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# Regulatory Takings, Expectations and Valid Existing Rights

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# Regulatory Takings, Expectations and Valid Existing Rights

MARLA E. MANSFIELD\*

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## I. INTRODUCTION

A songwriter may insist on being “a rock, . . . an island” in order to “feel no pain and .. never cry.”<sup>1</sup> Ecology, however, teaches that not only is no person an island, but no island is an island. Activity on any land impacts either other land or related

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\*\* Views expressed herein are the author’s own and do not necessarily reflect those of the National Energy Law and Policy Institute.

<sup>1</sup> “I Am A Rock”, copyright 1965 by Paul Simon.

resources of water or air. Physical reality tempers a claim to "free use, enjoyment, and disposal"<sup>2</sup> of so-called private property. Law reflects this bond by regulating private activity for the common good.<sup>3</sup> One vivid example is the Surface Mining Control and Reclamation Act of 1977 (SMCRA).<sup>4</sup>

The Act attempts to comprehensively address the externalities of surface mining.<sup>5</sup> Permits would precede mining to impose detailed performance standards.<sup>6</sup> Moreover, Congress declared an outright ban on surface mining in certain situations.<sup>7</sup> Section 522(e) of SMCRA specifically exempts existing mines and "valid existing rights" ("VER") from these prohibitions.<sup>8</sup>

If valid existing rights exist, the bans on mining in Section 522(e) of SMCRA do not apply. The proponent of mining will "win," but only so far as gaining the right to seek a permit,

<sup>2</sup> W. Blackstone, 2 Commentaries 2 (W. Lewis ed. 1898):

The 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. It 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.

<sup>3</sup> As Professor Cribbet aptly put it, Blackstone's definition of property is still alive and relevant: "If one de-emphasizes 'sole and despotic' and emphasizes 'save only by the laws of the land,' Blackstone's words approach the modern concept of property. . .". Cribbet, *Concepts in Transition: The Search for a New Definition of Property*, 1986 ILL. L. REV. 1, 39. See also, Cribbet, at 25-26 ("The net effect of police power regulations, environmental law, and public trust doctrines has been to make many decisions [on private land use] joint ventures between the individual and the state.").

<sup>4</sup> Surface Mining Control and Reclamation Act of 1977 [hereinafter SMCRA], Pub. L. No. 95-87, 91 Stat. 445 (codified at 30 U.S.C. §§ 1201-1328 (1988)).

<sup>5</sup> Udall, *The Enactment of the Surface Mining Control & Reclamation Act of 1977 in Retrospect*, 81 W. VA. L. REV. 553 (1979); Harris & Close, *Redefining the State Regulatory Role*, 12 ENVTL. L. 921, 923 (1982) (weak and ineffectual state programs impetus for Act).

<sup>6</sup> SMCRA § 515, 30 U.S.C. § 1265 (1988). Some aspects of underground mining are also regulated. SMCRA § 516, 30 U.S.C. § 1266 (1988).

<sup>7</sup> These include lands within National Parks, National Wildlife Refuges, Wildernesses, or National Forests as well as operations that would impact publicly owned parks or historic sites or come within certain distances of public roads, occupied dwellings, public buildings, churches, or cemeteries. SMCRA § 522(e), 30 U.S.C. § 1272(e) (1988). Other prohibitions forbid mining on certain alluvial valley floors in western states, with the exception of mines that produced coal in commercial quantities in the preceding year or had obtained a permit. *Id.* at § 510(b)(5). Other areas may be declared unsuitable for surface mining, with mining prohibited except when permitted, existing, or where "substantial legal and financial commitments" had been made. *Id.* at §§ 512(b) and 522(a)(6). See generally, McGinley & Barrett, *Pennsylvania Coal Co. 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, 421-24 (1981).

<sup>8</sup> SMCRA § 522(e), 30 U.S.C. § 1272(e) (1988).

which may or may not be granted based on other preconditions.<sup>9</sup> Congress meant something, however, by its language granting exemptions to more than existing mines. The Department of Interior has grappled with the meaning of VER for many years.<sup>10</sup>

Currently, three main contenders lead the definition fight. All require the claimant to prove ownership of the coal resource, but each requires a different additional proof:

1. A modified "all permits" test requires the applicant to have received all necessary permits or have made a "good faith" effort to receive them.<sup>11</sup>
2. An "authority to mine test" requires proof that the applicant had a right pursuant to state law to mine the property by the proposed method.<sup>12</sup>
3. A "takings" test requires that the applicant show that to deny the right to mine would violate the Fifth Amendment.<sup>13</sup>

An additional test, however, would supplement the basic tests and exempt coal needed for the continuing viability of a mine<sup>14</sup>

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<sup>9</sup> Valley Camp Coal Co. v. Office of Surface Mining, 112 I. B.L.A. 19, 36-37 (Nov. 16, 1989) (must still meet permit requirements).

<sup>10</sup> Briefly, it first required "all permits" to have been received. 44 Fed. Reg. 15,342 (1979), 30 C.F.R. § 761.5 (1980). The District Court recognized a "good faith" effort. *In Re Permanent Surface Mining Regulation Litigation*, 14 Env't Rep. Cas. (BNA) 1083, 1091 (D. D.C. 1980) (Hereinafter "*In Re P*") A proposed regulation was then promulgated with this test and others. 47 Fed. Reg. at 25,279 (1982). Interior adopted a "takings" test as a final rule. 48 Fed. Reg. at 41,398 (1983), 30 C.F.R. § 761.5 (1984). It was overturned on procedural grounds: it varied too greatly from the proposed rule. *In Re Permanent Surface Mining Regulation Litig.* 22 Env't Rep. Cas. (BNA) 1557 (D. D.C. 1985) (Hereinafter "*In Re IP*"). See generally, Note, *Regulation and Land Withdrawals: Defining "Valid Existing Rights"*, 3 J. MIN. L. & POL'Y 517, 519-24 (1988); McFerrin & Whitman, *Valid Existing Rights and the Constitution: 1983 Regulatory Changes*, 87 W. VA. L. REV. 647, 648-51 (1985).

<sup>11</sup> In conformity with *In Re I*, this test was adopted as an interim rule when later rulemaking was invalidated. 51 Fed. Reg. 41,954, 54-55 (1982). Reproposed as an option in the 1988 Notice of Proposed Rulemaking, 53 Fed. Reg. 52,374 (1988) (hereinafter "1988 Proposal"), withdrawn for further consideration, 54 Fed. Reg. 30,557 (1989).

<sup>12</sup> Proposed as an option in the 1988 Proposal, 53 Fed. Reg. 52,374 (1988), withdrawn for further consideration, 54 Fed. Reg. 30,557 (1989). Whether the "authority" must specify a mining method or simply distinguish surface, or other subsidence—causing methods, from traditional underground mining is disputed.

<sup>13</sup> 30 C.F.R. § 761.5 (1984), suspended, 51 Fed. Reg. 41,960 (1986). This test was not in the 1988 Proposal.

<sup>14</sup> See, *In Re I*, 14 Env't Rep. Cas. at 1091. The rationale was to avoid making existing mines uneconomical, a potentiality that could be a "taking" under certain theories. See *infra* notes 80-86 and accompanying text.

that existed on the relevant date.<sup>15</sup> None of the basic tests are sufficient.

First, the exception for VER occurs in a section designed to protect certain lands even more greatly than the permitting system would allow.<sup>16</sup> Congress could not have meant that each and every private party "owning" coal could develop the same.<sup>17</sup> Having the right to develop the mineral under state law must be a precondition for any permit under the Act. The SMCRA was not meant to increase the rights of a miner vis a vis other private parties<sup>18</sup> or state regulations.<sup>19</sup>

Second, the Act elsewhere declares that it is to be taken to the constitutional limit.<sup>20</sup> If the provision merely is inserted to prevent a taking, it is superfluous.<sup>21</sup> More importantly, it would

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<sup>15</sup> The relevant date is when SMCRA was passed for proposed mines affected by conditions that existed then. For conditions occurring later, the date is when the condition came into existence. This leads to a "continually created" VER tied to creation of new forbidding situations, such as newly occupied dwellings. *National Wildlife Federation v. Hodel*, 839 F. 2d 694, 748-50 (D.C. Cir. 1988) (concept upheld).

<sup>16</sup> SMCRA § 522(e), 30 U.S.C. § 1272(e)(1988). *Cf.*, *National Wildlife Federation*, 839 F.2d at 748, interpreting provision on "unsuitability" to require "balancing the financial interests of the mine operators against the public's interest in prohibiting mining where it is environmentally unsuitable."

<sup>17</sup> *Cogar v. Faerber*, 371 S.E.2d 321, 324 (W.Va. 1988) (lease acquisition insufficient under state counterpart); Laitos & Westfall, *Government Interference with Private Interests in Public Resources*, 11 HARV. ENVTL. L. REV. 1, 60 n. 332 (1987). *But see* Professor Laitos' contribution to this VER Symposium issue.

<sup>18</sup> At a minimum, this is the import of congressional declarations that SMCRA was not to change existing rights. *E.g.*, "Language of 522(e) is in no way intended to affect or abrogate any previous State court decisions," H.R. REP. No. 1522, 93rd Cong., 2nd Sess. 85 (1974). Reference was made to *United States v. Polino*, 131 F.Supp. 772 (N.D. W.Va. 1955). This case merely employed West Virginia law to determine if a reservation of minerals in a deed to the United States included the right to strip mine coal. The court held it did not. *Id.* at 776-77. *See also*, *United States v. Sterns Co.*, 595 F. Supp. 808, 811-13 (E.D. Ky. 1984) (employing Kentucky law in similar situation). *Compare*, *National Wildlife Federation v. Interstate Commerce Commission*, 850 F.2d 694, 706 (D.C. Cir. 1988)(state law defines reversionary interest); *Sierra Club v. Hodel*, 848 F.2d 1068, 1079-83 (10th Cir. 1988) (state law sets scope of right-of-way).

<sup>19</sup> SMCRA does not preempt more stringent state regulation. SMCRA § 505(b), 30 U.S.C. § 1255(b) (1988). It can, however, impose greater restrictions on mining to benefit surface owners. SMCRA § 102(b), 30 U.S.C. § 1202(b). *See*, *National Wildlife Fed. v. Lujan*, 733 F. Supp. 419, 426 (D.D.C. 1990) (" '[F]ully protected' means just that, not fully protected to the extent state law provides.").

<sup>20</sup> SMCRA § 102(m), 30 U.S.C. § 1202 (m): "It is the purpose of this Act to . . . wherever necessary, exercise the full reach of Federal constitutional powers to insure the protection of the public interest through effective control of surface coal mining operations." *See*, *In Re Permanent Surface Mining Regulation Litig.*, 653 F.2d 514, 520-21 (D.C. Cir. 1980) *cert. den.*, 454 U.S. 822 (1981) (federal standards and oversight needed).

<sup>21</sup> *Cf.*, *Stockley v. United States*, 260 U.S. 532, 544 (1922) (VER in withdrawal

not reflect congressional desire to exempt more than existing mines. Current takings jurisprudence allows vigorous regulation of diffuse externalities.<sup>22</sup> "Takings" of mineral interests would be rare and the test would grant little or no protection for private developers. Rather than balancing interests, environmental protection would silence all other equities.

Neither of these tests respond to the objectives of Section 522(e)'s VER exception. The answer must lie in between the "takings" test, which creates a non-existent exemption, and the ownership and authority to mine test, which is non-prohibitive. The "all permits test," however, is too restrictive. It is also not "compelled either by the statutory language or its legislative history."<sup>23</sup>

Takings jurisprudence does provide a key to help define VER: focus on reasonable expectation of development.<sup>24</sup> Although, broadly speaking, no mineral owner prior to SMCRA could have expected an unfettered right to develop, particularizing this inquiry could define valid rights to proceed *with* regulation. How strong must the expectation be to be a valid *existing* right? A crystalline act must objectify the expectation, but clear cut rules may be impossible to draw.<sup>25</sup>

An objective or "strong" expectations test would require some act in addition to ownership of coal to show anticipation of actual mining in the reasonably near future. At one extreme, analogy to vested right law in the zoning context would have

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order "means something less than a vested right, such as would follow from a completed final entry, since such a right would require no exception to insure its preservation").

<sup>22</sup> See, *infra* notes 49-65 and accompanying text. For an argument that existing private arrangements would prevent externalities better than regulatory attempts, see, Huffman, *The Allocative Impacts of Mineral Severance: Implications for the Regulation of Surface Mining*, 22 NAT. RES. J. 201 (1982).

<sup>23</sup> *Hodel v. Virginia Surface Mining & Reclamation Assn.*, 452 U.S. 264, 296 n. 37 (1981). See also, *Sunday Creek Coal Co. v. Hodel*, S.D. Ohio No. C-2-88-0416, slip op. (June 2, 1988) (test creates unconstitutional taking).

<sup>24</sup> *Cf.*, *In Re II*, 14 Env't Rep. Cas. at 1091:

The government avers that the all permits test ensures consonance with the taking cases. It requires an operator to expend a sizeable investment, and possess a substantial expectation of mining, in order to qualify for a valid existing right. This rationale is self defeating. Surely an operator who applies for all permits, but fails to receive one through governmental delay, engenders the same investment and expectations as an operator who timely receives all permits.

<sup>25</sup> Rose, *Crystals and Mud in Property Law*, 40 STAN. L. REV. 577 (1988). See *infra* note 122.

this occur when the private party had done everything necessary to proceed under prior law. It would then be inequitable to change the rules of the game.<sup>26</sup> A good faith attempt to get all permits would therefore suffice.

However, strong expectations may attach before reaching the permit stage. Permit acquisition would indicate an immediate desire to mine and less instant development plans may be proctible. Substantial financial or legal investments reveal actual intent to mine a specific deposit. Congress uses this test elsewhere in the Act.<sup>27</sup> Although general rules of statutory interpretation point to treating the two formulations differently,<sup>28</sup> such commitments could be elements of proof under the strong expectations test.

Under this test, what governs is the fact that a reasonable person anticipated being able to mine the specific deposit, albeit not free and clear of all regulatory constraints. Although the test looks to subjective expectations, they must be manifested by objective evidence. Proof of this expectation must be strong and show plans to mine in the reasonably foreseeable future.

## II. TAKINGS JURISPRUDENCE REVIEWED

### A. *Background: Constitutional Contours*

The Fifth Amendment provides that no "private property shall be taken for public use without just compensation."<sup>29</sup> The

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<sup>26</sup> Barkeley & Albert, *A Survey of Case Law Interpreting "Valid Existing Rights" - Implications for Unpatented Mining Claims*, 34 ROCKY MT. MIN. L. INST. 9-1, 9-85 - 9-87 (1988). Use of "vested" rights in this manner should not be confused with "vested right" analysis vis-a-vis changes in laws dealing with acquisition or regulation of federal resources. In the latter sense, vested rights include fee title, equitable rights to fee title, and issued leases. See Laitos & Westfall, *supra* note 17, at 12-13; *infra* notes 182-187 and accompanying text.

<sup>27</sup> SMCRA § 522(a)(b), 30 U.S.C. § 1272 (a)(6)(1988) (requires both when areas are designated unsuitable for surface mining).

<sup>28</sup> *Cogar*, 371 S.E.2d at 325. The Department of the Interior has taken inconsistent positions on the relationship between the two provisions. First, it felt that VER under § 552(e) must be stricter than substantial financial or legal commitments. 44 Fed. Reg. 14,991-92 (1979). Later, it found that the two provisions were "separate and distinct." 48 Fed. Reg. 41,316 (1983).

<sup>29</sup> U.S. CONST. amend. V. See also, "No person shall be . . . deprived of . . . property without due process of law." *Id.* See also U.S. CONST. amend. XIV, § 1: "nor shall any State deprive any person of property, without due process of law." "Due process" limits actions in regard to property in addition to the prohibition against taking without compensation.

word "taken" could have one uncomplicated meaning: government simply cannot acquire land or personal property without paying for it.<sup>30</sup> The prohibition against "takings," however, attacks two additional problems that may range beyond direct government acquisitions.<sup>31</sup> In the first, to "take" involves a physical occupation of land, which relates to the initial thrust of the provision.<sup>32</sup> Moreover, in some circumstances, less than either entry or acquisition of title could trigger the just compensation requirement: a regulation may too greatly impede private rights to be allowable.<sup>33</sup> This sparks the "regulatory taking" issue.

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<sup>30</sup> Cf., Rose-Ackerman, *Against Ad Hocery: A Comment on Michelman*, 88 COLUM. L. REV. 1697, 1702-05 (1988) (compensate only for improvements government will use). Despite the initial attractiveness of a literal reading, the provision has not been interpreted so narrowly. *Penn Central Transportation 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). Because destruction equates easily with physical appropriation of land, compensation for destroyed property was a natural progression. *Pumpelly v Green Bay Company*, 80 U.S. (13 Wall.) 166 (1871).

<sup>31</sup> Defining the issue as property "appropriated" can lead to word play: a restriction on use could "appropriate" a negative easement. See, Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1186-87 (1967). See also, Laitos, *Regulation of Natural Resources Use and Development in Light of the "New" Takings Clause*, 34 ROCKY MT. MIN. L. INST. 1-1, 1-17 - 1-23 (1988). This definitional tendency fuels some Justices' concern about compensating for easement acquisition. See *infra*, notes 99-101.

<sup>32</sup> Permanent entry on someone's land, either by the government itself or the public, under current rules may require compensation even if the intrusion is de minimus. *E.g.*, *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982); *Judlo v. Vons Companies*, 211 Cal. App. 3d 1020, 259 Cal. Rptr. 624 (Cal. App. 1989); *but see*, *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 82-84 (1980) (entry into shopping center literal but not constitutional taking). See also, Michelman, *Takings, 1987*, 88 COLUM. L. REV. 1600, 1603 (1988) (moving toward *per se* rule); 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); and Costonis, *Presumptive and Per Se Takings: A Decisional Model for the Taking Issue*, 58 N.Y.U. L. REV. 465, 511 (1983) (Loretto is aberrational).

<sup>33</sup> *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922); *but see*, *Mugler v. Kansas*, 123 U.S. 623, 668-69 (1887):

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.

These potentially inconsistent positions thread through takings jurisprudence. They are not, however, necessarily inconsistent. See *infra*, notes 44-73 and accompanying text; Costonis, *supra* note 32, at 497 n. 126; McGinley & Barrett, *supra* note 7, at 436-37. For arguments that these cases are incompatible, see Sax, *Takings and the Police Power*, 74 YALE L.J. 36, 41 (1964) (hereinafter, Sax I) and Stoebuck, *Police Power, Takings*,



Two inquiries compose the general question of whether a "regulatory taking" exists. First, as with all government actions, a threshold of legitimacy is necessary: the regulation must be a valid exercise of the police power or other enumerated power.<sup>34</sup> The central query in regulatory taking analysis, however, is whether the particular landowner should receive compensation because of the interference with property use.<sup>35</sup> A more precise rendition of the problem would be, "Has this landowner been disproportionately burdened?"<sup>36</sup>

Neither traditional glosses to this question nor modern refinements provide rigid rules. Nor should inflexibility be sought: "just compensation" requirements respond to the "expectations" that currently govern property rights or the process would not be "just." Although there is some constitutional core to the term "property," rights are not frozen. Protection aligns with societal needs and understandings through a process of evolutionary, as opposed to revolutionary, change.<sup>37</sup>

Two strands of existing case law coalesce to allow mining prohibitions under SMCRA to survive takings challenges. First is the nature of the government action. The Act seeks to protect collective values such as basic environmental amenities.<sup>38</sup> Similar goals have received respect in the past. The public rights vindicated are in a category of regulation requiring less scrutiny to survive a takings challenge.<sup>39</sup> Secondly, existing regulatory con-

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and Due Process, 37 WASH. & LEE L. REV. 1057, 1062 (1980). See also, *Florida Rock Industries, Inc. v. United States*, 791 F.2d 893, 901 (Fed. Cir. 1986) (*Pennsylvania Coal* breaks with precedent finding a regulation can never be a taking).

<sup>34</sup> *Hodel v. Virginia Surface Mining and Reclamation Assn.*, 452 U.S. 264, 308 (1981)(Commerce Clause authorizes).

<sup>35</sup> A unanimous Supreme Court reaffirmed that the Fifth Amendment does not prohibit interference with property rights, but conditions the interference on providing compensation. *Preseault v. Interstate Commerce Commission*, \_\_\_ U.S. \_\_\_, 110 S.Ct. 914 (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 115.

<sup>36</sup> See, generally, Michelman, *supra* note 31 and Costonis, *supra* note 32.

<sup>37</sup> *PruneYard*, 447 U.S. at 92-93 (Marshall, J. concurring): "Indeed, 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," quoting *Munn v. Illinois*, 94 U.S. 113, 134 (1877). State law may provide some definitions of property, but it, too, is not static.

<sup>38</sup> See Udall, *supra* note 5; *National Wildlife Fed. v. Lujan*, 773 F. Supp. at 426 (SMCRA goes beyond environmental concerns to ease hardships caused by coal mining).

<sup>39</sup> Regulation of "collective impinging" activity requires less deference to private use of property. See, Mansfield, *On the Cusp of Property Rights: Lessons from Public*

trol of mining should have influenced and limited the private owner's expectations about development. What is reasonable to have expected in regard to property development is a crucial element of takings analysis.

Nevertheless, if an affected interest had no opportunity to spread the risk of regulatory control, finding a taking may be appropriate to approximate fairness. Current law could distinguish between parties by appraising the "property affected" broadly to include all that the complaining party controls. Therefore, disproportionate harm may be avoided while not overtaxing the public's ability to either compensate, or, in the present situation, find a VER.

### B. *Traditional Takings Tests*

Regulatory takings are controversial because many times the overall social good could not be increased if everyone negatively impacted must receive full compensation. Overburdensome taxation would foreclose many clearly efficient actions, that is, actions with benefits exceeding the costs of their impacts.<sup>40</sup> Nevertheless, the classic liberal definition of property demands recognition. Property in this view requires individual control of the possession, use and disposition of an object.<sup>41</sup> The disparate tugs

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*Land Law*, 17 *ECOL. L.Q.* — (1990). The label may clarify the well-known "benefit versus harm" calculus by identifying the property to which the calculus must be applied. See *infra*, notes 49-59 and accompanying text. Although Section 552(e) protects federal property such as parks and wildlife refuges, it also protects private residences. Protecting private property does promote the public interest, but federal property may deserve greater protection because it can serve uniquely collective needs. Interior requested comments on this possibility in the 1988 Proposal. For other distinctions between types of property and protective level, see *infra*, note 102.

<sup>40</sup> Cost and trouble in tracing impacts influence takings decisions, see Michelman, *supra* note 31, at 1178-79; Merrill, *supra* note 32, at 14. Cf., Sax, *Property Rights in the U.S. Supreme Court: A Status Report*, 7 *UCLA J. ENVTL. L. & POL'Y* 139, 153 (1988) (hereinafter Sax 1987) (regulations redistribute wealth because government is responsible party of last resort). But see, Huffman, *Avoiding the Takings Clause Through the Myth of Public Rights: The Public Trust and Reserved Rights Doctrines at Work*, 3 *J. LAND USE & ENVTL. LAW* 171, 210 (1987) (those desiring nondevelopment should pay) and Wilkins, *The Takings Clause: A Modern Plot for an Old Constitutional Tale*, 64 *NOTRE DAME L. REV.* 1, 20 (1989) (inappropriate to protect "unless and until" too expensive).

<sup>41</sup> *United States v. General Motors*, 323 U.S. 373, 377 (1945) (property "denote[s] the group of rights inhering in the citizen's relation to the physical thing, as the right to possess, use and dispose of it.") For explication of the "liberal" concept of property, see, e.g., Radin, *The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings*, 88 *COLUM. L. REV.* 1667 (1988); Epstein, *Takings: Descent and*

of "property," social thought and practicality require reconciliation.

### 1. *The "Too Far" Test and its Limited Application*

One classic attempt to reconcile these discordant influences found refuge in "enough is enough" and seemingly made taking partially a matter of degree; regulation under the police power sometimes would require compensation if too great a diminution of value resulted:

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 the 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.<sup>42</sup>

This is, of course, Justice Holmes's famous pronouncement in *Pennsylvania Coal Co. v. Mahon*.<sup>43</sup> Writing for the Court, he 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.<sup>44</sup> Holme's statement recognizes that compensation is not required whenever value is destroyed, but would be necessary in

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*Resurrection*, 1987 SUP. CT. REV. 1.

A dialectic between two concepts of property permeates American thought. The Madison/Lockean "liberal" view is that property serves an individual's needs; government exists to protect the same. The Jeffersonian/Rousseauan concept imbues property with a social purpose; through ownership of property a citizen gains values necessary to participate meaningfully in government. See also, Bender, *The Takings Clause: Principles or Politics?*, 34 BUFF. L. REV. 735, 754-58 (1985).

<sup>42</sup> *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

<sup>43</sup> *Id.*

<sup>44</sup> For an explanation of subjacent support, see *Breeding v. Koch Carbon, Inc.*, 726 F. Supp. 645, 646-48 (W.D. Va. 1989); see also, Mansfield, *supra* note 39. Pennsylvania's mining prohibition was not absolute. A companion law allowed mining if a coal company contributed 2% of market value of mined coal to a fund that paid damages for subsidence. Friedman, *A Search For Seizure: Pennsylvania Coal Co. v. Mahon in Context*, 4 LAW & HIST. REV. 1, 18-22 (1986) (suggests Holmes thought general tax more appropriate).

“most” cases.<sup>45</sup> Nevertheless, non-compensable regulatory actions could go very far in lessening property value.<sup>46</sup>

Perhaps the dividing line between requiring and not requiring compensation is the strength of the public purpose being forwarded. In the *Pennsylvania Coal* case, Justice Brandeis dissented vigorously. One striking difference between his opinion and that of the majority is in characterizing the problem the statute addressed. Holmes apparently viewed it as a dispute between the Mahon family and the coal company; Brandeis envisioned the city of Scranton sliding into a gaping hole.<sup>47</sup>

In *Pennsylvania Coal*, the majority’s basic concern was that “the statute does not disclose a public interest sufficient to warrant such a destruction [of private rights].”<sup>48</sup> The “too much” or “diminution in value” factor, however, will become irresolute in three situations: when the prohibited action resembles a nuisance, when it would injure core values, and when it would destroy gains from reciprocal restrictions. These three areas provide sufficient public interest to avoid the requirement of compensation.

First, traditional nuisance law limits private property rights. 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.”<sup>49</sup> This principle provides a perimeter for constitutional safeguards. A regulation forbidding a nuisance simply

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<sup>45</sup> Compare, a more recent proponent of Holmes’ approach, who also excepts from censure regulations that either prevent discrete noxious activities or grant reciprocal benefits, *Penn Central Trans. Co. v. New York City*, 438 U.S. 105, 144-47 (Rehnquist, J. dissenting); and *Keystone Bituminous Coal Ass’n v. DeBenedictis*, 480 U.S. 470, 511-13 (1987) (Rehnquist, C.J. dissenting).

<sup>46</sup> In fact, the Supreme Court from 1923 until 1987 never struck down a regulation as a taking if it did not comprise a physical entry. See, Laitos, *supra* note 31, at 1-29. Holmes elsewhere approved legislation that interfered with either mineral recovery or contracts, see *Plymouth Coal Co. v. Commonwealth of Pennsylvania*, 232 U.S. 531 (1914); *Hudson Water Co. v. McCarter*, 209 U.S. 349, 357 (1908). See also, *Block v. Hirsh*, 256 U.S. 135 (1921); *Noble State Bank v. Haskell*, 219 U.S. 104 (1911); and *Erie R.R. v. Board of Public Utility Comm’rs*, 254 U.S. 394 (1921).

<sup>47</sup> Compare, the majority and dissenting opinions of *Pennsylvania Coal Co.*, 260 U.S. at 413, with 260 U.S. at 421-22. (Brandeis, J. dissenting). See also, Large, *The Supreme Court and the Taking Clause: The Search for a Better Rule*, 18 ENVTL. L. 3, 10-16 (1988) (background of justices’ views). For a more modern dilemma, see McCarthy, *Reclaiming Butte: The Doctrine of Subjacent Support*, 49 MONT. L. REV. 267 (1988).

<sup>48</sup> *Pennsylvania Coal*, 260 U.S. at 414.

<sup>49</sup> *Mugler v. Kansas*, 123 U.S. 623, 665 (1887).

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.<sup>50</sup>

A time-honored case embodying this principle 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.<sup>51</sup> Justice Holmes also found this principle self-evident.<sup>52</sup> Regulations that purportedly only prevent detriment and ones that seek gains for the public justify different impacts on private property.

Naturally, morality and community norms influence what is labeled "noxious" or detrimental. Standards change through time and so does legislation reflecting them; breweries exist again.<sup>53</sup> Courts, 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 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 values that the law makers and the court of his own state uphold.<sup>54</sup>

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<sup>50</sup> See, Sax I, *supra* note 33. See also, Wiseman, *When the End Justifies the Means: Understanding Takings Jurisprudence in a Legal System with Integrity*, 63 ST. JOHNS L. REV. 433, 459 (1989) (principle essentially sound).

<sup>51</sup> *Mugler*, 123 U.S. at 669.

<sup>52</sup> *Clarke v. Haberle Crystal Springs Brewing Co.*, 280 U.S. 286, 384 (1930) (Holmes, J.) ("when a business is extinguished as noxious under the Constitution the owners cannot demand compensation from the Government").

<sup>53</sup> See, 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); Dowling, *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").

<sup>54</sup> *Laurel Hill Cemetery v. San Francisco*, 216 U.S. 358, 366 (1910) (upholds

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.<sup>55</sup>

The line between the two types of actions sometimes defies clear analysis. Benefit and harm may be a matter of perspective. Brickmaking is not an "evil" occupation but a brickyard in a residential area damages the values of the houses.<sup>56</sup> 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.<sup>57</sup> An additional example clarifies both the weakness and the inherent appeal of the technique.<sup>58</sup>

The Psalms laud cedar trees, but if the trees harbor a pest deadly to neighboring apple orchards, cedars may be destroyed without compensation.<sup>59</sup> The source of this power is 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."<sup>60</sup> Neither tree is noxious or detrimental to man *per se*; they are simply incompatible with each other.<sup>61</sup> Faced with this dilemma, the legislature must choose:

ordinance outlawing burial in city despite alleged \$2 million cemetery expenditure); see also, *Jackman v. Rosenbaum*, 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. . .").

<sup>55</sup> See generally, Rose-Ackerman, *supra* note 30, at 1707-10. But see, Dunham, *A Legal and Economic Basis for City Planning*, 58 COLUM. L. REV. 650, 664-65 (1958) (workable test).

<sup>56</sup> *Hadacheck v. Sebastian*, 239 U.S. 394 (1915) (existing brickyard prohibited as health hazard despite precipitous drop in value of land. See also, *Reinman v. Little Rock*, 237 U.S. 171 (health and comfort of community justified exclusion of lawful stable from area).

<sup>57</sup> Coase, *The Problem of Social Cost*, 3 J. LAW & ECON. 1 (1960) (without transaction costs, markets would foster efficient land use regardless of fault labels); see also, Wittman, *Liability for Harm or Restitution for Benefit?*, 13 J. LEGAL STUD. 57 (1984).

<sup>58</sup> Indeed, Professor Michelman referred to the fault rationale as being "itself an attractive nuisance." Michelmen, *supra* note 31, at 1199 n.72.

<sup>59</sup> *Miller v. Schoene*, 276 U.S. 272 (1928). Chief Justice Rehnquist quibbles that because the owners could use the fallen trees, all value was not destroyed. *Keystone*, 480 U.S. at 513 (Rehnquist, C.J. dissenting). But the investment backed expectation of the owners was not that cedars would be a source of firewood.

<sup>60</sup> *Miller*, 276 U.S. at 279.

<sup>61</sup> See, e.g., *Sax I*, *supra* note 33, at 49 (many compensation denials involve inconsistency between perfectly innocent and independently desirable uses).

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 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 . . .<sup>62</sup>

In the world of *Miller v. Schoene*, apples were crucial to the local economy. In some instances, therefore, universal declarations of value are possible.<sup>63</sup> This would be the second instance of sufficient public interest to justify non-compensable regulation.

Regulation, however, does not limit itself to these clearcut areas of community concern nor to clearcut nuisances. Under the due process clause, government may constitutionally regulate property use under its police power. Lowering the value of individual property does not negate the power. Due process simply requires the regulation to have a rational tie to advancing the public health, safety, morals, or general welfare.<sup>64</sup> Public welfare encompasses "broad and inclusive"<sup>65</sup> goals. Ascertaining that the power to act exists, however, does not answer whether compensation is necessary.

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<sup>62</sup> *Miller*, 276 U.S. at 279-80. See also, Dowling, *supra* note 53, at 380 (test useful in conflicts arising out of nature).

<sup>63</sup> 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. *Miller*, 276 U.S. at 280. The court did, however, emphasize the economic value of apples. *Id.* at 279. The decision's tenor justifies categorizing it as one involving strong policy concerns. See also, *Bowdich v. City of Boston*, 101 U.S. 16, 19 (1879) (no compensation if building destroyed to stop spread of fire); Stoebuck, *A General Theory of Eminent Domain*, 47 WASH. L. REV. 553, 563-65 (1972) (remnant of king's prerogative power rather than exception to compensation).

<sup>64</sup> *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926). See generally, Dowling, *supra* note 53, at 364-69. The federal government, of course, must connect its activities to an enumerated power. For the SMCRA, this is the Commerce Clause.

<sup>65</sup> *Berman v. Parker*, 348 U.S. 26, 32 (1954):

The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled.

*Id.* at 33. See also, *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 240 (1984) ("The 'public use' requirement [of the takings clause] is thus coterminous with the scope of the sovereign's police power".)

A third way to regulate without compensation occurs when regulation increases values over-all. Land control can create value for the whole that would exceed individual parcel valuations if each individual landowner would develop in any way desired. Validating these regulations echoes the rationale for enforcing equitable servitudes.<sup>66</sup>

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.<sup>67</sup> Whether the particular statute itself must encompass such reciprocity or whether it could be found in the wider realm of regulatory actions is debatable.<sup>68</sup> In essence, if reciprocity exists, it provides compensation and therefore avoids violating the constitutional command.

These three approaches show that more than simple balancing between society's gain and the harm to the individual is needed to validate a regulation that destroys property value and does not compensate. The lower threshold ultimately only validates the exercise of the police power; a regulation that created more harm than good could not "advance" any public purpose.<sup>69</sup>

The nature of the government action and the purposes it is to serve create distinctions between regulations. The closer a regulation comes to protecting core communal values, the more likely it is to be upheld. At some point, the action to be curbed

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<sup>66</sup> *Tulk v. Muxhay*, 2 Phil. 774, 41 Eng.Rep. 1143 (Ch. 1848).

<sup>67</sup> *Pennsylvania Coal*, 260 U.S. at 415; but see, not needed if preventing harm, *Id.* at 422 (Brandeis, J. dissenting). 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 *Penn Central*, Justice Brennan did. From Brennan's description of the landmark preservation act's purpose, one wonders how a railroad company, which gains from travel, could ever have objected. *Id.* at 109.

<sup>68</sup> *Compare*, *Jackson v. Rosenbaum Co.*, 260 U.S. 22, 30 (1922): "The exercise of [police power without compensation is] . . . warranted in some cases by what we may call the average reciprocity of advantage, although the advantages may not be equal in the particular case." with Epstein, *supra* note 41, at 22-23 (nothing protected by takings clause if consider overall benefits of citizenship for reciprocity).

<sup>69</sup> See Large, *supra* note 47, at 24-25 (exercise of police power not valid if public good less than private harm); Stoebuck, *supra* note 33, at 1065-66. See also, Wiseman, *supra* note 50, at 438 (deprivation of property without due process is separate evil).



almost becomes a theft of those values if allowed to continue.<sup>70</sup> Alternatively, economic sensibility justifies and even demands regulation under the reciprocity analysis.<sup>71</sup> Modern case law adds a key refinement. Private property has always been subject to the law of the land and a landowner's reasonable expectations about the use of his or her land must recognize this.

## 2. *Modern Refinements: "Balancing" into an Expectations Spotlight*

None of the cases or approaches discussed above have been overruled. They remain in the jurisprudential quiver of arrows. Additional cases further distilled when a regulation would be protected from challenge because of its social utility or be found to have gone "too far," that is, to have created a "diminution of value" sufficient to comprise a taking. A flurry of activity by the Supreme Court in 1987 did not greatly disturb the existent trends.<sup>72</sup> Two crucial elements underscore and explain current jurisprudence: the nature of the governmental action and the nature of the private party's expectations about the disturbed "rights."

By the late 1970s, the test more openly balanced several factors in the "too far" equation when income-producing property was at issue: 1) the character of the governmental action; 2) the economic impact of the regulation on the claimant; and 3) the interference, if any, with investment-backed expectations.<sup>73</sup>

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<sup>70</sup> See Michelman, *supra* note 31, at 1236-37. Compare, Sax, *Liberating the Public Trust Doctrine from Its Historical Shackles*, 14 U.C. DAVIS L. REV. 185, 187-88 (1980) (hereinafter "Sax, Trust") (public trust prevents "destabilizing disappointment of expectations held in common but without formal recognition of title").

<sup>71</sup> See Wittman, *supra* note 57, at 74-76 (all gain from the French Quarter being designated a historic district even if individual might net more if singly allowed to violate norms).

<sup>72</sup> See, e.g., Sax, 1987 *supra* note 40; and Michelman, *supra* note 32. But see, Laitos, *supra* note 31, at 1-4 (may signal "resurrection" of clause as check on government). The most recent Supreme Court case continued a deferential Commerce Clause "rational basis" test in upholding the Rails-to-Trails Act. See *Presault v. Interstate Commerce Comm'n.*, U.S. , 110 S.Ct. at 914 (1990).

<sup>73</sup> *Penn Central Trans. Co. v. New York City*, 438 U.S. 104. See generally, 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: *Goldblatt v. Hempstead*, 369 U.S. 540, 594-95 (1962), emphasized a due process analysis and *Agins v. City of Tiburon*, 447 U.S. 255 (1979), emphasized a two prong analysis, due process and economic impact.

When a regulation impacts many in differing ways, requiring voluntary sales to reach regulatory objectives would entail high transaction costs. A multifaceted test, which requires judgmental balancing, is more appropriate than relying only on sales, or its equivalent, namely, automatic compensation.<sup>74</sup>

The first element of the test looks at the character of the governmental action. This may include aspects of the harm and detriment calculus as well as the public use test; the crucial question is the importance of the proposed police power exercise to the public welfare.<sup>75</sup> Some exigencies such as national security can override private concerns totally.<sup>76</sup> Most goals are less all-consuming and need closer analysis to balance the strength of the police power assertion with the remaining two elements.<sup>77</sup>

The second element considers how great a diminution in value need be borne without compensation. The rote response is that governmental 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. Two main techniques guide these exercises: conceptual severance, which considers each strand of property rights individually<sup>78</sup> and physical unity, which rejects reifying "rights" and clings to a literally earth-based definition.<sup>79</sup>

Some decisions forcefully reject conceptual severance and examine the property as a whole to see whether unaffected

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<sup>74</sup> Merrill, *supra* note 32, at 13, 43.

<sup>75</sup> *Penn Central*, 438 U.S. at 133, n.30. The case may have increased acceptable goals. See, Sax, *Some Thoughts on the Decline of Private Property*, 58 WASH. L. REV. 481, 483 (1983) (must *continue* to confer benefit on neighbors); Costonis, *supra* note 32, at 480, n. 65 (broadened concept of harm to "fundamentally change the test's content").

<sup>76</sup> *United States v. Caltex, Inc.* 344 U.S. 149 (1952) (security and imminent peril justify noncompensated destruction); *United States v. Eureka Mining Co.*, 357 U.S. 155 (1958) (gold mines closed in during war). These cases may be remnants of King's "emergency" prerogatives, rather than exceptions to compensation under eminent domain. See Stoebuck, *supra* note 33, at 1067. Compare, *First English Evangelical Lutheran Church of Glendale v. Los Angeles*, 482 U.S. 304 (1987) (Stevens, J. dissenting)(ability of government to restrict access to hazardous areas).

<sup>77</sup> Costonis, *supra* note 32, at 499-501 (vary government's burden of proof and level of scrutiny; "[n]ot all police power values are equal.")

<sup>78</sup> Radin, *supra* note 41, at 1674-78 (court in *Loretto* and *Nollan* began to adopt conceptual severance).

<sup>79</sup> See, Michelman, *supra* note 32, at 1614-16 ("conceptual severance" regards property right as estate effected rather than the "layman's thing," that is, "the conventionally demarcated land parcel with its improvements containing Grand Central Terminal").

portions retain any significant value.<sup>80</sup> A taking would exist only if total loss of use occurs, defined as leaving the property with no "economically viable"<sup>81</sup> or "reasonable beneficial"<sup>82</sup> use. Nevertheless, results may differ by attaching the word "property" to differing physical attributes of land.<sup>83</sup> Therefore, this element as traditionally stated is less than satisfactory as a sole determinant of liability.<sup>84</sup> It may, however, be useful in other respects if uniformly applied to help spread risks. 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.

The last element 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 party complaining had no reasonable expectation of benefiting from the newly prohibited action, the regulation could not be a taking. To some extent, this conclusion parallels the rationale that no person could maintain a nuisance. Because the law never entitled one to continue a nuisance, the activity could be outlawed without liability. It also resembles another method to find no taking occurred: declare the element of value that was interfered with to have never been a part of the private estate in the first place.

Refusing to recognize the disturbed interest as property skirts the Fifth Amendment's interdict. The 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

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<sup>80</sup> *Andrus v. Allard*, 444 U.S. 51, 66 (1979). *Penn Central*, 438 U.S. at 130 ("Taking jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been abrogated."); *but see Keystone*, 480 U.S. at 517 (Rehnquist, C.J. dissenting).

<sup>81</sup> *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980)

<sup>82</sup> *Penn Central*, 438 U.S. at 138.

<sup>83</sup> *Compare*, *Mountain States Legal Foundation v. Clark*, 740 F.2d 792 (10th Cir. 1984) (vacated), *with* the opinion on rehearing, *Mountain States Legal Foundation v. Hodel*, 799 F.2d 1423 (10th Cir. 1986), *cert. den.* 480 U.S. 951 (1987). Judge Seth's original opinion treated each blade of grass eaten by a wild horse as separate "property taken." *En banc*, the Tenth Circuit examined 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 when horses would use substantially all well's water).

<sup>84</sup> *See*, *McFerrin & Whitman*, *supra* note 10 at 655 (presence of alternative surface uses could preclude takings under "no other use" reading).

powers, no objection can be lodged.<sup>85</sup> No reasonable investment backed expectation could purportedly include values subject to the servitude.<sup>86</sup>

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. Notice and a hearing may be necessary before changes could 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.<sup>87</sup> Therefore, investment as opposed to expectation may be the primary focus of Fifth Amendment analysis,<sup>88</sup> at least when homes or other property imbued with personal emotion are not at issue.<sup>89</sup>

### C. *The 1986 Supreme Court Term*

In 1987, several Supreme Court decisions considered regulatory takings.<sup>90</sup> In most respects, the court did not alter prior

<sup>85</sup> *United States v. Cherokee Nation of Oklahoma*, 480 U.S. 700, 704 (1987) (no taking if exercise right to improve navigation); *United States v. Willow River Co.*, 325 U.S. 499, 502 (1945); *United States v. Twin City Power Co.*, 350 U.S. 222 (1956) (just compensation for riparian lands did not include value of location near navigable river); *Compare*, *Traux v. Corrigan*, 257 U.S. 312, 342-43 (1921) (Holmes, J. dissenting) (too much test circumvented by calling non-property). *See generally*, Morreale, *Federal Powers in Western Waters: The Navigation Power and the Rule of No Compensation*, 3 NAT. RES. J. 1 (1963); Note, *Determining the Parameters of the Navigation Servitude Doctrine*, 34 VAND. L. REV. 461 (1981).

<sup>86</sup> There might be limits to its reach, Michelman, *Property as a Constitutional Right*, 38 WASH. & LEE L. REV. 1097, 1106-08 (1981) (*Kaiser Aetna* protects fundamental right to exclude).

<sup>87</sup> *See, e.g.*, *Bowen v. Gillard*, 480 U.S. 904 (1987) (method of computing welfare benefits); *Allied-General Nuclear Services v. U.S.*, 839 F. 2d 1572 (Fed. Cir. 1988) (license); *Burglin v. Morton*, 527 F.2d 486, 488 (9th Cir. 1975) (pending lease applications); *Opinion of the Justices*, 337 Mass 786, 151 N.E.2d 475 (1958) (dower and curtesy). *Cf.*, VER is not "mere expectation of a right to mine," 30 C.F.R. 5761.5(a) (1979) (emphasis added). For classification of rights to use public lands, *see, generally*, Laitos & Westfall, *supra* note 17, and Barkeley & Albert, *supra* note 26.

<sup>88</sup> *See*, Note (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).

<sup>89</sup> *Hodel v. Irving*, 481 U.S. 704, 716 (1987) (no investment backed expectation in being able to will their property, but still protect right). *See also*, *St. Bartholomew's Church v. City of New York*, 728 F.Supp. 958, 966 (S.D.N.Y. 1989) (restriction a taking if it would prevent or seriously interfere with carrying out of charitable purpose).

<sup>90</sup> *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987); *Keystone Bituminous*

law extensively. Some members of the court are willing to actively review legislative choices, but when strict environmental protection as opposed to environmental enhancement was at issue, deference to legislatively imposed solutions continued. The importance of the police power objective remains a distinguishing characteristic.<sup>91</sup>

Two of the decisions did restrain government regulation. One case, *Hodel v. Irving*,<sup>92</sup> almost re-adopted Holmes's proclivity to examine what fragment of property the regulation affects and to declare a taking if it totally thwarts the limited interest. Property management was inefficient because of the large numbers of co-tenants in Native American allotments. To rectify the problem, a statute targeted certain small undivided interests and made them impossible to devise or pass by descent; they would escheat to the tribe to consolidate title.<sup>93</sup> Justice O'Connor did not view the property's usefulness to be land *per se*; she considered each small undivided interest individually and found each too greatly devalued. The statute disturbed a fun-

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Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1987); *Hodel v. Irving*, 481 U.S. 704; and *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304. For additional takings case, see *FCC v. Florida Power Corp.*, 480 U.S. 245 (1987). See also, *California Coastal Commission v. Granite Rock*, 480 U.S. 572 (1987) (state environmental controls on unpatented mining claims).

<sup>91</sup> Available remedies changed. Prior to *First English Evangelical Lutheran Church*, if a regulation was a taking, an injured party could only invalidate the offending law. *San Diego Gas & Electric v. City of San Diego*, 450 U.S. 621 (1981) (Brennan, J. dissenting). The landowner received no compensation for the time during which the unconstitutional law demanded compliance. *First English Evangelical Lutheran Church* recognized possible 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 319.

Agencies might become less aggressive in protecting the environment. Executive Order No. 12,630, "Government Actions and Interference with Constitutionally Protected Property Rights," 53 Fed. Reg. 8,859 (1988). This might not have been Justice Brennan's desired end. What incensed the Justice earlier was that government would suffer no censure from enacting a series of blatantly unconstitutional provisions to achieve a forbidden end. *San Diego Electric Gas & Electric Co.*, 450 U.S. at 655, n. 22 (Brennan, J. dissenting). See also, *Nollan*, 483 U.S. at 849 (Stevens, J. dissenting) (Brennan's damage position conflicts with desire for regulatory flexibility in *Nollan*); and Epstein, *supra* note 41 at 28-31 (absolute liability preferred to total lack of constraints; good faith standard possible).

<sup>92</sup> 481 U.S. 704 (1987) (sole use of severed mineral estate is coal removal); compare *Pennsylvania Coal*, 260 U.S. at 414; see also *Keystone*, 480 U.S. at 514 (Rehnquist, C.J. dissenting) (adopts and argues for same severance).

<sup>93</sup> *Hodel*, 481 U.S. at 704 (1987) For background on Indian land issues, see Note, *Hodel v. Irving: The Supreme Court's Emerging Takings Analysis - A Question of How Many Pumpkin Seeds per Acre*, 18 ENVTL. L. 597, 606-613 (1988).

damental element of property: the right to dispose thereof.<sup>94</sup> *Hodel*, however, presented an unusual opportunity to engage in conceptual severance; the land already had undivided interests and the statute specifically aimed at the subdivisions.<sup>95</sup>

The second case, *Nollan v. California Coastal Comm'n*,<sup>96</sup> also does not impact government regulation as greatly as might initially appear. As a condition for a building permit, the California Coastal Commission required the Nollans to provide public access across the beach on their property to link together two public beaches. The Court second guessed governmental intent and the means chosen to achieve its ends; to uphold the regulation required a clear nexus between the evil to be avoided and the land use restraint imposed. This did not exist.<sup>97</sup> This "nexus" requirement could signal tighter control of regulatory power, but for the fact that the agency actually sought an easement for public use across residential property.

The *Nollan* case reveals three circumstances that previously commanded solicitude for private interests. First, the Court believed something close to physical occupation of land would occur, a result declared to be a taking no matter how trivial the impact on the landowner.<sup>98</sup> An easement allows physical invasion, albeit not continual, but pursuant to a permanent right: "[t]o say the appropriation of a public easement across a landowner's premises does not constitute a taking of a property interest but rather . . . 'a mere restriction on its use' . . . is to use words in a manner that deprives them of all their ordinary meaning."<sup>99</sup>

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<sup>94</sup> *Hodel*, 481 U.S. at 716. The Justices disagree on whether the opinion affects *Andrus v. Allard*, discussed *supra* at note 80. *Id.* at 718 (Brennan, J. concurring, with Blackmun and Marshall) (no); *Id.* at 719 (Scalia, J. concurring with Rehnquist and Powell) (limits prior case to its facts).

<sup>95</sup> The Rails-to-Trails Act similarly targeted a subdivision of property rights; a reversionary interest could be burdened by changing the condition that makes it possessory. In a recent attack on the statute, three Justices found that if the Act displaces state-defined property rights, a taking may occur. *Preseault v. Interstate Commerce Commission*, \_\_\_ U.S. \_\_\_, 110 S. Ct. 914 (1990) (O'Connor, J., concurring). See also, *National Wildlife Federation v. ICC*, 850 F.2d at 704-06 (postponement of reversion indefinitely may be a taking). On the meaning of *Hodel v. Irving*, see also, Note, *supra* note 93, at 631, ("occupation" could result because tribe received control).

<sup>96</sup> *Nollan*, 483 U.S. 825 (1987).

<sup>97</sup> *Id.* at 831.

<sup>98</sup> *Loretto*, 458 U.S. at 430-35 (permanent physical occupation a taking while temporary invasion not always one).

<sup>99</sup> *Nollan*, 483 U.S. at 831. This extends "occupation" to more than filling space

The remaining two circumstances limiting *Nollan's* impact are the type of property involved and the setting in which the regulation was imposed. The Coastal Commission demanded the access right as a condition to grant a building permit for a residence. Therefore, the case relates more to subdivision exaction cases than traditional restraint of use cases. Compulsory land dedication always required a stronger connection between governmental demand and social concern.<sup>100</sup> Finally, the condition affected a residence, not a business already open to invitees.<sup>101</sup> A home receives greater protection than more fungible investment property.<sup>102</sup> The case does not necessarily indicate a new regime of enhanced scrutiny for all regulatory actions.<sup>103</sup>

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permanently:

We think a "permanent physical occupation" has occurred, for purposes of that rule, where individuals are given a permanent and continuous right to pass to and fro, so that the real property may continuously be traversed, even though no particular individual is permitted to station himself permanently upon the premises.

*Nollan*, 483 U.S. at 832. See also, *Seawall Associates v. New York City*, 74 N.Y. 2d 92, 542 N.E. 2d 1059, 544 N.Y.S. 2d 542 (1989) (prohibiting demolition of single room occupancy structures plus rent control constitutes physical taking). *Pinewood Estates v. Barnegat Township*, 898 F.2d 347 (3d Cir. 1980) (lack of vacancy decontrol transforms rent control law to permanent possessory transfer). But see, *ABN 51st Partners v. City of New York*, 724 F. Supp. 1142, 1153-57 (S.D. N.Y. 1989) (low rental set-asides not physical taking).

<sup>100</sup> See, e.g., *Costonis*, *supra* note 32, at 492-93. But see, *Epstein*, *supra* note 41, at 39-40 (Justice Scalia did not go far enough in importing unconstitutional conditions theory into eminent domain analysis). Cf., *W.J. Jones Insurance Trust v. Fort Smith*, 731 F. Supp. 912 (W.D. Ark. 1990) (cannot condition permit on easement grant unless change of land use would increase traffic).

<sup>101</sup> See, e.g., *PruneYard*, 447 U.S. 74 (no taking when law required shopping center to be open to free speech). *Oregon v. Cargill*, 786 P.2d 209 (Or. 1990) (no taking when petition gatherers use store's sidewalk). Cf., *Lorretto*, 458 U.S. at 436. ("[A]n owner suffers a special kind of injury when a *stranger* directly invades and occupies the owner's property.") (emphasis in original). But see, *Wiseman*, *supra* note 50 at 455 (*PruneYard* more accurately a rejection of a remedy, not lack of taking).

<sup>102</sup> See, e.g., *Radin*, *supra* note 41, at 1687-89 (1988) (property imbued with person entitled to greater protection); *Costonis*, *supra* note 32, at 468-69 (dominion right upgrades property protection for noneconomic values); *Rodgers*, *Bringing People Back: Toward A Comprehensive Theory of Taking in Natural Resources Law*, 10 *ECOL. L. Q.* 205, 208 (1982) (substantive due process limits legislative power for core "human" property). But see, *Lorretto*, 458 U.S. at 439 (fact property held for rental irrelevant).

<sup>103</sup> In *Preseault*, the Supreme Court continues a "rational relationship" test under the Commerce Clause for an act that would result in easement acquisition. *Preseault*, \_\_\_ U.S. \_\_\_, 110 S. Ct. 914 (1990) (legislation involves trade-offs). Traditional doctrine on reviewing regulation requires some review of legislative means but does not require fine tuning. *Hadacheck*, 239 U.S. at 413-14 (regulation need not exactly fit

The final important takings case of the 1986 term emphasizes that a delicate balancing of interests remains on center stage. *Keystone Bituminous Coal Co. v. DeBenedictis*<sup>104</sup> contains circumstances as closely analogous to *Pennsylvania Coal Co. v. Mahon*<sup>105</sup> as possible. Both cases appraised Pennsylvania statutes requiring coal to remain underground to prevent subsidence of private residences. Both involved parties who owned severed mineral estates.<sup>106</sup> The holdings, however, were anything but identical: the 1987 court found no taking where the 1922 court had 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, the majority found a clearer public purpose in the second statute.<sup>107</sup> The dissent details the similarities between the two statutes and is correct in categorizing any literal distinction as flawed.<sup>108</sup> But to come to that conclusion is not to fault the majority's result. Societal perceptions about the problems addressed are more important than the literal wording of the statute. In the sixty-five year interim, environmental issues have changed the context to Brandeis's vision rather than that of Holmes: the problem is not simply that of one private residence versus one private coal mine. Government must be able to act to protect the environment, including avoiding externalities of activities such as mining.<sup>109</sup>

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conditions or be the least harsh); *compare, Mugler*, 123 U.S. at 661:

If . . . a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured by fundamental law, it is the duty of the courts to so adjudge. . . .

Modern cases also allowed review. *Agins*, 447 U.S. at 260 (taking of particular property occurs by zoning "if the ordinance does not substantially advance legitimate state interests.'). For an argument that *Nollan* represents a more vigorous approach, see, e.g., Laitos, *supra* note 31. See also, *Crowe-New Jersey 32 Ltd. v. Township of Clinton*, 718 F.Supp. 378, 384-85 (D. N.J. 1989) (*Nollan* a substantive due process test).

<sup>104</sup> 480 U.S. 470 (1987).

<sup>105</sup> 260 U.S. 393 (1922).

<sup>106</sup> For general information on relationships between mineral and surface owners, see *Mansfield, supra* note 39.

<sup>107</sup> *Keystone*, 480 U.S. at 492 (prevents actions similar to public nuisance). See, *Rose, Mahon Reconstructed: Why the Takings Issue is Still a Muddle*, 57 S. CAL. L. REV. 561, 580 (1984) (act has no broad public purpose and is redistributive).

<sup>108</sup> *Keystone*, 480 U.S. at 511 (Rehnquist, C.J. dissenting).

<sup>109</sup> Udall, *supra* note 5. Note, *Keystone Bituminous Coal v. BeBenedictis*, 7 UCLA J. ENVTL. L. & POL'Y 185 (1988) (environmental concern tips balance for public).



The second revision to the calculus was what property the regulation affected. Holmes had narrowly viewed the impacted interest as being the right to mine coal without liability; the statute took a distinct negative easement that the coal company had in the surface.<sup>110</sup> The modern court acknowledged that a severed mineral estate existed but refused to either separate the support estate from the general mineral estate or to segment the latter into individual tons of coal. The question was whether the regulation was so great an interference that it rendered the mineral producing property as a whole uneconomical.<sup>111</sup> The property as a whole was the coal owned by the complaining companies.

Despite the fact that *Keystone* did not change the general wording of the takings tests, the majority opinion has a greater symbolic import than mere continuation of prior practice. It sanctions what an earlier case had not allowed. The dissent reveals some members of the Court 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.<sup>112</sup> Nevertheless, the 1986 term emphasized that regulation clearly aimed at the prevention of activity that would degrade the collective environment is not a taking.<sup>113</sup>

A comparison of the two cases in which controls on development were at issue underscores the importance of the police power objective. *Nollan*, unlike *Keystone*, dealt with a discrete easement that could efficiently be purchased. A strong concurrence in the recent case of *Preseault v. Interstate Commerce Commission*<sup>114</sup> emphasized that appropriation of a public ease-

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<sup>110</sup> See, e.g., *Costonis*, *supra* note 32, at 536, n. 291 (extinguishing negative easement equivalent to physical invasion).

<sup>111</sup> *Keystone*, 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." The Court did not address the possibility of alternative uses for the surface.

<sup>112</sup> *Id.* at 517-28 (Rehnquist, C.J. dissenting). The battle between Brandeis and Holmes continues, with Rehnquist taking up the Holmesian banner of conceptual severance. Rehnquist, like Holmes, would allow regulation if reciprocity or nuisance is involved.

<sup>113</sup> *Cf.*, *Laitos*, *supra* note 31, at 1-37 (*Keystone* takes nuisance exception to extreme and could render land-use and environmental regulations immune to challenge).

<sup>114</sup> *Preseault*, \_\_\_ U.S. \_\_\_, 110 S.Ct. 914 (1990).

ment would be a taking and require compensation.<sup>115</sup> *Keystone*, conversely, dealt with both diffuse harm and diffuse benefits.<sup>116</sup> 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.

### III. "TAKINGS TEST" WOULD NOT GENERALLY PROTECT INDUSTRY

#### A. *General Expectations Include Regulation*

It has been alleged that a "takings test" for valid existing rights would be more lenient than other definitions.<sup>117</sup> It would not, however, preserve many private claims. Mining may fairly easily be precluded without compensation. First, the public purpose behind the SMCRA prohibitions is strong.<sup>118</sup> Second, the coal developer's expectations must include the almost universal need to regulate the mining industry for environmental protection. The key to the second factor is the reasonableness of any investment-backed expectations the coal owner might have about development.

This component of the takings test harks back to Jeremy Bentham's definition of property as the expectation of deriving this or that advantage due to control over a thing.<sup>119</sup> It reflects

<sup>115</sup> *Id.* Justice O'Connor, joined by Justices Scalia and Kennedy, wrote to express a disagreement with the Second Circuit's approach, which might have allowed easement acquisition without compensation.

<sup>116</sup> This creates a need to protect "public rights", see, e.g., Sax, *Takings, Private Property, and Public Rights*, 81 YALE L. J. 149, 151 (1971) (hereinafter Sax II); and further increasing transaction costs of voluntary acquisition, Merrill, *supra* note 32. See also, Myers, *supra* note 73, at 558 (essential compromises of *Penn Central* intact).

<sup>117</sup> See, e.g., McFerrin & Whitman, *supra* note 10 at 664 (flexibility may allow administrators to allow more mining); Barkeley & Albert, *supra* note 26, at 9-53 (Whitney Benefits considered taking without any permit, existing mining, or substantial commitment); The Stearns Co., 110 I.B.L.A. 345, 359 n. 7 (Burski, J. dissenting) (good faith-all permits more restrictive).

<sup>118</sup> SMCRA § 101, 30 U.S.C. § 1201 (1982). See also McFerrin & Whitman, *supra* note 10, at 653 (mining prohibition in limited areas not arbitrary on record before Congress); McGinley & Barrett, *supra* note 7, at 435 (spillover analysis upholds SMCRA).

<sup>119</sup> J. BENTHAM, THEORY OF LEGISLATION 112-13 (4th ed. 1882):

The idea of property consists in an established expectation . . . . 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.

Blackstone's acknowledgment that the laws of the land limit individual dominion of property.<sup>120</sup> In some shorthands, too great an impingement on investment-backed expectations becomes the *sine qua non* of a taking.<sup>121</sup> One influential article on takings aptly summarized the interrelationship of the "diminution of value test" with expectations:

[T]he test poses not 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 crystalized, investment-backed expectation.<sup>122</sup>

What is "reasonable" to anticipate about property is crucial.

The first important premise is that the anticipation of yet unrealized profit 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.<sup>123</sup>

Public needs may justify regulation that interferes with such aims even if the power to profit from property "fortunately

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<sup>120</sup> W. Blackstone, *supra* note 2, at 2.

<sup>121</sup> See *State of Utah v Andrus*, 488 F.Supp. 995, 1011 (D. Utah 1979).

<sup>122</sup> Michelman, *supra* note 31, at 1233. The use of "crystalline" to describe expectations presages a later article, which labels "hard-edged rules" as "crystals." These purportedly form the basis of property law and Bentham-required expectations, but the article traces how they often are riddled by exceptions and equitable doctrines to become "mud." Law then turns again to "crystals" by positing new rules. Rose, *supra* note 25. Professor Rose ascribes the progression to "rule overload": sensible rules in one situation are inappropriately used in another and thus forced to change. *Id.* at 600. Both types of doctrines can serve social goals and assist predictability. Compare, Kennedy, *Form and Substance in Private Law Adjudication* 89 HARV. L. REV. 1685, 1773-74 (1976) ("rules" control "bad men," while "standards" promote goodness and altruism).

<sup>123</sup> *Andrus v. Allard*, 444 U. S. at 66. See also, *Florida Rock*, 791 F.2d at 903:

By 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 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.

situated [is] a right usually incident to property.”<sup>124</sup> Not all “economic advantages” are property rights: “only those economic advantages are ‘rights’ which have the law back of them, and only when they are so recognized may courts compel others to forbear from interfering with them or to compensate for their invasion.”<sup>125</sup>

The preceding statement implies that it is unreasonable to expect protection until the court says the questioned interest is one entitled to protection. This circularity leads to the proverbial chicken and egg dilemma in some situations. Moreover, legal classification can also defy the logic of the market; elements deemed “non-property” by courts do enter into private pricing decisions.<sup>126</sup>

If profit is to come from mining, however, the regulatory climate over such activity would determine whether a reasonable expectation of development could exist and then be subject to interference. If minerals were acquired knowing that restraints were imminent, the imposition of the restraints should not trigger compensation.<sup>127</sup> A direct analogy exists: value traceable to the

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<sup>124</sup> *Block*, 256 U.S. at 157 (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) and *Florida Power Corp.*, 480 U.S. at 245 (regulation of charges for access to utility poles). See also, *Sax I*, *supra* note 33, at 54-60 (protecting economic advantage neither consistent with early history of compensation principle or contemporaneous history of amendment); but see, *Stoebuck*, *supra* note 33, at 1075-77 (*Sax* fails to recognize the tyranny he describes is destruction of property).

<sup>125</sup> *United States v. Willow River Co.*, 324 U.S. 499, 502 (1945). For an extension of this view in the rate-making arena, see *Duquesne Light Co. v. Barash*, \_\_\_\_ U.S. \_\_\_\_, 109 S. Ct. 609 (1989) (may exclude from rate base investments reasonable when made but not actually used to provide power).

<sup>126</sup> For example, private ranches gain value from being base lands for permits under the Taylor Grazing Act. 43 U.S.C. § 315b (1982) (so-called “Section 3 permits”); *United States v. Fuller*, 409 U.S. at 490 (buyer of fee lands considers use of federal lands for fair market value). The Supreme Court, however, in a five to four decision, found Congress had clearly stated that no private expectation could attach to use of the lands. *United States v. Fuller*, 409 U.S. at 489 (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). See also, *Bigelow v. Michigan Dept. Of Natural Resources*, 727 F. Supp. 346, 352-53 (W.D. Mich. 1989) (commercial fishing permits gave no right to fish superior to Indian treaty rights).

<sup>127</sup> *Cf.*, *Izaak Walton League*, 353 F. Supp. at 710-11 (leases acquired after pres-

improvement for which the property is being acquired is not included in the value of the property "taken" when just compensation is computed.<sup>128</sup> The United States also should not pay for a regulation's affect on minerals acquired knowing that they never could be produced. This is not to say that once a VER is established, it could not be transferred. The initial acquisition or investments for mining must represent a *bona fide* expectation of mining. The so-called developer should not simply be gambling on payment from the government rather than planning production.

Mining has been regulated extensively over the years.<sup>129</sup> The past sixty-five years shows increased regulation and therefore decreased expectation of freedom to develop.<sup>130</sup> In fact, an unpatented mining claim, traditionally deemed a form of property, recently was classified as a mere right to a stream of income, thus testing regulation of it by the less demanding standard used for economic matters.<sup>131</sup> Federal statutes such as the Federal Land Policy and Management Act<sup>132</sup> underscore the new status of mining as a regulated industry: it clearly amended the Mining

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ervation intent clear) *Compare*, Michelman, *supra* note 31, at 1238 (land acquisition knowing scenic easement soon to be enforced). *But see*, Blume & Rubinfeld, *Compensation for Takings: An Economic Analysis*, 72 CALIF. L. REV. 569, 587 (1984) (seller, not purchaser, injured if regulatory risk lowered purchase price), and Nollan, 483 U.S. at 833-34 n. 2 (prior owners "transferred their full property rights in conveying the lot.") The last statement presumes, perhaps, that the price had not been discounted because if it had, the real party in interest would be the sellers.

<sup>128</sup> 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").

<sup>129</sup> As noted by the Interior Board of Land Appeals, some states have been active since 1906. *Valley Camp*, 112 I.B.L.A. at 34. *See also*, Dernbach, *Pennsylvania's Implementation of the Surface Mining Control and Reclamation Act: An Assessment of How "Cooperative Federalism" can Make State Regulatory Programs More Effective*, 19 U. MICH. J. L. REF. 903, 909-11, 920-21 (1986) (history of regulation in Pennsylvania).

<sup>130</sup> *Compare*, defense of Uranium Mill Tailings Radiation Control Act, *Atlas Corporation v. United States*, 895 F.2d 745, 758 (Fed.Cir. 1990) (those doing business in regulated field cannot object if amendments buttress legislative end). Wetlands regulation may create another genre of property for which a party might not reasonably anticipate free development rights. *Crow-New Jersey 32 Ltd.*, 718 F.Supp. at 384. *See generally*, Blumm & Zahela, *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).

<sup>131</sup> *United States v. Locke*, 471 U.S. 84, 105 (1985); criticized in, Barkeley & Albert, *supra* note 26, at 9-14 - 9-18.

<sup>132</sup> Pub. L. No. 94-579, 90 Stat. 2744 (1976) (codified as 43 U.S.C. §§ 1701-1784 (1982)).

Law of 1872 to allow the BLM to regulate mining to prevent "unnecessary or undue degradation."<sup>133</sup> Although the current Supreme Court has been characterized as pro-development, cases on mining did not enter this computation.<sup>134</sup>

Mining may no longer be a "bully" destroying surface values with no compunction. Whether this past characterization of the industry was correct or responsive to society's needs is immaterial: it colored takings analysis.<sup>135</sup> It also changed relationships between mineral and surface owners in many situations, either by judicial effort or legislation.<sup>136</sup> For example, some states passed statutes requiring payment for damages to the surface estate caused by oil and gas operations that were previously

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<sup>133</sup> FLPMA § 302, 43 U.S.C. § 1732(b) (1982). On the public lands, the state and federal government may regulate for environmental protection. *California Coastal Comm'n v. Granite Rock*, 480 U.S. at 572. One commentator claimed this case changed mining from a preferred use to simply one among many. Leshy, *Granite Rock and the State's Influence over Federal Land Use*, 18 ENVTL. L. 99, 125-26 (1988). The change, however, came much earlier. See generally, Mansfield, *supra* note 39. Mining has been a suspect category unless oil shale had been 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 NEPA). For some reason, the courts seemed adamant that oil shale development would save the western world.

<sup>134</sup> Levy & Glickman, *Judicial Activism and Restraint in the Supreme Court's Environmental Law Decisions*, 42 VAND. L. REV. 343, 345 n. 5 (1989). Similarly, for all the concern about statutes that target distinct property interests, *Dormant Mineral Acts* were upheld. *Texaco, Inc. v. Short*, 454 U.S. 516 (1982).

<sup>135</sup> *Cf.*, 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.

For the "text" as applied to coal mining, consider Eichbaum and Buente, *The Land Restoration Provisions of the Surface Mining Control and Reclamation Act: Constitutional Considerations*, 4 HARV. ENVTL. L. REV. 227 (1980).

<sup>136</sup> See, generally, Mansfield, *supra* note 39; Dycus, *Legislative Clarification of the Correlative Rights of Surface and Mineral Owners*, 33 VAND. L. REV. 871, 915-16 (1980) (possibly no reasonable expectation to destroy or substantially interfere with surface). Compare, response to allegation that Uranium Mill Tailings Radiation Control Act 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.*, 745 F.2d at 758.

within an implied or express easement of use already purchased. These have withstood taking challenges, being characterized as mere rearrangements of tort liability<sup>137</sup> or minor adjustments in a bundle of rights.<sup>138</sup>

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 had heretofore believed was available for development is quite simply untenable."<sup>139</sup> Justice Holmes provided a similar caution: "Such words as 'right' are a constant solicitation to fallacy".<sup>140</sup> Public needs color and modify private actions.

The almost all-encompassing requirements of varied environmental laws fetters the expectation of coal development.<sup>141</sup> Additionally, mining creates difficulties such as pollution and subsidence that resemble the subject matter of traditional nuisance law. Because of both the history and nature of the prob-

<sup>137</sup> *Murphy v. Amoco Production Co.*, 729 F.2d 552, 558 (8th Cir. 1984); *Davis Oil Co. v. Cloud*, 766 P.2d 1347 (Okla. 1986). See also, Lowe, *Development in Non-Regulatory Oil and Gas Law: Issues of the Eighties*, 35 OIL & GAS LAW INST. 1, 21-39 (1984) (constitutional).

<sup>138</sup> *Murphy*, 729 F.2d at 557 ("Amoco's right to not compensate Murphy for unavoidable damage to Murphy's surface estate, if indeed it is 'property' at all, amounts to a minor strand in the full bundle of rights which constitutes Amoco's mineral estate").

<sup>139</sup> *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*, 239 U.S. at 410.

His views in this case, which involved externalities from a brickyard, differ greatly from his traditional Lockean stance in the rent control cases. *Block*, 256 U.S. at 158-170 (dissent, McKenna J.). See *Bender*, *supra* note 41, at 765, n. 122 (McKenna's atypical alignment in *Hadacheck* because wealthy suburbanites objected to private uses).

<sup>140</sup> *Jackman*, 260 U.S. at 31. See also, *PruneYard*, 447 U.S. as 93 (Marshall, J. concurring) (due process does not require a freezing of common law property rights). See also, *Murphy*, 729 F.2d at 558 (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.*, 766 P.2d at 1350. See generally, Sax, *The Limits of Private Rights in Public Waters*, 19 ENVTL. L. 473, 476-79 (1989) (historical changes in water needs).

<sup>141</sup> *Laitos*, *supra* note 31, at 1-1 - 1-3; *McFerrin & Whitman*, *supra* note 10, at 660 (broad expectations test would find no right to continue negative externalities).

lems addressed, regulatory action may embody a balancing of harms and detriments similar to nuisance resolution.<sup>142</sup> Refusing to find a taking if mining is precluded after the balancing would be easier to justify based on private expectations than uncompensated preclusion of other activities.

### B. *An Alternative Analysis: Risks Spreading*

Despite the general status of expectations about mining, failure to compensate when mining is totally denied may challenge a sense of fairness. The diminution of value and balancing tests have the fulcrum of reasonable expectation, but they also have a quantitative side. This dual nature allows compliance with some intuitive idea of fairness; so long as the affected party still retains a thing of value or was forewarned that all might not be as desired, the burden of forwarding the public good will not be overly onerous. Concern with spreading the risks and costs of regulation is central to Fifth Amendment analysis.

One approach to takings previously noted was to manipulate the definition of the "property" the regulation affects. Standard responses and some tentative definitions may offer a way to temper the denial of valid existing rights status in some instances.<sup>143</sup> A takings-oriented definition of VER could employ this technique for distributional fairness.

Passage of a mining prohibition alone does not trigger a taking.<sup>144</sup> Takings analysis has required a case by case application of site specific questions. Generally, courts speak of the totality of the regulated operation.<sup>145</sup> The simple fact that some mineral

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<sup>142</sup> *Willowbrook Mining Co. v. Commonwealth of Pennsylvania*, 499 A.2d 2 (1985) (no entry or occupation of property but "adjust[s] benefits and burdens of economic life to promote common goods" quoting, *Penn Centra*, 438 U.S. at 124). *Van Alostyne, Taking or Damaging by Police Power: The Search for Inverse Condemnation Criteria*, 44 So. CAL. L. REV. 1, 13-15 (1970) (regulatory objectives similar to nuisance control more easily accepted).

<sup>143</sup> Professor Costonis offers a different conception of what "too much" means. A regulation would go "to far" either because the due process analysis showed no linkage, or "if the burden it imposes is greater than necessary to implement legislative goals previously adjudged fair in principle under the due-process-takings analysis." Costonis, *supra* note 32, at 496.

<sup>144</sup> *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 not a taking; must prevent "economically viable use").

<sup>145</sup> *See, e.g.*, *Skaw v. United States*, 740 F.2d 932, 940 (Fed. Cir. 1984) (need specific review of development by non-prohibited methods and of whether remaining



might be unmineable would not render the regulation unconstitutional. The Supreme Court's recent opinion may have taken this one level further.

In *Keystone*, the Supreme Court correctly rejected extreme hairsplitting. Each ton of coal was not an individual piece of property that the mining ban could render valueless.<sup>146</sup> Even without governmental requirements, no mine plan, no matter how efficient, anticipates recovery of all the resource.<sup>147</sup> If, however, the restriction so transforms mine development that it cannot proceed at all profitably, then a taking could occur under classic diminution of value theory unless one of two situations were present. First, the restriction must not be a part and parcel of the interest at the time of creation.<sup>148</sup> Second, non-mining uses must not be relevant.<sup>149</sup>

While looking at the particular impact of the regulation on the operation of a complainant has some appeal, it allows for disparate treatment. If two coal companies have adjacent holdings, a prohibition that forbids mining identical tonnage could be a taking and require compensation in one instance but not be a taking for the second company if mining its larger deposit remained profitable.<sup>150</sup> Naturally, if surface use is also considered, additional variables abound.<sup>151</sup>

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mineral could be mined); *Whitney Benefits, Inc. v. United States*, 752 F. 2d 1554, 1559 (Fed. Cir. 1985) (possible to show specific tract taken by SMCRA prohibitions); *Whitney Benefits, Inc. v. United States*, 18 Cl. Ct. 394 (Oct. 13, 1984) (compensation ordered but appeal pending).

<sup>146</sup> *Keystone*, 480 U.S. at 475. See also, *Id.* at 498 (2% of total coal which must remain in place is not "separate parcel of property").

<sup>147</sup> 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, Eichbaum and Buente, *supra* note 135, at 249; Lear, *Multiple Mineral Development Conflicts: An Armageddon in Simultaneous Mineral Operations?*, 28 ROCKY MOUNTAIN MIN. L. INST. 79, 81-89 (1988). Longwall mining is an underground mining technique referred to as a fully extractive technique. See, 1988 Proposal, 53 Fed. Reg. 52,374. The Supreme Court rejected its classification as "fully" extractive. *Keystone*, 480 U.S. at 475.

<sup>148</sup> See, *supra* notes 85-86.

<sup>149</sup> An alternative rescue has been hinted at by the Supreme Court: nonmining viable uses for the land could preclude compensation. See, *Hodel v. Virginia Surface Mining*, 452 U.S. at 296, n. 37.

<sup>150</sup> Cf., Large, *supra* note 47, at 43-44 (treatment in many wetlands regulation cases would differ for "similar but not identical harm" when one landowner's total property was restricted but the other retained some developable acreage). See also, Whitman & McFerrin, *supra* note 10 at 662 (state could find individual economic analysis required).

<sup>151</sup> *Florida Rock Industries*, 791 F.2d at 902 ("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.").

To ascertain whether the statute caused a taking, the *Keystone* court did not mention surface use, but also did not necessarily limit itself to impact on individual mines; it may be proper to examine all the coal the companies owned.<sup>152</sup> 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.<sup>153</sup> If holdings have not been rearranged purposefully, however, disparate treatment might not be an evil but a valid mechanism for spreading costs.<sup>154</sup> This is especially true if "property" could be broadened beyond the particular regulated mine-site. Multiple holdings assures that some return on investment can occur even if some investments do not provide the profit desired.<sup>155</sup> A similar return-sensitive approach has been 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.<sup>156</sup> 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.<sup>157</sup>

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<sup>152</sup> *Keystone*, 480 U.S. at 496. Because the Court is commenting on the total lack of evidence, no positive determination of what evidence the court would require is possible. Importantly, the Court did not mention the possibility of non-mining uses of the property. This analysis will similarly ignore that complication.

<sup>153</sup> *Compare, Pennsylvania Coal*, 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, *McGinley & Barrett*, *supra* note 7, at 437-39 (to give more rights to one who owns less shows how absurd it is to apply diminution of value to uses).

<sup>154</sup> *Cf.*, *Rose-Ackerman*, *supra* note 30, at 1702-1705 (compensate if all wealth is taken; individual might receive compensation when corporation would not).

<sup>155</sup> *Blume & Rubinfeld*, *supra* note 127, at 606-12 (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 possibility and collectively become self-insurance). Naturally, even with other resources, noncompensated 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 II*, *supra* note 116, at 177-186. See also, *Fischel & 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).

<sup>156</sup> *Cogar*, 371 S.E.2d at 326.

<sup>157</sup> *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. Environmental regulation could ignore artificial boundaries of ownership. Precedent for this exists for oil and gas development. Protection of correlative rights demands occasional exceptions from spacing requirements to enable each owner to recover his or her fair share of the pool, but no exception locations are available to develop small tracts voluntarily severed from larger ones.<sup>158</sup> Divided ownership of a mineral deposit, however, may have occurred from other than voluntary division of a larger holding.

To use the entire deposit as a focus for profitability, each owner of a part would need to share in the whole. For oil and gas, this is not difficult. Because of the fugaceous character of the resource once a reservoir is tapped, unitization is common. Owners share in both the costs and proceeds of production. Most producing states allow for forced unitization in the interest of conservation; more may ultimately be recovered from orderly development than from a race to individually capture the greatest amount of the common resource.<sup>159</sup>

Solid minerals are different. Unitization is thus less frequent<sup>160</sup> and not justified as a method to increase each individual's share from joint effort. Two strong policy goals, however, could justify the rearrangement of private shares: minerals need to be recovered and certain collective values must be protected. Naturally, forced joinder will multiply production difficulties if participants' priorities, financial capabilities, and engineering preferences differ.<sup>161</sup>

These proposals to allow a VER under takings analysis for some mineral owners but not others or to force joint development may seem to denigrate independent entrepreneurial spirit or violate fundamental notions that similarly situated persons

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<sup>158</sup> Texas Rule 37 procedures. TEX. ADMIN. CODE tit. 37, § 3.37(g) (1984).

<sup>159</sup> See, *Champlin Refining Co. v. Corporation Commission*, 286 U.S. 210 (1932) (no party may commit waste); *Northwest Central Pipeline v. State Corp. Commission of Kansas*, (1989) (regulations within state powers); *Gilmore v. Oil & Gas Commission*, 92 P. 2d 773 (Wyo. 1982).

<sup>160</sup> *But see*, statute providing for forced unitization of small tracts of uranium, N.M. STAT. ANN. 69-9 (1978).

<sup>161</sup> See, Adams, *Unitization of Solid Mineral Properties*, 28 ROCKY MT. MIN. L. INST. 733, 737 (1978) (avoid unitization if possible).

must be similarly treated. To compensate or find a VER for 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.

The optimal arrangement would be for the nation to clarify its priorities and agree to raise enough taxes to implement them with compensation for all parties affected.<sup>162</sup> Resolving our environmental dilemmas in this manner is an unlikely scenario. The existing law, therefore, must be developed to best reach necessary collective goals with the least disruption of the private sphere. Some degree of wealth distribution is an inevitable result of all regulation.

#### IV. STRONG EXPECTATION TEST

Generalized expectation tests make it difficult to find a taking of a mining interest. Manipulation of the "property affected" could create a VER for small companies but not for large companies. Therefore, "takings" jurisprudence itself would not give much substance to the expressed desire to exempt more than existing mines from the prohibition against mining in SMCRA's Section 522(e).<sup>163</sup> It does, however, signal how to ascertain valid existing rights: employ an individualized test to see if subjective "strong expectations" existed. Proof of this expectation, however, must be by objective evidence. This test, either alone or in conjunction with the special rules for small operators, would best meet congressional objectives.<sup>164</sup>

##### A. *Objective Evidence of Expectations*

Expectation analysis under takings law is sensitive to whether an existing mine or a new prospect is to be regulated. Actual

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<sup>162</sup> Cf., 1988 Proposal, 53 Fed. Reg. 52,374 (1988) (pursuant to available and proposed authority, Interior will seek to acquire VER in federally protected areas if development is imminent).

<sup>163</sup> SMCRA § 522(e), 30 U.S.C. § 1272(e) (1988). Because the prohibition "excepts" existing mines and is "subject to valid existing rights," the latter must be broader or superfluous.

<sup>164</sup> To a certain extent, the supplemental rule may be unnecessary. If the affected property was the sole asset of a bona fide mining company, it might per force have "strong expectations" of developing it.

mining operations would influence expectations on both sides of the equation. On one hand, the public would have a less reasonable expectation that its values in undisturbed land would continue. Actual mining evidences effort and expenditure toward a specified end. Regulation may curb existing uses,<sup>165</sup> but they tend to receive more solicitude than interests that have never been developed.

If a regulation does not disturb existing uses, it does not endanger disbursed efforts and appears less objectionable.<sup>166</sup> Holding property without development for long periods could indicate speculation, which in itself acknowledges risks about future events.<sup>167</sup> To regulate lands held as speculative reserves more strictly than developed parcels would be less disruptive of settled expectations.<sup>168</sup> When a person uses property in a certain manner, a specific expectation may attach to continuing that use, which has now become an identifiable part of that property's attributes.<sup>169</sup> Moreover, the expectation could be judged from objective evidence.

However, investments short of actual mining may also be a barometer of reasonable expectations. If a regulation directly impacts specific expenditures that would not have been made if the regulation was in force, direct interference with investment backed expectations is shown. The scenario in *Kaiser Aetna* cried

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<sup>165</sup> See, e.g., *Hadacheck*, 239 U.S. at 394; *Goldblatt*, 369 U.S. at 590; and discussion in *Penn Central*, 438 U.S. at 125-27. See also, *State of Utah*, 486 F. Supp. at 1004 (may regulate more stringently for wilderness when no existent uses); *St. Bartholomew's Church*, 728 F.Supp. at 966 (law contemplates continued use as in past).

<sup>166</sup> *Penn Central*, 438 U.S. at 136. *But see*:

It is, of course, irrelevant that appellees interfered with or destroyed property rights that *Penn Central* had not yet physically used. The Fifth Amendment must be applied with "reference to the uses for which the property is suitable, having regard to the existing business or wants of the community, or such as may be reasonably expected in the immediate future." *Boom Co. v. Patterson*, 98 U.S. 403, 408 (1879) (emphasis added [by Rehnquist])

*Id.* at 143 n. 6 (Rehnquist, J. dissenting).

However, adding "reasonability" and "immediacy" to protected expected future uses forces examination of the existing regulatory and economic climate.

<sup>167</sup> *Izaak Walton League v. St. Clair*, 353 F. Supp. 698 (D. Minn. 1973), *reversed on other grounds*, 497 F.2d 849 (8th Cir. 1974) *cert. denied*, 419 U.S. 1009 (lengthy failure to develop showed mineral holdings speculative).

<sup>168</sup> *City of Berkeley v. Superior Ct.*, 26 Cal.3d 515, 606 P.2d 362, 162 Cal.Rptr. 327, *cert. denied*, 449 U.S. 840 (1980) (public trust imposed on unfilled tracts in private hands, not on filled tracts).

<sup>169</sup> Michelman, *supra* note 31, at 1233.

out for the private party's relief: the developer would not have created the harbor if it could not recoup the expenditure by controlling access.<sup>170</sup>

What must be required is individual expectation about developing the particular coal for which valid existing right status is sought. Substantial financial or legal commitments either looking toward or relying upon mining the deposit would objectify strong expectations as to the particular deposit. Permit applications made in good faith would definitely suffice.<sup>171</sup>

Mere ownership of coal or ownership coupled with the right to engage in a certain type of mining would not be sufficient to meet this strong expectation test.<sup>172</sup> All unsevered coal - that is, coal owned in conjunction with the surface - would meet the test.<sup>173</sup> In fact, except for severances with insufficient waivers of subjacent support,<sup>174</sup> all privately owned coal would be exempted from the prohibitions.

This is not a meaningful result despite the fact that some members of Congress asserted that SMCRA did not intend to modify private rights; this simply meant that existing state law

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<sup>170</sup> *Kaiser Aetna*, 444 U.S. at 167-168, distinguished in, *PruneYard*, 447 U.S. at 84. See also, Wilkins, *supra* note 42, at 40-43 (*Kaiser Aetna* only subjective appraisal of expectations). Justice Blackmun also examined subjective intentions in *Loretto Teleprompter*, 458 U.S. at 445, (dissent) (no expectation for income from occupied space if unaware of cable when building purchased). See also, *Fallini*, 725 F. Supp. at 1122-23 (well permitted to water cattle and such use a distinct investment backed expectation).

<sup>171</sup> The 1988 Proposal indicated "good faith would be considered made if all necessary permits had been applied for prior to the date the prohibitions came into effect." 53 Fed. Reg. 5,234. However, mere cursory paper filings without supporting data and effort could be subterfuge hedges against regulation rather than actual gauges of anticipated effort. For a description of a permit process, see *Dernbach supra* note 129, at 920-27. Therefore, the filings must have been a good faith effort toward diligent development. Cf., other requirements of diligence to date rights prior to actual use or construction, *Colorado River Water Conservation District v. Denver*, 640 P.2d 1139 (Colo. 1982) (water right); 40 C.F.R. § 60.2(i) (definition of "commenced construction" for New Source Performance Standards permits under Clean Air Act).

<sup>172</sup> Legislative history interpreting "substantial legal and financial commitments" as used in § 522(a)(6) similarly rejects counting acquisition costs. H.R. REP. NO. 218, 95th Congress, 1st Sess. 95, reprinted in 1977 U.S. CODE CONG. & ADMIN. NEWS 593, 631. See, *National Wildlife Federation*, 839 F.2d at 744-48.

<sup>173</sup> Unless the proposed test anticipates express rights to mine by a particular method, which would only occur by way of a mineral deed or lease, all coal owned with the surface would be exempt from the prohibition. *But see*, *McGinley & Barrett, supra* note 7, at 441 (severance crystallizes expectations between parties but not about interference with public values).

<sup>174</sup> *Compare*, *Ball v. Island Creek Coal Co.*, 722 F. Supp. 1370, 1372 (W.D. Va. 1989) (clear and unequivocal waiver allows longwall mining); *with*, *Breeding*, 726 F. Supp. at 650 (mere severance of coal insufficient waiver).

was to determine if the threshold right to mine the coal was part of an initial "property" allocation between private parties.<sup>175</sup> The Act avowedly dealt with how to mine coal; it therefore can and must influence private development rights in regard to public values. Even with prohibitions of Section 552(e), ownership of coal remains undisturbed. The SMCRA is similar to zoning: it tells how private property may be developed to accord with overall societal needs.

The ownership and authority to mine approach would render the protections of 522(e) close to meaningless; the basic thrust of the statute was to render some lands off limits.<sup>176</sup> Conversely, limiting evidence of developmental plans to permit applications would tighten valid existing rights language beyond its traditional scope.<sup>177</sup>

### B. *Conformity with Spirit of Valid Existing Rights*

Valid existing rights language in statutes and withdrawal orders traditionally occurs when changes in federal law would impact acquisition or development of federal resources.<sup>178</sup> SMCRA's provision is not directly governed by this precedent because it does not speak to rights vis-a-vis the government, but to development rights universally.<sup>179</sup> Generalization about VER precedent is difficult.<sup>180</sup> Nevertheless, the "strong expectation" test is within the spirit of these traditional definitions.

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<sup>175</sup> E.g., "Language of 522(e) is in no way intended to affect or abrogate any previous State court decisions," H.R. REP. NO. 1522, 93rd Cong., 2nd Sess. 85 (1974). See, discussion *supra*, note 18; *NWF v. Lujan*, 733 F. Supp. at 428 (only resort to state law under SMCRA when directly mentioned).

<sup>176</sup> S. REP. NO. 128, 95th Cong., 1st Sess. 55. Cf., *Cogar*, 371 S.E.2d at 324 (construe exceptions to W. Va. statute narrowly because act designed to protect public environment). See, *National Wildlife Federation*, 839 F.2d at 752 (requires priority for non-mining uses of National Forests).

<sup>177</sup> It would transform it to vested rights under zoning cases.

<sup>178</sup> *Laitos & Westfall*, *supra* note 17, especially at 2 (legal changes hindering acquisition or unforeseen regulation burdening after acquired); *Barkeley & Albert*, *supra* note 26; *Note*, *supra* note 10.

<sup>179</sup> Therefore, it would be erroneous to protect simple "ownership" as is done in other instances of valid existing rights. Privately owned resources are exempt from new management standards applicable to federal resources under traditional valid rights usage. See, *State of Utah*, 486 F. Supp. at 1009 (access to state lands required but may restrict access to mining claim). Here, the question is not whether rights may be asserted against the federal government, but whether changes applicable to all interests should be imposed. *But see*, *Note*, *supra* note 10 at 544 (same standards as elsewhere required).

<sup>180</sup> See, e.g., Solicitor's Opinion, M-36910, Interpretation of Section 603 of the

The muddled precedent shows protecting valid existing rights serves two purposes: prevent takings and promote fairness and equity.<sup>181</sup> Takings jurisprudence provides the fulcrum of reasonable expectations for analytical purposes, but does not in itself define the VER for mining except perhaps in exceptional circumstances. The posited test does meet fairness and equity concerns. It also preserves the status quo, which is a practical gloss on VER: enable existing rights to continue but prevent the acquisition of new rights.<sup>182</sup>

Once a coal owner or lessee takes steps directly related to development, the mine itself could be viewed as part of the status quo. Well-developed case law under the National Environmental Policy Act of 1969 ("NEPA")<sup>183</sup> requires analysis of cumulative impacts, which include those from reasonably foreseeable development.<sup>184</sup> There must be some firm indication of potential development beyond mere speculation to trigger the requirement.<sup>185</sup> Similarly, after an indication of strong develop-

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Federal Land Policy and Management Act of 1976 - Bureau of Land Management Wilderness Study, 86 I.D. 89 (1979) and M-36910 (Supp.), The Bureau of Land Management Wilderness Review and Valid Existing Rights, 88 I.D. 909 (1981).

<sup>181</sup> *Cameron v. United States*, 252 U.S. 450 (1920), *Ramstad v. Hodel*, 756 F. 2d 1379, 1385 (9th Cir. 1985); *Peterson v. Dept. of Interior*, 510 F.Supp. 777, 783 (D. Utah 1981) ("unfair to encourage development of coal on federal lands, with the attendant expenditures, without giving the applicant a fair opportunity to capitalize on his investment"); *Peabody Coal v. Andrus*, 477 F.Supp. 120, 123 (D. Wyo. 1979); *Williams & Brenning*, 51 I.D. 225 (1925).

<sup>182</sup> *See, e.g., Stockley*, 260 U.S. at 544 ("purpose. . . was to save from the operation of the order claims which had been lawfully initiated, and which, upon full compliance . . . would ripen into title"); *Sierra Club v. Hodel*, 848 F.2d 1068, 1081 (10th Cir.1988) (VER language in FLPMA meant to "freeze" rights); *Louis J. Hobbs*, 77 I.D. 5 (1970); *Williams*, 51 I.D. 225; *see also*, Note, *supra* note 10 at 539 (not necessarily synonymous with takings law).

<sup>183</sup> Pub. L. No. 91-190, 83 Stat. 852 (1969) (codified as 42 U.S.C. §§ 4321-4370 (1982)).

<sup>184</sup> *See, generally, Mansfield, Through the Forest of the Onshore Oil and Gas Leasing Controversy Toward a Paradigm of Meaningful NEPA Compliance*, 24 LAND & WATER L. REV. 85, 118-22 (1989). *See also*, Council on Environmental Quality's definitions, 40 C.F.R. § 1508.7 (1989) (cumulative includes incremental impacts of action "when added to other past, present, and reasonably foreseeable future actions"); *Id.* at § 1508.27(b)(7) ("significance arises if it is reasonable to anticipate a cumulative significant impact on the environment"). *Compare*, rule of reason employed to ascertain "cumulative" hydrological impacts from existing mines, the subject mine, and "anticipated" mines, *National Wildlife Federation*, 839 F.2d at 757-59.

<sup>185</sup> The closest analogy would be *Cady v. Morton*, 527 F. 2d 786, 795 (9th Cir. 1975) (must analyze larger mine because need its coal to meet contract obligations). *See also, e.g., Sierra Club v. Marsh*, 769 F.2d at 878-80 (1st Cir. 1985) (parties heading toward defined goal of industrial park); *Save the Yaak Committee v. Block*, 840 F.2d



mental expectations, the proposed mining should be deemed part of the status quo: both public and private expectations should consider the mining as existent.

Fairness and equity require recognizing strongly crystalized expectations that are backed by reasonable investment of time or money. By firming up development plans for that particular coal, the market would have identified the best prospects for mining. Developers of that coal might not have reasonably anticipated unfettered development, but they would not have anticipated outright bans. On the public side of the equation, lands sought to be protected by the prohibitions of 522(e) for which plans were on the drawing board could not have reasonably been believed to be subject to an eleventh hour reprieve.<sup>186</sup> An objectively proven strong expectations test best balances diverse interests.

## VI. CONCLUSION

To define valid existing rights one must learn from takings jurisprudence, but temper its conclusions with equity and fairness. Because of the general state of mining regulation, a taking of mining rights is difficult because no one can expect to be free from regulation protecting core collective values. Expectations of both the mineral developer and the public, however, provide the key to valid existing rights. If a party shows a particularized "strong" expectation of development, this status quo should be preserved. The mine should be considered under the full regalia of SMCRA permit requirements, not flatly prohibited.

This test does not lend itself to mechanical application. To resolve the conflict of important rights, those of private interests

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714, 720-21 (9th Cir. 1988) (agency planned actions); *City of Davis v. Coleman*, 521 F.2d 661, 676 (9th Cir. 1975) (development sole justification for interchange).

<sup>186</sup> *Cf.*, Interior's argument that because the Act did not contemplate a person moving a mobile home to the edge of the property being mined to prohibit mining operations within 300 feet of the occupied dwelling, a "continually created VER" is justified:

To allow any person the opportunity to take extraordinary means to disrupt mining or deprive the opportunity to mine after the operator has made the substantial investments required to obtain a permit and begin operations is totally inconsistent with the *framework of protection the act gives to both operators and citizens* (emphasis added).

Preamble to Final 1983 Rules, 48 Fed. Reg. 41,312, 41,315 (1983). See also, *National Wildlife Federation*, 839 F.2d at 750.

and collective degradation, requires judgmental balancing.<sup>187</sup> A workable number of factors, however, could guide implementation. Strong expectations would be present if:

1. All necessary permits were obtained or applied for in good faith;
2. Substantial financial investments other than resource acquisition were undertaken;
3. Substantial legal commitments were made requiring mineral development from the particular property;<sup>188</sup> or
4. Other evidence of substantial efforts towards development is present.

Naturally, if the party does not have the right to develop under state law, then no permit could be granted. Ownership and a right to develop under state property law concepts would also be necessary. The Department of the Interior has the pieces of the puzzle in its various attempts to promulgate a rule; it must assemble them in a coherent package.

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<sup>187</sup> *Cf.*, Merrill, *supra* note 32, at 14.

<sup>188</sup> *See*, 30 C.F.R. § 762.5 (1989); *National Wildlife Federation*, 839 F.2d at 748 (definition may be limited to long term contracts).

