mansfield, *supra* note 2, at 822; GEORGE C. COGGINS, PUBLIC NATURAL RESOURCES LAW ch. 9 (1990); David H. Getches, *Managing the Public Lands: The Authority of the Executive to Withdraw Lands*, 22 NAT. RESOURCES J. 279 (1982); Charles F. Wheatley, Jr., *Withdrawals Under the Federal Land Policy and Management Act of 1976*, 21 ARIZ. L. REV. 311 (1979).

21 . National forests were initially set aside under executive authority pursuant to the Forest Reserve Amendment of 1891, which stated that the President could reserve "any part of the public lands wholly or in part covered with timber or undergrowth, whether of commercial value or not." 16 U.S.C. § 471 (repealed 1976). Congress partially repealed this authority in the Act of Mar. 4, 1907, ch. 2907, 34 Stat. 1271 (repealing authority in most of the western states). Before the repeal, however, most of the lands currently in the national forests were reserved. See generally James L. Huffman, *A History of Forest Policy in the United States*, 8 ENVTL. L. 239 (1978).

22 . For example, in 1903, President Roosevelt declared Pelican Island a Federal Bird Reservation. COGGINS, *supra* note 20, at § 2.03[2][c].

23 . National monuments, part of the national park system, could initially be reserved by the executive under the Antiquities Act of 1906. 16 U.S.C. §§ 431-433 (1988). National parks, however, were each reserved by specific congressional authorization. 16 U.S.C. § 2 (1988). See, e.g., the Yellowstone Park Act of 1872, 16 U.S.C. § 21 (1988). Some national monuments, such as the Jackson Hole National Monument and Grand Canyon National Monument, later became national parks.

24 . For the general statutory mandates of the national forests, national parks, wildlife refuges, and wilderness areas, see Mansfield, *supra* note 2, at 831.

25 . The Forest Service was founded in 1891; Pinchot assumed the directorship in 1898. In 1905, the agency was renamed the Forest Service and the nation's forest reserves were transferred from the Department of Interior to the Department of Agriculture. Huffman, *supra* note 21, at 258, 265-67.

tion.²⁶ They were not placed off-limits to commercial exploitation. Timber could be sold in national forests. Additionally, to appease mineral interests, the forests were open to location under the Mining Law of 1872.²⁷ The Mineral Leasing Act also applied in national forests²⁸ and grazing was allowed.²⁹ Generally, "wild areas" that were set aside from such uses by administrative action were not areas of interest to timber companies. A later statute, the Multiple-Use Sustained-Yield Act of 1960,³⁰ supplemented the purposes for which national forests would be managed, but these purposes were deemed secondary to timber and watershed concerns.³¹

Other specialized areas also took into account private interests in various ways. National Park administration appears restrictive, with mining and timber sales generally not allowed,³² but some of the initial park designations were in areas that did not have huge attractions for either miners or timber companies. In a similar compromise, when Congress finally provided general management guidance for the Wildlife Refuges in the 1960's,³³ it allowed uses of refuges in addition to wildlife protection,³⁴ but provided the Fish and Wildlife Service with guidance about prioritizing uses of the refuges.³⁵

In contrast to these specialized land management regimes arising out of reservations, the Bureau of Land Management ("BLM"), an agency of the Department of Interior, manages that portion of the "public domain" which had not

26. See *United States v. New Mexico*, 438 U.S. 696 (1978) (interpreting the Organic Administration Act of 1897, 16 U.S.C. §§ 473-482 (1988)). "Protection" of the forests, a seeming third function, was only operative in regard to the watershed and timber purposes. *Id.* at 707 n.14.

27. The Forest Service Organic Act forbids action that would "prohibit any person from entering upon such national forests for all proper and lawful purposes, including that of prospecting, locating, and developing the mineral resources thereof." 16 U.S.C. § 478 (1988). See *infra* note 216 and accompanying text.

28. 30 U.S.C. §§ 181-287 (1988).

29. *Light v. United States*, 220 U.S. 523 (1911). The first statute in the area was passed in 1950. 16 U.S.C. §§ 580k-580l (1988) (setting up advisory boards and authorizing permitting).

30. 16 U.S.C. §§ 528-531 (1988).

31. *Id.* § 528:

[T]he national forests are established and shall be administered for outdoor recreation, range, timber, watershed, and wildlife and fish purposes. The purposes of . . . this title are declared to be supplemental to, but not in derogation of, the purposes for which the national forests were established as set forth in . . . [the Organic Administration Act of 1897].

For further discussion, see Mansfield, *supra* note 2, at 852-57.

32. See Mansfield, *supra* note 2, at 844.

33. Prior to that, and to a certain extent thereafter, individual statutes or executive withdrawal actions provided management criteria.

34. See Refuge Recreation Act of 1962, 16 U.S.C. § 460k to k-4 (1988); Refuge Revenue Sharing Act of 1964, 16 U.S.C. § 715s (1988); National Wildlife Refuge System Administration Act of 1966, 16 U.S.C. § 668dd-668ee (1988).

35. The Refuge Recreation Act authorizes recreational use of refuges, but only as an "appropriate incidental or secondary use" and "only to the extent that is practicable and not inconsistent with . . . the primary objectives for which each particular area is established." 16 U.S.C. § 460k (1988). The later Refuge Administration Act expressly states that the Recreation Act will govern recreational uses. 16 U.S.C. § 668dd(h) (1988). The Refuge Administration Act allows uses other than recreation under a second standard, namely when they are "compatible with the major purposes for which such areas were established." 16 U.S.C. § 668dd(1)(A) (1988).

been reserved for other purposes.³⁶ Initially, the BLM was a merger of the General Land Office and the Grazing Service³⁷ and it adopted the perspectives of its predecessors. The General Land Office had been responsible for disposal of lands and resources under various homestead laws, state land grants, and mineral laws.³⁸ The Grazing Service managed grazing districts under the Taylor Grazing Act of 1934³⁹ "pending disposal." The BLM received the image of being simply a conduit through which private enterprise would receive its rightful share of the public resources or lands.⁴⁰ Congress began to redefine the agency's role with the Multiple Use and Surface Protection Act of 1955⁴¹ and the Classification and Multiple Use Act of 1964,⁴² which directed the agency to manage and classify lands for different purposes.

One of the most vivid illustrations of the changing nature of the BLM was the picture with which it represented itself.⁴³ Prior to 1965, the BLM's emblem had a surveyor, a logger, an oil driller, a cowboy, and a miner in the foreground. The background contained a wagon train and an indistinct oil field or industrial building. Its revised emblem is triangular, with a winding river extending from the bottom to its top, which depicts a mountain. A conifer tree is also in the foreground. The agency, at least in its public emblem, sought to replace the user groups with a depiction of the land itself. A changing population, however, demanded greater change.⁴⁴

In 1976, the Federal Land Policy and Management Act ("FLPMA") provided the organic act for at least a partially re-visualized agency. Although grazing and

36. See *Sierra Club v. Watt*, 659 F.2d 203 (D.C. Cir. 1981) (finding no implied water rights for BLM lands because they are public domain, not reservations). Nevertheless, portions of the BLM lands may have been withdrawn or reserved for specific management purposes by the BLM. For example, the Stock-Raising Homestead Act of 1916 directed the BLM to withdraw stock water holes and driveways under the Pickett Act. 43 U.S.C. § 300 (repealed 1976).

37. See George C. Coggins & Margaret Lindberg-Johnson, *The Law of Public Rangeland Management II: The Commons and the Taylor Act*, 13 ENVTL. L. 1, 54-68 (1982).

38. The agency did not always meet the congressional goals of these acts. See Sheldon L. Greene, *Promised Land: A Contemporary Critique of Distribution of Public Land by the United States*, 5 ECOL. L.Q. 707, 750-51 (1976) (predatory economic interests of large landholders and railroads perverted nineteenth century land laws from equitable distributive goals and distorted twentieth century reclamation law). See also PATRICIA N. LIMERICK, *THE LEGACY OF CONQUEST: THE UNBROKEN PAST OF THE AMERICAN WEST* 296, 298 (1987) (arguing western history infused with "business as usual" philosophy).

39. 43 U.S.C. § 315-315r (1988). See generally *NRDC v. Hodel*, 618 F. Supp. 848 (E.D. Cal. 1985).

40. For a summary of the major trends in statutory enactments, see George C. Coggins, *The Public Interest in Public Land Law: A Commentary on the Policies of Secretary Watt*, 4 PUB. LAND L. REV. 1, 9-10 (1983) (accurately noting a stage existed between land disposal and land retention in which resources were disposed).

41. 30 U.S.C. §§ 611-615 (1988).

42. 43 U.S.C. §§ 1411-1418 (expired 1970).

43. See JAMES MUHN & HANSON R. STEWART, *OPPORTUNITY AND CHALLENGE: THE STORY OF THE BLM* 116 (1988).

44. Marion Clawson, *The Federal Land Policy and Management Act of 1976 in a Broad Historical Perspective*, 21 ARIZ. L. REV. 585, 595-96 (1979) (tracing FLPMA's origins to demographic, economic, social, and political trends that brought a "larger total population, including more older persons in retirement and more younger persons physically and ideologically active").

mineral functions remain strong elements of the BLM's role,⁴⁵ FLPMA makes planning one of its central functions.⁴⁶ To a certain extent, however, FLPMA represents a stand-off between those seeking to exploit and those seeking to preserve the public lands because FLPMA requires the BLM to consider disparate values in meeting the "national interest," but it does not demand a result.⁴⁷ Congress did not order the BLM to place either resource use or non-use in a favored position throughout its jurisdiction or on any specific tract.⁴⁸ In fact, the statute has been labeled "internally inconsistent, reflecting different concerns of environmentalists, miners, and ranchers."⁴⁹

Nevertheless, some argue that FLPMA has an aura of environmental protection throughout it.⁵⁰ Others maintain the opposite.⁵¹ Two facts fuel these divergent views. In addition to FLPMA's lack of an overriding management goal, the second source of the dispute is that other statutes also operate on the public lands and influence its management. More particularly, FLPMA identifies the principal or major uses of the BLM lands as "domestic livestock grazing, fish and wildlife development and utilization, mineral exploration and produc-

45. See, e.g., Title IV of FLPMA, codified at 43 U.S.C. §§ 1751-1753, 315b, 315j (1988) (grazing amendments); *id.* § 1701(a)(12) (manage to promote food and mineral production); *id.* § 1702(f) (major or principal uses include domestic livestock grazing and mineral exploration and production). See also Public Rangeland Improvement Act, 43 U.S.C. § 1601-1629e (1988).

46. The first policy enunciated in the Act emphasized that "the public lands [should] be retained in Federal ownership, unless as a result of land use planning procedure provided for in this Act, it is determined that the disposal of a particular parcel will serve the national interest." 43 U.S.C. § 1701(a)(1) (1988). See generally George C. Coggins, *The Developing Law of Land Use Planning on the Federal Lands*, 61 COLO. L. REV. 307, 316-33 (1990).

47. Clawson, *supra* note 44, at 585 (temporary lull in debates); Raymond A. Peck Jr., "And Then There Were None": *Evolving Federal Restraints on the Availability of Public Lands for Mineral Development*, 25 ROCKY MTN. MIN. L. INST. 3-1, 3-14, 3-15 (1979) (arguing that debate between developing or preserving lands and who should decide the issue pre-dated the Constitution).

48. Marla E. Mansfield, *The "Public" in Public Land Appeals: A Case Study in "Reformed" Administrative Law and Proposal for Orderly Participation*, 12 HARV. ENVTL. L. REV. 465, 490-94 (1988). In one respect, taking a broader view may lessen the dilemma. As one judge put it: "Some lands can be preserved, while others, more appropriately, can be mined." *State v. Andrus*, 486 F. Supp. 995, 1003 (D. Utah 1979).

49. *State v. Andrus*, 486 F. Supp. at 1002. Congress's commands to the BLM include, *inter alia*, directives to both encourage mining as well as preserve land in its natural condition. See 43 U.S.C. § 1701 (policy section). Decisions the BLM makes in regard to public lands therefore are polycentric and made with multiple criteria and no overriding substantive guide post. Mansfield, *supra* note 48, at 499. FLPMA does require "consideration" of diverse values and other procedural steps, which may indirectly moderate BLM activity. *Id.* at 494-95.

50. *NRDC v. Hodel*, 618 F. Supp. 848 (E.D. Cal. 1985) (FLPMA gives environmental tinge to range duties); *Sierra Club v. Andrus*, 487 F. Supp. 443 (D.D.C. 1980), *aff'd on other grounds sub nom. Sierra Club v. Watt*, 659 F.2d 203 (D.C. Cir. 1981) (finding environmental goals in policy section to provide direction and duty but means to goal is discretionary). For commentary emphasizing environmental mandate, see, e.g., Perry R. Hagenstein, *Public Lands and Environmental Concerns*, 21 ARIZ. L. REV. 449, 451 (1979); George C. Coggins, *The Law of Public Rangeland Management IV: FLPMA, PRLA, and the Multiple Use Mandate*, 14 ENVTL. L. 1, 26-32 (1983).

51. Peck, *supra* note 47, at 3-13 (limiting development contrary to "national policies and statutory mandates"); William R. Marsh & Don H. Sherwood, *Metamorphosis in Mining Law: Federal Legislative and Regulatory Amendment and Supplementation of the General Mining Law Since 1955*, 26 ROCKY MTN. MIN. L. INST. 209, 250-72 (1980) (arguing Congress ultimately required mineral independence).

tion, rights-of-way, outdoor recreation, and timber production."⁵² While some of these uses are regulated under FLPMA,⁵³ others also are subject to independent statutes.⁵⁴ The BLM is therefore most definitely not a single purpose agency.⁵⁵

This thumbnail sketch of public land history shows that in numerous instances, private parties have had the opportunity to develop public land resources. Nevertheless, Congress has also determined that the public lands, both those managed by the BLM and lands in other management systems, should also be available for recreational, aesthetic, wildlife, and ecological purposes.

III. THE PUBLIC/PRIVATE DICHOTOMY

To come to grips with the concept of "public" versus "private" interests in public lands, it is necessary to identify the nature of public lands. The public lands are, on one level, what the name implies: they are lands titled in the government and thus, they seemingly belong to the citizenry at large. Nevertheless, the public lands cannot be viewed historically as either true common property nor true property owned by no one because of the congressional power over the lands.⁵⁶ Congress may dictate their uses. This does not mean that no citizens express care and concern over the use of public lands.⁵⁷ Many do and some are quick to label those supporting grazing, mining, cabin-sites, or even commercial rafting permits as champions of "private" rights, but label those supporting wilderness, wetland preservation, or species preservation as forwarding "public" values. If, however, "public" means serving the interest of the community, and "private" means serving the interest of the individual, it may be a conceptual error to separate the "public" from the individuals within it. The terms "public" and "private," if used to describe community or individual returns, may be similar to that proverbial glass of water, which may be half full or half empty depending on perspective. A different terminology is in order, one that does not automatically tar one perspective as selfish and one perspective as altruistic. Part

52. 43 U.S.C. § 1702(f) (1988). Under the concept of multiple use management, however, other uses may be considered. *Id.* § 1702(c).

53. *See, e.g.*, FLPMA Subchapter V, governing rights-of-way. 43 U.S.C. § 1761. FLPMA also governs sales and exchanges of public lands and planning and administration.

54. *See* Mansfield, *supra* note 2, at 835-37.

55. An occasional court case may declare that a particular statute it enforces has a singular purpose. *See, e.g.*, Fallini v. Hodel, 725 F. Supp. 1113, 1117-18 (D. Nev. 1989) (holding primary intent of grazing statutes to be livestock protection).

56. *Cf.* Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, 453 (1988) (Rights of Indians "do not divest the Government of its right to use what is, after all, its land."); *see also* text accompanying notes 11-15.

57. Compare Carol Rose, *The Comedy of the Commons: Custom, Commerce, and Inherently Public Property*, 53 U. CHI. L. REV. 711, 712 (1986) ("From this [tragedy of the commons produces waste] perspective, 'public property' is an oxymoron: things left open to the public are not property at all, but rather its antithesis.") with Robert H. Nelson, *Private Rights to Government Actions: How Modern Property Rights Evolve*, 1986 U. ILL. L. REV. 361, 373 (arguing that President Reagan's plans to sell public lands were thwarted by disparate users: "The Reagan Administration tried to sell someone else's property, and the owners reacted to the threat as vigorously as would any other private owners.").

of this linguistic transformation is to recognize that the traditional "public" values are of two types, one of which is similar to traditional "private" values.

Many of the so-called public interests represent the individual preferences, desires, or convictions⁵⁸ of the parties supporting them. The wilderness advocate might vacation in a wilderness area in a backpack tent. Wilderness may also promote liberty by aiding an individual to understand his or her heritage.⁵⁹ The wildlife or wetland advocate may have personal interest such as hunting or photography. More importantly, the advocate may have embraced the ethic of environmentalism as fervently as any religious tenet.⁶⁰ Religion, while often resulting in commitments to assist others, is also a private and individual enrichment. Therefore, the oft-labeled public values are benefiting specific individuals within the community.

Conversely, if forwarding the community interest includes benefiting individuals within the community, then it must be recognized that grazers, miners, and commercial outfitters are individually part of the "public," part of the community to be served. The mining company itself also pays taxes and provides jobs, both activities that forward community interest. Similarly, an individual rancher supports local businesses. The commercial outfitter performs an additional function beyond spreading an economic return. The outfitter allows those not personally trained to be able to take a trip down the river or into the back country. Many might say that despite the outfitter's profit, the outfitter offers a "public" or community service—at least to those individuals who partake of the outfitter's offer of assistance.⁶¹ Public and private interests therefore blur, if the test of these labels is whether an individual or the community benefits.

Nevertheless, some values tend to align against general consumer desires.⁶² Maintaining environmental integrity, be it preserving wilderness, wetlands, or

58. See Mark Sagoff, *Economic Theory and Environmental Law*, 79 MICH. L. REV. 1393, 1411 (1981) (explaining that a "conviction" represents a party's beliefs about what is appropriate policy for society and differs from a desire).

59. James L. Huffman, *Governing America's Resources: Federalism in the 1980's*, 12 ENVTL. L. 863, 898 (1982) (arguing public ownership of wildland in national parks and wilderness areas promotes liberty).

60. See generally William D. Ruckelshaus, *Environmental Protection: A Brief History of the Environmental Movement in America and the Implications Abroad*, 15 ENVTL. L. 455 (1985).

61. The controversy over the allocation of river running permits between commercial and non-commercial activities epitomizes this looking-glass dilemma: does the "public" consist of those fit and trained enough to run the river alone or does it consist of those who can simply afford the price of a seat on a commercial river run? See *Wilderness Pub. Rights Fund v. Kleppe*, 608 F.2d 1250 (9th Cir. 1979), cert. denied sub nom. *Wilderness Pub. Rights Fund v. Andrus*, 446 U.S. 982 (1980).

62. See Mark Sagoff, *We Have Met the Enemy and He is Us; or Conflict and Contradiction in Environmental Law*, 12 ENVTL. L. 283, 284 (1982) (dichotomy between consumers and citizens). As Professor Sagoff noted when his students expressed their preference to keep Mineral King mountain undeveloped, despite their desire to ski on its slopes:

The skiers themselves may believe, on ideological grounds, that the wilderness should be preserved, even if that belief conflicts with their own consumer preferences. Thus, this conflict pits the consumer against himself as a citizen or as a member of a moral community. The conflict arises not only among us but within us. It confronts what I want as an individual with what I believe as a citizen.

biological diversity, often means foregoing development. Unlike timber and other commodity resources, wilderness and other environmental values do not lend themselves to traditional economic or even multiple use analyses. Traditional economic analysis, which employs market values, does not apply well to environmental amenities because they are not readily traded in a priced context. Land managers are familiar with multiple use planning, which does not necessarily require dollar equivalents.⁶³ Multiple use planning, however, often is interpreted to search out uses that are compatible with other uses and some environmental considerations, such as wilderness, often require maintenance of the status quo.⁶⁴

In addition to its seeming lack of economic return,⁶⁵ maintaining environmental integrity may be further categorized by comparing it to certain activities that must be the subject of a central government. Creation of these "public goods" requires collective action and the benefits of the activity cannot be parceled out individually. Defense is a good example. No one can individually protect all borders and no one person can be excluded from the benefits of a rigorous defense.⁶⁶ Similarly, ecologically sound land management benefits are beyond the capacity of any one person to control. This can be illustrated by cataloguing some homocentric and pragmatic benefits of environmental preservation: wetlands provide water filtration and flood control,⁶⁷ biological diversity may present opportunities for pharmaceutical advances,⁶⁸ and healthy for-

Id. at 302-03. See also Joseph L. Sax, *The Legitimacy of Collective Values: The Case of the Public Lands*, 56 U. COLO. L. REV. 537, 542 (1985) (contrasting "collective" versus "individualistic"). Compare Frank I. Michelman, *Politics and Values or What's Really Wrong with Rationality Review*, 13 CREIGHTON L. REV. 487, 509 (1979) (contrasting "individualistically self-serving activity" of private sphere with "joint and mutual search for good and right answers" of public life) with Daniel A. Farber, *From Plastic Trees to Arrow's Theorem*, 1986 U. ILL. L. REV. 337, 343 (criticizing Michelman for drawing too sharp a division because all aspects of life provide opportunities for both).

63. See Mansfield, *supra* note 2, at 853.

64. See Thomas M. Rickert, *Wilderness Land Preservation: The Uneasy Reconciliation of Multiple and Single Use Land Management Policies*, 8 B.C. ENVTL. AFF. L. REV. 873, 915-17 (1980).

65. Tourism is, however, a vibrant economic benefit of some preservation efforts.

66. Lloyd R. Cohen, *The Public Trust Doctrine: An Economic Perspective*, 29 CAL. W. L. REV. 239, 255-56 (1992) (explaining consumption of public goods "entails no rivalry among consumers and the exclusion principle does not operate" (emphasis added)). See also Christopher K. Lehman & Robert H. Nelson, *The Rise of Managerial Federalism: An Assessment of Benefits and Costs*, 12 ENVTL. L. 981, 1001-02 (1982); cf. Richard A. Epstein, *Property as a Fundamental Civil Right*, 29 CAL. W. L. REV. 187, 191 (1992) (common property should exist where "the cost of exclusion is high relative to its social benefits"). Epstein, however, does not believe that government ownership and regulation is necessarily the proper response. *Id.* at 201. He advocates purchase of property interests (e.g., easements) needed for wildlife concerns. *Id.* at 202-03.

67. Cohen, *supra* note 66, at 255. Wetlands also provide for migrating wildfowl, which have also been used as an illustration of a public good. They are enjoyed not only by those that visit the nesting grounds, but by those who see the birds flying overhead and are simply reassured that the species continue. *Id.*

68. The Endangered Species Act, however, goes beyond preserving potential economic value from plants and animals. It is concerned with the loss of the "aesthetic, ecological, educational, historical, recreational and scientific value." 16 U.S.C. § 1531(a) (1982). See also Holmes Rolston, III, *Property Rights and Endangered Species*, 61 U. COLO. L. REV. 282, 294-97 (1990).

ests provide watersheds to supply drinking and irrigation water.⁶⁹ Environmentally sensitive use of the public lands is therefore a "public good."⁷⁰

The nature of these concerns leads one to relabel some aspects of environmental protection, a concern which is often identified with the so-called "public rights." One new label would be "non-consumptive" uses. This reflects the fact that most conflicts between "private" rights and environmental protection take place when specific resource development is proposed. To complete the dichotomy, the so-called "private" rights should be considered either "consumptive," because resources are to be developed, or "exclusionary," because the "private" owner wants exclusive control over the resource. In looking at the public or non-consumptive rights, moreover, it must be recognized that these rights are of two types: "public/individual" and "public/collective."

The "public individual rights" represent those uses of the public lands that are to be enjoyed by individual members of the public on a non-exclusive or non-consumptive basis, recognizing that sometimes the forwarding of one type of non-consumptive use may actually exclude other such uses⁷¹ and that some presumptively non-consumptive uses may actually become consumptive in the face of over-use.⁷² The "public/collective" rights differ from the individual rights because their benefits do not flow to specific individuals in the community. These collective rights encompass what would be necessary to preserve an ecosystem for the benefit of humanity in general and throughout time. Such protection enters into the creation of "public goods" that are valued even without use.

Exclusionary or consumptive rights can be both contrasted with and compared with non-consumptive or collective uses. They differ from collective rights because an exclusionary or consumptive right begins with a benefit to a specified individual, a benefit that in some circumstances may diminish what is available for others to use or enjoy. But despite the fact that an individual may benefit, the grant of the exclusionary or consumptive right may be a method chosen by Congress to forward some aspect of community needs. For example, grazing and mineral rights are granted to individuals, but the rationale behind the statutes creating the rights is to forward the public good. Therefore, "public" and "private" rights may be difficult to distinguish if the feature believed to distinguish these two spheres is whether individual or community benefits are being promoted.

69 . In fact, securing favorable water flows and timber production were the twin lodestars of the early forest service. *United States v. New Mexico*, 438 U.S. 696 (1978).

70 . Cf. Leman & Nelson, *supra* note 66, at 1002 (few true public goods exist except in natural resources field); see also Bruce Babbitt, *Federalism and the Environment: An Intergovernmental Perspective on the Sagebrush Rebellion*, 12 ENVTL. L. 847, 851-52 (1982) (arguing federal ownership of public domain protected vital national interest).

71 . The conflicts between hikers and mountain bikers or cross-country skiers and snowmobilers are examples.

72 . Problems of "loving wildernesses to death" come to mind.

IV. INDIVIDUAL AND COLLECTIVE PUBLIC VALUES AS PROPERTY

Property has been defined in numerous ways. It also has been characterized as serving at least two purposes.⁷³ Under the Madison/Lockean or "liberal" concept, property serves an individual's needs; government exists to protect property and to promote the ideal of individuality. The Jeffersonian/Rousseauian concept imbues property with a social purpose; through ownership of property a citizen gains values necessary to participate meaningfully in government.⁷⁴ Hence, societal needs color "ownership." The dialectic between these positions permeates American law, and can explain some of the seemingly contradictory court decisions.⁷⁵ Moreover, from the recognition that the so-called "public" rights are both individual and collective, the dignity of these rights may be reinforced by correlating them to more traditional "rights."

The traditional liberal definition of property is "the group of rights inhering in the citizen's relation to the physical thing, as the right to possess, use and dispose of it."⁷⁶ Nevertheless, even Blackstone, who is often cited for this formulation,⁷⁷ notes that property "consists in the free use, enjoyment, and disposal of all [a person's] acquisitions, without any control or diminution, *save only by the laws of the land.*"⁷⁸ Blackstone's final caveat emphasizes that potential restraints exist and these restraints on individual use of property may be propelled by the social aspect of property. Property is not a true dyadic relationship involving

73 . In addition to the individual and societal purposes, a second dichotomy is between viewing land as existing in the "transformative economy" or in the "economy of nature." Joseph L. Sax, *Property Rights and the Economy of Nature: Understanding Lucas v. South Carolina Coastal Council*, 45 STAN. L. REV. 1433, 1442-46 (1993). The first theory views land as a distinct entity that can be made into a human artifact; the latter views land as "consisting of systems defined by their function, not by man-made boundaries." *Id.* at 1442. Consider also the argument that land itself may demand to be used in a manner that suits its place in the natural ecological chain; no one should have the right to modify or destroy its natural systems. See, e.g., David B. Hunter, *An Ecological Perspective on Property: A Call for Judicial Protection of the Public's Interest in Environmentally Critical Resources*, 11 HARV. ENVTL. L. REV. 311 (1988); Lynton K. Caldwell, *Land and the Law: Problems in Legal Philosophy*, 1986 U. ILL. L. REV. 319; Michael B. Metzger, *Private Property and Environmental Sanity*, 5 ECOL. L.Q. 793 (1976).

74 . See, e.g., Gregory S. Alexander, *Takings and the Post-Modern Dialectic of Property*, 9 CONST. COMMENTARY 259 (1992); Leslie Bender, *The Takings Clause: Principles or Politics?*, 34 BUFF. L. REV. 735, 754-58 (1985); Carol M. Rose, *Mahon Reconstructed: Why the Takings Issue is Still a Muddle*, 57 S. CAL. L. REV. 561, 594-97 (1984) (property serves "proacquisitive" and "prosocial" positions).

75 . It has also been inaccurately characterized as a distinction between the "nineteenth-century world of the common law and the twentieth-century world of the modern regulatory state." Gary Minda, *The Dilemmas of Property and Sovereignty in the Post Modern Era: The Regulatory Takings Problem*, 62 COLO. L. REV. 599, 621 (1991). Nineteenth century cases also display the social side of the property dialectic. See *infra* text accompanying notes 187-88.

76 . *United States v. General Motors Corp.*, 323 U.S. 373, 377 (1945). For an explication of the "liberal" concept of property, see Margaret J. Radin, *The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings*, 88 COLUM. L. REV. 1667 (1988) and Richard A. Epstein, *Takings: Descent and Resurrection*, 1987 SUP. CT. REV. 1.

77 . "[T]he right of property . . . [is] that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe." 2 WILLIAM BLACKSTONE, COMMENTARIES *2.

78 . 1 WILLIAM BLACKSTONE, COMMENTARIES *138 (emphasis added).

only an owner and a thing.⁷⁹

A second, and perhaps more intriguing definitional exercise, is to examine property from the viewpoint of expectation:

The idea of property consists in an established expectation; in the persuasion of being able to draw such or such an advantage from the thing possessed Now this expectation, . . . can only be the work of law. I cannot count upon the enjoyment of that which I regard as mine, except through the promise of the law which guarantees it to me. . . . Property and law are born together, and die together.⁸⁰

Expectations, if backed by law, create the foundations of property interests. This construct recognizes the interrelationship between individuals and their society. Because of the use of reasonable expectations in takings jurisprudence, the nature of expectations in regard to public lands is important.

Generally, expectation analysis has concentrated on the consumptive or exclusionary interest. For example, questions focused on whether a private proponent had a statutory or contractual right to develop the resource⁸¹ or on whether an enterprise was so pervasively regulated that more regulation could be anticipated.⁸² However, in the public lands context, where lands have not been developed or consumptively used, there could be an expectation that the status quo would continue, and the lands would therefore remain in their present state.⁸³ This expectation could influence the so-called public rights.

The expectation can be attached to both the "public/individual" interests and the "public/collective" interests. Obviously, the user of a tract of public land for hunting or hiking maintains a subjective expectation that the land will remain available for these pursuits. Similarly, the park visitor will anticipate returning to the park, perhaps when the infant in the baby carrier is able to navigate a trail on two feet. The expectation interest, however, goes beyond individual users.

If a person never used a park, it does not mean that member of the public does not value the land for being a park. It is perhaps safe to say that no citizen would want Yellowstone Park destroyed even if that person did not plan to visit

79. Daniel W. Bromley, *Regulatory Takings: Coherent Concept or Logical Contradiction*, 17 VT. L. REV. 647, 648-56 (1993).

80. BENTHAM, *supra* note 3, at 112-13.

81. Compare *Union Oil Co. v. Morton*, 512 F.2d 743, 750-51 (9th Cir. 1975) (finding regulation promulgated after issuance of an oil and gas lease may be a taking) with *Alaska v. Andrus*, 580 F.2d 465, 482-84 (D.C. Cir. 1978), *vacated in part and remanded sub nom. Western Oil & Gas Ass'n v. Alaska*, 439 U.S. 922 (1978) (finding no taking if lease terminated pursuant to clause in lease forbidding development if unacceptable harm would result).

82. See *Atlas Corp. v. United States*, 895 F.2d 745, 758 (D.C. Cir.), *cert. denied*, 498 U.S. 811 (1990) (upholding Uniform Mill Tailings Control Act); *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 411 (1983) (regulated industry should anticipate additional regulation).

83. Cf. Joseph L. Sax, *Liberating the Public Trust Doctrine from its Historical Shackles*, 14 U.C. DAVIS L. REV. 185, 186-94 (1980) (arguing public trust doctrine "prevent[s] the destabilizing disappointment of expectations held in common").

it. Certain goods have "existence value;" the simple fact that they exist enriches the collective consciousness even if never used. Wilderness is often identified as a resource that provides such benefits.⁸⁴ Thus, there is an expectation that these values will be maintained. This may also be true in regard to wetlands, wildlife, and some other environmental values. There may be an "ecological expectation" of their continued existence because of their importance in the ecosystem. The collective or ecological expectation, however, may run into the private, consumptive expectation that an owner of "private property" maintains about his or her ability to make use of the property for profit or individual pleasure.⁸⁵

Because two rights reside in the same resource, to a certain extent what is created are correlative rights in the resource. The correlative rights doctrine first emerged in the oil and gas setting to reconcile rights to a truly common resource, an underground oil and gas reservoir from which all owners of minerals in lands overlying the pool have rights to remove oil and gas.⁸⁶ As the Supreme Court in *Ohio Oil Co. v. Indiana*⁸⁷ explained:

It follows from the essence of their right and from the situation of the things, as to which it can be exerted, that the use by one of his power to seek to convert a part of the common fund to actual possession may result in an undue proportion being attributed to one of the possessors of the right to the detriment of the others, or by waste by one or more to the annihilation of the rights of the remainder.⁸⁸

Because of the communal nature of the legal rights and the physical object of these rights, a state legislature could intervene and regulate the manner of production. The Supreme Court found such legislation did limit "property" rights gained under the Rule of Capture, but was not a taking of private property; it labeled the statute as one "protecting private property and preventing it from being taken by one of the common owners without regard to the enjoyment of the others."⁸⁹

Naturally, the oil and gas situation is not perfectly analogous to the relationship of "private" rights and "public" rights, either public/individual or public/collective. Each owner of a right to produce from the common oil and gas reservoir has a legally recognized "co-equal" right to produce. The dignity of these "public" rights to the public lands has not been elevated to co-equal status with the private consumptive or exclusionary property rights across the board.

84 . Lehman & Nelson, *supra* note 66, at 1002 (support by distant citizens show wildernesses and parks to be true public goods valued for their existence). Cf. Sax, *supra* note 62, at 551-52 (some value arises from the "bandwagon" effect; individual values wilderness because community deems it important).

85 . That is, the ability to make use of it in the "transformative economy." Sax, *supra* note 73, at 1442.

86 . *Ohio Oil Co. v. Indiana*, 177 U.S. 190, 209-10 (1900); see Mansfield, *supra* note 13, at 72-74.

87 . 177 U.S. 190 (1900).

88 . *Id.* at 210.

89 . *Id.*

These "rights" only emerge as legally protected rights when Congress declares that the public lands shall be managed for these purposes. Moreover, the public rights probably should not be elevated in one leap to such co-equal property rights because thoughts about property rights tend to evolve slowly. As a result, subjecting these rights to cataclysmic change could destabilize society as a whole.

In fact, simply elevating these collective concerns to "property" status could have an unintended drawback. If the government regulates private consumptive or exclusionary interests that also are "property" expectations, the gain to the collective or to the individual public interests could be equated with acquiring an interest for the benefit of governmental property.⁹⁰ Under some theories, this could create a compensable taking.⁹¹ Takings analysis, however, is more complex than simply labeling a governmental action one that appropriates a benefit. Moreover, before the issue of takings may arise, the agency must first decide how to reconcile the conflicting interests.

V. AGENCY RECONCILIATION OF COMPETING INTERESTS

Parties with purported rights to use land, either actual public land owned by the federal government⁹² or land adjacent to such lands,⁹³ may discover their desired development would impact on some public rights, be they of the individual or collective type. The land managing agency with jurisdiction must then reconcile the conflicting interests. Unless there is a statute that mandates a specific result,⁹⁴ there is room for balancing.

The BLM's lands and some of the other publicly held lands may be subject to statutes that have seemingly diametrically opposed goals. These include statutes that promote mining⁹⁵ and those that promote wilderness.⁹⁶ Not even these purposeful statutes necessarily enshrine one value over all else: the Mineral

90 . Defining the takings issue as compensating for property "appropriated" can lead to word play: a restriction on use could "appropriate" a negative easement. See Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1186-87 (1967).

91 . Compare William B. Stoebuck, *Police Power, Takings, and Due Process*, 37 WASH. & LEE L. REV. 1057, 1091-93 (1980) (stating such a benefit would arguably be a taking) with Joseph L. Sax, *Takings, Private Property and Public Rights*, 81 YALE L.J. 149, 177-78 (1971) (arguing not necessarily a taking if benefit required to protect the public).

92 . For example, a mineral lease, grazing lease, timber contract, mining claim, concession contract, or cabin-site lease allows some consumptive or exclusionary uses of lands technically owned by the federal government. The nature of the right to use may be defined by statute or regulation. See *infra* notes 225-26.

93 . For the reach of the Property Clause beyond federally owned property, see Mansfield, *supra* note 13, at 52-56.

94 . See, e.g., *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 193-95 (1978) (interpreting the Endangered Species Act as removing equitable discretion from both the agency and the courts).

95 . Mining Law of 1872, 30 U.S.C. §§ 21-42 (1988); Mineral Leasing Act, 30 U.S.C. §§ 181-227 (1988); Mining and Minerals Policy Act of 1970, 30 U.S.C. § 21a (1988); National Materials and Minerals Policy, Research and Development Act of 1980, 30 U.S.C. §§ 1601-1605 (1988).

96 . See, e.g., Wilderness Act of 1964, 16 U.S.C. §§ 1131-1136 (1988).

Leasing Act requires consideration of surface values⁹⁷ and the Wilderness Act acknowledges existing private mineral rights and allowed for initiation of new rights for a time.⁹⁸ Indeed, even the National Park Service Organic Act also has inherent tension; the Park Service is to preserve its resources and at the same time provide for the enjoyment of future generations.⁹⁹

Acts governing other specialized land regimes provide for some development in these areas, but also give guidance on priorities. The National Wildlife Refuges are to be managed primarily for wildlife and whatever additional values may be especially noted in the executive order or statute creating the refuge.¹⁰⁰ Similarly, the Wild and Scenic Rivers Act ("the Rivers Act") requires the managing agency to administer a designated river "to protect and enhance the values which caused it to be included in said system without, insofar as is consistent therewith, limiting other uses that do not substantially interfere with public use and enjoyment of these values."¹⁰¹ Under the Rivers Act, Congress decides to preserve the area, but the agency determines whether a proposed activity violates the Act's protective thrust. Because interference with protected values must be "substantial" before it is forbidden, there is extensive discretion within the agencies.¹⁰² Despite the discretion afforded under these acts, the BLM and the Forest Service, which are governed by multiple use mandates, most vividly show the potential for conflicts in their laundry lists of policies and management goals.¹⁰³

For example, FLPMA allows the BLM considerable discretion in managing the public lands. Because FLPMA does not direct the BLM to favor any one interest, it may balance conflicting interests that affect particular parcels of land. Thus, the BLM could, under FLPMA's command to prevent "unnecessary or undue degradation"¹⁰⁴ of the public lands, declare that an activity could be "unduly degrading" because it would cause excessive environmental harm or preclude an inordinate number of alternative uses of the public lands. It could balance rights, looking to the admittedly imperfect analogy of correlative rights.¹⁰⁵ Under such a balancing approach, the BLM would not condemn an activity, such as a mine or a road, without also looking at its potential for praise.

97 . 30 U.S.C. § 226(g) (1988).

98 . 16 U.S.C. § 1133(d)(2)-(d)(3) (1988).

99 . 16 U.S.C. § 1 (1988).

100 . See *Schwenke v. Secretary of Interior*, 720 F.2d 571 (9th Cir. 1983) (construing management priorities for Russell Range); *supra* notes 33-35; see also *Mansfield*, *supra* note 2, at 846-48.

101 . 16 U.S.C. § 1281(a) (1988).

102 . *Wilderness Soc'y v. Tyrrel*, 701 F. Supp. 1473, 1478-79 (E.D. Cal. 1988). Compare with other acts requiring agency discretion within protective framework, *Oregon Natural Resources Council v. Lyng*, 882 F.2d 1417 (9th Cir. 1989) (Hell's Canyon National Recreation Area Act); *Izaak Walton League v. St. Clair*, 497 F.2d 849 (8th Cir. 1974) (Wilderness Act).

103 . See *Mansfield*, *supra* note 48, at 490-99.

104 . 43 U.S.C. § 1732(b) (1988) (dealing with general land use); *id.* § 1782(c) (dealing with interim management of wilderness study areas when grandfathered uses or valid existing rights involved).

105 . See generally *Mansfield*, *supra* note 13 (fully developing and initially presenting arguments that follow).

The balancing exercise, however, must employ value judgments. The BLM cannot rely totally on the seeming neutrality of numerical cost-benefit analysis. This technique, which monetizes both benefits and costs of a proposal, is more attuned to ranking competing development proposals. It is less helpful when the decision is between development and preserving collective or non-consumptive rights.¹⁰⁶ Moreover, absolute neutrality is neither possible nor desirable as a goal for an agency such as the BLM. Inevitably, managing the public lands requires value judgments. Therefore, rather than hiding behind the mask of numerical balancing, the agency should accept this truth and make value judgments openly so all will know the basis of its choices.

Before making such choices, a land managing agency imbued with discretion must hear the arguments in favor of differing allocative choices in full.¹⁰⁷ If the agency must solve conflicting demands without firm guidance from Congress, the interest representation model of administrative law would be especially suited to its resource allocation decisions.¹⁰⁸ The agency's eventual decision should promote what it determines to be the public interest. This task requires a judgmental conclusion and therefore differs from simply reflecting the sum of all "votes" of interested persons.¹⁰⁹ In some cases, this process will lead to the conclusion that development should be halted or greatly modified, but in other situations development will be allowed to proceed. The agency must exercise

106. Two difficulties emerge. First, it is difficult to "price" certain environmental costs and benefits. Therefore, the results of cost-benefit analysis may be weighted in favor of proposals that will produce benefits more easily rendered into dollars. Second, the analysis may give value judgments a veneer of scientific respectability because environmental amenities are given dollar equivalents, even if the methodology behind such exercises may be questionable. See generally Mansfield, *supra* note 13, at 83-84; see also William H. Rodgers, Jr., *Benefits, Costs and Risks: Oversight of Health and Environmental Decisionmaking*, 4 HARV. ENVTL. L. REV. 191, 194-201 (1980); Ralph C. d'Arge, *A Practical Guide to Economic Valuation of the Natural Environment*, 35 ROCKY MTN. MIN. L. INST. 5-1 (1989). Moreover, once reaching one "right" answer justified by a maximization approach, the administrative process may appear to be completed and an agency would be less responsive to changed circumstances. Martin Shapiro, *APA: Past, Present, Future*, 72 VA. L. REV. 447, 454-56 (1986).

107. The interest representation model of administrative law requires such agency openness to public input. Professor Stewart was the first to note that many agencies had come to resemble mini-legislatures, and that therefore a primary goal of administrative law should be to assure representation of all interests in this new forum. Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669 (1975).

108. See generally Mansfield, *supra* note 48, at 498-99. Allowing all affected parties to participate ensures all resources are spoken for, broadens the agency's information base, and provides a basic ingredient of the democratic process, namely the representation without which laws should not be made. *Id.* at 513-14.

109. See Coggins, *supra* note 40, at 24-26 (arguing that the search for the public interest is crucial to government although it is an elusive and changing standard). Agencies, however, tend to regard the "public interest" as being served when a decision is made that best accommodates the desires of those demanding attention, rather than looking beyond the goals of these parties. PAUL J. CULHANE, PUBLIC LANDS POLITICS: INTEREST GROUP INFLUENCE ON THE FOREST SERVICE AND THE BUREAU OF LAND MANAGEMENT 208-31 (1981); Charles A. Reich, *The Public and the Nation's Forests*, 50 CAL. L. REV. 381, 406 (1962); Cass R. Sunstein, *Factions, Self-Interest, and the APA: Four Lessons Since 1946*, 72 VA. L. REV. 271 (1986).

discretion in each individual setting without preconceived frameworks.¹¹⁰ Nevertheless, some guiding principles exist.

First, a land managing agency need not halt all activities that disturb resources on the public lands or which are incompatible with either type of "public right." Despite potential expectations about the status quo continuing, public land management need not be static.¹¹¹ Therefore, only those private consumptive or exclusionary enterprises that threaten core public values should be curbed.¹¹² These values include wildernesses and lands important for watershed protection, recreational activities, and wildlife preservation. Second, development need not necessarily be foreclosed even if it threatens these or other public land functions. The public benefits from the activity, such as jobs, minerals, and independence from reliance on foreign sources, enter the equation. In some instances, the gains from development will justify the loss of environmental values.

Therefore, if an agency is interpreting an open-ended mandate such as preventing "unnecessary or undue degradation," it should employ a sliding scale. To do so, the nature of the proposed private action is important. Minerals, of course, can only be mined at locales that nature provides, but pipelines, hotels, and condominiums may often be sited in numerous locales. Therefore, the availability of alternatives for both the "private" and "public" rights are important. Moreover, even if a mineral is involved, further consideration is needed. The relative scarcity of both the mineral resource and the threatened collective resources will influence the decision. For example, development of a particularly rare or major mineral deposit could justify more usurpation of other resources than smaller or more common deposits. Conversely, lands serving major ecological or recreational interests could demand more vigorous preservation than other public lands.¹¹³

Ultimately, private activities should be precluded only if they would affect public lands that provide significant collective and individual public benefits.

110 . Discretion, in and of itself, is not necessarily an evil. The BLM personnel can provide crucial professional knowledge and initiative. Congress has neither the time nor the expertise to either define national policy completely or manage each acre of public lands. Therefore, it must delegate discretion. Mansfield, *supra* note 48, at 496-97.

111 . Compare Joseph L. Sax, *The Public Trust Doctrine in Natural Resources Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 482 (1970) (government may accommodate new needs by reallocating resources even if uses of property subject to public trust change) with Sax, *supra* note 83, at 186 (public trust doctrine not rigid prohibition of change).

112 . Cf. Eugene R. Gaetke, *The Boundary Waters Canoe Area Wilderness Act of 1978: Regulating Nonfederal Property Under the Property Clause*, 60 OR. L. REV. 157, 183 (1981) (only allow land managing agencies to regulate activity beyond the borders of their lands when imperative to preserve congressional policy about federal property use); Eric T. Freyfogle, *Context and Accommodation in Modern Property Law*, 41 STAN. L. REV. 1529, 1553-56 (1989) (should not restructure property rights in water on a wholesale basis, but only to preserve crucial values).

113 . Acknowledging the BLM's authority to forbid activity would not necessarily be a defeat for mineral interests or other developers. If the BLM has this power, its decision-making would consider placing environmental concerns above development. If, after this review, the BLM allows the activity, the public interest decision would deserve more deference than one in which the agency avers that it must approve the activity simply because it cannot forbid it. Thus, environmentalists may gain greater protection of the resources they value, but developers in return will get greater certainty that decisions favorable to them will not be overturned.

This provides an element of fairness. In essence, the exceptional beauty, wildlife use, or ecological importance of the lands would put the developer on notice that these values might need to be preserved.¹¹⁴

VI. TAKINGS JURISPRUDENCE

The Fifth Amendment of the United States Constitution declares that no private property shall be taken for public use without just compensation.¹¹⁵ Unfortunately for those seeking simplicity, the prohibition has not been limited to forbidding the government from outright acquisitions of land or personal property without paying for it.¹¹⁶ The Fifth Amendment has, rightly or wrongly, been interpreted as requiring compensation in two additional situations. In the first, to "take" encompasses physical occupation of land, a situation that relates to the initial thrust of the provision.¹¹⁷ Additionally, in some circumstances, less than either physical entry or acquisition of title might trigger the just compensation requirement: a regulation may too greatly impede private rights to be allowable.¹¹⁸ This second situation fuels the "regulatory takings" issue. The central query in regulatory takings analysis is whether the particular landowner should receive compensation because of an interference with property use.¹¹⁹ A more precise rendition of the problem would be, "Has this landowner

114. Cf. Richard J. Lazarus, *Putting the Correct "Spin" on Lucas*, 45 STAN. L. REV. 1411, 1430 (1993) (analogizing for takings purposes to the Fourth Amendment cases that find the physical character of land influences privacy expectations).

115. U.S. CONST. amend. V. ("No person shall be . . . deprived of . . . property without due process of law."); U.S. CONST. amend. XIV, § 1 ("nor shall any State deprive any person of life, liberty, or property, without due process of law"). "Due process," of course, provides limits on actions in regard to property in addition to the prohibition against taking without compensation. Some of the following arguments were originally developed in Marla E. Mansfield, *Regulatory Takings, Expectations and Valid Existing Rights*, 5 J. MIN. L. & POL'Y 431 (1989-90).

116. *Pennsylvania Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 123 n.25 (1978) (taking not limited to physical transfers of property). See also *id.* at 143 (Rehnquist, J., dissenting). For advocates of similar propositions, see Jed Rubinfeld, *Usings*, 102 YALE L.J. 1077, 1114-15 (1993) (taking occurs "when some productive attribute or capacity of private property is exploited for state-dictated service"); Susan Rose-Ackerman, *Against Ad Hocery: A Comment on Michelman*, 88 COLUM. L. REV. 1697, 1702-05 (1988) (compensate only for improvements government will use).

117. Because destruction equates easily with physical appropriation of land, compensation for destroyed property was a natural next step. *Pumpelly v. Green Bay Co.*, 13 U.S. (1 Wall.) 166 (1871). Permanent entry on someone's land, either by the government itself or the public, under current rules may also require compensation even if the intrusion is *de minimis*. See, e.g., *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982); but see *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 82-84 (1980) (entry into shopping center literal but not constitutional taking). See also Thomas W. Merrill, *Trespass, Nuisance, and the Costs of Determining Property Rights*, 14 J. LEGAL STUD. 13, 28-29, 44 (1985) ("mechanical" permanent physical occupation test similar to formal eminent domain, reflects low transaction costs, and resembles "dimensional" test for trespass and nuisance distinction).

118. See *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922); but see *Mugler v. Kansas*, 123 U.S. 623, 668-69 (1887) where the Court stated that "[a] prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or an appropriation of property for the public benefit." *Id.* at 668-69. These potentially inconsistent positions thread through takings jurisprudence. They are not, however, necessarily inconsistent. See generally Mansfield, *supra* note 115.

119. An unanimous Supreme Court reaffirmed that the Fifth Amendment does not prohibit interference with property rights, but conditions the interference on providing compensation. Pre-

been disproportionately burdened?"¹²⁰

Neither traditional glosses to this question, nor modern refinements provide rigid rules. In *Lucas v. South Carolina Coastal Council*,¹²¹ Justice Scalia¹²² attempts, but fails, to provide a more definitive analytical structure. Rigidity, however, should not necessarily be a goal. "Just compensation" requirements should respond to the "expectations" that currently govern property rights or the process would not be "just." There may be a constitutional core to the term "property," but no rights are frozen. Protection of both property rights and other rights align with societal needs and understandings through a process of evolutionary, as opposed to revolutionary, change.¹²³ The law before *Lucas* recognized this and also allowed distinctions between parties by defining the "property affected" by a regulation in broad terms, which could include all property the complaining party controls.¹²⁴ In this manner, risk-spreading was acknowledged and disproportionate harm avoided while not overtaxing the public's ability to compensate.

In order to assess how *Lucas* fits into prior case law and to what extent it modified it, the case will first be explicated. After a historical review, it is found that prior law recognizing risk-spreading and the evolutionary nature of property rights has not been eviscerated, although *Lucas* does attempt to curb legislative initiative in land use regulation.

A. *Lucas v. South Carolina Coastal Council: Scalia's Holding*

Justice Scalia in *Lucas* categorizes potential takings situations into three groups. One category will always be a taking, namely when there is a permanent physical occupation of the relevant private property.¹²⁵ The remaining two situations involve regulations that diminish the value of property. If the diminution is less than total, a court must consider "[t]he economic impact of the regulation on the claimant and . . . the extent to which the regulation has inter-

seault v. Interstate Commerce Comm'n, 494 U.S. 1 (1990) (no taking if Tucker Act available for compensation). Although unanimous on this point, Justices O'Connor, Scalia, and Kennedy provided a concurring opinion. See *infra* note 182.

120 . See generally Michelman, *supra* note 90; John Costonis, *Presumptive and Per Se Takings: A Decisional Model for the Taking Issue*, 58 N.Y.U. L. REV. 465 (1983).

121 . 112 S. Ct. 2886 (1992).

122 . Justice Scalia's opinion was joined by Chief Justice Rehnquist, and Justices White, O'Connor, and Thomas. Justice Kennedy concurred in the result. Justices Blackmun and Stevens dissented, and Justice Souter provided a separate "statement," declaring certiorari to have been improvidently granted.

123 . In *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 92-94 (1980) (Marshall, J., concurring), the Court stated "[i]ndeed, the great office of statutes is to remedy defects in the common law as they are developed, and to adapt it to the changes of time and circumstances." *Id.* at 92-93 (quoting *Munn v. Illinois*, 94 U.S. 113, 134 (1877)). State law may provide some definitions of property, but it, too, is not static.

124 . See *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 497-502 (1987).

125 . *Lucas*, 112 S. Ct. at 2893.

ferred with distinct investment-backed expectations."¹²⁶ If, however, the diminution of value is total, denying the owner "all economically feasible use" of the property,¹²⁷ there will be a taking unless the regulated activity would meet the common law definition of nuisance.¹²⁸ In the latter situation, the property owner would never have had the right to proceed in such a fashion; nuisance law constrains and defines the limits of property rights. Both the bases for and implication of these statements need explanation.

The case arose out of the 1988 South Carolina Beachfront Management Act.¹²⁹ The Act regulated coastal zones, including the Isle of Palms barrier island, on which Lucas had purchased two residential lots in 1986.¹³⁰ Owners of pre-existing homes were subjected to various requirements,¹³¹ but the impact at issue was the prohibition of building permanent, inhabitable dwellings seaward of a baseline, determined by connecting the points of erosion in the past forty years. The Lucas lots were within this zone. The inability to build residences on the lots, for the purpose of the case, rendered the lots "valueless."¹³²

In reviewing prior case law, Justice Scalia maintained that the ability to regulate land use and a commensurate impact on land values is an inevitable part of a government's police power, and partially justified by the reciprocity of advantage received from living in a community.¹³³ Nevertheless, when a full deprivation of value occurs, a landowner generally is required to keep land in its natural state.¹³⁴ Justifications for such deprivations in the past called upon the "noxious or harmful use" rationale, which stated there could be no taking if the regulation merely stopped a harmful use, rather than sought a public benefit.

126 . *Id.* at 2895 n.8 (citing *Penn Central*, 438 U.S. 104).

127 . *Id.* at 2894. Justice Scalia variously uses the phrases "denies all economically beneficial or productive use of lands" and "denies an owner economically viable use of his land." *Id.* at 2893. He only applies the rule to land, not to personal property. He distinguished personal property, allowing regulation to go further without compensation because of the "State's traditionally high degree of control over commercial dealings." *Id.* at 2899.

128 . *Lucas*, 112 S. Ct. at 2901.

129 . S.C. CODE ANN. § 48-39-250 (Supp. 1990).

130 . Lucas was one of the developers of the residential project. He repurchased the lots at more than four times their initial sales price. Purportedly, one would be for his own residence and one for resale after building a house. At the time Lucas acquired these parcels, he was not legally obliged to obtain a permit in advance of any development activity.

131 . See *Lucas*, 112 S. Ct. at 2924 (Stevens, J., dissenting).

132 . *Id.* at 2896 n.9. But see *id.* at 2908 (Blackmun, J., dissenting) (delineating residual value of lot for camping, picnicking, or use with a mobile home); *id.* at 2903 (Kennedy, J., concurring).

133 . *Id.* at 2894. Justice Scalia also states that "'prevention of harmful use' was merely our early formulation of the police power justification necessary to sustain (without compensation) any regulatory diminution of value." *Id.* at 2898-99. This statement does not mean the nuisance exception has been rewritten to be co-extensive with the police power; Scalia also states that this formulation can only justify the police power, not total deprivations without compensation. *Id.* at 2899. But see Jan G. Laitos, *The Public Use Paradox and the Takings Clause*, 13 J. ENERGY, NAT. RESOURCES & ENVTL. L. 9, 14 (1993) (arguing that *Lucas* continues trend of authorizing any regulation if done for the public use).

134 . The fact that land must be kept in a natural state may be the anathema Justice Scalia seeks to avoid. He insists that prior cases in which no takings were found did not exclude *all* use of property, but just excluded particular *uses* of property, such as livery stables, breweries, and brick manufacturing. *Id.* at 2899.

Justice Scalia accurately noted that such a determination may be two-sides of one coin; any competent legislative drafter could easily couch almost any benefit desired as a prevention of harm.¹³⁵ Therefore, Justice Scalia sought refuge in nuisance law.

Justice Scalia phrases the issue as whether, under the common law of a particular state, either a private party could stop the proposed use through a private nuisance action or a public entity could enjoin the activity as a public nuisance. If either theory would prevail, the regulatory restriction would "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."¹³⁶ As Justice Scalia notes, a statute or regulation forbidding the same would be duplicative.¹³⁷

To determine if a nuisance exists, Justice Scalia demands judicial action. A court should balance the factors listed in the Restatement of Torts.¹³⁸ Justice Scalia, however, does intimate that common land uses would infrequently be "nuisances:"

The fact that a particular use has long been engaged in by similarly situated owners ordinarily imports a lack of any common-law prohibition (though changed circumstances or new knowledge may make what was previously permissible no longer so), see Restatement (Second) of Torts, *supra*, § 827, comment g. So also does the fact that other landowners, similarly situated, are permitted to continue the use denied to the claimant.¹³⁹

To Justice Scalia, "[i]t seems unlikely that common-law principles would have prevented the erection of any habitable or productive improvements on petitioner's land."¹⁴⁰ He warned that legislative findings of harm and the public interest would not be determinative; to forbid the activity without compensation would require "South Carolina . . . [to] identify background principles of nui-

135 . He noted that negative easements are obtainable by purchase. *Id.* at 2895. Moreover: One could say that imposing a servitude on Lucas's land is necessary in order to prevent his use of it from "harming" South Carolina's ecological resources; or, instead, in order to achieve the "benefits" of an ecological preserve. Whether one or the other of the competing characterizations will come to one's lips in a particular case depends primarily upon one's evaluation of the worth of competing uses of real estate.

Id. at 2898 (citations omitted). See also *id.* at n.12 (harm/benefit test "amounts to a test of whether a legislature has a stupid staff").

136 . *Id.* at 2900.

137 . *Id.*

138 . According to Justice Scalia, the determination would require: 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, see, e.g., Restatement (Second) of Torts §§ 826, 827, the social value of the claimant's activities and their suitability to the locality in question, see, e.g., *id.*, §§ 828(a) and (b), 831, and the relative ease with which the alleged harm can be avoided through measures taken by the claimant and the government (or adjacent private landowners) alike, see, e.g., *id.*, §§ 827(c), 828(c), 830.

Id. at 2901.

139 . *Id.*

140 . *Id.*

sance and property law that prohibit the uses . . . [Lucas] now intends in the circumstances in which the property is presently found."¹⁴¹ On remand, the South Carolina court found no nuisance.¹⁴²

B. *Pre-Lucas Law*

Most commentators, and even Justice Scalia,¹⁴³ date the first recognition of regulatory takings to the famous pronouncement by Justice Holmes in *Pennsylvania Coal Co. v. Mahon*:¹⁴⁴

One fact for consideration in determining such limits [of proper police power impingement] is the extent of diminution. When it reaches a certain magnitude, in most if not all cases there must be an exercise of eminent domain and compensation to sustain the act The general rule . . . is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.¹⁴⁵

This holding seemed to make compensable takings partially a matter of degree; regulation under the police power sometimes would require compensation if too great a diminution of value resulted.¹⁴⁶ Holmes' statement recognized, however, that compensation is not required whenever value is destroyed, but would be necessary in "most" such cases.¹⁴⁷ Nevertheless, non-compensable regulatory actions could greatly lessen property value.¹⁴⁸

141 . *Id.* at 2901-02. This holding was characterized as dramatically changing the burden of proof. *Id.* at 2909 (Blackmun, J., dissenting).

142 . 424 S.E.2d 484 (S.C. 1992).

143 . *Lucas*, 112 S. Ct. at 2892-93. See also *Florida Rock Indus., Inc. v. United States*, 791 F.2d 893, 901 (D.C. Cir. 1986) (*Mahon* breaks with precedent finding a regulation can never be a taking.). But see Glynn S. Lunney, Jr., *A Critical Reexamination of the Takings Jurisprudence*, 90 MICH. L. REV. 1892, 1900-09 (1992) (citing earlier cases requiring compensation without physical occupation); William W. Fisher III, *The Trouble with Lucas*, 45 STAN. L. REV. 1393, 1394 (1993) (labeling Justice Scalia's embrace of the "new" *Mahon* rule as a retreat from original intent analysis).

144 . 260 U.S. 393 (1922).

145 . *Id.* at 413-15. Some of the following arguments were originally developed in Mansfield, *supra* note 115.

146 . Justice Holmes invalidated a statute that required coal to remain underground to prevent subsidence of residences and other improvements. The statute would have precluded mining even if the owner of the severed mineral had waivers of the right to subjacent support unless, under a companion law, the coal company contributed two percent of market value of mined coal to a fund that paid damages for subsidence. See Lawrence M. Friedman, *A Search For Seizure: Pennsylvania Coal Co. v. Mahon in Context*, 4 LAW & HIST. REV. 1, 18-22 (1986) (suggesting Holmes thought general tax more appropriate).

147 . Compare the discussion of *Lucas*, *infra* part VII-A, with other recent proponents of Holmes' approach, who also except from censure regulations that either prevent discrete noxious activities or grant reciprocal benefits, for example, *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 511-13 (1987) (Rehnquist, J., dissenting) and *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 144-49 (1978) (Rehnquist, J., dissenting).

148 . In fact, from 1923 until 1987, the Supreme Court never struck down a regulation as a taking if it did not comprise a physical entry. See Jan G. Laitos, *Regulation of Natural Resources Use and Development in Light of the "New" Takings Clause*, 34 ROCKY MTN. MIN. L. INST. 1-1, 1-29 (1988). Holmes elsewhere approved legislation that interfered with either mineral recovery or contracts. See, e.g.,

Courts have employed various methods to discern the dividing line between requiring and not requiring compensation for a taking. One distinction may be the strength of the public purpose being forwarded. In *Mahon*, the majority's basic concern was that "the statute does not disclose a public interest sufficient to warrant so extensive a destruction of . . . constitutionally protected [private] rights."¹⁴⁹ Despite the presence of "diminution in value" that could arguably be "too much," compensation historically was not required in three strong public interest situations: when the prohibited action resembles a nuisance,¹⁵⁰ when it would injure core values,¹⁵¹ and when it would destroy gains from reciprocal restrictions.¹⁵²

The nature and purposes of the government action create distinctions between types of regulations.¹⁵³ The closer a regulation comes to protecting core communal values, the more likely it is to be upheld. If the action to be curbed is allowed to continue, it almost becomes a theft of those values.¹⁵⁴ Alternatively, economic sensibility justifies and even demands regulation under the reciprocity analysis.¹⁵⁵

Modern case law adds a key refinement. Private property has always been subject to the law of the land. Therefore, a landowner's reasonable expectations about the use of his or her land must recognize this. By the late 1970's, the tak-

Eric R.R. Co. v. Board of Pub. Util. Comm'rs, 254 U.S. 394 (1921); *Block v. Hirsh*, 256 U.S. 135 (1921); *Plymouth Coal Co. v. Pennsylvania*, 232 U.S. 531 (1914); *Noble State Bank v. Haskell*, 219 U.S. 104 (1911); *Hudson County Water Co. v. McCarter*, 209 U.S. 349, 357 (1908).

149 . 260 U.S. at 414. Compare *Mahon*, 260 U.S. at 413 (Holmes apparently viewed it as a dispute between the Mahon family and the coal company) with *id.* at 421-22 (Brandeis envisioned an entire city disappearing into a yawning hole). See also Donald W. Large, *The Supreme Court and the Takings Clause: The Search for a Better Rule*, 18 ENVTL. L. 3, 10-16 (1987) (explicating background of justices' views).

150 . *Mugler v. Kansas*, 123 U.S. 623, 668-69 (1887).

151 . See *Miller v. Schoene*, 276 U.S. 272 (1928).

152 . *Mahon*, 260 U.S. at 415.

153 . These three approaches require more than simply balancing society's gain with the harm to the individual to validate a regulation that destroys property value without compensation. The lower balancing threshold ultimately only validates the exercise of the police power; a regulation that created more harm than good could not "advance" any public purpose.

154 . Michelman, *supra* note 90, at 1236-37; cf. Sax, *supra* note 83, at 188 (public trust prevents "destabilizing disappointment of expectations held in common but without formal recognition such as title").

155 . Land use regulation can create value for the whole that exceeds individual parcel valuations, even if each individual landowner could develop in any way desired. A focus on overall increased benefits eliminates the need to identify a "nuisance" or overriding social concern. It recognizes, as both Justices Holmes and Brandeis did, that there may, in civilized society, be a "reciprocity of advantage" in regulation. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922). But see *id.* at 422 (Brandeis, J., dissenting) (no reciprocity of advantage is needed if preventing harm). See also *Penn Central*, 438 U.S. at 143-47 (Rehnquist, J., dissenting) (compensation unnecessary "under a comprehensive land use plan, [which] benefited as well as burdened for average reciprocity"). Although Rehnquist found no reciprocity in *Mahon*, Justice Brennan did. From Brennan's description of the Landmark Preservation Law's purpose, one wonders how a railroad company, which gains from travel, could ever have objected. *Id.* at 109. In essence, if reciprocity exists, it provides compensation, and therefore violation of the constitutional command is avoided. See Donald Wittman, *Liability for Harm or Restitution for Benefit?*, 13 J. LEGAL STUD. 57, 75-76 (1984) (all landowners gain from New Orleans' French Quarter being a historic district even if individual might net more if singly allowed to violate norms).

ings test more openly balanced several factors in the "too far" equation when income-producing property was at issue. The test encompassed the character of the governmental action, the economic impact of the regulation on the claimant, and the interference, if any, with investment-backed expectations.¹⁵⁶ This multifactored balancing test is more appropriate than relying only on voluntary sales, or its equivalent, namely, automatic compensation, since a regulation impacts many owners in different ways. Using voluntary sales to reach regulatory objectives would entail high transaction costs in these situations.¹⁵⁷

The first factor of the test looks at the character of the governmental action. This element may include aspects of the harm and detriment calculus as well as the public use test, but the crucial question is how important the proposed police power exercise is to the public welfare.¹⁵⁸ Some exigencies, such as national security, can override private concerns completely.¹⁵⁹ However, most goals are not all-consuming, but require closer analysis to balance the strength of the police power assertion with the remaining two elements.¹⁶⁰

The second element considers how great a diminution in value need be borne without compensation. The rote response is that government activity may diminish a property's value, but not demolish it. This maxim is deceptively simple. Confusion abounds when courts attempt to delineate what exactly is the affected property.¹⁶¹

The final element of the three-part balance moves the analysis away from the challenged regulation and is more helpful in initially determining whether a taking exists. It examines, not the government's current action, but the law and general atmosphere that colored the rights of the private party before the questioned regulation. If the complaining party had no reasonable expectation of benefiting from the newly prohibited action, the regulation could not be a taking.¹⁶² To some extent, this conclusion parallels the rationale that no person

156. *Penn Central*, 438 U.S. at 124. See generally David A. Myers, *Some Observations on the Analysis of Regulatory Takings in the Rehnquist Court*, 23 VAL. U. L. REV. 527, 528-37 (1989). Two cases provided variants: *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980) emphasized a two-prong analysis: due process and economic impact; and *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 594-95 (1962), emphasized a due process analysis.

157. Merrill, *supra* note 117, at 43.

158. *Penn Central*, 438 U.S. at 133 n.30. See also Joseph L. Sax, *Some Thoughts on the Decline of Private Property*, 58 WASH. L. REV. 481, 483 (1983) (arguing takings law jurisprudence requires person to continue to confer benefit on neighbors); *Costonis*, *supra* note 120, at 480 n.65 (broadening the concept of harm to "fundamentally change the harm/benefit test's content").

159. *United States v. Caltex, Inc.*, 344 U.S. 149, 154 (1952) (security and imminent peril justify uncompensated destruction of oil terminal); *United States v. Central Eureka Mining Co.*, 357 U.S. 155 (1958) (gold mines closed during wartime). These cases may be remnants of King's "emergency" prerogatives, rather than exceptions to compensation under eminent domain. *Stoebeck*, *supra* note 91, at 1067; cf. *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 326 (1987) (Stevens, J., dissenting) (government may restrict access to hazardous areas).

160. *Costonis*, *supra* note 120, at 499-501 (vary government's burden of proof and level of scrutiny because "[n]ot all police power values are equal").

161. See *infra* text accompanying notes 243-70.

162. *Ciampitti v. United States*, 22 Cl. Ct. 310 (1991) (claimant purchased wetlands knowing of developmental restraints); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1006 (1984) (information given to EPA with no expectation of privacy).

can retain a nuisance. Because the law never entitled one to continue a nuisance, the activity could be outlawed without liability. It also resembles another method courts use to find no taking. They declare the element of value that was interfered with to have never been a part of the private estate in the first place.¹⁶³

Another line of cases underscores the central position of expectations in takings analysis. Courts declare many interests non-property for purposes of "takings," but recognize them as property for due process protection. Hence, notice and a hearing may be necessary before changes can affect them, but these interests command no compensation if discontinued or modified. Contrarily, in light of the importance of "investment backed expectations" in takings analysis, they are dismissed as "mere expectancies," rather than property.¹⁶⁴ Therefore, investment as opposed to expectation may be the primary focus of Fifth Amendment analysis,¹⁶⁵ at least when homes or other property imbued with personal emotion are not at issue.¹⁶⁶

Before the decision in *Lucas*, the last noteworthy year for the Supreme Court and the question of regulatory takings was 1987.¹⁶⁷ In most respects, the court did not alter prior law extensively.¹⁶⁸ The importance of the police power objective remained a distinguishing characteristic between compensable and non-compensable regulation.¹⁶⁹ For example, in *Nollan v. California Coastal Commis-*

163. This technique applies to land riparian to navigable water. All navigable waters are subject to an interest known as the "navigation servitude," under which the United States has jurisdiction to control water use for power and navigational purposes. If the United States exercises these powers, no objection can be lodged. *United States v. Twin City Power Co.*, 350 U.S. 222 (1956) (just compensation for condemned riparian lands did not include value of location near navigable river). There might, however, be limits to the reach of the navigation servitude. Frank I. Michelman, *Property as a Constitutional Right*, 38 WASH. & LEE L. REV. 1097, 1106-08 (1981) (Kaiser Aetna v. United States, 444 U.S. 164, 179-80 (1979), protects fundamental right to exclude); see also *Stevens v. City of Cannon Beach*, 835 P.2d 940 (Or. Ct. App. 1992) (no taking if public trust doctrine forbids the activity the private claimant proposed); Fred R. Disheroon, *After Lucas: No More Wetlands Takings?*, 17 VT. L. REV. 683 (1993) (arguing property rights in water and hence wetlands limited).

164. See, e.g., *Bowen v. Gillard*, 483 U.S. 587 (1987) (method of computing welfare benefits); *Allied-General Nuclear Services v. United States*, 839 F.2d 1572 (D.C. Cir. 1988) (license); *Burglin v. Morton*, 527 F.2d 486 (9th Cir. 1975) (pending lease applications); Opinion of the Justices, 151 N.E.2d 475 (Mass. 1958) (dower and curtesy); see also Richard A. Epstein, *Lucas v. South Carolina Coastal Council: A Tangled Web of Expectations*, 45 STAN. L. REV. 1369, 1379-85 (1993) (discussing the meaning of "expectations" in private law).

165. See *Ciampetti*, 22 Cl. Ct. at 321 (discounting impact on claimant because he had not truly assigned any value to the wetlands up on their acquisition with other property; the government is not to be the "involuntary guarantor of [claimant's] gamble"); see also Stephen J. Massey, *Justice Rehnquist's Theory of Property*, 93 YALE L.J. 541, 555-60 (1984) (traditional rights stabilize control of productive resources and promote efficiency).

166. *Hodel v. Irving*, 481 U.S. 704, 715 (1987) (finding no investment-backed expectation in being able to devise property, but protecting right); see also *St. Bartholomew's Church v. City of New York*, 728 F. Supp. 958, 966 (S.D.N.Y. 1990) (restriction a taking if it would prevent or seriously interfere with carrying out of charitable purpose).

167. See, e.g., *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987); *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987); *Hodel v. Irving*, 481 U.S. 704 (1987); *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987).

168. For a fuller discussion, see Mansfield, *supra* note 115.

169. Available remedies changed. Prior to *First English*, if a regulation was a taking, an injured party could only invalidate the offending law. *San Diego Gas & Electric Co. v. City of San Diego*,

sion,¹⁷⁰ although the private parties prevailed, the case did not impact governmental regulation as greatly as it might initially appear. The California Coastal Commission required that the Nollans provide public access across the beach on their property as a condition for a building permit. The Court second-guessed governmental intent and the means chosen to achieve its ends; to uphold the regulation, a clear nexus between the evil to be avoided and the land use restraint imposed was required. No such nexus was found.¹⁷¹ This "nexus" requirement could signal tighter control of regulatory power, but for the fact that the agency actually sought to acquire an easement for public use across residential property. This aligns the case with circumstances that previously commanded solicitude for private interests.¹⁷² The case did not necessarily indicate a new regime of enhanced scrutiny for all regulatory actions.

A second takings case of the 1986 term indicated that a delicate balancing of interests continued to be necessary. The circumstances of *Keystone Bituminous Coal Ass'n v. Benedictus*¹⁷³ are closely analogous to *Pennsylvania Coal Co. v. Mahon*.¹⁷⁴ Both cases appraised Pennsylvania statutes that required coal remain underground to prevent subsidence of private residences. Both involved complaints from owners of severed mineral estates objecting to the surface protection.¹⁷⁵ The holdings, however, were anything but identical: the 1987 Court found no taking where the 1922 Court found a regulation that went "too far" because it totally destroyed the property's viable use. Nevertheless, the second case did not overrule the first. It distinguished the cases on two major counts.

First, to the majority, the second statute's public purpose was clearer.¹⁷⁶ The dissent details the similarities between the two statutes and is correct in categorizing any literal distinction as flawed.¹⁷⁷ But to come to that conclusion is not to fault the majority's result. Societal perceptions about the purpose and nature of the problems addressed are more important than the literal wording of

450 U.S. 621, 640-42 (1981) (Brennan, J., dissenting). The landowner received no compensation for the time during which the unconstitutional law demanded compliance. *First English* allowed damages for a "temporary" taking, measured by the time the law was presumptively valid and "worked a taking of all use of property." *First English*, 482 U.S. at 321. On remand, the California court found no taking occurred because the building restriction was passed to prevent injury and death. *First English Evangelical Lutheran Church v. County of Los Angeles*, 258 Cal. Rptr. 893, 904 (1989), *cert. denied*, 493 U.S. 1056 (1990).

170 . 483 U.S. 825 (1987).

171 . *Id.* at 837-39.

172 . For further discussion of this case, see Mansfield, *supra* note 115, at 451-52 (facts of case were close to allowing physical occupation of land, involved requirements for land dedication, and affected a residence).

173 . 480 U.S. 470 (1987).

174 . 260 U.S. 393 (1922).

175 . Compare *Mahon*, 260 U.S. at 393-96 with *Keystone*, 480 U.S. at 475-79. For general information on relationships between mineral and surface owners, see Mansfield, *supra* note 13, at 66-78.

176 . *Keystone*, 480 U.S. at 492 (prevents actions similar to public nuisance). See Rose, *supra* note 74, at 580 (rejects arguments for broad public purpose and characterizes the law as redistributive); Rubinfeld, *supra* note 116, at 1113 (statute put coal to affirmative use as support).

177 . *Keystone*, 480 U.S. at 509-11 (Rehnquist, J., dissenting).

the statute.¹⁷⁸ By 1987, there was more of a consensus that government may act to protect the environment, including protection of the public from the externalities of activities such as mining.

The second revision to the calculus was what property the regulation affected.¹⁷⁹ Holmes narrowly viewed the impacted interest to be the right to mine coal without liability; what was taken was the coal company's distinct negative easement in the surface.¹⁸⁰ The modern court acknowledged that a severed mineral estate existed but refused to segment the coal estate into individual tonnage. It asked whether the regulation left the mineral producing property uneconomical "as a whole."¹⁸¹ The property "as a whole" was the coal owned by the complaining companies.

A comparison of the two cases in which land use controls were at issue underscores the importance of the police power objective. *Nollan*, unlike *Keystone*, dealt with a discrete easement that could efficiently be purchased.¹⁸² *Keystone*, conversely, dealt with both diffuse harm and diffuse benefits.¹⁸³ In addition to confirming that strength of purpose can validate regulation without compensation, the Court's treatment of the "too much" equation looked at broad ownership patterns. This spreads the cost of protection from such harm and militates against costly compensation.

C. *A Critique of Lucas*

Justice Scalia, writing for the majority, does not turn takings jurisprudence on its head in *Lucas v. South Carolina Coastal Council*.¹⁸⁴ In addition to recognizing the continued viability of the nuisance exception, he acknowledges that other questions remain to be argued. First, in footnote seven, he reiterates that he would deem any regulated property to be a discrete parcel rather than a portion of a party's larger holding, but he recognizes that the definition of the property

178. In the sixty-five year interim, environmental issues have changed the context of the struggle to Brandeis's vision rather than that of Holmes: the problem is not simply that of one private residence versus one private coal mine. Compare *Mahon*, 260 U.S. at 413 with *id.* at 421-22 (Brandeis, J., dissenting).

179. For a general discussion of techniques, see *infra* text accompanying notes 243-70.

180. *Costonis*, *supra* note 120, at 536 n.291 (case found statute physically invaded property because it extinguished a negative easement; true regulatory takings cases involve mere impingement on landowner's fee interest).

181. 480 U.S. at 496 ("We do know, however, that petitioners have never claimed that their mining operations, or even any specific mines, have been unprofitable since the Subsidence Act was passed. Nor is there evidence that mining in any specific location . . . has been unprofitable.")

182. A strong concurrence in *Preseault v. Interstate Commerce Comm'n*, 494 U.S. 1 (1990) emphasized that appropriation of a public easement would be a taking and require compensation. See also *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 831-32 (1987).

183. See generally *Sax*, *supra* note 91, at 155 (creating a necessity to protect "public rights"); *Merrill*, *supra* note 117 (further increasing transaction costs of voluntary acquisition).

184. See, e.g., critical reviews by parties of contrasting views, Epstein, *supra* note 164 (arguing Justice Scalia failed to clarify law), and Sax, *supra* note 73, at 1437 (arguing Justice Scalia wants to affirm importance of property but cannot find standard to control government excess without undermining all regulation).

affected by a regulation could be contentious.¹⁸⁵ Second, in footnote 8, he re-acknowledges the importance of property owner expectations when regulation results in less than complete loss of economic value.¹⁸⁶ Despite this continuity with prior law, in his analysis of nuisance, however, Justice Scalia misses some subtleties and he incorrectly denigrates the role of the legislature.

First, Justice Scalia faults the "noxious use" test and embraces the "nuisance" test, but fails to recognize the interrelationship between the two methods of ascertaining when compensation need not be paid; the tests are different labels for the same analytical framework. Traditional nuisance law encompasses the idea that some uses in *context* are "noxious" and, therefore, nuisance limits private property rights.¹⁸⁷ Nuisance law provides a perimeter for constitutional safeguards. Justice Scalia correctly notes that a regulation forbidding a nuisance simply implements legislatively what a court could order by equitable injunction. No compensation would therefore be due. In simple situations, the distinction between appropriating, such as obtaining sites for highways or post offices, and regulating activities that unreasonably impinge on neighboring land may give predictable and non-objectionable results.¹⁸⁸

The strengths and weaknesses of the technique, however, become apparent when a time-honored case embodying this principle is examined. *Mugler v. Kansas* involved a brewery building rendered useless when the state outlawed liquor manufacture and sale. Justice Harlan's opinion upheld the statute because prevention of a "noxious use" is inherently different from a regulation that prohibits an "innocent" use in order to obtain a public benefit.¹⁸⁹ Justice Holmes also found the "noxious use" principle self-evident.¹⁹⁰ Regulations that purportedly only prevent detriment and ones that seek gains for the public historically justified different impacts on private property.

Naturally, morality and community norms influence what is labeled "noxious" or detrimental.¹⁹¹ Standards change through time as does legislation re-

185 . *Lucas*, 112 S. Ct. 2886, 2894 n.7.

186 . *Id.* at 2895 n.8.

187 . No person may unreasonably use property to the detriment of neighbors: "all property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community." *Mugler v. Kansas*, 123 U.S. 623, 665 (1887).

188 . See *Sax*, *supra* note 91, at 154-55; see also Patrick Wiseman, *When the End Justifies the Means: Understanding Takings Jurisprudence in a Legal System with Integrity*, 63 ST. JOHN'S L. REV. 433, 459 (1989) (arguing the nuisance principle is essentially sound).

189 . *Mugler*, 123 U.S. at 669.

190 . *Clarke v. Haberle Crystal Springs Brewing Co.*, 280 U.S. 384, 386 (1930) (Holmes, J.) ("when a business is extinguished as noxious under the Constitution the owners cannot demand compensation from the Government").

191 . See Douglas W. Kmiec, *The Original Understanding of the Taking Clause is Neither Weak nor Obtuse*, 88 COLUM. L. REV. 1630, 1638 (1988) (nuisance law follows community norms to be neutral benchmark between benefit and harm); Donald C. Dowling Jr., *General Propositions and Concrete Cases: The Search for a Standard in the Conflict Between Individual Property Rights and the Social Interest*, 1 J. LAND USE & ENVTL. L. 353, 367 (1985) ("a charting of the history of the police power parallels a history of general social attitudes").

flecting them; breweries exist again.¹⁹² Although flexibility through time might not be a fault but a strength of the test, the distinction between obtaining a benefit and controlling harm presents other difficulties.¹⁹³

As Justice Scalia correctly notes, the line between the two types of actions sometimes defies clear analysis.¹⁹⁴ Benefit and harm may be a matter of perspective. A stable is not an "evil" occupation but a stable in a residential area damages the health and comfort of residents.¹⁹⁵ To retell the example made famous by Coase, a rancher earns a livelihood from cattle. Roaming cattle would not cause damage if a neighbor did not plant corn. The removal of the "detriment," namely roaming livestock, benefits the farmer. In a post-Coasean world, it is often impossible to straightforwardly declare which of two activities, farming or ranching, is necessarily *the* nuisance.¹⁹⁶ However, Justice Scalia's rejection of the "harm/benefit" calculus may be more a desire to reject the concept that a legislature may declare any and all development "harmful" because it would disturb ecological integrity, than a failure to understand the interconnection between the two tests.¹⁹⁷

After rejecting the "harm/benefit" test and adopting the nuisance test, however, Justice Scalia in *Lucas* also de-emphasizes the inherent flexibility of nuisance law by concentrating on existing case law to define property rights. Nuisance law looks beyond "background" property rights to current, on the ground concerns. It encompasses certain principles, including an interrelationship between legislative pronouncements and the concept of a "nuisance."¹⁹⁸

192 . Courts, as well as legislatures, according to Justice Holmes, must respect the deliberate pace of this flux:

[T]he extent to which legislation may modify and restrict the uses of property consistently with the Constitution is not a question for pure abstract theory alone. Tradition and the habits of the community count for more than logic. . . . The plaintiff must wait until there is a change of practice or at least an established consensus of civilized opinion before it can expect this court to overthrow the rules that the lawmakers and the court of his own State uphold.

Laurel Hill Cemetery v. City & County of San Francisco, 216 U.S. 358, 366 (1910) (upholds ordinance outlawing burial in city to cemetery despite alleged \$2 million expenditure); *see also* *Jackman v. Rosenbaum Co.*, 260 U.S. 22, 31 (1922) ("If a thing has been practiced for two hundred years by common consent, it will need a strong case for the Fourteenth Amendment to affect it.").

193 . *See generally* Rose-Ackerman, *supra* note 116, at 1707-10. *But see* Allison Dunham, *A Legal and Economic Basis for City Planning*, 58 COLUM. L. REV. 650, 664-65 (1958) (workable test).

194 . *Lucas*, 112 S. Ct. at 2898.

195 . *Reinman v. City of Little Rock*, 237 U.S. 171 (1915) (health and comfort of community justified exclusion of lawful stable from area); *see also* *Hadacheck v. Sebastian*, 239 U.S. 394 (1915) (existing brickyard prohibited as health hazard despite precipitous drop in value of land).

196 . R.H. Coase, *The Problem of Social Cost*, 3 J. LAW & ECON. 1, 6-8 (1960) (demonstrating that without transaction costs, markets would foster efficient land use regardless of fault labels). *See also* Donald Wittman, *Liability for Harm or Restitution for Benefit?*, 13 J. LEGAL STUD. 57 (1984). Indeed, Professor Michelman referred to the fault rationale as being "itself an attractive nuisance." Michelman, *supra* note 90, at 1199 n.72.

197 . *See* Sax, *supra* note 73, at 1441-42.

198 . *See* John A. Humbach, *Evolving Thresholds of Nuisance and the Takings Clause*, 18 COLUM. J. ENVTL. L. 1, 14-15 (1993) (arguing law of public nuisance always recognized the police power of the state and did not balance as in traditional private nuisance).

A judge deciding if an activity is a nuisance would look to legislative balancing of rights. To refuse to consider the legislative action would be to ignore majoritarian views of what is "reasonable" use of property. Although a court must seek to protect the individual from the majority, if the goal is an "objective" view of what is reasonable in regard to land use, the judge cannot fail to consider legislative findings. It is, of course, quite possible that factions have influenced the legislative process. If legislation truly targets an individual property rather than a wide-ranging problem, then the courts must come to the aid of the individual disproportionately burdened.¹⁹⁹ Therefore, while the legislative findings need not be conclusive, legislation must, as Justices Stevens,²⁰⁰ Blackmun,²⁰¹ and Kennedy²⁰² acknowledge, assist the common law and its growth.²⁰³

In an additional contraction of nuisance doctrine's flexibility, Justice Scalia notes that if the use had been allowed in the past or is allowed to be done by others, it would less likely be a nuisance. He does acknowledge that this tendency is a less than iron-clad rule, but this denigrates strong precedent. It is clear that merely because an action was not prohibited in the past does not foreclose future control: "The submission that . . . a 'taking' [is established] simply by [a] 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."²⁰⁴ Justice Holmes provided a similar caution: "Such words as 'right' are a constant solicitation to fallacy."²⁰⁵ New interpretations of public needs color and modify private actions.

199 . *Lucas*, 112 S. Ct. at 2923-24 (Stevens, J., dissenting); Saul Levmore, *Takings, Torts, and Special Interests*, 77 VA. L. REV. 1331, 1356-58 (1991). *But see* Rubinfeld, *supra* note 116, at 1138 (arguing protection should come from equal protection guarantees, not takings analysis).

200 . *Lucas*, 112 S. Ct. at 2921-22 (Stevens J., dissenting).

201 . *Id.* at 2914 (Blackmun, J., dissenting).

202 . *Id.* at 2903 (Kennedy J., concurring).

203 . The entanglement of legislation and determining whether a nuisance exists is further illustrated by the fact that judges have been accused of using the guise of common law to legislate, that is, to make general societal choices when they determine if a nuisance exists. *Prah v. Maretti*, 321 N.W.2d 182, 195 (Wis. 1982) (Callow, J., dissenting).

204 . *Penn Central*, 438 U.S. at 130. Justice Harlan's voice echoes: "[Although the brewery was legal when built], the State did not thereby give any assurance, or come under an obligation, that its legislation upon that subject would remain unchanged." *Mugler*, 123 U.S. at 669. *See also* Justice McKenna:

A vested interest cannot be asserted against . . . [exercise of the police power] because of conditions once obtaining. To so hold would preclude development and fix a city forever in its primitive conditions. There must be progress, and if in its march private interests are in the way they must yield to the good of the community.

Hadacheck v. Sebastian, 239 U.S. 394, 410 (1915) (citations omitted).

205 . *Jackman v. Rosenbaum Co.*, 260 U.S. 22, 31 (1922); *see also* *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 93 (1980) (Marshall, J., concurring) (due process does not require a freezing of common law property rights); *Murphy v. Amoco Prod. Co.*, 729 F.2d 552, 558 (8th Cir. 1984) (noting that if change in liability equals a taking, "any new rule of state law requiring a tortfeasor to compensate those he harms would constitute a taking"); *accord* *Davis Oil Co. v. Cloud*, 766 P.2d 1347, 1350 (Okla. 1986). *See generally* Joseph L. Sax, *The Limits of Private Rights in Public Waters*, 19 ENVTL. L. 473, 476-79 (1989) (delineating historical changes in the relationship between water needs and private property rights).

Finally, Justice Scalia downplays the contextual nature of nuisance law. He seems to ask whether a house per se is a nuisance when he concludes that "[i]t seems unlikely that common-law principles would have prevented the erection of any habitable or productive improvements on petitioner's land; they rarely support prohibition of the 'essential use' of land."²⁰⁶ The question, however, is whether building in the particular location would create a nuisance by unreasonably interfering with the rights of other property owners or the public. These rights include preventing erosion and protecting property and human safety.²⁰⁷ Justice Scalia at this point seems to forget the one definition of a nuisance that most remember, namely the definition encapsulated in Justice Sutherland's famous aphorism: "A nuisance may be merely a right thing in a wrong place, like a pig in a parlor instead of the barnyard."²⁰⁸ Justice Scalia does, however, leave room for this acknowledgment when he notes that the South Carolina justification for nuisance must look at the proposed use in view of "the circumstances in which the property is presently found."²⁰⁹ Therefore, it is more the tone of Justice Scalia's rhetoric than the actual doctrinal holding that lends itself to proponents of property rights.

VII. TAKINGS AND PUBLIC LAND MANAGEMENT DECISIONS

Correctly viewed and applied, the nuisance exception can justify significant regulation of private consumptive or exclusionary interests. When applied to the public lands context, however, a threshold question exists: whose nuisance law is to be examined for the background of property rights? The BLM or Park Service should not be forced to manage lands differently in Utah and Colorado if the state courts define property in subtly different ways. The federal common law of nuisance, however, arose primarily not to determine the extent of federal regulation, but to settle interstate disputes.²¹⁰ Nevertheless, there are some cases defining "nuisance" to determine the extent of the Property Clause.²¹¹ It is possible, therefore, that a new federal common law of nuisance will emerge to judge the potential for regulatory takings when rights to public lands are involved. Courts have in the past acknowledged that federal property interests cannot be confined

206 . *Lucas*, 112 S. Ct. at 2888. Professor Lazarus asks whether building a luxury home or holding real estate for speculative gain are "essential" uses. See Lazarus, *supra* note 114, at 1424.

207 . See Natasha Zalkin, *Shifting Sands and Shifting Doctrines: The Supreme Court's Changing Takings Doctrine and South Carolina's Coastal Zone Statute*, 79 CAL. L. REV. 205, 212-213 (1991), cited with approval in *Lucas*, 112 S. Ct. at 2904 n.1 (Blackmun, J., dissenting).

208 . *Village of Euclid v. Amber Realty Co.*, 272 U.S. 365, 388 (1926).

209 . *Lucas*, 112 S. Ct. at 2902.

210 . See, e.g., *City of Milwaukee v. Illinois*, 451 U.S. 304 (1981); *Illinois v. City of Milwaukee*, 406 U.S. 91 (1972).

211 . *Camfield v. United States*, 167 U.S. 518 (1897) (referring to a fence on private property as being a nuisance for public land management); *United States v. County Bd. of Arlington County*, 487 F. Supp. 137, 143-44 (E.D. Va. 1979) (finding no federal power to regulate high rise construction that would visually intrude on monumental core of Washington because buildings not nuisances). See generally John L. Giesser, Comment, *The National Park Service and External Development: Addressing Park Boundary-Area Threats Through Public Nuisance*, 20 B.C. ENVTL. AFF. L. REV. 761 (1993).

by state property definitions.²¹² Or, perhaps more appropriately, a test other than a nuisance-based one will be articulated. Because of the strength of the Property Clause and the plenary power of Congress under it, to limit either Congress or a land-managing agency to nuisance abatement may be untenable.²¹³

Therefore, the extent of the government's absolute right to prohibit activity on the public lands under the nuisance exception to takings or under a special analog of this test is not clear. Nevertheless, *Lucas* is important because it continues to recognize an additional regulatory takings test. This test examines the nature of a party's expectation to conduct the prohibited activity if the diminution of value of the property was less than total.²¹⁴ This test, as well as the difficulty of determining the extent of the property regulated, will be examined further as takings jurisprudence is applied to two hypothetical situations: a prohibition of mining on an unpatented mining claim and a prohibition of grazing on a grazing permit.

Grazing and mining are consumptive uses of the public lands. Although these uses take place in other land management systems, this discussion will focus on the BLM's denial of a use and the resulting takings determination. There are several reasons for this focus. First, the nature of a grazing permit under the Taylor Grazing Act has been the subject of judicial and statutory clarification.²¹⁵ Secondly, the BLM's organic act does not directly forbid it from regulating an unpatented mining claim to the point of saying "no" to mining.²¹⁶ In fact, if the mining claim was located after the passage of FLPMA in 1976, the BLM may have been directly granted authority to veto development.²¹⁷

The following hypotheticals posit a BLM decision preventing initial development of an unpatented mining claim or ceasing to allow grazing on a particular allotment. To a large extent, the BLM's decisions are, and would continue to

212. See *North Dakota v. United States*, 460 U.S. 300 (1983) (state could not authorize interference with federal easements); *United States v. Little Lake Misere Co.*, 412 U.S. 580 (1973) (state law does not define federal purchases for wildlife refuges).

213. See *Mansfield*, *supra* note 48, at 496-97.

214. *Lucas*, 112 S. Ct. at 2895 n.8.

215. Permits "shall not create any right, title, interest, or estate in or to the lands." 43 U.S.C. § 315b (1988). The Supreme Court interpreted this to mean that there can be no compensation for the value added to base property by the permit. *United States v. Fuller*, 409 U.S. 488 (1973). See 43 U.S.C. § 1752(g) (1988) for the ability to cancel a grazing permit.

216. *Cf.* The Forest Service Organic Administration Act forbids action that would "prohibit any person from entering upon such national forests for all proper and lawful purposes, including . . . prospecting, locating, and developing . . . mineral resources . . ." 16 U.S.C. § 478 (1982). The Forest Service regulations reflect this. Miners have "a statutory right to enter upon the public lands to search for minerals [but operations] shall be conducted so as to minimize adverse environmental impacts on National Forest System surface resources." 36 C.F.R. § 228.1 (1993); see also *Skaw v. United States*, 740 F.2d 932, 941 (D.C. Cir. 1984) (Forest Service may not prohibit or circumscribe use too strictly); *United States v. Weiss*, 642 F.2d 296 (9th Cir. 1981) (Forest Service authorized to minimize harm, not to interfere with mining).

217. Although FLPMA left much of prior law unaltered, mining operations were subjected to section 302(b)'s general command to prevent "unnecessary or undue degradation." 43 U.S.C. § 1732(b) (1988). For the argument that the BLM may have the authority to foreclose mining under this authority, see *Mansfield*, *supra* note 13, at 79.

be, insulated from substantive judicial review.²¹⁸ Judicial deference to the BLM's decisions is not necessarily an evil. This deference allows the BLM to assess activities within the framework of its overall land management regime, rather than limiting its focus to the particular parcel of public land on which the activity will occur.²¹⁹ Nevertheless, if courts defer totally to agency decisions, there is no guarantee that professionalism or rationality will prevail.²²⁰ The basic review standard under the Administrative Procedures Act overturns arbitrary or capricious actions.²²¹ Without attempting to resolve the question of appropriate levels of judicial review, a threshold for meaningful review requires that this test should not insulate the agency from unexplained and unexplainable choices.²²²

Nevertheless, so long as it provides all interested parties with access to the decision-making process, the agency, rather than the federal courts, is the appropriate body to make decisions about public land management. For purposes of the next section of this analysis, presume that the decision to forego development would meet a test of rational agency decision-making. To do so, the agency must have considered all impacted resources and interests as well as alternative methods to approach development. A dispassionate third party would agree that, on the evidence presented, the gains from allowing the private activity would not justify destroying other values.²²³ Nevertheless, there is a second question, namely whether the owner of the consumptive or exclusionary right should be compensated for foregoing the right.

218 . Mansfield, *supra* note 48, at 495.

219 . Utah v. Andrus, 486 F. Supp. 995, 1003 (D. Utah 1979). For an opposing view, compare the criticism of judicial allocation of resources under public trust doctrine as "undemocratic." George Gould, *Public Trust Doctrine and Water Rights*, 34 ROCKY MTN. MIN. L. INST. 25-47 to 25-49 (1988). For similar views see James L. Huffman, *Trusting the Public Interest to Judges: A Comment on the Public Trust Writings of Professors Sax, Wilkinson, Dunning and Johnson*, 63 DENV. L.J. 565 (1986); James L. Huffman, *Avoiding the Takings Clause Through the Myth of Public Rights: The Public Trust Doctrine and Reserved Rights Doctrines at Work*, 3 J. LAND USE & ENVTL. L. 171, 208-10 (1987). *But see* Sax, *supra* note 83, at 192-93 (trust doctrine democratizes process); and the lively debate between Professors Huffman and Blumm in Symposium, *The Public Trust and the Waters of the American West: Yesterday, Today and Tomorrow*, 19 ENVTL. L. 425 (1989).

220 . Factions and special interest groups may prevail upon legislatures. This could result in oppression, but due process analysis could protect those disproportionately singled out.

221 . 5 U.S.C. § 706(2)(A) (1988).

222 . F. Kaid Benfield, *The Administrative Record and The Range of Alternatives in National Forest Planning: Applicable Standards and Inconsistent Approaches*, 17 ENVTL. L. 371, 375 (1987) (arbitrary and capricious standard favors federal agencies decisions but need at least minimal factual support and reasonableness). There should be some middle ground between extreme deference to an agency and total distrust of its actions. *Compare* Perkins v. Bergland, 608 F.2d 803, 807 n.12 (9th Cir. 1979) (agency action must be "irrational" with virtually no evidence to support agency's methodology) *with* Hinsdale Livestock Co. v. United States, 501 F. Supp. 773, 777 (D. Mont. 1980) (court effectively looked to ranchers as primary experts).

223 . *Cf.* Zygmunt J.B. Plater & William L. Norine, *Through the Looking Glass of Eminent Domain: Exploring the "Arbitrary and Capricious" Test and Substantive Rationality Review of Governmental Decisions*, 16 B.C. ENVTL. AFF. L. REV. 661, 666 (1989) (positing a workable test of arbitrariness to be "whether a rational official could have reached challenged decision on the given facts").

A. *The Unpatented Mining Claim*

A prohibition on mining would be a taking under *Lucas* in two circumstances.²²⁴ First, if it created a total diminution of the property's value and mining was not a nuisance or, second, if the diminution was less than total and the prohibition created an untoward interference with reasonable investment-backed expectations. It is possible that a complete denial of development would not be a taking. Three issues are crucial to such a conclusion: 1) how the property impacted is defined, 2) what is reasonable to anticipate about the ability to mine, and, of course, 3) whether mining could be considered a nuisance.

As a threshold issue, the nature of an unpatented claim must be determined. An unpatented mining claim is a form of property.²²⁵ However, the only "right" the mining claimant has is to mine: the claim may not be used for non-mining purposes.²²⁶ Therefore, the expectations about the ability to derive a benefit from the claim will pivot on the right to mine.

In an analysis of whether a regulation effects a taking, what is "reasonable" to anticipate about property is crucial. The key is the reasonableness of any investment-backed expectations the owner might have about development. In some shorthands, too great an impingement on investment-backed expectations becomes the *sine qua non* of a taking.²²⁷ Nevertheless, expectation analysis might not assist the mining claimant in asserting a right to compensation.

If a mine is not yet in operation, what the claimant anticipates is unrealized profit, which is one of the least protected aspects of property ownership:

Prediction of profitability is essentially a matter of reasoned speculation that courts are not especially competent to perform. Further, perhaps because of its very uncertainty, the interest in anticipated gains has traditionally been viewed as less compelling than other property-related interests.²²⁸

224 . This discussion assumes that the "nuisance" exception, however nuisance may be defined, does apply to validate regulations of public lands use.

225 . *Cole v. Ralph*, 252 U.S. 286, 295 (1920) (finding an unpatented mining claimant's possessory title to be property "in the fullest sense"); *United States v. Etcheverry*, 230 F.2d 193, 195 (10th Cir. 1956). The mining claim is, however, a form of property that is defined by Congress. *Freese v. United States*, 639 F.2d 754 (Ct. Cl.), *cert. denied*, 454 U.S. 827 (1981).

226 . 30 U.S.C. § 612(b) (1988); see *United States v. Curtis-Nevada Mines, Inc.*, 611 F.2d 1277, 1280 (9th Cir. 1980).

227 . *State v. Andrus*, 488 F. Supp. 995, 1011 (D. Utah 1979). One influential article on takings aptly summarized the interrelationship of the "diminution of value test" with expectations:

[T]he test poses not nearly so loose a question of degree; it does not ask "how much," but rather (like the physical-occupation test) it asks "whether or not": whether or not the measure in question can easily be seen to have practically deprived the claimant of some distinctly perceived, sharply crystallized, investment-backed expectation.

Michelman, *supra* note 90, at 1233.

228 . *Andrus v. Allard*, 444 U.S. at 66. See also *Florida Rock Indus., Inc. v. United States*, 791 F.2d 893, 903 (D.C. Cir. 1986) (citations omitted):

[B]y dispensing with the fair market value test in determining the occurrence of a taking, it makes the case improperly one to recover for frustration of business expectations. A taking is founded on the fact that Florida Rock is prevented from doing

Public needs may justify regulation that interferes with private consumptive or exclusionary aims even if the power to profit from property is "a right usually incident to fortunately situated property."²²⁹

Additionally, if the mine is not yet in operation, the status quo is non-development. This means there may be strong public expectations, be they individual or collective, that the values supporting these interests would continue to exist.²³⁰ While it is not impossible to regulate existing uses without running afoul of the takings clause, it is easier to regulate new uses.²³¹ One reason for this distinction is the importance of the investment end of the expectation test; less would be invested for a new use.²³²

More importantly, if profit is to come from mining, the regulatory climate over such activity would determine whether a reasonable expectation of unfettered development could exist to be interfered with.²³³ Mining has been regulated extensively over the years.²³⁴ The peculiar status of an unpatented mining

a profitable business in the extraction and sale of its limestone. Yet frustration of performance of even an existing contract is not a taking of contract rights, still less a hope of future profitable contracts.

229 . *Block v. Hirsh*, 256 U.S. 135, 157 (1921) (Holmes, J.):

But while it is unjust to pursue such profits from a national misfortune with sweeping denunciations, the policy of restricting them has been embodied in taxation and is accepted. It goes little farther than the restriction put upon the rights of the owner of money by the more debatable usury laws.

See also *Pennell v. City of San Jose*, 485 U.S. 1 (1988) (tenant financial hardship may effect rent control); *FCC v. Florida Power Corp.*, 480 U.S. 245 (1987) (regulation of charges for access to utility poles); *Sax*, *supra* note 91, at 154-60 (protecting economic advantage neither consistent with early history of compensation principle or contemporaneous history of amendment). *But see* *Stoebeck*, *supra* note 91, at 1075-77 (Sax fails to recognize the tyranny he describes is destruction of property).

230 . Knowledge of the mineral character of the land may have tempered these expectations because it would have provided "notice" of the land's usefulness for this purpose. This is similar to the notice given the developer about the land's ecological value. *See* discussion *supra* at note 114.

231 . *Pennsylvania Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 136 (1978).

232 . *Cf. Iowa Coal Mining Co. v. Monroe County*, 494 N.W.2d 664 (Iowa 1993) (finding no taking by precluding new use of strip mine's pit, partially because initial investment was for coal-mining, not running the new landfill).

233 . Compare the response to allegations that Uranium Mill Tailings Radiation Control Act, 42 U.S.C. §§ 2022, 2113, 2114, 7901-7942 (1988), interfered with investment backed expectations:

The only "expectation" that Western Nuclear could have under the circumstances it has alleged is that it expected it would not have to spend its own money to remediate health and environmental hazards created by its production of uranium. Such an expectation cannot be a reasonable commercial expectation.

Atlas Corp. v. United States, 895 F.2d 745, 758 (D.C. Cir.), *cert. denied*, 498 U.S. 811 (1990).

234 . Mining may no longer be a "bully" destroying surface values with no compunction. Whether this characterization of the industry is correct or responsive to society's needs is immaterial: it colors takings analysis. *Cf. Gregory S. Alexander, Takings, Narratives, and Power*, 88 COLUM. L. REV. 1752, 1753 (1988):

Takings doctrine is generated not by any abstract methodological or theoretical concern, but by the pictures that judges have in their heads about the participants in the public land-use planning arena, pictures about who is empowered, who is unempowered and how those who enjoy a power monopoly have used the power to their strategic advantage.

The "bully" characterization has also changed relationships between mineral and surface owners in many situations, either by judicial effort or legislation. *See generally* *Mansfield*, *supra* note 13.

claim reflects this growth of regulation. In 1985 the unpatented mining claim, traditionally deemed a form of property, was classified as a mere right to a stream of income, thus testing regulation of such claims under the less demanding standard used for economic matters.²³⁵ On the public lands, both the state and federal government may regulate for environmental protection.²³⁶ Congress may modify the requirements for and benefits of patenting up until the time a party has fully complied with all that is necessary under the law to obtain a patent.²³⁷

More generally, a developer's expectations must include the almost universal need to regulate the mining industry for environmental protection. The recent past shows increased regulation and, therefore, decreased expectation of freedom to develop.²³⁸ Therefore, if minerals were acquired knowing that restraints were imminent, the imposition of the restraints should not trigger compensation.²³⁹ The United States should not pay for a regulation's effect on minerals acquired by a purchaser who knew that they never could be produced.

The almost all-encompassing requirements of varied environmental laws restrain the expectation of mineral development.²⁴⁰ Using law to define expectations may at first glance appear to embrace an element of circularity, as Justice Kennedy noted in *Lucas*,²⁴¹ but in reality the analogy is more to a spiral; expect-

235 . *United States v. Locke*, 471 U.S. 84, 105 (1985). An unpatented mining claim may therefore be approaching the status of personal property, rather than real property. If this is so, as Justice Scalia noted, personal property may be subjected to greater controls than real property. *Lucas*, 112 S. Ct. at 2899.

236 . *California Coastal Comm'n v. Granite Rock*, 480 U.S. 572, 588-89 (1987). One commentator claimed this case changed mining from a preferred use to simply one among many, John D. Leshy, *Granite Rock and the States' Influence over Federal Land Use*, 18 ENVTL. L. 99, 125-26 (1988). The change, however, came much earlier. See generally Mansfield, *supra* note 13. Mining has been a suspect category unless oil shale was involved. See *Andrus v. Shell Oil Co.*, 446 U.S. 657 (1980) (oil shale exception to "valuable mineral" requirement of mining law); *Environmental Defense Fund v. Andrus*, 619 F.2d 1368 (10th Cir. 1980) (oil shale exception to the National Environmental Policy Act). For some reason, the courts seemed adamant that oil shale development would save the western world. See generally James N. Berkeley & Lawrence V. Albert, *A Survey of Case Law Interpreting "Valid Existing Rights": Implications for Unpatented Mining Claims*, 34 ROCKY MTN. MIN. L. INST. 9-13 to 9-20 (1988) (illustrating change in property status of unpatented mining claims).

237 . *Freese v. United States*, 639 F.2d 754 (Ct. Cl.), *cert. denied*, 454 U.S. 827 (1981).

238 . Although the current Supreme Court has been characterized as pro-development, cases on mining did not enter this computation. Richard E. Levy & Robert L. Glicksman, *Judicial Activism and Restraint in the Supreme Court's Environmental Law Decisions*, 42 VAND. L. REV. 343, 345 n.5 (1989). Similarly, despite the suspicion of statutes that target distinct property interests, Dormant Mineral Interests Acts were upheld. *Texaco, Inc. v. Short*, 454 U.S. 516 (1982).

239 . *Ciampitti v. United States*, 22 Cl. Ct. 310, 320-21 (1991) (no taking when claimant purchased knowing of wetland restrictions). The refusal to compensate if regulation was imminent when the interest was acquired may be analogized to the situation where value is traceable to the improvement for which the government is condemning property. This value is not included in the value of the property "taken" when just compensation is computed. The United States need not buy at the price "boomtown" homesites will command after its dam is built in the desert. *United States v. Miller*, 317 U.S. 369, 377 (1943) ("[O]wners ought not to gain by speculating on probable increase in value due to the Government's activities.").

240 . Laitos, *supra* note 148, at 1-1 to 1-3; John McFerrin & Benita Y. Whitman, *Valid Existing Rights and the Constitution: 1983 Regulatory Changes*, 87 W. VA. L. REV. 647, 660 (1985) (broad expectations test would find no right to continue negative externalities).

241 . *Lucas*, 112 S. Ct. at 2903 (Kennedy, J., concurring).

tations and the law slowly grow and respond to each other. The recognition of the interrelationship between the regulatory climate and expectations is important if the diminution of value is less than total. It also is important if the diminution is total and a court must ascertain whether the decision to stop mining would prevent a nuisance.

Mining does create difficulties such as pollution and subsidence that resemble the subject matter of traditional nuisance law.²⁴² The balancing a court will have to do in the analysis will resemble, but need not directly replicate, the BLM's decision-making on whether to allow the mining. Naturally, whether expectation analysis or nuisance definition is the proper analytical path requires a delineation of the property impacted by the decision. This definitional exercise may also assist in reaching a fair result.

Despite the general status of expectations about mining, when mining a particular mining claim is totally denied, failure to compensate may challenge a sense of fairness. The diminution of value and balancing tests have as their fulcrum reasonable expectation, but they also have a quantitative side. This two-sided inquiry allows compliance with some intuitive idea of fairness; if the affected party either retains a thing of value or was forewarned that development might not be unfettered, the burden of forwarding the public good is not overly onerous. Concern with spreading the risks and costs of regulation is thus central to Fifth Amendment analysis.

Two main techniques guide attempts to define the property impacted by government action: conceptual severance, which considers each strand of property rights individually,²⁴³ and physical unity, which rejects reifying "rights" and clings to a literal earth-based definition.²⁴⁴ Some decisions forcefully reject conceptual severance and examine the property as a whole to see whether unaffected portions retain any significant value.²⁴⁵ A taking would exist only if total loss

242. *But see* Florida Rock Indus. v. United States, 21 Cl. Ct. 161 (1990) (limestone mining in that particular locale not a nuisance).

243. Radin, *supra* note 76, at 1674-78 (court in *Loretto* and *Nollan* began to adopt conceptual severance). *See also* Frank Michelman, *Takings*, 1987, 88 COLUM. L. REV. 1600, 1601 (1988) (employing term "entitlement chopping").

244. *See* Michelman, *supra* note 243, at 1614-16 ("conceptual severance" regards property right as estate affected rather than the "layman's thing," that is, "the conventionally demarcated land parcel with its improvements containing Grand Central Terminal").

245. *Andrus v. Allard*, 444 U.S. 51, 65-66 (1979); *Pennsylvania Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 130. ("Taking" jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated"), *criticized by* *Keystone*, 480 U.S. at 517 (Rehnquist, J., dissenting).

Rehnquist's dissent shows some members of the court are ready to curb governmental regulation by strictly looking at the particular interest interfered with; each stick in the bundle of property rights would require separate analysis. *Id.* at 517-28 (Rehnquist, J., dissenting). *See also* *Hodel v. Irving*, 481 U.S. 704 (1987). This case, however, presented an unusual opportunity to engage in conceptual severance; the land already had undivided interests and the statute specifically aimed at the subdivisions. Justice O'Connor did not view the property's usefulness to be land per se; each small undivided interest individually was too greatly devalued. The statute disturbed a fundamental element of property: the right to dispose thereof. *Id.* at 716. *See also* *Pennell v. City of San Jose*, 485 U.S. 1, 21 (1988) (Scalia, J., concurring and dissenting) (arguing rent control statute's requirement that "hardship to a

of use results from the regulation. A total loss of use would leave the property with no "economically viable"²⁴⁶ or "reasonable beneficial" use.²⁴⁷ The *Lucas* case echoes these holdings, but does not necessarily define the property interest to be tested because the regulation at issue in *Lucas* purportedly affected the entire fee.²⁴⁸

Nevertheless, results may differ by attaching the word "property" to differing physical attributes of land.²⁴⁹ As Justice Stevens noted:

[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. . . . 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.²⁵⁰

The "relevant property interest" when dealing with an unpatented mining claim must simply be the ability to mine, which is the limit of statutorily delineated rights.²⁵¹ Therefore, the viability of surface uses would not be an issue as it might be in other regulatory actions affecting mining.²⁵² The remaining technique, altering the denominator in the takings fraction and thus changing the percentage of loss may be relevant.

The opportunity to define "property" arises because takings analysis requires a case by case application of site specific questions. Simply precluding some mineral recovery does not automatically trigger a taking.²⁵³ Further examination is needed. Generally, courts speak of impacts on the totality of the

tenant" be considered took the freedom of individual landlords to charge fair market rent to poor tenants).

246 . *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980).

247 . *Penn Central*, 438 U.S. at 138.

248 . *Lucas*, 112 S. Ct. at 2886 n.7. The Court also did not look beyond the two lots currently owned by Lucas.

249 . Compare *Mountain States Legal Foundation v. Clark*, 740 F.2d 792 (10th Cir. 1984) (vacated) with *Mountain States Legal Foundation v. Hodel*, 799 F.2d 1423 (10th Cir. 1986) (opinion on rehearing), cert. denied, 480 U.S. 951 (1987). Judge Seth's original opinion treated each blade of grass eaten by a wild horse as separate "property taken." The Tenth Circuit examined en banc whether the horses substantially diminished the private owner's real estate. See also *Fallini v. Hodel*, 725 F. Supp. 1113, 1122-23 (D. Nev. 1989) (taking occurs when horses would use substantially all well's water).

250 . *Lucas*, 112 S. Ct. at 2919-20 (Stevens, J., dissenting).

251 . See *supra* note 226.

252 . The Supreme Court has intimated that viable non-mining uses for land might preclude compensation. See *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 296 n.37 (1981); *McFerrin & Whitman*, *supra* note 240, at 655 (presence of alternative surface uses could preclude takings under "no other use" reading). But see *United States v. Whitney Benefits*, 926 F.2d 1169, 1174-75 (D.C. Cir.), cert. denied, 112 S. Ct. 406 (1991) (finding surface uses immaterial if severed mineral estate at issue).

253 . Compare with cases rejecting a taking simply from passage of a legislative mining prohibition such as *Hodel v. Virginia Surface Mining*, 452 U.S. at 294-96. See also *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 126-27 (1985) (assertion of regulatory authority alone a taking; must prevent "economically viable use").

regulated operation.²⁵⁴ The decision would not be unconstitutional merely because a regulation rendered a particular mineral unmineable. The Supreme Court's *Keystone* opinion may have taken the analysis one level further, although Justice Scalia denounced the practice in footnote seven of *Lucas*.²⁵⁵

The first step in *Keystone*, however, is slightly less controversial: the Supreme Court rejected extreme hairsplitting. Each ton of coal was not an individual piece of property that the statute's mining ban could render valueless.²⁵⁶ Even without governmental requirements, no mine plan, no matter how efficient, anticipates recovery of all the resource.²⁵⁷ If, however, the restriction so transforms mine development that it cannot proceed profitably, then a taking could result under classic diminution of value theory.²⁵⁸

Looking at the particular impact of the regulation on the operation of a complainant has some appeal, but it does allow for disparate treatment and may be criticized as looking at the impact on the regulated party, rather than the property.²⁵⁹ If two companies have adjacent holdings, a decision that forbids mining identical tonnage could be a taking in one instance and require compensation but not a taking for the second company if mining its larger deposit remained profitable.²⁶⁰ Various cases looking at the impact of development of wetlands have similarly allowed for such distinctions.²⁶¹ To ascertain how much diminution of value flowed from a permit denial, these courts looked not merely at the area that could not be developed, but also at the upland areas already de-

254 . See, e.g., *Skaw v. United States*, 740 F.2d 932, 940 (D.C. Cir. 1984) (requiring specific review of development by non-prohibited methods and of whether remaining mineral could be mined in order to ascertain if prohibition of mining method equals a taking).

255 . *Lucas*, 112 S. Ct. at 2894 n.7.

256 . *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 498 (1987) (two percent of total coal which must remain in place is not "separate segment of property").

257 . Room and pillar mining generally requires mineral to remain in place. Surface pits are designed to recover the most mineral and handle the least amount of overburden. Mineral at the outer boundaries of the deposit therefore will not be recovered. See generally Phillip W. Lear, *Multiple Mineral Development Conflicts: An Armageddon in Simultaneous Mineral Operations?*, 28 ROCKY MTN. MIN. L. INST. 79, 81-89 (1983). Longwall mining is an underground mining technique sometimes referred to as a fully extractive technique, but the Supreme Court rejected its classification as "fully" extractive. *Keystone*, 480 U.S. at 475.

258 . Two exceptions could negate a taking. These two exceptions would be that remaining surface uses were material or that the restriction was a part and parcel of the interest at the time of creation.

259 . See, e.g., *Epstein*, *supra* note 76.

260 . Naturally, if surface use could also be considered, additional variables abound. *Florida Rock Indus., Inc. v. United States*, 791 F.2d 893, 902 (D.C. Cir. 1986) ("Mineral land in the mountains or deserts may well be foreseen to have no future use except for production of minerals. This land [near Miami, Florida] is different."), *on remand*, 21 Cl. Ct. 161 (1990). For the reverse situation, see *Iowa Mining Co., Inc. v. Monroe County*, 494 N.W.2d 664 (Iowa 1993) (holding there was no taking if the claimant was precluded from using a pit for a landfill if it could still stripmine).

261 . Wetland regulation may create another genre of property for which a party might not reasonably anticipate unrestricted development rights. *Crow-New Jersey 32 Ltd. v. Township of Clinton*, 718 F. Supp. 378, 384 (D.N.J. 1989). See generally Michael C. Blumm & D. Bernard Zaleha, *Federal Wetlands Protection Under the Clean Water Act: Regulatory Ambivalence, Intergovernmental Tension, and a Call for Reform*, 60 U. COLO. L. REV. 695, 754-60 (1989).

veloped or available for development.²⁶² They recognized that “[f]actors such as the degree of contiguity, the dates of acquisition, the extent to which the parcel has been treated as a single unit . . . and no doubt many others . . . enter the calculus.”²⁶³

To ascertain whether the statute involved in *Keystone* caused a taking, that court took a further step, however, when it did not necessarily limit itself to impact on individual mines. The court intimated that it may be proper to examine all the coal the companies owned.²⁶⁴ Increasing the scope of the analysis to minerals in other locales could again create disparate treatment, but would look beyond the vagaries of one mineral deposit. The resulting difference in treatment, however, need not be anathema.

To a certain extent, measuring “property” in this manner could promote asset shuffling to exploit the government’s liability for compensation.²⁶⁵ If holdings have not been rearranged purposefully, however, disparate treatment might not be an evil but a valid mechanism for spreading costs.²⁶⁶ This is especially true if the “property” examined could be broadened beyond the particular regulated mine-site. Multiple holdings assure that some return on investment can be had even if some properties do not provide the profit desired.²⁶⁷ Again, the wetland cases provide analogy; if real estate developers have received a return

262. *Tabb Lakes, Inc. v. United States*, 10 F.3d 796, 802 (D.C. Cir. 1993); *Ciampitti v. United States*, 22 Cl. Ct. 310 (1991); *Deltona Corp. v. United States*, 657 F.2d 1184 (Ct. Cl. 1981), *cert. denied*, 455 U.S. 1017 (1982); *Jentgen v. United States*, 657 F.2d 1210 (Ct. Cl. 1981), *cert. denied*, 455 U.S. 1017 (1982); *O'Connor v. Corp of Engineers*, 801 F. Supp. 185 (N.D. Ind. 1992); *State v. Schindler*, 604 So. 2d 565 (Fla. Ct. App. 1992). *But see* cases emphasizing that the “property” impacted was the non-developable wetlands: *Formanek v. United States*, 26 Cl. Ct. 332 (1992); *Loveladies Harbor, Inc. v. United States*, 21 Cl. Ct. 153 (1990); *Florida Rock Indus. Inc. v. United States*, 791 F.2d 893 (D.C. Cir. 1986), *cert. denied*, 479 U.S. 1053 (1987), *on remand*, 21 Cl. Ct. 161 (1990).

263. *Ciampitti*, 22 Cl. Ct. at 318. Another factor listed was “the extent to which the protected lands enhance the value of remaining lands.” This is important for development, such as housing, that may benefit from the amenity of open-space, but it is not necessarily relevant to a mining operation.

264. *Keystone*, 480 U.S. at 496. Because the Court is commenting on the total lack of evidence, no determination of what evidence would satisfy the Court is possible. Importantly, the Court did not mention the possibility of non-mining uses of the property.

265. *But cf. Mahon*, 260 U.S. at 419 (Brandeis, J., dissenting): “I would suppose no one would contend that by selling his interest above 100 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?” See Patrick C. McGinley & Joshua Barrett, *Pennsylvania Coal Company v. Mahon Revisited: Is the Federal Surface Mining Act a Valid Exercise of the Police Power or an Unconstitutional Taking?*, 16 TULSA L.J. 418, 437-39 (1981) (to give more rights to one who owns less shows it is absurd to apply diminution of value to uses).

266. *Cf. Rose-Ackerman*, *supra* note 116, at 1702-05 (if you compensate when all wealth is taken, an individual might receive compensation when a corporation would not).

267. Lawrence Blume & Daniel L. Rubinfeld, *Compensation for Takings: An Economic Analysis*, 72 CAL. LAW. REV. 569, 606-12 (1984) (compensate relatively large losses for those unable to insure against such losses; large investors purchase numerous investments, all of which are risky, independent of taking possibilities and collectively become self-insurance). Naturally, even with other resources, uncompensated, regulation could make entrepreneurs more cautious and hinder capital formation. But, the result could also foster improved mining methods by creating incentives to avoid the costs imposed by uncompensated bans. Sax, *supra* note 91, at 177-86. See also William A. Fischel & Perry Shapiro, *A Constitutional Choice Model of Compensation for Takings*, 9 INT’L REV. OF L. & ECON. 115, 124 (1989) (must consider expected behavior of government as well as private decision makers).

on their investment, a taking is less likely to be found.²⁶⁸ A similar return-sensitive approach was hinted at by another court: judge the value of a particular mining deposit by looking at the operation it is a part of through time.²⁶⁹ Past productive mining may foreclose a taking because the property as a whole had value. The inability to mine some of the tract in the future may be only a slight diminution in value.²⁷⁰

An argument that would allow for compensation under takings analysis for some mineral owners but not others may seem to not only denigrate independent entrepreneurial spirit, but to violate the fundamental notion that similarly situated persons must be similarly treated. To compensate a small mineral company but not a large one might seem "unfair" from the viewpoint of the large company. However, the two companies are not truly similarly situated; the impact on the small company will be much more drastic. Hard facts do create hard law.

Moreover, it may be argued that the public lands are imbued with a public interest.²⁷¹ In other words, when a party has rights that impact the public lands, a mirror-image of *Munn v. Illinois*²⁷² results. In that case, the Supreme Court found that when private property is used for public purposes, there is a limited grant to government sufficient to support regulation.²⁷³ Conversely, when public lands are affected, all private rights may be limited by a public interest claim because of a limit on the grant to the private party. If that is the case, regulation of private interests that impact this public interest is justified and, to avoid a takings claim, all that would be required is some "reasonable" return on the party's investment.²⁷⁴

B. *Takings and Grazing Permits*

The second hypothetical is that the BLM determines that grazing shall no longer be allowed on a specific allotment in order to improve the ecosystem.

268 . *Tabb Lakes, Inc. v. United States*, 10 F.3d 796, 802 (D.C. Cir. 1993); *Ciampitti v. United States*, 22 Cl. Ct. 310 (1991).

269 . *Cogar v. Faerber*, 371 S.E.2d 321, 326 (W. Va. 1988) ("[I]t appears that, while the value of the entire tract may be reduced somewhat by the denial of the permit, the Intervenor has, nevertheless productively mined the tract for some thirteen years.").

270 . *Id.* Another measure of the "property" regulated could also spread costs. Nature provides a unit: the mineral deposit itself. If its recovery becomes uneconomic, then a taking would occur.

271 . *Nebbia v. New York*, 291 U.S. 502, 525 (1934). This view of takings compensation based on *Duquesne Light Co. v. Barasch*, 488 U.S. 299 (1989) differs from the use of a "collective-protection servitude," which has been described by the author and rejected as premature. Mansfield, *supra* note 13, at 96-97. Under the servitude theory, a private party's rights would not include the ability to act in a manner that would interfere with important public land values; therefore an activity could be precluded without any need to consider compensation under the Fifth Amendment. A *Duquesne* analysis, however, recognizes that the public interest may limit a party's return from the use of private property, but does not totally deny the right to a return on an investment.

272 . 94 U.S. 113 (1876).

273 . *Id.* at 126.

274 . *Cf. Duquesne*, 488 U.S. 299 (1989).

The allotment will remain in public ownership and no other development would preclude grazing directly. If the BLM follows the appropriate procedures to cancel a permit,²⁷⁵ the easy answer to the takings question would be that the rancher has absolutely no claim to compensation because the rancher had no right or interest in property from the permit.²⁷⁶ Any "expectation analysis" would have to include this knowledge of the law. Therefore, a court would not be free to compensate the permittee.²⁷⁷ Nevertheless, on another level of expectation analysis, or when considering the extent of property impacted, the grazing permittee could have an equitable claim for compensation, with equitable meaning within the dictates of fairness.²⁷⁸

A grazing permittee has strong expectations about the continuing ability to use federal lands in conjunction with base lands because of past practice. Families have ranched the same land for generations. Other ranches have changed hands and the value of the grazing permits did impact price of the base lands. The current rancher would have "bought" this value from a previous private seller, although not from the United States.²⁷⁹

Conversely, the public interest is seeking a change from the status quo, the stopping of a current use for the purpose of improving the range. Arguably, the erosion and desertification that may attend overgrazing could be nuisance-like and the prohibition justified on that ground. Nevertheless, it is easier to regulate new uses than to curb existing uses.²⁸⁰ The expectation interest on the public side is less strong than when the current status is being maintained. It is potentially less demoralizing to see the range remain in its current condition than to initially see it being changed.

Additionally, the impact of the cancellation may fall on an individual ranching operation. An individual operator may have little ability to spread risks. The rancher may therefore have a stronger equitable claim to compensa-

275 . 43 U.S.C. § 1752(g) (1988).

276 . *United States v. Fuller*, 409 U.S. 488 (1973) (according to the Taylor Grazing Act, permits "shall not create any right, title, or estate in or to the lands" and therefore cannot compensate for value they add to base property).

277 . *Cf.* Rubinfeld, *supra* note 116, at 1108-09 (discussing "economic viability test" and termination of government benefits).

278 . This would have to be a political settlement through legislation. As noted below, it may be one of the only ways to end grazing on the public domain if that is the ecologically desired option. Another way would be to amend the Taylor Grazing Act regulations so that parties wishing to put AUM's "in the bank" for wildlife or forage repair may do so through private purchases of grazing permits. The current regulations require a party to "be engaged in the livestock business" to retain a lease or permit. 43 C.F.R. § 4110.1 (1992).

279 . *United States v. Fuller*, 409 U.S. at 503-04 (Powell, J., dissenting) (buyer of fee lands considers use of federal lands for "fair market value"). However, the Supreme Court, in a five to four decision, found Congress had clearly stated that no private expectation could attach to use of the lands. *Id.* at 494 (permits "shall not create any right, title, or estate in or to the lands" and therefore cannot compensate for value they add to base property).

280 . *Penn Central*, 438 U.S. at 125-27. *But see* *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962) (upholding prohibition of excavating below ground water level despite fact it would force existing sand and gravel business to close). *See also* *Bernardsville Quarry, Inc. v. Borough of Bernardsville*, 608 A.2d 1377 (N.J. 1992) (rejecting takings claim based on depth of mining restriction that eliminated ninety percent of value).

tion based on financial impact and expectations, but another factor may also color the equities. A ranch is identified more intimately with the "personhood" of the rancher than a mine is, at least for a mine other than a "mom and pop" mining operation.²⁸¹ Property intimately connected with the creation of individuality rather than mere investment should require more deference from interference.²⁸²

The difficulties encountered in trying to raise grazing fees may be a political reflection of these emotional responses. The stories told and images held by the public and decision-makers influence results.²⁸³ The movies and television shows of our childhood have given the rancher and cowboy the mantle of hard-working, individualistic hero. Therefore, despite any negative impact on the continued viability of the range resource from grazing, total uncompensated removal of livestock from the range, while within constitutional prerogatives, may not be politically or sociologically possible without a long period of education and counter myth-making.²⁸⁴

VIII. CONCLUSION

The problems of public land management cry out for insightful new techniques, especially in resolving conflicts between private consumptive or exclusionary desires and those of the public's individual and collective needs. Someone must mediate the clashes, because to simply do nothing is in itself a decision that one or the other values will be denigrated. If Congress has not made clear allocative choices, the land managing agency must accept the burden of deciding. At some future point in the development of our laws and thinking, public land use may be weighted in favor of individual/public and collective/public uses. This would evolve out of a growing acknowledgment of their importance to the public as a whole. At that time, the world of *Miller v. Schoene*²⁸⁵ would be reached.

281 . Margaret Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 959 (1982) (employing example of a lost wedding ring; if stolen from a jeweler, insurance proceeds will recompense but if stolen from a "loving wearer" no amount of money could restore status quo).

282 . *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 436 (1982) ("[A]n owner suffers a special kind of injury when a *stranger* directly invades and occupies the owner's property."). See also Rose-Ackerman, *supra* note 116, at 1700-02 ("social" more protected than "legal"); William H. Rodgers, Jr., *Bringing People Back: Toward A Comprehensive Theory of Taking in Natural Resources Law*, 10 ECOLOGY L.Q. 205, 207-08 (1982) (substantive due process limits legislative power for core "human" property); Costonis, *supra* note 120, at 499-500 ("economic" interest less protected than "dominion" interest); Rubinfeld, *supra* note 116, at 1102-04 (identifying tendency to find "fundamental" property rights and link same to fundamental right of privacy); but see *Loretto*, 458 U.S. at 439 (fact property held for rental irrelevant).

283 . Cf. Alexander, *supra* note 234, at 1753.

284 . Total permanent removal, however, may not be the best result ecologically. Ungulates, such as cattle are, when properly managed, an integral part of a healthy range. See CHARLES F. WILKINSON, *CROSSING THE NEXT MERIDIEN* 104-07 (1992).

285 . 276 U.S. 272 (1928).

In the *Miller* case, the Supreme Court upheld the uncompensated destruction of cedars that harbored a pest deadly to neighboring apple orchards.²⁸⁶ The source of this power was specific: "it is obvious that there may be, and that here there is, a preponderant public concern in the preservation of the one interest over the other."²⁸⁷ Neither tree is noxious or detrimental to man *per se*; they are simply incompatible with each other.²⁸⁸ Faced with this dilemma, the legislature must choose:

It would have been none the less a choice if, instead of enacting the present statute, the state, by doing nothing, had permitted serious injury to the apple orchards within its borders to go unchecked. When forced to such a choice the state does not exceed its constitutional powers by deciding upon the destruction of one class of property in order to save another which, in the judgment of the legislature, is of greater value to the public. It will not do to say that the case is merely one of a conflict of two private interests
²⁸⁹

In the world of *Miller v. Schoene*, apples were crucial to the local economy. In some instances, therefore, courts have accepted that legislative embodiments of universal declarations of value are possible.²⁹⁰ The *Miller v. Schoene* rationale goes beyond the "nuisance" or "noxious use" exception because it allows the legislature to declare an overriding public interest to resolve private clashes.²⁹¹

We have not yet reached such a consensus on the need to protect collective values that would justify blanket prohibitions of private consumptive or exclusionary interests. For example, the statutes governing the public lands acknowledge mineral, grazing, and other uses. The history of public land law fostered use by individuals as well as maintenance of more diffuse public values. The expectations that arose out of this regime must be considered. "Demoralization"

286. Justice Rehnquist quibbles that because the owners could use the fallen trees, all value was not destroyed. *Keystone*, 480 U.S. at 513 (Rehnquist, J., dissenting). But the investment-backed expectation of the owners was not that cedars would be a source of firewood. See also *Bowditch v. City of Boston*, 101 U.S. 16, 19 (1879) (no compensation if building destroyed to stop spread of fire); William B. Stoebuck, *A General Theory of Eminent Domain*, 47 WASH. L. REV. 553, 563-65 (1972) (destruction of building to stop the spread of fire is a remnant of King's prerogative power rather than exception to compensation).

287. *Miller*, 276 U.S. at 279.

288. See, e.g., Sax, *supra* note 91, at 153-54 (many compensation denials involve inconsistency between perfectly innocent and independently desirable uses).

289. *Miller*, 276 U.S. at 279-80. See also Dowling, *supra* note 191, at 380 (test useful in conflicts arising out of nature).

290. The Court employed a deferential standard: "we cannot say that . . . exercise [of the police power], controlled by considerations of social policy which are not unreasonable, involves any denial of due process." Therefore, mere rationality may have sufficed. *Id.* at 280. The Court did, however, emphasize the economic value of apples. *Id.* at 279. The decision's tenor justifies categorizing it among cases hinging on strong policy concerns.

291. Cf. Carol M. Rose, *Property Rights, Regulatory Regimes and the New Takings Jurisprudence: An Evolutionary Approach*, 57 TENN. L. REV. 577, 589-91 (1990) (arguing local regulation goes through three steps: anything goes, ad hoc takings review of land use regulations, and finally state legislative declarations).

costs are real costs, ones that impact on the ability to legitimize change.²⁹² Human expectations are part of the equation and need to be respected to afford dignity to both judicial decisions and legislative mandates.²⁹³

In an optimal world, the nation would clarify its priorities and, if the desired result would suddenly change the status quo, we should agree to raise enough taxes to implement the goals with compensation for all parties who find their "private" rights affected. Naturally, solving all our environmental dilemmas in this manner is an unlikely scenario. The bounds of existing law must be examined so that important collective goals may be achieved with the least disruption. In so doing, it must be acknowledged that some degree of wealth distribution is an inevitable result of all regulation.²⁹⁴ Nevertheless, some will have to be compensated for bearing a disproportionate burden when "public" rights confront their "private" rights. With incremental changes in expectations through education and new regulations, however, less and less compensation will be required.²⁹⁵ We will move from *Duquesne*, which limits returns from property clothed with the public interest, to *Miller v. Schoene*, which creates the potential for forwarding the public interest without any compensation whatsoever.

292. If takings are too frequent and arbitrary, landowners will fail to make investments desirable for economic efficiency. See Michelman, *supra* note 90, at 1214-15 (defining demoralization costs); Daniel W. Bromley, *Regulatory Takings: Coherent Concept of Logical Concept or Logical Contradiction?*, 17 VT. L. REV. 647, 659 (1993); see also Robert C. Ellickson, *Bringing Culture and Human Frailty to Rational Actors: A Critique of Classical Law and Economics*, 65 CHI.-KENT L. REV. 23, 35-40 (1989) (criticizing law and economics models for failing to account for value of "psychologically vested rights").

293. See *Lucas*, 112 S.Ct. at 2899-2900 (discussing the "historical compact" of the takings clause); Fisher, *supra* note 143, at 1397-1402.

294. See Justice Scalia's objection to the "off-budget financing" inherent in a rent control ordinance's requirement to consider a tenant's hardship in *Pennell v. City of San Jose*, 485 U.S. 1, 22-23 (1988) (Scalia, J., concurring and dissenting) and the discussion in Minda, *supra* note 75, 616-18 (arguing such "extra taxes" are inherent in land regulation because not only do they directly impact those owning land, but also those seeking access to land).

295. Cf. Sax, *supra* note 73, at 1451 (arguing that during period transitional to an ecosystem philosophy must mitigate burdens by phasing, grandfathering, and other techniques).

