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The Enigma of Regulatory Takings

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I. INTRODUCTION

The exercise of governmental power to either take private property for public use upon payment of compensation, or alternatively, to use the police power to shift the loss onto owners of property, has produced some of the most difficult practical and theoretical issues on the American jurisprudential scene. For the practitioner, no bright line exists to predict when governmental liability might attach. Regardless of judicially admitted

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futility, disputes over which of the powers of government are being exercised propels this search for the bright line forever onward at both the federal and state levels. While attempting to establish more workable standards, Minnesota courts have provided useful insights on how the judicial power should be exercised. The exercise of judicial power occurs within the framework of a state constitution that grants independent control to each coordinate branch of government over powers falling within their respective spheres.

In marking the "bright line" on the federal level, the Holmesian dictum in *Pennsylvania Coal Co. v. Mahon*,[1] "that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking,"[2] is more of an observation about the difficulty in deciding when compensation should be paid than it is a rule capable of precise application. The Minnesota Supreme Court made a similar observation in *State ex rel. Lachtman v. Houghton*[3] when it recognized that "[t]he dividing line between restrictions which may be lawfully imposed under the police power and those which invade the rights [to just compensation] secured . . . by the constitutional provisions . . . has never been distinctly marked out, and probably cannot be."[4] In the highest courts of each level of government, the practitioner will find similar gratuitous comments expressing a certain futility in applying simple standards to the claims of clients.

Nonetheless, if making educated guesses about what courts will do remains the goal of lawyers in representing clients, a more forthright and broader analysis can contribute to a higher incidence of correct guesses. Although the legal profession aspires to define the consistency and coherence between similar but unconnected cases, this Article takes a different direction and presumes that some benefit can be derived from explaining why consistency is so elusive.

The term "regulatory taking" is broadly applied to nonphysical interferences with property rights. A taking usually occurs through the enactment of a rule or regulation under circumstances where the government must respond in eminent domain rather than avoid liability under the police power. When this is

1. 260 U.S. 393 (1922).
2. *Id.* at 415.
3. 134 Minn. 226, 158 N.W. 1017 (1916).
4. *Id.* at 230, 158 N.W. at 1019.

determined to have occurred, inverse condemnation[5] is the judicial remedy. Whether the remedy should be given will depend upon how the court rationalizes its decision. Several phenomena, some of which have only recently developed, bear upon the judicial rationalization used to decide whether the remedy is warranted.

Of immediate concern are four emerging phenomena that present some lack of clarity for practitioners, and, perhaps, the courts. This Article will attempt to describe and assess these phenomena. First, at both the federal and the state levels, appellate courts have created multiple standards to resolve regulatory takings cases.[6] Second, the bill of rights of both the Minnesota Constitution and the United States Constitution are being reinterpreted in such a way that each must be independently applied in regulatory takings cases.[7] Third, the concept of property for purposes of eminent domain liability is being enlarged, particularly by the United States Supreme Court.[8] Finally, appellate courts do not clearly and consistently define their role with respect to the other coordinate branches of government in deciding regulatory takings cases.[9] Each of these phenomena play an important part in casting shadows on the not so bright line between the threshold of government liability for a taking and the uncompensable exercise of the police power.

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5. For a definition of inverse condemnation, see *infra* note 10 and accompanying text.

6. *See, e.g.*, Keystone Bituminous Coal Ass'n v. DeBenedictus, 480 U.S. 470 (1987) (applying a two-factor test to the issue of what constitutes a taking); Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978) (using a three-part test to determine the legal effect of a regulation); Czech v. City of Blaine, 312 Minn. 535, 536, 253 N.W.2d 272, 274 (1977) (applying a standard focusing on the number of reasonable uses of the property remaining after imposing the regulation); Alevizos v. Metropolitan Airports Comm'n, 298 Minn. 471, 487, 216 N.W.2d 651, 662 (1974) (setting forth a separate standard specific to cases involving aircraft noise); *see also* Floyd B. Olson, *Stare Decisis in Public Law and Policy*, 10 HAMLINE J. PUB. L. & POL'Y 361, 370-72 (1989). The author suggests that the multiplicity of tests, factors, and standards are often created to suit the result desired, thereby obscuring the rationale in applying them. *Id.*

7. For an extremely insightful analysis of this phenomenon, see Rita C. DeMeules, *Minnesota's Variable Approach to State Constitutional Claims*, 17 WM. MITCHELL L. REV. 163 (1991). For an earlier article dealing with the independent interpretation of state constitutions, see Terrence J. Fleming & Jack Nordby, *The Minnesota Bill of Rights: "Wrapt in the Old Miasmal Mist"*, 7 HAMLINE L. REV. 51, 57-77 (1984) (exploring the power, the propriety, and the criteria in independent state interpretations of state constitutions).

8. For a complete background on this phenomenon as it applies to the concept of property in general, see MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870-1960, at 145-67 (1992) [hereinafter HORWITZ 1870-1960].

9. Olson, *supra* note 6, at 363-69.

II. The Inverse Condemnation Process in Minnesota.

Virtually all inverse condemnation actions originate by writ of mandamus to compel the governmental unit to take property as if the governmental action were to be affirmatively accomplished by a legislative declaration of the governing body. The Minnesota Supreme Court has defined inverse condemnation as "[t]he popular description of a cause of action against a governmental defendant to recover the value of property which has been taken in fact by the governmental defendant, even though no formal exercise of the power of eminent domain has been attempted by the taking agency."[10]

The function of the trial court, even though no physical damage has occurred, is to determine whether the property rights of an owner have been taken or damaged in the constitutional sense.[11] This is a matter of law for the court.[12] If the facts are undisputed and the mandamus court finds a taking, the court specifies in its order the nature, extent and date of taking.[13] The court also makes specific findings identifying the reasons supporting the takings determination.[14] If the facts are in dispute, a jury resolves the disputed facts and "the judge then rules whether the facts as found by the jury legally constitute a taking."[15]

Inverse condemnation claims against the government are frequently brought on multiple theories. In *Wilson v. Ramacher*,[16] the Minnesota Supreme Court concluded that the facts, as

10. Alevizos v. Metropolitan Airports Comm'n, 298 Minn. 471, 477, 216 N.W.2d 651, 657 (1974) (quoting Thornburg v. Port of Portland, 376 P.2d 100, 101 (Or. 1962)). The court of appeals also has stated that even without a physical taking, condemnation proceedings are required if the state's actions damage property in such a way that rises to the level of a compensable taking. *See* Fitger Brewing Co. v. State, 416 N.W.2d 200, 205 (Minn. Ct. App. 1987). In *Fitger*, however, the court ruled that if the government makes it clear that it wants to abandon a plan to take, no taking will be found. *Id.* at 208.

11. *See, e.g.*, Thomsen v. State, 284 Minn. 468, 476, 170 N.W.2d 575, 577 (1969) (remanding for findings on constitutional property damage); *see also* State v. Prow's Motel, Inc., 285 Minn. 1, 4, 171 N.W.2d 83, 84 (1969) (citing *Thomsen* and remanding for determinations of property damage in a constitutional sense).

12. *See, e.g.*, *Thomsen*, 284 Minn. at 474, 170 N.W.2d at 580; *Prow's Motel*, 285 Minn. at 4-5, 171 N.W.2d at 85.

13. *Prow's Motel*, 285 Minn. at 6-7, 171 N.W.2d at 86.

14. *Thomsen*, 284 Minn. at 474, 170 N.W.2d at 580.

15. Alevizos v. Metropolitan Airports Comm'n, 317 N.W.2d 352, 360 (Minn. 1982); *accord Thomsen*, 284 Minn. at 474, 170 N.W.2d at 580.

16. 352 N.W.2d 389 (Minn. 1984).

pleaded, alleged an invasion of private property through diversion of surface water despite the fact that the landowner could not recover on a tort theory for diversion of surface waters.[17] Though the remedy was misconceived, the court held that the plaintiff's failure to artfully plead should not prevent him from proceeding under a claim of inverse condemnation.[18] However, a petitioner is not entitled to a writ of mandamus directing inverse condemnation where other legal remedies exist.[19]

III. Standards in Takings Decisions.

Minimal research will convince even the novice practitioner that takings standards are often conflicting and confusing because they differ depending, first, on whether the Minnesota or United States Constitution is applicable and, second, on the nature of the claimed taking.

A. *Minnesota Standards.*

1. *Constitutional Provision.*

Article I, section 13 of the Minnesota Constitution provides that "[p]rivate property shall not be taken, destroyed, or damaged for public use without just compensation therefore first paid or secured."[20] The language "destroyed or damaged" was not a part of the original constitution,[21] but was added by amendment in 1896 to overrule court interpretations that denied consequential or indirect damages.[22] Nevertheless, at the

17. *Id.* at 394.

18. Specifically, the court stated that the "plaintiff should [not] be denied the right to proceed in inverse condemnation where his pleadings set out the requisite facts for a taking and plaintiff has simply neglected to supply the proper label for the remedy he seeks." *Id.* at 395.

19. *See, e.g.*, Lowry Hill Properties, Inc. v. State, 294 Minn. 510, 200 N.W.2d 295 (1972) (reversing grant of mandamus where plaintiff could resort to the remedy supplied by the state's hold-harmless agreement with its contractors); City of Rushford Village v. Darr, 389 N.W.2d 541 (Minn. Ct. App. 1986), *review denied* (Minn. Aug. 27, 1986) (reversing eminent domain proceeding and remanding case for determination of statutory damages).

20. Minn. Const. art. I, § 13.

21. Dickerman v. City of Duluth, 88 Minn. 288, 288, 92 N.W. 1119, 1119 (1903).

22. *Id. See, e.g.*, Henderson v. City of Minneapolis, 32 Minn 319, 20 N.W. 322 (1884) (holding that an action will not lie against a municipality for consequential damages to property abutting a public street caused by a lawful and proper change of an established grade); *see also* Fred L. Morrison, *An Introduction to the Minnesota Constitution*, 20 Wm. Mitchell L. Rev. 287 (1994).

turn of the century, this provision, as amended, was not considered applicable to a proper exercise of the police power.[23]

2. *Court Created Standards*

Minnesota courts have recognized compensable takings when property or its use has been lost or diminished as the result of physical appropriation or damage, zoning ordinances, dedication, interim zoning or moratoria, and historical preservation regulations. Takings, however, need not be physical or even the result of government regulation; courts have found takings as the result of airport noise, interference with air, light, or view, and the loss of access to and from property. The following sections attempt to demonstrate the complexities of judicially recognized takings in Minnesota by summarizing representative cases in each circumstance.

a. Physical Takings

Where a physical appropriation of a permanent nature results from government action, there is a taking under both the Minnesota and United States Constitutions. In *Spaeth v. City of Plymouth*,[24] the use of a private owner's property for a ponding area by government planning, even though not included in a petition to condemn, resulted in a taking cognizable in an inverse condemnation action.[25] Under this standard, "permanent" means a servitude of indefinite duration even though it may be an intermittent physical invasion.[26] Even without invasion, physical damaging of an innocent third party's property by the police in the course of apprehending a felony suspect will also require payment of just compensation.[27] The United States Supreme Court

23. *See* HAROLD F. KUMM, THE CONSTITUTION OF MINNESOTA ANNOTATED 46 (1924).

24. 344 N.W.2d 815 (Minn. 1984).

25. *Id.* at 822. *See also* Caponi v. Carlson, 392 N.W.2d 591, 595 (Minn. Ct. App. 1986) (holding that city's adoption of plans to install two storm sewer pipes which vastly increased water volume in holding pond was a taking in violation of both the state and federal constitutions).

26. *Spaeth*, 344 N.W.2d at 822. *See also* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982). In *Loretto*, the Supreme Court stated that under the Constitution "when the 'character of the governmental action' is a permanent physical occupation of property, our cases uniformly have found a taking to the extent of the occupation, without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner." *Id.* at 434-35 (citation omitted).

27. Wegner v. Milwaukee Mut. Ins. Co., 479 N.W.2d 38, 42 (Minn. 1991). The court's approach is a novel application of the state's constitutional provision on emi-

has expressed similar views to establish takings under the United States Constitution where physical intrusions have occurred.[28]

b. Land Use Regulation as a Taking

(i.) Zoning and Rezoning: The No Reasonable Use Test

The supreme court has not hesitated to hold that the refusal to grant a rezoning request will constitute a taking of property where all reasonable use of the property was disallowed.[29] In *Czech v. City of Blaine*,[30] the court concluded that "the evidence compels a finding that the public health, safety, and welfare will not be endangered by such a development on the property."[31] The issue of what constituted reasonable uses was specifically addressed in *Krahl v. Nine Mile Creek Watershed District*[32] where a flood plain ordinance did not prevent some alternate uses. The Minnesota Supreme Court found alternate uses to be reasonable where the land could have been "used agriculturally; to meet open-space requirements of the zoning code; as a density credit area; for golf driving ranges, parking lots, recreation uses, setback areas; or for any use which would not impede the flow of

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nent domain. Exactly where the decision fits into takings jurisprudence is unclear. For an in-depth discussion, see notes 124-44 and accompanying text.

28. *Compare* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982) (holding that physical occupation of property occurred in connection with cable television company's installation of cables notwithstanding that statute might be within state's police power) *with* Spaeth v. City of Plymouth, 344 N.W.2d 815 (Minn. 1984) (finding a taking that occurred through flooding) *and* Wegner v. Milwaukee Mut. Ins. Co., 479 N.W.2d 38 (Minn. 1991) (finding a compensable taking where police fired tear gas into home during the course of apprehending armed suspect).

29. *See, e.g.*, Pearce v. Village of Edina, 263 Minn. 553, 118 N.W.2d 659 (1962); Amcon Corp. v. City of Eagan, 348 N.W.2d 66 (Minn. 1984).

30. 312 Minn. 535, 253 N.W.2d 272 (1977).

31. Presumably, if the court had found endangerment, compensation would not be required, since the refusal would have been a proper exercise of the police power. *Id.* at 538, 253 N.W.2d at 275; *see, e.g.*, Holaway v. City of Pipestone, 269 N.W.2d 28, 30-31 (Minn. 1978) (stating that inverse condemnation was inappropriate where city simply rezoned land from residential to commercial after annexation because mere diminution in value is not a taking under article I, § 13 of the Minnesota Constitution); BBY Investors v. City of Maplewood, 467 N.W.2d 631, 635 (Minn. Ct. App. 1991) (holding that the trial court's denial of a conditional use permit to construct a high density apartment complex on land zoned commercial was not a taking of property); County of Wright v. Kennedy, 415 N.W.2d 728, 732 (Minn. Ct. App. 1987) (holding that owner did not show that county zoning ordinance requiring restrictions on width and pitch of roof of mobile home deprived owner of all alternative uses of property).

32. 283 N.W.2d 538, 543 (Minn. 1979) (stating that determination of whether valid encroachment regulation constitutes a taking requires balancing harm to society by unregulated use of land against the impact of the regulation upon the usability of the land).

surface waters."[33] The United States Supreme Court applied a similar "categorical rule" under the Constitution in *Lucas v. South Carolina Coastal Council*[34] that appears to be more restrictive than *Krahl* in recognizing the remaining reasonable uses.[35]

(ii.) Zoning and Rezoning: The Arbitration/Enterprise Zoning Test

According to the "arbitration/enterprise zoning" test attributed to Professor Sax[36] and applied in *McShane v. City of Faribault*,[37] a taking results if, first, an ordinance regulates for the benefit of a governmental enterprise—in this case, for the Faribault Municipal Airport—rather than as an "arbitration" of competing land uses, and, second, the landowner's property is substantially diminished in value.

Notably, *McShane* did not acknowledge a 1971 article by Professor Sax in which he repudiated his earlier views on the basis that regulation was too complex for such a test.[38] Despite the disfavored status, Minnesota has expanded the test. In *Pratt v. Department of Natural Resources*,[39] the court held that a taking may be established where "the enterprise and arbitration functions emerge from [a] . . . wild rice regulatory scheme."[40] Where both the enterprise and arbitration purposes are prominent, as opposed to the situation in *McShane*, "a taking may occur if the landowner's property is substantially diminished in value."[41]

However, not every regulation can be challenged successfully under the arbitration/enterprise test. Thus, in *Thompson v. City of Red Wing*,[42] the Minnesota Court of Appeals held that Minne-

33. *Id.* at 543.
34. 112 S. Ct. 2886 (1992).
35. *Id.* at 2893.
36. *See* Joseph L. Sax, *Takings and the Police Power*, 74 YALE L.J. 36 (1964).
37. 292 N.W.2d 253, 258 (Minn. 1980).
38. *See* Maryland Port Admin. v. Q.C. Corp., 529 A.2d 829, 833 (Md. 1987) (citing Sax, *supra* note 37, at 149 wherein Professor Sax rejects his earlier views); *see also* Floyd B. Olson, *The Arbitration/Enterprise Test in Regulatory Takings*, 12 URB., ST. AND LOC. L. NEWSL. 3 (Spring 1989) (reviewing the Sax test in the context of environmental regulation). Therein it is argued: "what the arbitration/enterprise test fails to recognize is that though a governmental enterprise might be benefitted through regulation, the purpose of regulation is to benefit the public, not some enterprise separated from the public interest." *Id.* at 11.
39. 309 N.W.2d 767 (Minn. 1981).
40. *Id.* at 774; *see also McShane*, 292 N.W.2d at 257.
41. *Pratt*, 309 N.W.2d at 774.
42. 455 N.W.2d 512 (Minn. Ct. App. 1990).

sota Statute section 307.08(2) which prohibits destruction, mutilation, injury or removal of human burials was not regulation for a governmental enterprise.[43] According to the court, "regulations for the purpose of historic preservation do not constitute enterprise functions."[44] Moreover, property owners must show a substantial and measurable decline in market value as a result of the regulations in order to show diminution of value.[45] To decide whether the diminution is "definite and measurable," a court may determine whether there exists a market to be diminished. If there is no demand, there is no diminution.

Finally, in *Spaeth v. City of Plymouth*,[46] the Minnesota Supreme Court clarified, to some degree, when the test was applicable. The arbitration/enterprise test "applies only where government has allegedly taken property by regulating property use and not where, as here, government has physically appropriated property."[47] In *Penn Central Transportation Co. v. New York City*,[48] the United States Supreme Court also considered this test, and similarly refused to find that historical preservation regulations constituted a governmental enterprise.

(3) Dedications as a Taking: The Reasonably Related Test

In *Collis v. City of Bloomington*,[49] the Minnesota Supreme Court required a reasonable relationship between the exactions in a subdivision and the municipality's need for land by dedication on the plat. The court followed the rationale applied by the Wisconsin Supreme Court in *Jordon v. Village of Menomonee Falls*[50] which distinguished subdivision controls from other takings by viewing the subdivision control exactions as a business regulation required for development.[51]

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43. *Id.* at 517.

44. *Id.*

45. *Keenan v. International Falls-Koochiching County Airport Zoning Bd.*, 357 N.W.2d 397, 399 (Minn. Ct. App. 1984). The *Keenan* court, addressing an airport zoning ordinance, mixed the standards applicable to zoning regulations with the standards applicable to nonregulatory noise interferences in the use of property. *See also* Alevizos v. Metropolitan Airports Comm'n, 298 Minn. 471, 216 N.W.2d 651 (1974).

46. 344 N.W.2d 815 (Minn. 1984).

47. *Id.* at 821.

48. 438 U.S. 104, 138 (1978).

49. 310 Minn. 5, 17, 246 N.W.2d 19, 26 (1976).

50. 137 N.W.2d 442 (Wis. 1966).

51. *Id.* at 449-50.

The "reasonably related" test is one of four standards courts apply to determine whether a dedication rises to the level of a taking and should be considered in comparison with the other three. First, the "uniquely attributable" test was set forth in *Pioneer Trust & Savings Bank v. Village of Mount Prospect.*[52] This approach notes that reasonable statutory requests for streets and public grounds are based upon the theory that the developer of a subdivision may be required to incur costs specifically and uniquely attributable to its activities that would otherwise be cast upon the public.[53] Second, the "rational nexus" test is set out in *Land/Vest Properties, Inc, v. Town of Plainfield.*[54] Where offsite improvements can be properly required, the subdivision can be compelled to bear only the portion of the cost that bears a rational nexus to the needs created by, and the benefits conferred upon the subdivision.[55] Finally, the "essential nexus" test was applied by the Supreme Court in *Nollan v. California Coastal Commission.*[56] This test holds that conditioning a land owner's building permit upon his granting an easement is a lawful land use regulation if it substantially furthers governmental purposes that justify denial of the permit.

(4) Interim Zoning and Moratoria

Under Minnesota state law, interim ordinances are permitted to "regulate, restrict or prohibit any use, development, or subdivision" if a municipality is conducting or has authorized the conducting of a study, or has held or scheduled a hearing to consider amendments to its comprehensive plan or official controls.[57] The Minnesota Supreme Court established the "authority to adopt moratorium ordinances of limited duration provided they are enacted in good faith and without discrimination."[58] In *Woodbury Place Partners v. City of Woodbury*[59] the Minne-

52. 176 N.E.2d 799, 801 (Ill. 1961).

53. *Id.*; *see also* R.G. Dunbar, Inc. v. Toledo Plan Comm'n, 367 N.E.2d 1193, 1196 (Ohio Ct. App. 1976) (stating if a subdivision regulation is within statutory grant of power to municipality and if burden upon subdivision is specifically and uniquely attributable to its activities, the regulation is permissible).

54. 379 A.2d 200, 201 (N.H. 1977).

55. *Id.*

56. 483 U.S. 825, 837 (1987).

57. MINN. STAT. § 462.355, subd. 4 (1992).

58. *See* Almquist v. Town of Marshan, 308 Minn. 52, 64, 245 N.W.2d 819, 825 (1976).

59. 492 N.W.2d 258 (Minn. Ct. App. 1992).

sota Court of Appeals held that the municipality's two-year moratorium did not constitute a categorical taking, even where the parties stipulated that during the period the owners were denied all economically viable use of their land.[60] This decision was rendered despite claims that Article V of the United States Constitution had been violated and that *Lucas v. South Carolina Coastal Council*[61] and *First English Evangelical Lutheran Church v. County of Los Angeles*[62] required a determination that a categorical taking had occurred.[63] Instead, the court of appeals applied the "three factor inquiry"[64] applied in *Penn Central*,[65] and remanded the case to the district court to determine whether the moratorium effected a compensable taking under that test.[66]

(5) Historical Preservation

State ex rel. Powderly v. Erickson[67] presented the issue of whether row houses in the City of Red Wing were a protectable resource under the Minnesota Environmental Rights Act.[68] The opinion cited *Penn Central*[69] for the proposition that historical preservation ordinances "do not effect a taking of property even though the value of the property is diminished."[70] Justice Wahl, writing for the court, had some misgivings and suggested that it "would seem to be more fair and more efficient" if the government were to initiate condemnation proceedings.[71] Thus, she stated, "[w]here control or acquisition of property is for the benefit of the many, it makes sense that the cost of the control or acquisition should be borne by all of the taxpayers and not fall on the few directly affected."[72]

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60. *Id.* at 262.

61. 112 S. Ct. 2886 (1992).

62. 482 U.S. 304 (1987).

63. *Id.* at 305.

64. Woodbury Place Partners v. City of Woodbury, 492 N.W.2d 258, 263 (Minn. Ct. App. 1992).

65. Penn Cent. Trans. Co. v. New York City, 438 U.S. 104 (1978).

66. *Woodbury Place Partners*, 492 N.W.2d at 263.

67. 285 N.W.2d 84 (Minn. 1979).

68. *Id.* at 87-88 (referring to the Minnesota Environmental Rights Act set out in MINN. STAT. § 116B.02, subd. 4 (1992)).

69. Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104 (1978).

70. *Erickson*, 285 N.W.2d at 90 (citing *Penn Cent. Transp. Co.*, 438 U.S. at 134).

71. *Id.*

72. State *ex rel.* Powderly v. Erickson, 285 N.W.2d 84, 90-91 (Minn. 1979).

c. *Nonphysical Nonregulatory Takings*

Although Minnesota courts cite both physical takings and land use takings cases to support decisions regarding nonphysical, nonregulatory takings, this category of government actions is analyzed under its own separate tests.

(1) Airport Noise

Aircraft noise, in and around airports, has been a source of major litigation throughout the United States[73] and seems to invite analysis of airport cases under the arbitration/enterprise test adopted in *McShane v. City of Fairbault.*[74] It is, however, an invitation that should be rejected. The appropriate analysis was suggested in *City of Mankato v. Hilgers,*[75] a case involving the acquisition of a navigation easement. According to the court, "[t]he invasions of . . . property rights . . . are not the result of use regulations imposed by the ordinance but of the actual operation of the airport."[76] Thus, *McShane* was held not applicable to airport noise cases.[77] Instead, the test articulated in *Alevizos v. Metropolitan Airports Commission*[78] applied.

In *Alevizos I,* the supreme court rejected the use of nuisance and trespass theories for aircraft noise intrusions, adopting instead, the use of inverse condemnation as the theory for the case.[79] In so ruling, the court required that there be: (a) a "direct and substantial invasion" of property rights of such a magnitude that the owner is "deprived of the practical enjoyment of the property," and (b) "that the invasion results in a definite and measurable diminution of the market value of the property."[80] To establish invasions of property rights, a claimant must show

73. *See, e.g.*, City of DeKalb v. Town of Cortland, 599 N.E.2d 153, 155 (Ill. App. Ct. 1992); Fitzgarrald v. City of Iowa City, 492 N.W.2d 659, 664 (Iowa 1992); Offen v. County Council, 625 A.2d 424, 432-33 (Md. Ct. Spec. App. 1993); Curtis Inv. Co. v. Zoning Hearing Bd., 592 A.2d 813, 814 (Pa. Commw. Ct. 1991).

74. 292 N.W.2d 253, 258 (Minn. 1980).

75. 313 N.W.2d 610, 613 (Minn. 1981).

76. *Id.* at 613.

77. *McShane,* 292 N.W.2d at 256 (stating that a variance would be neither adequate nor appropriate relief in response to the effect of the airport zoning regulations).

78. 298 Minn. 471, 487, 216 N.W.2d 651, 662 (1974) [hereinafter *Alevizos I*]. *See also* Ario v. Metropolitan Airports Comm'n, 367 N.W.2d 509 (Minn. 1985); Alevizos v. Metropolitan Airports Comm'n, 317 N.W.2d 352 (Minn. 1982) [hereinafter *Alevizos II*]; Alevizos v. Metropolitan Airports Comm'n, 452 N.W.2d 492, 497-98 (Minn. Ct. App. 1990) [hereinafter *Alevizos III*].

79. *Alevizos I,* 216 N.W.2d at 662.

80. *Id.*

that (a) the invasions are "not of an occasional nature," (b) are "repeated and aggravated," and (c) there is a "reasonable probability" that they will continue.[81] This test is most effectively analyzed under the "highly unusual facts" of *Thomsen v. State.*[82] The *Thomsen* court,[83] considered whether the noise, vibration, light or fumes caused by vehicular traffic constituted a taking in an inverse condemnation action.[84] The case raises the issue of the applicability of the *Alevizos I* test to vehicular traffic noise.[85]

(2) Interference with Air, Light and View

In *Haeussler v. Braun,*[86] no taking was found where noise barriers were alleged to have interfered with the adjacent owner's air, light and view.[87] The court stated that "[t]he implied easements for light, air, and view are a limited interest in property, subservient to the public right to travel on the roadway,"[88] and concluded that "[i]t is only when the light, air, and view over a public street are obstructed by improper street uses that an additional servitude is deemed to be placed upon these implied easements and a taking can be found."[89] The court found that the abutting landowners were benefitted by the barriers.[90] However, owners were found not to have benefitted where a skyway connecting a municipal parking ramp to a central skyway system interferes with an implied easement of air, light and view.[91]

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81. *Id.*

82. 284 Minn. 468, 469-70, 170 N.W.2d 575, 577 (1969) (finding that the state highway department's construction of a highway and passing within 10 feet of bedroom and a wire fence denied plaintiff access to the highway).

83. *Id.* The facts of *Thomsen* were such that no physical taking occurred, but an altered route put a highway within 10 feet of a house. *Id.*

84. *Id.* at 473, 170 N.W.2d at 579. *See also* State v. Prow's Motel, Inc., 285 Minn. 1, 4-5, 171 N.W.2d 83, 85 (1969).

85. *See Alevizos I,* 298 Minn. 471, 487, 216 N.W.2d 651, 662 (1974).

86. 314 N.W.2d 4 (Minn. 1981) (comparing the applicability of the *Alevizos I* test for noise cases with street use and the invasion of property rights of adjacent owners).

87. *Id.* at 9.

88. *Id.* at 7.

89. *Id.* at 8.

90. *Id.* at 9.

91. Castor v. City of Minneapolis, 429 N.W.2d 244, 246 (Minn. 1988). Note, however, that the court of appeals held it to be a proper use. *See* Castor v. City of Minneapolis, 415 N.W.2d 739, 743 (Minn. Ct. App. 1987).

(3) Access Takings

The taking of access to and from property has been compensable by inverse condemnation as a result of the Minnesota decision in *Hendrickson v. State*.[92] The right is to have "reasonably convenient and suitable access to the main thoroughfare" in at least one direction.[93] Numerous cases have followed this rule.[94]

B. Federal Standards

1. Constitutional Provision

The Fifth Amendment to the United States Constitution provides that private property shall not be "taken for public use without just compensation."[95] The language "destroyed or damaged," which appears in the Minnesota Constitution,[96] is absent from its federal counterpart. A comparison of federal and state court decisions shows that this distinction has produced significantly different results.[97]

2. Court Created Standards

The United States Supreme Court has considered takings within an equally diverse collection of circumstances, and has articulated an evolving body of standards by which takings claims are considered.

a. Physical Takings

When owners of private property are compelled to suffer physical invasion or occupation of their property, a taking occurs. In *Lorretto v. Teleprompter Manhatten CATV Corp.*,[98] a New York statute required a landlord to allow a cable television company to install its equipment on his property for a charge of not more than the one-dollar payment which was determined to be reasonable by a state commission.[99] The United States Supreme Court,

92. 267 Minn. 436, 445, 127 N.W.2d 165, 172 (1964).

93. *Id.* at 446, 127 N.W.2d at 173.

94. One of the most frequently cited cases in this area is State v. Gannons, Inc., 275 Minn. 14, 19, 145 N.W.2d 321, 326 (1966). *See also* Johnson Bros. Grocery, v. State Dep't of Highways, 304 Minn. 75, 77, 229 N.W.2d 504, 505 (1975); Bulletin Publish. Corp. v. City of Cottage Grove, 379 N.W.2d 685, 687 (Minn. Ct. App. 1986).

95. U.S. CONST. amend. V.

96. MINN. CONST. art. 1, § 13.

97. *See Alevizos I*, 298 Minn. 471, 487, 216 N.W.2d 651, 662 (1974).

98. 458 U.S. 419 (1982).

99. *Id.* at 421. *See also* N.Y. EXEC. LAW § 828(1) (McKinney 1981-82).

looking to the character of the governmental action, held that under Article V of the Constitution there is a taking regardless of whether the action achieves an important public benefit and imposes only minimal economic impact on the owner.[100]

b. Land Use Regulation as a Taking

(1) The Two-Factor Test

This test, adopted in *Agins v. Tiburon*,[101] was applied in a facial challenge to the Pennsylvania Subsidence Act[102] in *Keystone Bituminous Coal Ass'n v. DeBenedictis*.[103] Under this view, a land use regulation can amount to a taking if: (a) it "does not substantially advance legitimate state interests," *or* (b) it denies an owner of the "economically viable use" of land.[104] The Subsidence Act, like the Kohler Act[105] applied in *Pennsylvania Coal Co. v. Mahon*,[106] prohibited the mining of property under the surface rights of another. Aside from the fact that one case involved bituminous coal[107] while the other involved anthracite coal they are strikingly similar.[108] Their results, however, are markedly different. The Supreme Court, in *Keystone*, concluded that a taking under the two-factor test had not occurred because the owners had not claimed that the Act made it "commercially impracticable" to continue mining operations.[109] Only two percent of the coal in place (approximately twenty-seven million tons) was affected and no evidence was produced to show the percentage of loss to the "support estate."[110]

(2) The Three-Factor Test

Adopted in *Penn Central Transportation Co. v. New York City*,[111] this test arose as a result of New York City's efforts to apply its

100. *Lorretto*, 458 U.S. at 421.
101. 447 U.S. 255 (1980).
102. PA. STAT. ANN., tit. 52, § 1406.1-.21 (Supp. 1993).
103. 480 U.S. 470 (1987).
104. *Id.* at 485.
105. PA. STAT. ANN., tit. 52, §§ 661-71 (1966).
106. 260 U.S. 393 (1922) (holding that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking).
107. 480 U.S. at 478.
108. 260 U.S. at 412.
109. Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 495-96 (1987).
110. *Id.* at 471-72.
111. 438 U.S. 104 (1978).

historic preservation law to the Penn Central Station.[112] The Supreme Court reviewed its earlier cases and concluded that takings actions are "essentially ad hoc, factual inquiries."[113] To accommodate the uniqueness of specific claims, the Court set forth a three-factor test that focuses on: (a) the economic impact of the regulation on the claimant; (b) the extent to which the regulation has interfered with distinct investment backed expectations; and, (c) the character of the governmental action.[114]

The difficulty in applying the two-factor and three-factor tests was exemplified in *Parranto Bros. v. City of New Brighton*[115] where the Minnesota Court of Appeals analyzed a takings claim under both the *Keystone* and *Penn Central* standards. The *Parranto* court observed that "[w]hile both the *Agins* [(*Keystone*)] test and the 3-part *Connelly* [(*Penn Central*)] test were applied by the Supreme Court last term, it is unclear which circumstances dictate the use of one test or the other."[116]

(3) The Essential Nexus Test

In *Nollan v. California Coastal Commission*,[117] the Supreme Court declared a permit condition to be a taking where, in an opinion considered too restrictive by the dissent,[118] the essential nexus could not be established between the regulation and legitimate state interests.[119] Thus, the Court held that the dedication of an easement that would have allowed public access to the beach as a condition for building a large residence on the California coastline constituted a taking.[120]

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112. *Id.* at 104.

113. *Id.* at 124.

114. *Id.*

115. 425 N.W.2d 585 (Minn. Ct. App. 1988), *review denied* (Minn. July 28, 1988).

116. *Id.* at 591.

117. 483 U.S. 825 (1987).

118. *Id.* at 843 (Brennan & Marshall, JJ., dissenting); *Id.* at 866 (Blackmun & Stevens, JJ., dissenting).

119. *Id.* at 825-26.

120. *Id.* at 841-42. *But see* Collis v. City of Bloomington, 310 Minn. 5, 246 N.W.2d 19, 20 (1976) (authorizing a municipality to require dedication of land or payment of fees by state statute is within the scope of enabling legislation and not a taking without just compensation).

(4) *Modification of the Two-Factor Test*

In *Lucas v. South Carolina Coastal Council*,[121] the Supreme Court reviewed a case in which the state Beachfront Management Act[122] prevented the owner of two residential lots from building homes on a South Carolina barrier reef island.[123] The Supreme Court concluded that "we have found categorical treatment appropriate . . . where regulation denies all economically *beneficial or productive use of land.*"[124] Whether the addition of the words "beneficial or productive" actually alters the *Keystone* test is unclear. On remand, the lower court was to decide the state law question of whether common law property principles would have prevented the construction of any "habitable or productive" improvements on the beach.[125] The Court emphasized, however, that although the legislature deemed such uses as inconsistent with the public interest, this fact could not be considered on remand.[126]

C. *The Wegner Standard*

The question of how to apply standards to determine when just compensation is paid for takings may appear to be mere guesswork for practitioners who enter the arena of regulatory takings for the first time. Equally frustrating is the government lawyer's task of advising clients as to what differentiates a compensable taking from a noncompensable exercise of the police power under eminent domain. On one side, practitioners will find categorical rules which are applied without regard to the public purpose or use issue. In these cases either physical or title invasions or total diminutions of value or uses must be clear. On the other extreme, equity is the general approach of the courts.

121. 112 S. Ct. 2886 (1992). *Compare id. with* Krahl v. Nine Mile Creek Watershed Dist., 283 N.W.2d 538, 543 (Minn. 1979) (regulating of floodplain encroachment by riparian owners is a sufficient use that prevents a finding of a taking where the harm posed to society by lack of regulation outweighs impact of regulation on usability of the land).

122. S.C. CODE ANN. § 48-39-290(A) (Law. Co-op. 1994).

123. *Lucas*, 112 S. Ct. at 2889.

124. *Id.* at 2893 (emphasis added). *See also* Agins v. Tiburon, 447 U.S. 255, 260 (1980); Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 495 (1987).

125. 112 S. Ct at 2901.

126. *Id.* at 2901. The Court stated that South Carolina must identify "background principles" of nuisance and property law that prohibit the uses intended in the property as presently found in order to claim that the Act does not constitute a taking. *Id.* at 2901-02.

While "mere diminution in value" cannot be the basis for a taking claim, the three-factor test of *Penn Central* injects the element of fairness, or a noncategorical approach, into the decision.[127] The efforts of both the state and federal appellate courts to give definition to what may be an indefinable threshold between the police power and eminent domain have yielded only profound confusion for practitioners. The real bases for many of these decisions may simply be an unarticulated sense of fairness or justice that is shrouded in a cloud of paraphrased quotes from unreconciled state and federal decisions.

Recent examples that illustrate the difficulty in deciding these cases can be found in *Wegner v. Milwaukee Mutual Insurance Co.*[128] and *McGovern v. City of Minneapolis.*[129] In *Wegner*, the Minneapolis police department severely damaged a house into which a suspected felon had fled.[130] The city denied Wegner's claim for $71,000 in damages.[131] Wegner then sought recovery against her insurance carrier, who paid $28,006, and was subrogated to the claims of Wegner against the city to the extent of its payments.[132] Both the insurance carrier and the City brought motions for summary judgment after Wegner sought recovery from a claimed trespass and taking under article I, section 13 of the Minnesota Constitution.[133] A partial summary judgment was granted in favor of the city by the district court on the taking issue.[134] The court of appeals held that although there was a taking under the state constitution, it was noncompensable under the doctrine of public necessity.[135] In rejecting the defense of public necessity, the Minnesota Supreme Court concluded that "in situations where an innocent third party's property is taken, damaged or destroyed by the police in the course of apprehending a suspect, . . . the municipality . . .

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

128. 479 N.W.2d 38 (Minn. 1991).

129. 480 N.W.2d 121 (Minn. Ct. App. 1992) *review denied* (Minn. Feb. 27, 1992).

130. *Wegner*, 479 N.W.2d at 38.

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

135. *Wegner*, 479 N.W.2d at 39-40. *But see* Pletan v. Gaines, 494 N.W.2d 38 (Minn. 1992) (reinforcing public necessity doctrine by extending immunity to a police officer and the officer's municipality where a child was killed during a high speed chase).

[must] compensate the innocent party for the resulting damages."[136]

Wegner is both anomalous and instructive. Although the supreme court analyzed the case under a "plain meaning" application of article I, section 13 of the Minnesota Constitution, it simultaneously "agree[d] that this [was] not an eminent domain action and should not be analyzed as such."[137] The *Wegner* court treated as significant "the requirement that the taking or damaging must be for a public use,"[138] and concluded that "reasonableness" was not an issue in the case.[139] Further, the court obliterated the traditional distinction between the reasonable exercise of the police power—consistently held to be noncompensable—and a compensable taking or damaging under the power of eminent domain.[140]

Significantly, the requirement of "public use" is apparently met through exercises of the police power for the health, safety and welfare of the public. The Minnesota Supreme Court found the public use requirement for an eminent domain analysis sufficient because "[t]he capture of this individual most certainly was beneficial to the whole community."[141] The problem with this view is that all land use regulations and the demolition of haz-

136. *Id.* at 42.

137. *Id.* at 40. The Superior Court of New Jersey reached the same conclusion in a similar case without citing *Wegner*. *See* Wallace v. City of Atlantic City, 608 A.2d 480 (N.J. Super. Ct. Law Div. 1992). The *Wallace* court applied the "intended benefit" test, stating in relevant part:

> Under this test if the particular intended beneficiary was the public, rather than a private individual, compensation would be warranted. However, if the particular intended beneficiary was a private individual, rather than the public as a whole, there would be no entitlement to just compensation even if the public was an incidental beneficiary.

Id. at 483.

138. *Wegner*, 479 N.W.2d at 40.

139. *Id.*

140. *See id.* at 40; *see also* Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415-16 (1922). *Wegner* seems to imply that legal classification of these two competing doctrines is irrelevant since "simply labeling the actions of the police as an exercise of the police power 'cannot justify the disregard of the constitutional inhibitions.' " *Wegner*, 479 N.W.2d at 40 (citing *In re* Droesch, 233 Minn. 274, 282, 47 N.W.2d 106, 111 (1951)).

141. *Wegner*, 479 N.W.2d at 42. The meaning of the term "public use" is not clear. *See, e.g.*, State *ex rel.* Twin City Bldg. Inv. Co. v. Houghton, 144 Minn. 1, 176 N.W. 159 (1920) (holding that although public use is required for the exercise of the power of eminent domain, it should not be confused with the public purpose doctrine applied in the expenditure of public money). Thus, in Visina v. Freeman, 252 Minn. 177, 89 N.W.2d 635, 643 (1958), the Minnesota Supreme Court recognized that while railroads and public utilities may condemn property for uses declared public, public money may not necessarily be spent to purchase the property.

ardous buildings are for the benefit of the whole community. If "benefit to the whole community" is the equivalent of "public use," it might logically be argued that any loss in property value as a result of governmental activity, whether done under the police power or not, should be compensated.

For the first time, the supreme court has determined that the owner's culpability will affect the application of constitutional rights under article I, section 13 of the Minnesota Constitution.[142] Thus, "where *an innocent third party's* property is . . . damaged . . . by the police in the course of apprehending a suspect," that property is damaged within the meaning of the constitution.[143] Surely, questions of what "innocent" means, and who "third parties" are, will arise. In the execution of no-knock warrants in drug cases the owner may be "innocent" but the tenant may be culpable. How the case would apply to innocent mortgage holders or lien holders is unclear, as are the elements necessary to prove culpability. At this point, cases such as *McGovern v. City of Minneapolis*[144] do not provide guidance in this area.

Although the supreme court could have decided *Wegner* based on precedents that compensate for physical invasions or occupations of private property, the court ultimately rested its decision on notions of fairness and equity.[145] A critical analysis would direct that where broad policy grounds are implicated, the court should have used the approach applied in *Spanel v. Mounds View School District No. 621*[146] to defer any policy action to the state legislature.[147]

Note that the *Wegner* court addressed public uses, while in McGovern v. City of Minneapolis, 480 N.W.2d 121 (Minn. Ct. App. 1992), the court addressed property set aside for public purposes. Further, in City of Duluth v. State, 390 N.W.2d 757, 763 (Minn. 1986), the court indicated that "[h]istorically, the court has used the words 'public use' interchangeably with the words 'public purpose.' " However, in the *Wegner* analysis, "public use" for eminent domain purposes is not the same as acting for the purpose of the health, safety and welfare of the public.

142. Wegner v. Milwaukee Mut. Ins. Co., 479 N.W.2d 38 (Minn. 1991).

143. *Id.* at 42 (emphasis added).

144. 480 N.W.2d 121 (Minn. Ct. App. 1992). However, the supreme court has stated that "the issue is whether it is fair to allocate the entire risk of loss to an innocent homeowner for the good of the public." *Wegner*, 479 N.W.2d at 42.

145. *Wegner*, 479 N.W.2d at 42.

146. 264 Minn. 279, 118 N.W.2d 795 (1962).

147. The result was Minnesota Statutes, Chapter 466 which was adopted in 1963. *See* MINN. STAT. § 466 (1994). The statute proscribes tort liability for political subdivisions and addresses, among other issues, maximum liability, liability insurance, indemnification and payment of judgements. *Id.*

IV. The Reinterpretation of the Minnesota Constitution

In 1984, Terrence Fleming and Jack Nordby reported that "[a]t least [thirty-two] state courts have interpreted their state constitutions as providing more expansive safeguards for the rights of their citizens than the minimum protection required by the Federal Constitution."[148] Another author has suggested that the reason for judicial atrophy in state constitutional law was the expansion of federal doctrines under the Warren Court era.[149] Shirley Abrahamson, in *Reincarnation of State Courts*,[150] concluded that "[a]s the federal constitutional guarantees grew during the Warren Court years, the protection of individual rights under the state constitutions almost came to a halt."[151] Now, however, the appointment of new members to the United States Supreme Court, who reflect different governmental and economic philosophies, has led to a rediscovery of state constitutions.[152] Minnesota is no exception to this trend.[153]

148. Fleming & Nordby, *supra* note 7, at 52 n.3.

149. Shirley S. Abrahamson, *Reincarnation of State Courts*, 36 Sw. L.J. 951 (1981).

150. *Id.*

151. *Id.* at 957.

152. *See, e.g.*, Bryan v. State, 571 A.2d 170 (Del. 1990) (stating that failure of police to inform defendant his attorney was on telephone was denial of right to counsel guaranteed under state constitution); Beirkamp v. Rogers, 293 N.W.2d 577 (Iowa 1980) (stating that guest statute violates state equal protection provision); People v. Jackson, 217 N.W.2d 22 (Mich. 1974) (requiring counsel at photo lineup and rejecting the holding in United States v. Ash, 413 U.S. 300 (1973)).

153. *See, e.g.*, State v. Davidson, 481 N.W.2d 51, 56 (Minn. 1992) (addressing the issue of obscenity, the court stated that "in appropriate cases we will construe liberties more broadly under the state constitution than under the federal"); Cohen v. Cowles Media Co., 479 N.W.2d 387, 391 (Minn. 1992) (stating that the free speech clause may be broader under state constitution); State v. Russell, 477 N.W.2d 886, 889 (Minn. 1991) (finding state equal protection more demanding than under federal provisions); State v. Hershberger, 462 N.W.2d 393, 397 (Minn. 1990) (finding greater religious liberty under Minnesota Constitution than under the First Amendment); State v. Gray, 413 N.W.2d 107, 111 (Minn. 1987) (stating that fundamental rights are not limited by United States Constitution); *see also* Friedman v. Commissioner of Pub. Safety, 473 N.W.2d 828, 835 (Minn. 1991) (claiming it appropriate for state courts to consider protections afforded by state constitution more expansively and doing so with regard to individuals' right to counsel); Hill Murray Fed'n of Teachers v. Hill-Murray High Sch., 471 N.W.2d 372, 376 (Minn. Ct. App. 1991) (stating that language of the state constitution is broader and more emphatic than United States Constitution relating to religious freedoms); State v. Hamm, 423 N.W.2d 379, 386 (Minn. 1988) (finding that the Minnesota Constitution guarantees a criminal defendant's right to a 12 person jury); State v. Fuller, 350 N.W.2d 382, 386 (Minn. Ct. App. 1984) (interpreting identical language regarding double jeopardy more expansively in state constitution than United States Supreme Court has interpreted the Federal Constitution).

A. *Adequate and Independent State Grounds*

Takings claims can avoid review by the federal courts, where constitutional claims can plausibly be made, by asserting a state constitutional claim and foregoing the claim under a parallel provision in the United States Constitution.[154] *Wegner* provides a good local example of this strategy, since the opinion rested solely on reference to article I, section 13 of the Minnesota Constitution.[155]

In *Michigan v. Long*,[156] the United States Supreme Court based its decision on "[t]he principle that we will not review judgments of state courts that rest on adequate and independent state grounds."[157] Prior to *Long*, if it was unclear to the United States Supreme Court that the decision was based on adequate and independent state grounds, the Court would "require state courts to reconsider cases to clarify the grounds of their decisions."[158] To avoid confusion, *Long* established a new procedural rule, which coincided with the retreat from earlier "more liberal" rights enlarging precedents, known as the "plain statement" rule.[159] The Court concluded that "we merely assume that there

154. The long-established rule holds that where no federal rights are denied, and the state decision is based on independent and adequate state grounds, it is not reviewable by the United States Supreme Court. *See, e.g.*, Michigan v. Long, 463 U.S. 1032, 1040-41 (1983).

155. Wegner v. Milwaukee Mut. Ins. Co., 479 N.W.2d 38, 40-42 (Minn. 1991).

156. 463 U.S. 1032 (1983).

157. *Id.* at 1041-42.

158. *Id.* at 1040.

159. The Court, in examining its earlier treatment of cases involving references to state law, found its treatment unsatisfactory and inconsistent. *Id.* at 1032. Thus, the Supreme Court held that the ad hoc method formerly employed would no longer be followed. *Id.* In respect of state courts' independence, the Court established a new rule for determining when it would examine cases:

> [W]hen . . . a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that the federal law required it to do so.

Id. at 1040-41. Assuming, however, the state court decision clearly and expressly indicates that its decision is based upon independent grounds, the Supreme Court has stated that it will respect the decision and forego review:

> If a state court chooses merely to rely on federal precedents as it would on the precedents of all other jurisdictions, then it need only make clear by a *plain statement* in its judgment or opinion that the federal cases are being used only for the *purpose of guidance*, and *do not* themselves *compel the result* that the court has reached.

Id. at 1041 (emphasis added).

are no such grounds when it is not clear from the opinion itself that the state court relied upon an adequate and independent state ground."[160]

The plain statement rule may be the reason for the anomalous language in *Wegner*, which states "[w]e agree that this is not an eminent domain action and should not be analyzed as such."[161] The court, however, then adds "[t]his action is based on the plain meaning of the language of [Minnesota Constitution article I, section 13], which requires compensation when property is damaged for a public use."[162]

B. State Constitutional Claims

If the use of multiple federal and state standards burdens practitioners and judges in inverse condemnation cases, the search for consistency in state constitutional claims is no less a burden.[163] For example, earlier in this century the Minnesota Supreme Court acknowledged that interpretations of due process under the Minnesota Constitution were controlled by decisions of the United States Supreme Court because the fundamental principles of due process were common to both constitutions.[164] This approach has changed over time. In 1991, in *State v. Davidson*,[165] the court of appeals concluded that Minnesota Statutes section 617.241[166] was void for vagueness, and presumably decided the case under article I, section 7 of the state constitution.[167] On appeal, the Minnesota Supreme Court found the statute not void for vagueness under the Minnesota

160. Michigan v. Long, 463 U.S. 1032, 1042 (1983).

161. Wegner v. Milwaukee Mut. Ins. Co., 479 N.W.2d 38, 40 (Minn. 1991).

162. *Id.*

163. *See* DeMeules, *supra* note 7. The author points out that "[t]here is no consistent approach by the Minnesota Supreme Court to questions of state constitutional law." *Id.* at 167 n.14.

164. *See* KUMM, *supra* note 23, at 34 (citing W.J. Armstrong Co. v. New York Cent. & Hudson River R.R., 129 Minn. 104, 151 N.W. 917 (1915)).

165. 471 N.W.2d 691 (Minn. Ct. App. 1991).

166. MINN. STAT. § 617.241 (1992) (delineating Minnesota's obscenity statute).

167. MINN. CONST. art. I, § 7. The court, in addressing the due process issue, impliedly decided the case on state grounds, but failed to make that point clear. *Davidson*, 471 N.W.2d at 696-700. Judge Randall, writing for the court, stated that "[a] statute which provides the basis of a criminal prosecution must meet due process standards under both the Minnesota and the United States Constitution." *Id.* at 696. However, Judge Amundson decided the case solely on state constitutional grounds. *Id.* at 702-03 (Amundson, J., concurring specially).

Constitution.[168] Although the court believed that the respondent could prevail only if a higher level of due process were required under article I, section 7 than under the Federal Fourteenth Amendment,[169] it did not decide whether a higher level was, indeed, required under the Minnesota Constitution.[170]

Again, in 1992, in *State v. Reha*,[171] a City of Minneapolis ordinance was upheld under a void for vagueness challenge to the words "clean and sanitary" without specific reference to either the federal or state constitutional due process provisions.[172] Under equal protection principles, the Minnesota Supreme Court indicated that it will apply a "more stringent" and "independent" constitutional test for rational basis review than found under the Federal Constitution.[173]

C. *Interpreting the Minnesota Constitution*

1. *Original Intent*

The notion that the framers' original intent should be consulted in constitutional interpretation is an old one,[174] and is the focus of debate in understanding the Federal Constitution. In Minnesota, ascertaining original intent is far more difficult for several reasons. First, the Minnesota Constitutional Convention, called in 1857, divided on the first day into Democratic and Republican constituencies, which met separately.[175] Second, after two constitutions were separately drafted, a conference committee was established to compose a single constitution.[176] Third, after adoption, the Supreme Court did not agree that original intent should be considered in ascertaining the meaning of the

168. State v. Davidson, 481 N.W.2d 51, 56 (Minn. 1992).

169. *Id.*

170. *Id.*

171. 483 N.W.2d 688 (Minn. 1992).

172. *Id.* at 690-93.

173. State v. Russell, 477 N.W.2d 886, 889 (Minn. 1991). The court acknowledged that it "has not been consistent in explaining whether the rational basis standard under Minnesota law, although articulated differently, is identical to the federal standard or represents a less deferential standard under the Minnesota Constitution." *Id.* One might wonder what impact this statement has for prior decisions in which the Minnesota Supreme Court applied an earlier, different rational basis test.

174. *See* Fleming & Nordby, *supra* note 7, at 56.

175. 1 WILLIAM W. FOLWELL, A HISTORY OF MINNESOTA, 397-421 (rev. ed. 1956).

176. Folwell reports that "[n]o minutes of the proceedings have been found." *Id.* at 417. Further, he states that "[t]he document before the United States Senate on January 11, 1858 was beyond doubt this copy of the Democratic constitution." *Id.* at 421 n.43.

constitution.[177] Next, the debates focused largely on the determination of state boundaries and contained very little on the bill of rights.[178] In addition, the models on which the Minnesota constitution was based differed depending on which convention is considered.[179] Finally, many judges and attorneys simply do not believe that history should be used as an aid to interpreting constitutional provisions as applied to contemporary conditions.[180]

2. *The Evolving Constitution*

The doctrine of original intent can be criticized as being too static. Levy aptly notes that "[t]he worthy belief that the experience of the past represents a fund of knowledge for our direction may degenerate into the idolatry of blindly following some particular embodiment of that past 'wisdom.' "[181] The notion of a developing constitution relies not on rigid adherence to original intent but on an application of past actions to explain a modern interpretation. Here, constitutional principles represent an evolving historical process gleaned from precedent. As Cardozo has pointed out, some bodies of law owe their existing form almost exclusively to history.[182] Where constitutional growth is

177. Chief Justice Wilson, a member of the Republican convention, stated that "we think such debates should not influence a [c]ourt in expounding a constitution in any case." *See* Taylor v. Taylor, 10 Minn. 107, 126, 10 Gil. 81, 99 (1865). This view was not, however, universally accepted. Specifically, Chief Justice Emmett, who was a member of the Democratic convention, felt that reference to the debates was of great assistance. *See, e.g.*, Minnesota & Pac. R.R. v. Sibley, 2 Minn. 13, 19, 2 Gil. 1, 8 (1858).

178. One case specifically recognizes the importance of the separate Republican and Democratic constitutional debates in construing the document. *See* State v. Finnegan, 188 Minn. 54, 60, 246 N.W. 521, 524 (1933) (stating that should the meaning of the constitution become doubtful, resort to construction if necessary); *see also* State *ex rel.* Univ. of Minn. v. Chase, 175 Minn. 259, 273, 220 N.W. 951, 957 (1928) (stating that debates are an aid to be resorted to only in case of doubt).

179. FOLWELL, *supra* note 171, at 404. Folwell observed:

> "The Republican drafts were in the main quite close copies of the Wisconsin [C]onstitution of 1848. In a few instances Ohio, Michigan, and Iowa examples were used. The Democrats, while drawing from the same sources, were more catholic. Their bill of rights appears to be a compound of those of New York and New Jersey."

Id.

180. *See, e.g.*, West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1936). *But see* Reed v. Bjornson, 191 Minn. 254, 253 N.W. 102 (1934).

181. BERYL H. LEVY, CARDOZO AND FRONTIERS OF LEGAL THINKING, 58 (1938).

182. BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS (1921). To more fully understand the importance of history as an aid to construction of the Minnesota Constitution, see Minnesota & Pac. R.R. v. Sibley, 2 Minn. 13, 19, 2 Gil. 1, 8 (1858); Leighton v. City of Minneapolis, 222 Minn. 516, 25 N.W.2d 263 (1946) (looking to "the

viewed as making written provisions satisfy some desirable social objective, the method and premises of sociology can be used to change the meaning of a constitution.[183]

3. *The Plain Meaning*

The methodologies of history and sociology in constitutional interpretation offer contextual approaches to explain the meanings of constitutions. Applying the "plain meaning of the language" avoids the discipline of precedent and clearly understood social objectives. In *Wegner*, the traditional analysis of what falls under the legitimate exercise of the police power and what falls under eminent domain is absent.[184] Instead, the "action is based on the plain meaning of the language of [Minnesota Constitution article I, section 13],"[185] an approach that relies on "beliefs" about fairness and justice, which, in *Wegner* means deciding who should bear the risk.[186]

4. *Certainty in Constitutional Interpretation*

Actions taken by governmental bodies, and policies with respect to those actions, depend on the legal analysis applied by lawyers who represent the public interest. If cases are decided in such a manner as to establish broad public policies without references to comparable federal standards, or if decisions are rendered on policy grounds without a clear and consistent reference to history or well defined and documented social objectives, the already existing confusion in regulatory takings becomes more problematic. Where certainty is lacking in consti-

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history of the times and the state of things existing when the provision was framed and adopted to ascertain the mischief and the remedy sought" to construe a restrictive tax provision of the Minnesota Constitution); Minnesota Baptist Convention v. Pillsbury Academy, 246 Minn. 46, 74 N.W.2d 286 (1955) (referring to the Minnesota constitutional convention to construe prospective application of MINN. CONST. art. 4, § 33 subd. 10).

183. *See, e.g.*, Plessy v. Ferguson, 163 U.S. 537, 548-49 (1896). The separate but equal doctrine was not subsequently overruled because of a change in the language of the United States Constitution but as a result of rethinking the social consequence of the doctrine. *See also* Brown v. Board of Educ., 347 U.S. 483 (1954).

184. Wegner v. Milwaukee Mut. Ins. Co., 479 N.W.2d 38 (Minn. 1992).

185. *Id.* at 40

186. *Id.* at 42. The court emphasized this point in stating that "[w]e do not believe the imposition of such a burden on the innocent citizens of this state would square with the underlying principles of our system of justice." *Id.* Use of the "plain meaning" approach in constitutional analysis does not discredit the "beliefs" or the ultimate outcome of the case.

tutional decisions, definition for sound public policy becomes even more difficult for legislative bodies elected to make such policies. This is particularly true where similar provisions in federal and state constitutions are interpreted to create different legal standards and tests at each level of government.

V. ENLARGEMENT OF THE CONCEPT OF PROPERTY

Although the idea of low cost government may be a popular political view, both federal and state constitution eminent domain provisions limit cost-free governmental activity with respect to "private property." In Morton Horwitz's monumental work, *The Transformation of American Law 1780-1860*,[187] the development of the issue of compensation for land taken or injured by the government was viewed as having limited importance early in American history.[188] Horwitz uses the law of eminent domain to trace the movement away from a physicalist conception of property that took place during the late nineteenth century.[189]

In Minnesota, this transformation became part of article I, section 13 in 1896, when the state constitution was amended to require payment of just compensation for indirect or consequential damages to private property.[190] Although the amendment was designed to require payment for indirect damage to private property, the concept of private property was also expanded. This expanded view of the so-called "bundle of rights" for which governmental interference requires payment

187. HORWITZ 1780-1860, *supra* note 8. Horwitz advances the thesis that the change in legal orthodoxy in America from classical legal thought to progressive legal thought represents a social and economic struggle in which political and moral choices are denied or hidden by a fixation to sharply separate law from politics.

188. *Id.* at 63. Horwitz observed that "[d]espite the efforts of Thomas Jefferson to establish the principle of just compensation in postrevolutionary Virginia, no law providing compensation for land taken for roads was enacted until 1785." *Id.* Further, he notes that "[u]ntil the nineteenth century, Pennsylvania and New Jersey still denied compensation on the ground that the original proprietary land grants had expressly reserved a portion of real property for the building of roads." *Id.* at 64.

189. *Id.* at 146.

190. MINN. CONST. art. I, § 13. *Compare* Lee v. City of Minneapolis, 22 Minn. 13 (1875) (holding no recovery for consequential damages for change of grade) *with* Morgan v. City of Albert Lea, 129 Minn. 59, 151 N.W. 532 (1915) (permitting recovery for substantial change of grade and lateral support). An explanation of the reasons for amending the state constitution by adding the words "destroyed or damaged" is set forth in Dickerman v. City of Duluth, 88 Minn. 288, 291-94, 92 N.W. 1119, 1120-21 (1903).

has resulted in legal standards that embody economic loss as the measure of interference.[191]

A. *Property Under Federal Standards*

Historically, state law defines property interests for the purposes of eminent domain.[192] The concepts of property and property interference are simple as long as common law estates (fee, leasehold and easement) are the subject of a taking. Courts have also subscribed to the notion that a taking will not be found for a mere diminution in the property's value.[193] In *Keystone Bituminous Coal Association v. DeBenedictis*,[194] landowners failed to show a "deprivation significant enough to satisfy the heavy burden placed upon one alleging a regulatory taking."[195] The court applied the standard that land use regulation can amount to a "taking if it 'does not substantially advance legitimate state interests, . . . or denies an owner economically viable use of the land.' "[196] In *Keystone*, the Supreme Court concluded that a taking under the "economically viable use" test had not occurred because the owners had not claimed that the regulation at issue made it commercially impracticable to continue mining operations.[197]

The "ad hoc, factual inquir[y]" approach articulated in *Penn Central Transportation Co. v. New York City*[198] applies a three-factor test that includes "the economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations."[199]

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191. HORWITZ 1870-1960, *supra* note 8, at 149.

192. *See, e.g.*, County of San Diego v. Cabrillo Lanes, Inc. 12 Cal. Rptr. 2d. 613, 614-15 (1992); Southeastern Pa. Transp. Auth. v. Frankford 5206 Bar, Inc., 587 A.2d 855, 860 (Pa. 1991).

193. Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1987); *see also* Euclid v. Ambler Realty Co., 272 U.S. 365 (1926) (holding that "mere" diminution was 75%); Hadecheck v. Sebastian, 239 U.S. 394 (1915) (indicating that diminution was 87.5%).

194. 480 U.S. at 470.

195. *Id.* at 493.

196. Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 485 (1987) (citing *Agins*, 447 U.S. at 260). This test was previously recognized in both Nollan v. California Coastal Comm'n, 483 U.S. 825, 841 (1987) and, earlier, in Agins v. Tiburon, 447 U.S. 255, 260 (1980). *See supra* notes 101, 117-20 and accompanying text.

197. *See also* Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2893-95 (1992) (applying an "economically beneficial and productive use of land" test).

198. 438 U.S. 104 (1978).

199. *Id.* at 124 (citing Goldblatt v. Hampstead, 369 U.S. 590, 595 (1962)).

Moreover, the *Penn Central* Court assumed that "development rights" were "property rights," but held that no taking had occurred because historical preservation restrictions were permissible under the police power.[200] These tests, on the federal level, focus on interference with economic expectations rather than interference with the classical physicalist conception of property or common law estates.

B. Property Under State Standards

The notion of "development rights" as property can be seen in other applications. Under state statute, metropolitan counties are authorized, for purposes of establishing solid waste facilities, to acquire development rights.[201] The development rights that must be acquired in "buffer areas" surrounding disposal sites are defined as the "right[s] of the owner of the fee interest in land to change the use of the land from its existing use to any other use."[202] Thus, with one legislative enactment, zoning, which historically involved the exercise of the police power, has been converted to a property right which is now subject to eminent domain.

In *Haeussler v. Braun*,[203] the Minnesota Supreme Court recognized the implied easement for light, air and view as a limited interest in property that is subservient to the public right to travel on a roadway.[204] The *Haeussler* court concluded that only improper street uses would result in an additional servitude being placed on these implied easements.[205] Thus, no taking occurred by the placement of noise barriers along the roadway.[206]

An even more expansive notion of property rights can be found in the recent case of *State v. Strom*.[207] In *Strom*, construction-related interferences caused temporary reduction in rental income of an office building.[208] A change of grade also resulted in loss of visibility to the property that remains after a partial

200. 438 U.S. at 138.
201. MINN. STAT. § 473.811, subd. 1 (1992).
202. MINN. STAT. § 473.833, *repealed by* 1991 MINN. LAWS ch. 337, § 90(b).
203. 314 N.W.2d 4 (Minn. 1981).
204. *Id.* at 7-8.
205. *Id.* at 8.
206. *Id.* at 9.
207. 493 N.W.2d 554 (Minn. 1992) (Simonett, Coyne, JJ., dissenting in part, Tomljanovich, J., dissenting).
208. *Id.* at 560-61.

taking.[209] The majority opinion concluded that both elements of damage were admissible in a partial taking case and must be considered in a determination of the diminution in market value of the remaining property.[210] Both Justices Simonett and Coyne dissented on the first element, but concurred on the issue of loss of visibility from the road.[211] Justice Tomljanovich dissented on both elements.[212]

The opinions illustrate the lack of consensus on what is property for eminent domain purposes. The majority opinion expands the elements of damage to be considered in a market value diminution analysis where a partial taking has occurred. Justice Simonett, suggested that "[w]hether there is an implied easement of view *to* the abutting landowner's property, as well as *from*, is an interesting question", which need not be answered.[213] Justice Tomljanovich concluded that the owner "has a right to be compensated for the partial taking. However, there is no inherent property right to be seen . . . ."[214]

C. *What is Property?*

Under a physicalist concept of property, where physical intrusion, or acquisition of land or buildings takes place, property is readily definable. However, where indirect loss occurs, the identity of property rights, as seen in *Strom*, becomes more elusive. When reduction in potential development occurs as the result of

209. *Id.* at 558.

210. *Id.* at 560-61.

211. *Id.* at 562, 565.

212. State v. Strom, 493 N.W.2d 554, 565 (Minn. 1992).

213. *Id.* at 564. Justice Simonett stated "the question is not whether there has been the taking of a property interest, an appurtenant easement of view, but whether the state's use of the land taken . . . has caused an unfair, direct, substantial and peculiar injury to Woodbridge's remainder real estate." *Id.* He also concluded that "[a]t times, visibility must yield to proper street improvements." *Id.* at 565 (citing Haeussler v. Braun, 314 N.W.2d 4, 8 (Minn. 1981)).

214. *Strom*, 493 N.W.2d at 566. Justice Tomljanovich stated that until *Strom*:

> Minnesota has never held that a property owner has a right to be seen. . . . Even if the right to be seen were synonymous with the implied right to a view, it is not an absolute right but an entitlement to a "view that [is] not obstructed by a *proper street* use."

Id. at 565-66 (citing Haeussler v. Braun, 314 N.W.2d 4, 8 (Minn. 1981)) (emphasis added). She further stated that "[a]lthough the ability of the traveling public to see Woodbridge has been altered by the grade level change and construction, there is no dispute that the use of trunk highway 12 as converted to limited access 394 is a proper street use." *Strom*, 493 N.W.2d at 566. Justice Tomljanovich viewed the majority decision as a "revolutionary and dramatic change in condemnation law." *Id.*

traditional police power exercises which infringe upon so-called "development rights," the concept of property becomes confused. In such cases, anticipated profits from entrepreneurial efforts emerge as a property right. The expansion of "property" subject to payment of just compensation may ultimately rest on privately held unarticulated assumptions about who ought to bear the burden of loss—the taxpayer or the private landowner.[215]

VI. CONCLUSION

The quest for certainty and predictability in regulatory takings cases is affected by all of these enigmatic phenomena. Practitioners are advised to prepare voluminous complaints on behalf of their clients in order to cover all possible applications of the panoply of takings standards. The advocate for the landowner must rely as much on commonly held notions of justice as on prior case law. How courts respond may depend on privately held views which cannot be found in case law. The practitioner is thus obliged to press the client's position as far as allowable through the appeal process in the effort to obtain a satisfactory result.

To those practitioners representing governmental bodies, regulatory takings represent an extremely difficult challenge in assessing the risks of policy decisions. When judicial opinions are viewed as "result-oriented" or "ad hoc factual inquiries," or decided according to any one of several competing legal standards written to satisfy changing and competing views of constitutional interpretations, the discipline offered by reference to historical experience is absent. Attempting to understand the forces at

215. Note, for example, the majority response to the issue of construction inconvenience in State v. Strom, 493 N.W.2d 554, 560 (Minn. 1992). The court allowed such evidence and rejected the state's policy argument that forecasted the construction of highway projects would become prohibitively expensive. Addressing the issue of visibility from the roadway, the court found that the rule of admissibility is "most compatible with the compensation provision of our state constitution." *Id.* at 561.

In his dissent, Justice Simonett proposed a test that would ask "whether the interference unfairly, directly, substantially, and peculiarly causes a diminution in the market value of the landowner's property." *Id.* at 563. While the existence of a partial taking is important, this dissent would not make it conclusive.

In her dissent, Justice Tomljanovich characterized the decision as "a burden on the taxpayers that is unfair and unwise." *Id.* at 566. While technical, legal analysis supports all of the aforementioned opinions, moral and political choices underlay each of the approaches.

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work may be the best that the ordinary legal practitioner can achieve.