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The Takings Clause: A Modern Plot for an Old Constitutional Tale

*Richard G. Wilkins**

I. Introduction

This is the story of the continuing tribulations of that little clause tucked at the end of the fifth amendment to the United States Constitution which provides, in a rather straightforward manner, that "private property" shall not be "taken for public use, without just compensation."[1] Consistent construction of these few words holds extreme importance for both property owners and government regulators. But, notwithstanding its seeming linguistic simplicity, the takings clause has engendered Supreme Court precedent as convoluted as the plot of a pulp novel. Over sixty-five years ago, Justice Holmes declared that the clause requires compensation if the government encroaches "too far" upon property rights.[2] Unfortunately, however, there has been little agreement regarding when that point is reached.[3] And, although the Court recently emphasized the theoretical importance of the clause when it concluded that all "takings" — even temporary ones — require compensation,[4] the most important element of the constitutional story line remains obscure: the Court has candidly recognized its inability to deduce "objective rules" that will clearly indicate when government action "becomes a taking."[5] As a result, hardly any one, whether property owner or government regulator, can be certain that this tale will have a happy ending.[6]

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1 U.S. CONST. amend. V.

2 Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 414-16 (1922) (land use regulations constitute a taking if they go "too far;" the State of Pennsylvania had taken a mining company's property by legislating that certain coal must be left in place to prevent surface subsidence).

3 *See* Keystone Bituminous Coal Ass'n v. DeBenedictis, 107 S. Ct. 1232, 1242-46 (1987) (Court concludes that, on balance, a statute virtually identical to the one at issue in *Pennsylvania Coal* now passes constitutional muster; Pennsylvania's requirement that certain coal be left in the ground to prevent subsidence does not constitute a taking because the regulation does not make over-all operation of the coal mines unprofitable and the state has a substantial interest in preventing surface damage).

4 First English Evangelical Lutheran Church v. County of Los Angeles, 107 S. Ct. 2378, 2389 (1987).

5 *Id.* at 2399 n.17 (Stevens, J., dissenting) (citing Hodel v. Irving, 107 S. Ct. 2076 (1987); Andrus v. Allard, 444 U.S. 51, 65 (1979); Penn Central Transp. Co. v. City of New York, 438 U.S. 104, 183-84 (1978)).

6 *Cf.* First English Evangelical Lutheran Church v. County of Los Angeles, 107 S. Ct. at 2393-400 (Stevens, J., dissenting) (arguing that the majority should not have reached the issue whether a "temporary taking" required compensation because, on the facts presented, it was a legal certainty that the lower courts on remand would find that the regulatory action did not amount to a taking).

The dismal state of the takings clause has been frequently noted. Many distinguished writers have commented on the Court's crazy-quilt takings jurisprudence. *See, e.g.*, C. Harr, LAND USE PLANNING (3d ed. 1977); Berger, *A Policy Analysis of the Taking Problem*, 49 N.Y.U. L. REV. 165 (1974); Dunham, Griggs v. Allegheny County *in Perspective: Thirty Years of Supreme Court Expropriation Law*,

The conundrum created by current takings clause jurisprudence can be understood by considering the plight of two hypothetical landowners, each owning property affected by government action. The first is a typical homeowner, who has been informed the city will condemn a portion of her backyard vegetable garden to build a highway. The second is a developer who, after publicizing her plans to build a twenty-five-story office tower within the scope of long-standing zoning regulations, learns that a group of nearby residents opposed to the development has persuaded the city commissioners to enact a "mountain view" ordinance. The ordinance, enacted after the residents unsuccessfully attempted to block the office tower by changing the applicable zoning regulations, diminishes the value of the second owner's property by at least sixty-five percent because it prohibits any construction over forty feet in height in order to protect the residents' view of distant mountains.

Both property owners have at least a rudimentary understanding that, while the city may put their property to "public use," the city's ability to "take" the property hinges upon the payment of "just compensation."[7] The property owners, to be sure, may not frame the taking issue in constitutional terms, but the basic operative provisions of the fifth amendment's takings clause are understood: "If the city wants to benefit my neighbors by putting my vegetable garden or my developable air space to a public use, it must pay for that privilege."

But, despite the obvious common sense similarities between the property owners' plights,[8] under current Supreme Court precedent a disparate outcome for each case is virtually guaranteed. The homeowner will be awarded enough money to keep her in tomatoes for years.[9] The other landowner — who by any realistic measure suffered a substantial injury when she lost the right to build her office tower — will be dismissed without a dime.[10] Instead of cash, she will receive the admonition that "[l]egislation designed to promote the general welfare commonly burdens some more than others,"[11] perhaps bolstered with a backhanded compliment for preserving a scenic view that will make a long-lasting contribution to the public weal.[12]

1962 S. Ct. Rev. 63; Michelman, *Property, Utility and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165 (1967); Rose, *Mahon Reconstructed: Why the Takings Clause is Still a Muddle*, 57 S. CAL. L. REV. 561 (1984). For an historical overview of the takings clause see Note, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 YALE L. J. 694 (1985).

7 U.S. CONST. amend. V.

8 In both cases, government has taken an easement to permit access — in the first case physical, in the second case visual — across real property.

9 *Cf.* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 435-40 (1982) (statute requiring landlord to permit physical installation of cable television wires on her apartment building constitutes a taking requiring payment of just compensation).

10 *Cf.* Landmark Land Co. v. City of Denver, 728 P.2d 1281 (Colo. 1986), *appeal dismissed sub nom.*, Harsh Inv. Corp. v. City of Denver, 107 S. Ct. 3222 (1987) (involving challenge to Denver "mountain view" ordinance which placed 42-foot height limitation on property previously zoned for the construction of high-rise office towers; the evidence showed that the property owner suffered a 65% diminution in the value of the commercially zoned property).

11 Penn Central Transp. v. City of New York, 438 U.S. 104, 133 (1978).

12 *Cf. id.* at 132 (turning aside a challenge to the New York landmark preservation law, at least in part because the statue "preserve[s] structures of historic or aesthetic interest").

The contrasting results of the two cases just examined, though hardly satisfying, are virtually mandated by the Supreme Court's recent attempts to delineate the functional boundaries of the takings clause. The Court has identified pragmatic factors to govern the application of the clause, including the nature or character of the government action involved, the economic impact on the property owner, and the extent to which the government action interferes with distinct investment-backed expectations.[13] But, like old dogs, these criteria have lain toothless by the wayside, nary able to take a healthy nip at the heels of the government regulators. Indeed, while repeatedly invoking its multiple-factor test, the Court has found a taking only in cases involving either physical dispossession[14] or, less frequently, total destruction of some right closely related to physical dominion over property.[15] Such cases, however, "are relatively rare."[16] Accordingly, the vast majority of governmental actions adversely affecting the interests of property owners escape with little or no constitutional scrutiny.

This Article suggests that the Court's lax construction of the takings clause demands correction. To further that end, the Article critiques the takings clause analysis presently used by the Court. That analysis has generally proceeded on two levels, with the Court (1) inquiring whether government regulation exceeds "police power" limitations, and then (2) examining whether the regulation, even if a legitimate exercise of police power, nevertheless constitutes a taking. Each level of the analysis, along with suggestions for improvement, will be examined in turn.

The first section of the Article scrutinizes the "police power" test applied to takings clause cases. Under the police power analysis, the Court inquires whether government regulation bears a substantial relationship to a legitimate state interest.[17] Although this inquiry traditionally has not operated as a significant limitation on the regulation of property rights,[18] the Court has rather abruptly suggested that the analysis has real bite.[19] The wisdom of testing legislative or administrative action against a rigorous "means/ends" standard, however, is questionable. Such an approach proved unmanageable and unwise in the heyday of "substantive due process," and there is little reason to think the meth-

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13 *Id.* at 124.

14 *See, e.g.*, Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982); Kaiser Aetna v. United States, 444 U.S. 164 (1979). *Cf.* First English Evangelical Lutheran Church v. County of Los Angeles, 107 S. Ct. 2378, 2393-400 (1987) (Stevens, J., dissenting) (the majority should not have reached the taking issue because, on the facts presented, it was a legal certainty that the regulatory action did not amount to a taking); Humbach, *A Unifying Theory for the Just-Compensation Cases: Takings, Regulation and Public Use*, 34 RUTGERS L. REV. 243 (1982).

15 Government regulation cannot destroy a "fundamental attribute of ownership." Agins v. City of Tiburon, 447 U.S. 255, 262 (1980). For examples of such "attributes," see Hodel v. Irving, 107 S. Ct. 2076, 2083 (1987) (right to "pass on property" to "one's heirs" or "to one's family"); Kaiser Aetna v. United States, 444 U.S. at 179-80 (right to exclude).

16 First English Evangelical Lutheran Church v. County of Los Angeles, 107 S. Ct. at 2393.

17 Agins v. City of Tiburon, 447 U.S. at 260-62; Penn Cent. Transp. Co. v. City of New York, 438 U.S. at 127.

18 *E.g.*, Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 387-90 (1926).

19 Nollan v. California Coastal Comm'n, 107 S. Ct. 3141, 3147 (1987).

odology will prove more workable — or justifiable — in the context of the takings clause.

If the police power hurdle is cleared, government action must be scrutinized to determine whether it constitutes a "taking." Beginning with *Pennsylvania Coal Co. v. Mahon*,[20] the Court recognized that government regulation, even though it does not result in physical dispossession of the property owner, can nevertheless constitute a taking if it goes "too far."[21] The second section of this Article explores the current status of this inquiry.

In the sixty-six years since the *Pennsylvania Coal* test was first announced, government regulation has become one of the nation's true growth industries. The Court, accordingly, has attempted to isolate specific criteria to aid in delineating the "far" from the "near." These criteria, however, have never been rigorously applied. As a consequence, and despite the counter-intuitive nature of the results, vegetable garden owners are given cold hard cash for lost zucchini while investors are given the boot for millions of dollars in development rights that are lost when the city condemns a scenic easement over their property.[22]

This condition should not continue.[23] The third section of the Article suggests a relatively modest solution: the Court should demonstrate that its takings clause analysis is more than high-toned rhetoric. Fifth amendment doctrine, I believe, does not need wholesale revamping — it needs a vitamin pill. The Constitution provides just compensation for all takings, even temporary ones.[24] And, determining which governmental actions constitute "takings" is not so difficult a task that the Court should relegate the takings clause to the status of a constitutional myth. Indeed, the Court has already identified factors that, if consistently and carefully applied, furnish a workable contemporary plot for the clause. The Court, however, simply has not demanded adherence to its own story line. The time has come for the Court to brush off its traditional takings analysis and demonstrate that it means what it says.

II. The Police Power Limit: Do the Means Relate To The Ends?

As Justice Brennan has recently noted, there can be little "dispute that the police power of the States encompasses the authority to impose conditions" on the ownership and use of property.[25] Whether such conditions exceed the legitimate scope of the police power has been tested

20 260 U.S. 393 (1922).

21 *Id.* at 415.

22 Landmark Land Co. v. City of Denver, 728 P.2d 1281 (Colo. 1986), *appeal dismissed sub nom.* Harsh Inv. Corp. v. City of Denver, 107 S. Ct. 3222 (1987).

23 *See* Epstein, *The Public Purpose Limitation On The Power Of Eminent Domain: A Constitutional Liberty Under Attack*, 4 PACE L. REV. 231, 264 (1984) (urging judges deciding takings cases to "be more careful to protect the individual from excessive governmental schemes"); *cf.* Oakes, *"Property Rights" In Constitutional Analysis Today*, 56 WASH. L. REV. 583, 625-26 (1981) (predicting a "new era" in the judicial protection of property rights and noting that "the takings clause has suddenly come to the fore") (footnote omitted).

24 First English Evangelical Lutheran Church v. County of Los Angeles, 107 S. Ct. 2378, 2388 (1987).

25 Nollan v. California Coastal Comm'n, 107 S. Ct. 3141, 3151 (1987) (Brennan, J., dissenting).

under a familiar "means/ends" test: government regulation must "substantially advance legitimate state interests."[26] The rigor with which this analysis has been applied to various exertions of governmental authority has waxed and waned throughout this century — mostly waning during recent decades. Indeed, apart from legislation regulating certain fundamental rights,[27] the "means/ends" test has rarely been considered to be a serious contemporary constitutional limitation. But, after nearly half a century of deference, the Supreme Court has signalled a new willingness to apply a "means/ends" test with real vigor to governmental actions adversely affecting the use or ownership of property.[28] Whether this is a wise — or workable — development, however, is debatable.

As any student of constitutional law knows, the requirement that legislative means "reasonably"[29] further legitimate governmental ends was applied with devastating effect to numerous legislative enactments during the first three decades of this century. The approach, which came to be known as "substantive due process,"[30] was used to invalidate everything from regulations limiting a baker's working hours[31] to major portions of Franklin Roosevelt's "New Deal" legislation.[32] Because the doctrine was used to disable major legislative and executive resolutions of pressing social policy issues, substantive due process engendered significant political opposition. Roosevelt threatened his famous "Court-packing" plan in an attempt to obtain a majority of Justices disinclined to invoke the doctrine.[33] But, of more immediate concern, the doctrine was severely criticized as an undue judicial intrusion upon the operation of the coordinate branches of government.[34]

A judicial conclusion that a given governmental action did not "reasonably" or "substantially" further "legitimate" ends was, at bottom, a declaration that the Court disagreed with either the wisdom of the means used to achieve the stated goal or the propriety of the goal itself. In its

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

27 *E.g.*, Carey v. Population Servs. Int'l, 431 U.S. 678 (1977) (contraceptives); Roe v. Wade, 410 U.S. 113 (1973) (abortion); Griswold v. Connecticut, 381 U.S. 479 (1965) (contraceptives); Gibson v. Florida Legislative Investigation Comm., 372 U.S. 539 (1963) (right of association); Bates v. City of Little Rock, 361 U.S. 516 (1960) (right of association); Pierce v. Society of Sisters, 268 U.S. 510, 534-35 (1925) (familial privacy; the "liberty of parents . . . to direct the upbringing and education of children under their control").

28 Nollan v. California Coastal Comm'n, 107 S. Ct. 3141, 3150 (1987).

29 Lawton v. Steele, 152 U.S. 133, 137 (1894).

30 A strict requirement that legislative means substantially further legitimate governmental ends was based upon the Supreme Court's assumption that the due process clause gives substantive protection to various "liberty" interests explicitly mentioned in or implicitly derived from the express provisions of the Constitution. *E.g.*, Lochner v. New York, 198 U.S. 45, 57 (1905).

31 *See, e.g.*, *id.* (striking down a state law limiting a baker's work day to 10 hours because the legislature had "no reasonable ground for interfering with the liberty of person or the right of free contract, by determining the hours of labor, in the occupation of a baker"); *Cf.* Morehead v. New York *ex rel.* Tipaldo, 298 U.S. 587 (1936) (striking down New York law forbidding employment of women at an oppressive or unfair wage).

32 *E.g.*, Railroad Retirement Bd. v. Alton R.R., 295 U.S. 330 (1935). *See also* United States v. Butler, 297 U.S. 1 (1936); Carter v. Carter Coal Co., 298 U.S. 238 (1936); Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).

33 JACKSON, THE STRUGGLE FOR JUDICIAL SUPREMACY (1949).

34 *E.g.*, Ferguson v. Skrupa, 372 U.S. 726, 730 (1963); Roe v. Wade, 410 U.S. 113, 173 (1973) (Rehnquist, J., dissenting).

most elementary form, therefore, substantive due process was used to supplant and invalidate public policy decisions which proved unpopular to a majority of the Supreme Court.[35] The "narrow conception of rationality" which infused the doctrine was little more than "a judicial arrogation of legislative authority."[36]

When it became evident that requiring "scientific precision" in the fit between legislative means and ends was simply a method of enforcing the Court's own views of sound public policy, the Justices abandoned a strict "means/ends" analysis because the test constituted "an intolerable supervision hostile to the basic principles of our government . . . ."[37] In its place, the Court erected a highly deferential "means/ends" inquiry. A legislative enactment "need not be in every respect logically consistent with its aims to be constitutional;" rather "[i]t is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it."[38]

Interestingly enough, the substantive due process blunderbuss — even during its prime — was rarely fired successfully at legislative enactments restricting the ownership or use of property.[39] For example, in *Hadacheck v. Sebastian*,[40] the Court upheld a city ordinance that prohibited the manufacturing of bricks despite the manufacturer's claim that the prohibition deprived him of the profitable use of his backyard. The Court stated that the city had a legitimate public purpose in preventing a nuisance (such as a brickyard) from operating in residential areas, and held that the challenged ordinance was a reasonable means to achieve that purpose.[41] Similarly, in *Welch v.*

35 *Cf.* Day-Brite Lighting, Inc. v. Missouri, 342 U.S. 421, 423 (1952) ("Our recent decisions make plain that we do not sit as a super-legislature to weigh the wisdom of legislation nor to decide whether the policy which it expresses offends the public welfare. . . . [S]tate legislatures have constitutional authority to experiment with new techniques; they are entitled to their own standard of the public welfare").

36 Nollan v. California Coastal Comm'n, 107 S. Ct. 3141, 3153 (1987) (Brennan, J., dissenting).

37 Sproles v. Binford, 286 U.S. 374, 388 (1932). *See also* Ferguson v. Skrupa, 372 U.S. 726, 730 (1963) ("The doctrine that . . . due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely . . . has long since been discarded. We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies").

38 Williamson v. Lee Optical Co., 348 U.S. 483, 487-88 (1955); Roe v. Wade, 410 U.S. 113, 173 (1973) (Rehnquist, J., dissenting) ("liberty is not guaranteed absolutely against deprivation, only against deprivation without due process of law. The test traditionally applied in the area of social and economic legislation is whether or not a law such as that challenged has a rational relation to a valid state objective"). *See also* Day-Brite Lighting, Inc. v. Missouri, 342 U.S. 421 (1952); West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937).

39 *See generally* Oakes, *"Property Rights" in Constitutional Analysis Today*, 56 WASH. L. REV. 583, 591-94 (1981) (describing generally the protection accorded property rights by substantive due process).

40 239 U.S. 394 (1915).

41 *Id.* at 410-12. *Cf.* Mugler v. Kansas, 123 U.S. 623, 665 (1887) (upholding licensing restriction forbidding the operation of a brewery because "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"); Miller v. Schoene, 276 U.S. 272, 279-80 (1928) (upholding state law requiring the destruction of trees which carry cedar rust in order to protect producing apple orchards from infection; "where the public interest is involved preferment of that interest over the property interest of the individual, to the extent even of its destruction, is one of the distinguishing characteristics of every exercise of the police power which affects property"); Ellickson, *Suburban Growth Controls: An Economic and Legal Analysis*, 86 YALE L.J. 385, 418-24 (1977) (suggesting that the rigor of the takings analysis depends upon whether or not challenged government action abated a nuisance).

Swasey[42] and *Village of Euclid v. Ambler Realty Co.*,[43] the Court sustained zoning ordinances that adversely affected the complainants' property values because the ordinances were rationally related to the health and safety of the community.[44] In fact, a "means/ends" attack upon land use regulations succeeded only once during the reign of substantive due process. In *Nectow v. City of Cambridge*,[45] the Court invalidated a zoning ordinance which permitted only residential use of property located in a heavily industrialized area. Noting that land use regulations must bear a "substantial relation to the public health, safety, morals, or general welfare," the Court found that the ordinance in question failed the "means/ends" test because it had "no foundation in reason" and was "a mere arbitrary or irrational exercise of power."[46]

Following *Nectow*, and consistent with the general decline in the judiciary's enthusiasm for a strict "means/ends" analysis, the police power limitation on government actions affecting the use or ownership of property came to have little practical significance. Indeed, in rejecting a police power challenge to a land use regulation in the first such case to come before it since *Nectow*, the Supreme Court wrote that "[t]he concept of the public welfare is broad and inclusive" and the role of the judiciary in restricting the exercise of the police power "is an extremely narrow one."[47] The "legislature," the Court wrote, "not the judiciary, is the main guardian of the public needs to be served by social legislation . . . ."[48] Eight years later, in rejecting the claim that a municipal ordinance which prohibited the excavation of gravel below the water table constituted a taking, the Court reiterated that " 'debatable questions' " regarding the " 'interests of the public' " and the " 'means . . . reasonably necessary' " to accomplish public purposes " 'are not for the courts but for the legislatures.' "[49] Thus, although regulations affecting the use or ownership of property were required to have a reasonable relationship to legitimate objectives, the test "result[ed] in a rubber stamp of approval in fact if not in theory."[50] But, as if to prove that aged doctrines never die (nor, like old soldiers, even fade away), the Supreme Court has re-recruited a strict "means/ends" test and placed it at the forefront of the takings clause analysis.

In *Nollan v. California Coastal Commission*[51] the Court invalidated the California Coastal Commission's requirement that the Nollans grant the

42 214 U.S. 91 (1909).

43 272 U.S. 365 (1926).

44 Welch v. Swasey, 214 U.S. at 105-06; Village of Euclid v. Ambler Realty Co., 272 U.S. at 387-89. In *Welch*, the Court recited that a statute "passed under the exercise of so-called police power" passes constitutional scrutiny if it merely has "some fair tendency to accomplish, or aid in the accomplishment of some purpose, for which the legislature may use the power." 214 U.S. at 105.

45 277 U.S. 183 (1928).

46 *Id.* at 187-88 (quoting Village of Euclid v. Ambler Realty Co., 272 U.S. at 395).

47 Berman v. Parker, 348 U.S. 26, 32-33 (1954).

48 *Id.* at 32.

49 Goldblatt v. Town of Hempstead, 369 U.S. 590, 595 (1962) (quoting Lawton v. Steele, 152 U.S. 133, 137 (1894); Sproles v. Binford, 286 U.S. 374, 388 (1932)).

50 Denvir, *Justice Rehnquist and Constitutional Interpretation*, 34 HASTINGS L.J. 1011, 1020 (1983) (citing L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 16-3 (1978)).

51 107 S. Ct. 3141, 3143, 3148-50 (1987).

public an easement to pass along the seawall located on their shorefront property as a condition of obtaining a permit to build a new home on their lot. The Commission had exacted the easement based on its finding that the proposed home would contribute to a " 'wall' of residential structures" that would cumulatively "burden the public's ability to traverse to and along the shorefront."[52] The Commission, therefore, had concluded that the required "access condition . . . was sufficiently related to burdens created by the project to be constitutional."[53] The Court, by contrast, found that the Nollans' proposed home did not burden the public's ability to pass along the shoreline but blocked, at most, "visual access" to the beach. The Court accordingly held that the contested easement was insufficiently related to the amelioration of that burden: "It is quite impossible to understand how a requirement that people already on the public beaches be able to walk across the Nollans' property reduces any obstacles to viewing the beach created by the new house."[54]

The decision in *Nollan* marks the return — with a vengeance — of a strict "means/ends" analysis. Relying upon language from earlier cases that rather perfunctorily recited the traditional police power test,[55] the Court "describe[d] the condition for abridgment of property rights through the police power as a '*substantial* advanc[ing]' of a legitimate State interest."[56] As applied by the Court, the test requires searching scrutiny of both the ends served by governmental action[57] as well as the means used to achieve those ends.[58] Although the California Coastal Commission had found that the proposed construction would result in " 'increase[d] private use [of the shorefront] immediately adjacent to public tidelands' " and had concluded that the required easement would alleviate concomitant " 'adverse impacts on the public's ability to traverse the shoreline,' "[59] the Court disregarded the Commission's stated concern regarding increased private use of the shoreline and instead limited the legitimate governmental objective to the preservation of "visual access" to the beach.[60] And, once the Court had zeroed in on this narrow purpose, it dismissed as a "play on words" the Commission's argument that an easement permitting lateral access legitimately served that goal.[61]

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52 107 S. Ct. at 3143-44.

53 *Id.*

54 107 S. Ct. at 3149.

55 107 S. Ct. at 3146 (quoting Agins v. City of Tiburon, 447 U.S. 255, 260 (1980); Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 137 (1978)).

56 107 S. Ct. at 3150 (emphasis in original) (quoting Agins v. Tiburon, 447 U.S. 255, 260 (1980) (land use regulation does not effect a taking if it "substantially advance[s] legitimate state interests")).

57 107 S. Ct. at 3146 (quoting from Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 127 (1978) (land use regulations must be "reasonably necessary to the effectuation of a *substantial* government purpose") (emphasis added)).

58 107 S. Ct. at 3150.

59 107 S. Ct. at 3155 (Brennan, J., dissenting) (quoting the Commission's report in support of the permit condition).

60 107 S. Ct. at 3149.

61 *Id.*

The Court's rough handling of the Commission's stated ends and the means used to further them prompted cries of protest from four Justices. Justice Brennan, in a dissent joined by Justice Marshall, objected that the "Court imposes a standard of precision for the exercise of a State's police power that has been discredited for the better part of this century."[62] Justice Blackmun stated that the decision was "an anomaly" because "a State's exercise of its police power need be no more than rationally based."[63] Justice Stevens, for his part, decried the impact of the decision on the "flexibility" of government agencies.[64] The majority, however, was unmoved by these invocations of modern orthodoxy.[65] The Court had gleaned from prior cases a requirement that land use regulations "substantially" advance legitimate state interests,[66] and the Court was "inclined to be particularly careful about the adjective."[67]

The grammatical care evidenced by the Court in *Nollan* raises several troubling issues. First, does the rigorous "police power" test adopted in the case really flow from the takings clause, rather than the due process clause? Next, assuming that the analysis does proceed from the takings clause, does it impose significant restraints on governmental action (or, put another way, does it provide any substantial protection for property rights)? Finally, if the Court's test does, in fact, nullify governmental action that would escape a more traditional takings clause analysis, is it subject to the same fatal criticisms that brought down *Lochner v. New York*?[68]

The precise provenance and legitimacy of the strict "police power" analysis embraced by the majority in *Nollan* is uncertain. Prior cases challenging land use regulations have suggested that the traditional "means/ends" analysis is a limitation inherent in the due process clause.[69] Accordingly, *Nollan*'s conclusion that the test flows from the

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62 107 S. Ct. at 3151 (Brennan, J., dissenting).

63 107 S. Ct. at 3163 (Blackmun, J., dissenting).

64 107 S. Ct. at 3163 (Stevens, J., dissenting).

65 Interestingly enough, the dissenters and the majority in *Nollan* switch sides on the police power issue when the substantive constitutional question before the Court involves individual rather than property rights. Justice Rehnquist, for example, relied upon the police power arguments marshalled in *Nollan* by Justices Brennan, Blackmun and Stevens to dissent from Roe v. Wade, 410 U.S. 113, 173 (1973) (Rehnquist, J., dissenting). Other members of the *Nollan* majority have also criticized the application of a strict "means/ends" test in privacy cases. City of Akron v. Akron Center for Reproductive Health, 462 U.S. 416, 453 (1983) (O'Connor, J., dissenting) (joined by White, J., and Rehnquist, J.) (arguing that state regulation that does not "unduly burden" the abortion decision should be upheld if "the regulation rationally relates to a legitimate state purpose"). This inconsistency may suggest that the *Nollan* majority is willing to accord property rights the same exalted status that the dissenters bestow upon so-called "fundamental" rights. *Cf.* Michelman, *Property as a Constitutional Right*, 38 WASH. & LEE L. REV. 1097 (1981). Whether this is a welcome development is debatable. *See infra* text accompanying notes 87-89.

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

67 107 S. Ct. at 3150.

68 198 U.S. 45 (1905).

69 For example, in Goldblatt v. Hempstead, 369 U.S. 590, 594 (1962), the Court stated that the question whether land use regulations exceeded "a valid exercise of the . . . police power" was governed by "the familiar standard of 'reasonableness.'" The cases cited in *Goldblatt* (369 U.S. at 594-95) to support that conclusion, Lawton v. Steele, 152 U.S. 133 (1894), and Sproles v. Binford, 286 U.S. 374 (1932), establish a standard of bare rationality under the due process clause. *See also* First English Evangelical Lutheran Church v. County of Los Angeles, 107 S. Ct. 2378, 2399 (1987) (Stevens, J., dissenting) (noting that land use regulations may "unfairly deprive a citizen of the right

takings clause is somewhat problematic. Moreover, even if one assumes that the "means/ends" test derives from the takings clause, earlier opinions have never suggested that there are any important analytical differences between a due process "means/ends" test and a similar line of inquiry under the property clause.[70] A standard "means/ends" analysis, of course, only requires a "rational" relationship between stated means and ends.[71] Thus, the Court's sudden emphasis upon a "substantial" connection between means and ends seems dubious at best.

Nevertheless, the Court in *Nollan* proceeded under the assumption that a rigorous "means/ends" test is required by the takings clause. Indeed, the Court expressly defended its searching analysis of means and ends by turning aside Justice Brennan's assertion that police power standards under the takings clause are "the same as those applied to due process or equal-protection claims."[72] Accordingly, whatever prior law suggested, the takings clause now requires that government regulation bear a substantial relation to a legitimate state interest.[73]

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to develop his property at the time and in the manner that will best serve his economic interests," but stating that "it is the due process rather than [the takings clause] that protects the property owner from improperly motivated, unfairly conducted, or unnecessarily protracted governmental decision making"); Comment, *Balancing Private Loss Against Public Gain to Test for a Violation of Due Process or a Taking Without Just Compensation*, 54 WASH. L. REV. 315, 319-27 (1979) (describing due process limitations on land use regulations); Note, Eldridge v. City of Palo Alto: *Aberration or New Direction in Land Use Law?*, 28 HASTINGS L.J. 1569, 1570 (1977) (describing the "police power" and "takings" analyses as "disjunctive").

70 The *Nollan* Court asserted that "our verbal formulations [of the police power test] in the takings field have generally been different" from the standard due process analysis. 107 S. Ct. at 3147 n.3. The Court, in fact, went so far as to claim that "our opinions do not establish that [police power] standards are the same [under the takings clause] as those applied to due process or equal protection claims." *Id.* Schad v. Borough of Mount Ephraim, 452 U.S. 61 (1981), however, demonstrates that these assertions, if not inaccurate, are at the very least hyperbole. In *Schad*, the Court stated that '[w]here property interests are adversely affected" by land use regulations "the courts generally have emphasized the breadth of municipal power to control land use and have sustained the regulation *if it is rationally related to legitimate state concerns* . . . ." 452 U.S. at 68 (emphasis added). That formulation, of course, is *not* "quite different" from the standards "applied to due process . . . claims." *Nollan*, 107 S. Ct. at 3147 n.3. *See also* Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 163 (1980) (government may "deny the property owner of some beneficial use of his property" if the exaction is "reasonably related" to the promotion of "the general welfare").

The two cases cited by the *Nollan* Court in support of its strict takings clause analysis, furthermore, do not uniformly state a police power test differing from the standard due process analysis. While Agins v. City of Tiburon, 447 U.S. at 260, does require a "substantial" connection between means and ends, Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 127 (1978), states only that specified means must "reasonably" further a "substantial 'public' purpose." Thus, although both cases use the adjective "substantial," the word is used differently each time: in *Agins* the adjective specifies the connection between means and ends, in *Penn Central* the adjective modifies the importance of the governmental interest required in the first place. Such inconsistent usage raises considerable doubt that the Court—in either case—thought it was formulating a test under the takings clause which departed from the due process "reasonableness" standard previously announced for land use regulations. Goldblatt v. Hempstead, 369 U.S. at 594-95.

71 *Nollan*, 107 S. Ct. at 3151 (Brennan, J., dissenting).

72 107 S. Ct. at 3147 n.3 (citing Agins v. Tiburon, 447 U.S. 255, 260 (1980)).

73 107 S. Ct. at 3147. *Nollan*, arguably, is not the first case in recent years to invalidate government action under a "means/ends" takings analysis. An earlier takings case, Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155 (1980), appears to have been decided on police power grounds. There, the Court invalidated a state statute which appropriated all interest earned on interpleader funds deposited in court. The exaction of the interest was in addition to a statutory fee for services rendered in managing the fund, and the state offered no "police power justification" for its action. 449 U.S. at 163. Although the Court's precise rationale is somewhat unclear, it appears the appropriation was unconstitutional because "the exaction [was] a forced contribution to general

The next important question therefore becomes whether *Nollan*'s rigorous "means/ends" requirement will have any significant substantive impact. That query, of course, cannot be answered with any precision at this point. But, despite the rather startling result in *Nollan*, the opinion may become nothing more than an interesting footnote in future cases.

Nollan does not hold that the California Coastal Commission may *not* take an easement without paying compensation — the case merely holds that the Commission cannot take an easement permitting lateral passage across beachfront property on the theory that the easement increases visual access. Thus, so long as a regulatory agency clearly articulates *how* a particular exaction furthers specifically articulated ends, the barrier erected in *Nollan* should be overcome. Indeed, the Court stated that, while the California Coastal Commission's lateral access requirement was defective, "if [the condition had] consisted of the requirement that the Nollans provide a viewing spot on their property for passersby with whose sighting of the ocean their new house would interfere," the "condition would . . . be constitutional."[74] As a result, Justice Brennan's final evaluation of the decision may well be accurate: "Fortunately, the Court's decision . . . will probably have little ultimate impact" because government regulators "should have little difficulty in the future in utilizing [their] expertise to demonstrate a specific connection between" chosen means and ends.[75]

A gambler, however, would be hesitant to place her stake on Justice Brennan's prediction of the future. In response to Justice Brennan's assessment, the majority retorted that "[w]e view the fifth amendment's property clause to be more than a pleading requirement, and compliance with it to be more than an exercise in cleverness and imagination."[76] The decision in *Nollan*, moreover, itself demonstrates how far the Court will go in rejecting proffered regulatory rationales as mere "cleverness and imagination."[77] The California Coastal Commission, after all, had expressly found that the Nollans' home would result in increased private use of the shoreline to the detriment of the general public's ability to use non-privately owned tidelands, and had accordingly concluded that the required easement bore a significant relation to the legitimate end of protecting the public's right of access to public property.[78] That a majority of the Court was predisposed to dismiss all of this as "a play on the

governmental revenues, and it [was] not reasonably related to the costs of using the courts." *Id.* But, while *Webb's Fabulous Pharmacies* apparently used a "means/ends" analysis, the mode in which the analysis was carried out bears little resemblance to *Nollan*. The Court required only a "reasonable" relation between means and ends, and the Court — contrary to the approach in *Nollan* (107 S. Ct. at 3148-49) — did not reject or closely scrutinize a proffered regulatory rationale. On the contrary, "[n]o police power justification [was], offered for the deprivation" at issue in the case. 449 U.S. at 163.

74 107 S. Ct. at 3148.

75 *Id.* at 3161 (Brennan, J., dissenting).

76 *Id.* at 3150.

77 *Id.*

78 107 S. Ct. at 3155 (Brennan, J., dissenting) (quoting order of California Coastal Commission).

word 'access,' "[79] suggests that the "ultimate impact" of the *Nollan* test may not be "little."[80]

If the new "means/ends" test in fact invalidates government regulation affecting the use and ownership of property that previously escaped constitutional scrutiny, one is left to wonder why the Court has suddenly seized upon an approach rarely used to any effect in prior cases, and whether the analysis, so used, is jurisprudentially sound. The answers to both inquiries are related.

There are, of course, many possible explanations for the Court's sudden fascination with the fit between legislative means and ends. Perhaps the most obvious, however, is the Court's inability to come up with a fully satisfactory takings clause analysis. As will be addressed in the next section of this Article, the Court has had dismal success in affording property owners any real protection under the substantive provisions of the clause. Virtually any governmental action (short of actual physical appropriation) passes constitutional scrutiny.[81] The multiple factor takings analysis adopted by the Court, moreover, is cumbersome and difficult.[82] In these circumstances, the attraction of a strict "means/ends" test is obvious. Despite the disadvantages of the analysis,[83] the libertarian aspects of a rigorous "means/ends" test might prove particulary appealing to those seeking reinforcement of private property rights. Strict judicial scrutiny of regulatory means and ends can be used to place certain rights (including the destruction of property rights without compensation) beyond legislative control. The analysis, furthermore, is relatively straightforward and uncomplicated; the Court need only announce that given "means" do not "substantially" further certain "ends" — there is no need to wander indeterminately through several levels of inquiry.

The possible virtues of the *Nollan* approach, however, should not blind the Court to history. The utility and flexibility which are the chief advantages of a strict "means/ends" test are also the doctrine's principal drawbacks. The strict "means/ends" test used during the early decades of this century plainly constricted the realm of legislative discretion even in the absence of clear guidance from the constitutional text. It was open to debate, for example, whether New York's restriction upon the number of hours worked by bakers was wise or unwise, but the State's policy choice was almost certainly not constitutionally proscribed.[84] The Court "has long since . . . discarded" the "doctrine that . . . due process autho-

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79 107 S. Ct. at 3148.

80 107 S. Ct. at 3161 (Brennan, J., dissenting).

81 *See infra* notes 116-133.

82 *See id.*

83 A strict "means/ends" test creates a body of law that is relatively unpredictable. The substantive due process cases, for example, left few clear guidelines. The demarcation between permissible and impermissible state regulation was difficult to perceive or justify. *Compare* Lochner v. New York, 198 U.S. 45, 57 (1905) (invalidating limit on number of hours bakers could work) *with* Holden v. Hardy, 169 U.S. 366 (1898) (sustaining state law limiting the hours miners could work underground).

84 Lochner v. New York, 198 U.S. at 57. There is, after all, nothing in the constitution which speaks directly to the length of a baker's work day.

rizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely,"[85] and the Court should hesitate before recycling that discredited analysis. A strict "means/ends" analysis under the takings clause raises once again the specter of judicial legislation: a judgment that a given land use regulation does not "substantially" further particular ends, in effect, simply supplants a legislative or executive policy determination with a judicially determined substitute. There is as little justification for that result under the takings clause as under the due process clause.[86]

The Court, as the opinions in *Nollan* demonstrate, is intimately aware of the argument that a strict "means/ends" test unduly intrudes upon legislative discretion. The argument, in fact, has been used by some members of the *Nollan* majority to criticize "fundamental rights" decisions supported by the *Nollan* dissenters.[87] The *Nollan* dissenters, in turn, have now invoked the same reasoning to decry the searching scrutiny of the *Nollan* majority.[88] The willingness of individual Justices to criticize — or embrace — a strict "means/ends" analysis depending upon the substantive constitutional right involved is not only somewhat disingenuous,[89] it demonstrates the illegitimacy of the analysis in the first place. Privacy rights may (or may not) be more "fundamental" than property rights, but it is hardly clear why a rigorous "means/ends" analysis is any more or less appropriate in one instance than the other. In reality, the ad hoc assignment of a strict "means/ends" test to some, but not all, constitutional rights probably reflects the predilections of individual Justices. Privacy rights and property rights either do — or do not — receive heightened "means/ends" scrutiny depending upon where the particular rights fall within an individual jurist's hierarchy of values. That, of course, is precisely the reason why the process is objectionable: it relegates the Court to an ad hoc policymaking body, thereby usurping the primary function of a legislature in a democratic society.

A strict "means/ends" approach not only intrudes upon legislative policymaking functions, it also provides little concrete protection for property rights and even less guidance to government regulators. Indeed, *Nollan*, provides no sound comfort either to citizens invoking the

85 Ferguson v. Skrupa, 372 U.S. 726, 730 (1963).

86 My criticism of a strict "means/ends" test under the takings clause should not be taken to imply that courts must completely foreswear *any* examination of means and ends. There *are* legitimate limits on the exercise of the police powers. Courts, for example, must be ready to set aside arbitrary or capricious government action. *E.g.*, Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 163 (1980) (striking down a statute appropriating all interest earned on accounts deposited with a state court because the exaction "is not reasonably related to the costs of using the courts"). The threshold for judicial intervention, however, is a showing of irrationality; it is not enough to argue that the legislature or executive has not acted wisely. In the vast arena of social and economic legislation, courts ordinarily should not invalidate legislative or executive action just because other "means" may more "substantially" further given "ends." *E.g.*, Williamson v. Lee Optical Co., 348 U.S. 483, 487-88 (1955).

87 *E.g.*, City of Akron v. Akron Center for Reproductive Health, 462 U.S. 416, 453 (1983) (O'Connor, J., dissenting) (joined by White, J., and Rehnquist, J.); Roe v. Wade, 410 U.S. 113, 173 (1973) (Rehnquist, J., dissenting).

88 Nollan v. California Coastal Comm'n, 107 S. Ct. 3141, 3151 (1987) (Brennan, J., dissenting); *id.* at 3163 (Blackmun, J., dissenting); *id.* (Stevens, J., dissenting).

89 *See supra* note 65.

fifth amendment's property clause or to government regulators attempting to abide by its dictates. The case, for example, would be of little use to the hypothetical property owners described at the start of this Article because it is unlikely that either of them could successfully assert that the respective appropriations of their property (whether vegetable garden or developable air space) did not "substantially" further stated governmental objectives (whether building a highway or preservation of a mountain view).[90] The case, moreover, gives just as little aid to government regulators. *Nollan* does not inform government regulators of the factors that transform their actions into a "taking," nor does the opinion even unambiguously declare that government cannot take property without paying just compensation[91] — *Nollan* merely teaches that property can be taken without compensation only when the Court agrees that the exaction substantially furthers legitimate ends.

The above factors suggest that a strict "means/ends" analysis will not clarify the takings clause's garbled constitutional plot. Rigorous scrutiny of the means and ends of government action simply will not ensure a happy ending for either property owners or government regulators. If, as this Article suggests, takings clause values deserve more rigorous protection than they are currently accorded, the Court should provide that protection by shoring up the substantive protections of the clause itself — not by making "scientific precision [in the fit between governmental means and ends] a criterion of consitutional power. . . ."[92]

III. Going "Too Far": Is Nothing Out of Bounds?

The "means/ends" limitation addressed above does not exhaust the Constitution's protection against uncompensated appropriation of private property. If it did, wholesale government confiscation would escape constitutional scrutiny so long as the government clearly articulated how a particular exaction furthered the public welfare.[93] It is necessary, therefore, to examine when particular governmental means constitute a "taking" even though employed for the most redoubtable of ends. This second level of the "takings" analysis has proven to be exceedingly difficult.

The fundamental precepts governing the second level of the current takings analysis were set out in *Pennsylvania Coal Co. v. Mahon*.[94] There, after balancing private property rights against public necessity, the Court invalidated a Pennsylvania statute which required underground coal

90 The developer challenging the mountain view ordinance could conceivably put on evidence that there is no view from his property worthy of protection or that the ordinance would not, in fact, preserve whatever view exists. Such an approach, however, would constitute a direct challenge to the wisdom of the ordinance and, unless *Nollan* is given an exceedingly broad reading, would almost certainly be rebuffed. *See* Landmark Land Co. v. City and County of Denver, 728 P.2d 1281, 1285-86 (Colo. 1986), *appeal dismissed sub nom.* Harsh Inv. Corp. v. City of Denver, 107 S. Ct. 3222 (1987).

91 *Nollan* intimates that if the California Coastal Commission wants to preserve "visual access" to the beach, it may require the Nollans to erect a viewing spot on their property. 107 S. Ct. at 3148-49.

92 Sproles v. Binford, 286 U.S. 374, 388 (1932).

93 *E.g.*, *Nollan*, 107 S. Ct. at 3148.

94 260 U.S. 393 (1922).

mine operators to leave pillars of coal in place to prevent surface subsidence. Justice Holmes, writing for the majority, noted that although the takings clause gives "seemingly absolute protection" to the property owner by providing that property "shall not be taken for [public] use without compensation,"[95] the government must have *some* ability to act without paying every adversely affected property owner.[96] Accordingly, property rights are "qualified by the police power."[97] That qualification, however, must be carefully hedged against "the natural tendency of human nature . . . to extend the qualification more and more until at last private property disappears."[98] Thus, Justice Holmes wrote, the "general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."[99]

Applying the above principles to the facts before him, Justice Holmes found that the Pennsylvania statute constituted a taking. " 'For practical purposes, the right to coal consists in the right to mine it' " and the Pennsylvania statute had the effect of making it "commercially impracticable to mine certain coal."[100] The fact that the statute was passed to promote the public welfare—i.e., to prevent subsidence—was not sufficient to save the enactment. "[A] strong public desire to improve the public condition," wrote Justice Holmes, "is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change."[101]

Justice Brandeis penned a vigorous dissent. The subsidence statute, he argued, did not interfere with the physical possession of property but merely restricted a "noxious use," and "the legislature has power to prohibit such uses without paying compensation."[102] The "noxious use" analysis, derived from earlier cases which had upheld land use regulations under a nuisance rationale,[103] was given extremely broad scope by Justice Brandeis: so long as property "remains in the [physical] possession of its owner," government has an unquestioned right to "prevent[] the owner from making a use which interferes with paramount rights of the public."[104] Therefore, in Justice Brandeis' view, if there is no physical dispossession and the "paramount rights of the public" are involved, a governmental restriction upon the use of property does not constitute a

95 260 U.S. at 415.

96 *Id.* at 413 ("Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law").

97 *Id.* at 415.

98 *Id.*

99 *Id.*

100 260 U.S. at 414 (quoting Commonwealth v. Clearview Coal Co., 100 A. 820 (1917)).

101 260 U.S. at 416.

102 260 U.S. at 417 (Brandeis, J., dissenting).

103 260 U.S. at 418 (Brandeis, J., dissenting) (citing Mugler v. Kansas, 123 U.S. 623 (1887); Hadacheck v. Sebastian, 239 U.S. 394 (1915)).

104 260 U.S. at 417 (Brandies, J., dissenting). *Compare* Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 134 n.30 (1978) (noting that the "noxious use" cases are better understood as resting "not on any supposed 'noxious' quality of the prohibited uses but rather on the ground that the restrictions were reasonably related to the implementation of the policy . . . expected to produce a widespread public benefit and applicable to all similarly situated property").

taking even if the regulation "deprives the owner of the only use to which the property can then be profitably put."[105]

The majority and dissenting opinions in *Mahon* well illustrate the tensions inherent in the Court's takings clause jurisprudence. As Justice Holmes noted, seemingly absolute property rights must be subject to some measure of uncompensated police power regulation or effective government will cease.[106] The difficulty arises in delimiting this police power qualification somewhat short of the point, arguably reached by Justice Brandeis,[107] at which "private property disappears."[108] The Holmes/Brandeis debate has provided fertile ground for disputation.[109] Justice Holmes' approach, however, has not prospered. While the Court's taking clause cases since *Mahon* have often posed the Holmesian inquiry, "has government regulation gone too far?,"[110] the answer has most often been the one supplied by Justice Brandeis.

In *Penn Central Transportation Co. v. New York City*,[111] the court recognized that "[t]he question of what constitutes a 'taking' for purposes of the fifth amendment has proved to be a problem of considerable difficulty."[112] The court nevertheless stated that, while there was no " 'set formula' " for determining when a taking has occurred, prior decisions "have identified several factors that have particular significance."[113] These factors, drawn from "the major eminent domain cases decided by [the] court,"[114] include "the character of the governmental action," the "economic impact of the regulation on the claimant" and the "extent to which the regulation has interfered with distinct investment-backed expectations."[115] This multiple factor analysis, applied in *Penn Central* to sustain New York City's Landmarks Preservation Law against fifth amendment challenge, has become the focus of recent takings clause jurisprudence.[116]

105 260 U.S. at 417-18 (Brandeis, J., dissenting).
106 260 U.S. at 413.
107 260 U.S. at 417-18 (Brandeis, J., dissenting).
108 260 U.S. at 415.
109 *Compare, e.g.*, Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 128-38 (1978) (upholding a landmark preservation act against the contention that it goes "too far") *with id.* at 142-53 (Rehnquist, J., dissenting) (contending that the act constitutes a taking).
110 260 U.S. at 415.
111 438 U.S. 104 (1978).
112 *Id.* at 123.
113 438 U.S. at 124 (quoting Armstrong v. United States, 364 U.S. 40, 49 (1960)).
114 438 U.S. at 142 n.4 (Rehnquist, J., dissenting).
115 438 U.S. at 124.
116 *E.g.*, Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 485 (1987) (the "character of the governmental action involved here leans heavily against finding a taking," there is no evidence that the regulation "makes it impossible for petitioners to profitably engage in their business," and there has been no "undue interference with their investment-backed expectations"); Hodel v. Irving, 107 S. Ct. 2076, 2082 (1987) (takings analysis turns upon "essentially ad hoc, factual inquiries . . . such as the economic impact of the regulation, its interference with reasonable investment backed expectations, and the character of the governmental action' ") (quoting Kaiser Aetna v. United States, 444 U.S. 164, 175 (1979)); Connolly v. Pension Benefit Guar. Corp., 475 U.S. 211, 225 (1986) (setting out the *Penn Central* test as having "particular significance"); Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 426 (1982) (setting out *Penn Central* test); Andrus v. Allard, 444 U.S. 51, 65-66 (1979) (court implicitly analyzes the *Penn Central* factors, noting that the government action did not result in a "physical invasion" or completely obliterate property values).

The *Penn Central* test, at first blush, appears to offer some protection to property owners against untrammeled regulatory action. The test, after all, suggests that whether a taking has occurred will depend upon a realistic appraisal of the actual impact of regulatory action on the property owner. The *Penn Central* factors, however, have been construed in a manner reminiscent of Justice Brandeis' assertion that, so long as property "remains in the [physical] possession of its owner," virtually any regulation taken to further the "paramount rights of the public" escapes constitutional scrutiny.[117] Thus, while the Supreme Court has recognized a taking any time the character of the government action is such that the property owner is physically dispossessed,[118] the court has not been as prompt to the rescue when the government merely binds and gags the property owner.[119]

Indeed, the Court's analysis of the *Penn Central* factors has become quite summary. In *Connolly v. Pension Benefit Guaranty Corp.*,[120] for example, the Court simply noted that the "nature of the governmental action" does not "constitute a taking requiring Government compensation" if "the Government does not physically invade or permanently appropriate any of the [property owner's] assets for its own use" and the regulation at issue "adjusts the benefits and burdens of economic life to promote the common good."[121] The Court's analysis of the economic impact of regulation upon the property owner, as well as its inquiry into interference with investment-backed expectations, has been similarly undemand-

117 Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 417 (1922) (Brandeis, J., dissenting).

118 *See* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 426 (1982) (physical installation of television cables on apartment building results in a taking; when there is "a permanent physical occupation, a taking has occurred"); Kaiser Aetna v. United States, 444 U.S. 164, 180 (1979) (government mandated right of pubic access to private marina constitutes a taking because the servitude "will result in an actual physical invasion of the privately owned marina"); United States v. Dickinson, 331 U.S. 745, 750-51 (1947) (when the government takes part of a tract of land by flooding, it must pay for the damage caused by resulting erosion to the rest of the tract); United States v. Cress, 243 U.S. 316, 326-29 (1917) (construction of locks and dams that periodically flooded property results in a partial taking of the property); United States v. Lynah, 188 U.S. 445, 468-70 (1903) (when government floods property, the resulting physical dispossession of the owner results in a compensable taking); St. Louis v. Western Union Tel. Co., 148 U.S. 92, 98-99 (1893) (placement of telegraph poles upon property results in a taking because the poles "effectually and permanently dispossess[]" the property owner); Pumpelly v. Green Bay Co., 80 U.S. (13 Wall.) 166, 181 (1872) ("where real estate is actually invaded by superinduced additions of water, earth, sand, or other material, or by having any artificial structure placed on it, so as to effectually destroy or impair its usefulness, it is a taking, within the meaning of the Constitution"). *Cf.* United States v. Causby, 328 U.S. 256, 261 (1946) (military overflights of chicken farm resulted in a taking because the effect of the flights on the property owners was "as complete as if the United States had entered upon the surface of the land and taken exclusive possession of it").

119 *See* MacDonald, Sommer & Frates v. County of Yolo, 477 U.S. 340 (1986) (Court declines to address whether a regulation limiting prime residential property solely to agricultural use constitutes a taking); Williamson Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172 (1985) (court declines to address whether various land use regulations constitute a taking even though the jury had concluded that the regulations denied the property owner any economically viable use of its land); San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621 (1981) (Court declines to consider whether zoning regulation limiting industrial property to "open space" uses constitutes a taking); Agins v. City of Tiburon, 447 U.S. 255 (1980) (Court concludes that change in zoning ordinance which prohibited high-density development, thereby injuring property owners by as much as $2 million, did not constitute a taking).

120 475 U.S. 211 (1986).

121 *Id.* at 225.

ing. In *Penn Central*, the Court wrote that its prior cases "uniformly reject the proposition that diminution in property value, standing alone, can establish a 'taking' " — and the *Penn Central* Court insisted on analyzing economic impact "standing alone."[122] Moreover, while the concept of investment-backed expectations would seem to *require* the fact finder to delve into the disappointed expectations of the property owner, the *Penn Central* Court rejected "the submission that appellants may establish a 'taking' simply by showing that they have been denied the ability to exploit a property interest that they heretofore had believed was available for development."[123] Thus, for all practical purposes, the Court dismissed "economic impact" and "investment-backed expectations" as potent inquiries in the very case that formally established them as analytical factors. The feeble nature of the inquiries was confirmed in *Andrus v. Allard*,[124] where the Court concluded that the owners of valuable native American artifacts could be stripped of their right to sell or trade those items — even though the regulation destroyed the market value of the artifacts as well as the investment-backed expectations of their owners.[125] The fact that the government action rendered extremely valuable objects "priceless" in a dramatically literal sense did not raise serious constitutional concern.

The impact of the Court's contemporary takings clause analysis upon property owners has been dramatic. The factors identified in *Penn Central* have become a legal litany, but they have not been given any real muscle.[126] Government, it seems, can confiscate all practical value inherent in property so long as the regulation "involves the adjustment of rights for the public good,"[127] leaves the property owner in physical possession of the property involved,[128] and does not "extinguish a fundamental attribute of ownership."[129] The protection this approach accords property values is not substantial. Government regulation, by definition, almost always involves a "strong public desire to improve the public condition."[130] Moreover, government regulations which result in the physical invasion of private property "are relatively rare."[131] The only "fundamental attributes of ownership" recognized by the Court to date are physical possession or some closely associated right — such as the right to donate, devise or (in some circumstances) exclude others from property.[132] Thus, under the Court's current analysis, government regu-

122 Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 131 (1978).

123 *Id.* at 130.

124 444 U.S. 51 (1979).

125 *See* 444 U.S. at 64-68.

126 *See infra* note 153.

127 444 U.S. at 65.

128 *Id.* at 66.

129 Agins v. City of Tiburon, 447 U.S. 255, 262 (1980).

130 Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 416 (1922).

131 First English Evangelical Lutheran Church v. County of Los Angeles, 107 S. Ct. 2378, 2393 (1987) (Stevens, J., dissenting).

132 Hodel v. Irving, 107 S. Ct. 2076, 2083 (1987) (striking down as a "taking" the complete abrogation of the right to devise certain interests in Indian allotment lands; "[i]n one form or another, the right to pass on property—to one's family in particular—has been part of the Anglo-American legal system since feudal times"); Kaiser Aetna v. United States, 444 U.S. 164, 179-80

lation will not exceed the strictures of the takings clause—whatever the practical impact of the regulation upon the property owner—so long as the property owner retains the right to "possess," "transport," or "donate or devise" an otherwise valueless shell.[133] With such an analytical framework, very little government regulation—to borrow Justice Holmes' turn of phrase—goes "too far."[134]

The jurisprudence surveyed above indicates that the owner of the hypothetical vegetable garden described at the start of this Article will receive compensation; she has been physically displaced from a small section of her backyard. The developer, on the other hand, will receive nothing: the mountain view ordinance furthers the public interest, the landowner still physically possesses her property, and she has lost no "fundamental attribute of ownership."[135] Accordingly, the developer has no constitutional complaint—even though she has lost a significant property interest. These results are problematic.[136]

It is difficult to justify why a vegetable garden lost to the commuting public should invariably and without question result in a "taking" with concomitant "just compensation" while millions of dollars in development rights lost in the name of public aesthetics are not compensable. To say, as Professor Sax has suggested in a well-known analysis of the issue, that the results are required because the government is acting in its role as a "proprietor" when it builds a road, while it is merely "arbitrating" the interests of the developer and nearby residents when it appropriates a scenic easement, is hardly satisfactory.[137] If compensation is

(1979) (holding that "the 'right to exclude,' so universally held to be a fundamental element of the property right, falls within [the] category of interests that the Government cannot take without compensation") (footnote omitted). *Cf.* Pruneyard Shopping Center v. Robins, 447 U.S. 74, 84 (1980) (shopping center's reliance on "right to exclude" persons circulating petitions rejected; "appellants have failed to demonstrate that the 'right to exclude others' is so essential to the use or economic value of their property that the state-authorized limitation of it amounted to a 'taking' ").

133 Andrus v. Allard, 444 U.S. 51, 66 (1979).

134 *Pennsylvania Coal*, 260 U.S. at 415. Indeed, this past term the Court sustained a Pennsylvania subsidence statute that, under any realistic analysis, is virtually identical to the one invalidated in *Pennsylvania Coal.* Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 506 (1987) (Rehnquist, C.J., dissenting). *See* Berger, *The Year of the Taking Issue*, 1 B.Y.U. J. PUB. L. 261, 287-96 (1987).

135 Agins v. City of Tiburon, 447 U.S. 255, 262 (1980).

136 Not everyone, however, is troubled. The apparent rule established by the Court's cases — i.e., that physical dispossession constitutes a taking while anything short of that does not — is supported by some commentators. *See* Bender, *The Takings Clause: Principles or Politics?*, 34 BUFFALO L. REV. 735, 831 (1985) ("My recommendation is that the takings clause should be restricted to a small variety of cases in which the government acquires real property ownership, possession or full control (restrictions on use would never be takings) for government projects that service the public.") (footnote omitted); Humbach, *A Unifying Theory for the Just-Compensation Cases: Takings, Regulation and Public Use*, 34 RUTGERS L. REV. 243 (1982) (arguing that physical dispossession is the dividing line between permissible regulation and a taking). *Cf.* Stoebuck, *A General Theory of Eminent Domain*, 47 WASH. L. REV. 553, 597 (1972) (arguing that the power of eminent domain should be essentially unlimited).

137 Sax, *Takings and the Police Power*, 74 YALE L.J. 36, 62 (1964). Professor Sax:

> distinguishes between government's proprietary role, when appropriations of private property result in a benefit to a government enterprise such as the military or school and highway construction, and government's arbital [sic] role as mediator among competing economic claims. If private property is appropriated in the course of government's role as proprietor, then compensation is due, but if government only mediates and resolves conflicts among the competing interests of its citizens, consequential losses to private property owners are a noncompensable consequence of the police power.

required when the government condemns a vegetable garden to build a road that benefits the general public, why isn't the argument for compensation even stronger when—as in the case of the developer's lost air space—government action burdens a property owner to benefit a discrete segment of the public (citizens who would rather have a view of the mountains than a commercial development)?[138]

The disparate outcomes for the vegetable garden owner and the developer *can* be justified pragmatically. Indeed, the Court's pronounced reticence to find that anything short of physical ouster constitutes a taking may be a direct (but unstated) result of fiscal concerns — the public can afford to buy vegetable gardens to build roads, but society simply cannot raise enough money to pay for all the scenic beauty it desires. That government cannot afford everything it would like to accomplish is a widely recognized modern reality. That reality, however, is not a sound constitutional foundation upon which to erect a modern takings clause jurisprudence because the support it provides for property rights gives way precisely when needed the most. If the unstated rationale for refusing the developer compensation is that public scenic easements, while desirable, come too dear, the fifth amendment is indeed a strange constitutional shield: it protects the private property owner unless and until things become too expensive for the government. The takings clause, as such, becomes not a bulwark against governmental oppression, but rather a hurdle the government surmounts by sadly turning its pockets inside out. This result is objectionable. The contemporary government desire to "regulate more and spend less"[139] should not automatically invest regulators seeking "to improve the public condition" with "a shorter cut than the constitutional way of paying for the change."[140]

A positivist property analysis leads to a final possible rationale for the compensated gardener and disappointed developer. As Justice Brennan noted in his dissent in *Nollan*, property law "as a general proposition" is "left to the individual States to develop and administer."[141] Taken for all it is worth, this and similar statements suggest that property and property rights have no independent existence outside of state law.[142] And, if state law indeed defines and delimits property rights, no

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Note, Devines v. Maier: *An Unwelcome Positivist Intrusion Upon Traditional Taking Analysis*, 46 U. PITT. L. REV. 845, 852-53 (1985). *See also* Sax, *Takings, Private Property and Public Rights*, 81 YALE L.J. 149, 161-62 (1971).

138 Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1201 (1967). It is, moreover, not entirely clear how Professor Sax would classify the developer's case. The argument could be made that, in condemning a scenic easement across the developer's property, the government was acting in a proprietary capacity. Sax, *Takings and the Police Power*, 74 YALE L.J. 36, 71 (1964).

139 Berger, *The Year of the Taking Issue*, 1 B.Y.U. J. PUB. L. 261, 264 (1987).

140 Pennsylvania Coal Co. v. Mahon, 260 U.S. 293, 416 (1922) (Holmes, J.).

141 Nollan v. California Coastal Comm'n, 107 S. Ct. 3141, 3158 (1987) (Brennan, J., dissenting) (quoting Hughes v. Washington, 389 U.S. 290, 295 (1967) (Stewart, J., concurring)). *See also* Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1001 (1984).

142 *See, e.g.*, Texaco, Inc. v. Short, 454 U.S. 516, 526 (1982) (upholding the Indiana Dormant Mineral Interests Act against the claim that the reversion provision of the Act constituted a taking without just compensation; "we have no doubt that, just as a State may create a property interest that is entitled to constitutional protection, the State has the power to condition the permanent retention of that property right on the performance of reasonable conditions that indicate a present intention

regulatory measure short of actual physical dispossession of the owner could constitute a taking — the regulation would, in effect, simply *redefine*, not *take*, property.[143] Thus, the owner of the garden receives compensation as a result of her physical ouster. The developer, by contrast, receives nothing because she only possesses the property rights that the state deigns to accord her — and the state has changed its mind.

Although the Court has seemingly embraced the positivist approach described above when the constitutional question before it is whether a property right has been deprived without due process of law,[144] similar analysis under the takings clause is troubling. The fifth amendment, by its literal terms, states that "private property" shall not "be taken for public use, without just compensation."[145] Although the takings clause "has not always been read literally,"[146] the wording of the clause suggests — at the very minimum — that "private property" is not subject to unfettered state control. Indeed, unquestioned adoption of the positivist notion that "private property" consists only of those interests that are accorded the owner by legislative grace would render the takings clause a dead letter. Justice Holmes noted over sixty years ago that property values "are enjoyed under an implied limitation and must yield to the police power."[147] But, as he emphasized, that implied limitation "must have its limits" or "private property disappears."[148] Property interests, even if "not created by the Constitution,"[149] must nevertheless be protected by it.[150]

IV. Clarifying the Analysis: Can the Court Mean What It Says?

In a much-heralded decision this past Term, the Court declared that even temporary regulatory takings require just compensation.[151] The

to retain the interest"); Board of Regents v. Roth, 408 U.S. 564, 577 (1972) (discussing which property interests in employment contracts require pretermination hearing; "Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law — rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.").

143 *Cf.* Baker, *Property and Its Relation to Constitutionally Protected Liberty*, 134 U. PA. L. REV. 741, 816 (1986) (while a property owner has a right to "participate in . . . collective decisionmaking," liberty interests do not "dictate the existence of any particular set of economic opportunities" or "require unrestricted individual opportunities to engage in exchange transactions").

144 *See, e.g.*, Goss v. Lopez, 419 U.S. 565, 574 (1975) (school district must provide adequate process prior to suspending students; "[h]aving chosen to extend the right to an education to people of appellees' class generally, Ohio may not withdraw that right on grounds of misconduct, absent fundamentally fair procedures to determine whether the misconduct has occurred"); Bishop v. Wood, 426 U.S. 341, 344 (1976) (when property interest is created by ordinance or implied contract, any claim of entitlement to the interest must be decided by reference to state law); Arnett v. Kennedy, 416 U.S. 134, 152-53 (1974) (plurality opinion) (statute which granted an employee the right not to be discharged except for "cause" also provided the procedures by which "cause" is to be determined and supersedes the constitutional due process guarantees claimed by the employee).

145 U.S. CONST., amend. V.

146 Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 142 (1978) (Rehnquist, J., dissenting).

147 Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413 (1922).

148 *Id.* at 413, 415.

149 Board of Regents v. Roth, 408 U.S. 564, 577 (1972).

150 *See* Michelman, *Property as a Constitutional Right*, 38 WASH. & LEE L. REV. 1097 (1981).

151 First English Evangelical Lutheran Church v. County of Los Angeles, 107 S. Ct. 2378 (1987).

opinion, however, was rendered on the pleadings and did not address the fundamental question whether a taking had actually occurred.[152] The case, therefore, simply establishes that property owners who suffer a taking will obtain compensation; it does not clarify when, or under what circumstances, a taking results. The preceding discussion shows that such clarification is sorely needed.

As shown above, the Court's current takings clause analysis gives little concrete protection to property owners. Although the Court has deduced a three-part test to probe the outer limits of permissible government regulation, the inquiry has in fact collapsed into a search for physical dispossession of the property owner or abrogation of rights closely entwined with physical possession.[153] Such an analysis, of course, is far too attenuated to prevent government regulators from going "too far."[154] Ironically, and despite the results it has reached, even the Supreme Court has verbally rejected "the proposition that a 'taking' can never occur unless government has [interfered with] physical control" of property.[155] The Court should bring its holdings in line with its rhetoric.

There are numerous possible ways for the Court to provide a coherent policy for the takings clause. Prior commentators have made excellent suggestions, ranging from the theoretical and philosophical[156] to the

152 The *First English Evangelical* plaintiff alleged that certain activities of the County of Los Angeles had resulted in a temporary taking of its property. The lower state courts, based on the California Supreme Court's decision in Agins v. City of Tiburon, 598 P.2d 25 (1979), *aff'd on other grounds*, 447 U.S. 255 (1980), had sustained the defendant's demurrer to the complaint on the ground that, even if a "taking" had occurred, the plaintiff could not obtain "just compensation" because the sole remedy was a declaratory judgment action or mandamus. The Supreme Court granted review only to determine whether the demurrer was properly sustained and accordingly had "no occasion to decide whether the ordinance at issue" actually resulted in "a compensable taking." 107 S. Ct. 2384-85.

153 *E.g.*, Hodel v. Irving, 107 S. Ct. 2076 (1987); Kaiser Aetna v. United States, 444 U.S. 164 (1979).

154 Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).

155 Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 123 n.25 (1978).

156 *E.g.*, Michelman, *Property as a Constitutional Right*, 38 WASH. & LEE L. REV. 1097 (1981); Michelman, *Mr. Justice Brennan: A Property Teacher's Appreciation*, 15 HARV. C.R.-C.L. L. REV. 296 (1980); Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165 (1967). *See also* R. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN (1985) (arguing that a judge can objectively determine the meaning of the takings clause by construing its language in accordance with its commonly accepted meaning at the time of the drafting and ratification of the Constitution, with specific reference to the philosophy of John Locke); Baker, *Property and Its Relation to Constitutionally Protected Liberty*, 134 U. PA. L. REV. 741, 816 (1986) (Professor Baker suggests that property rights are essentially political rights; "[w]hile a formal conception of liberty encompasses the right to participate in . . . collective decision-making, it does not dictate the existence of any particular set of economic opportunities"); Bender, *The Takings Clause: Principles or Politics?*, 34 BUFFALO L. REV. 735, 824, 828-29 (1985) (Professor Bender suggests a hierarchical arrangement of property rights under which developmental property rights would "increasingly yield to . . . community values and interests"); Oakes, *"Property Rights" In Constitutional Analysis Today*, 56 WASH. L. REV. 583 (1981) (analyzing the interaction of the contracts clause, due process clause, and the takings clause in the protection of property rights); Radin, *Property and Personhood*, 34 STAN. L. REV. 957 (1982) (Professor Radin analyzes the feasibility and legitimacy of distinguishing between 'fungible property" and "personal property" as defined by their relationship to personhood; she suggests that "fungible" property rights (such as investment interests that can be easily converted into dollar amounts) may be more readily taken than personal property rights more closely associated with personality and autonomy); Rodgers, *Bringing People Back: Toward A Comprehensive Theory of Taking in Natural Resources Law*, 10 ECOLOGY L.Q. 205 (1982) (proposing a legal analysis based on the behavioral preferences of human beings as suggested by the laws of biology).

practical.[157] The Court, in fact, has gleaned at least a portion of its current analysis from this commentary.[158] Despite the plethora of approaches recommended by the commentators, however, the Court continues to reach ad hoc results, at least in part because of the conceptual difficulties of the academic proposals. The analysis set out here, therefore, is derived from the Court's own construction of the takings clause.[159] Indeed, I believe the Court has already sketched out a workable plot for the takings clause. Unfortunately, the Court has refused to develop its own outline.

In *Penn Central* the Court identified a trio of factors that have "particular significance" under the takings clause.[160] Those factors have been repeatedly applied by the Court as its standard takings clause analysis.[161] But, instead of giving each factor precise content and considering their logical impact and interaction, the Court has disabled the *Penn Central* test by giving each factor an extremely narrow focus and citing cases which turn on one factor to dispose of an entirely different inquiry under a separate factor. The only character of government action which raises the Court's collective eyebrow, for example, is physical dispossession.[162] And, in reliance on cases which in fact turned on the character of the

157 *E.g.*, Sax, *Takings, Private Property and Public Rights*, 81 YALE L.J. 149 (1971); Sax, *Takings and the Police Power*, 74 YALE L.J. 36 (1964). As noted, Professor Sax makes a distinction between government action taken in "proprietary" and "arbitral" roles. The approach, as he aptly demonstrates, has certain practical appeal. *Id.* at 62-63. However, one quickly encounters significant difficulties in distinguishing between "proprietary" and "arbitral" functions — and in justifying why proprietary actions require compensation while arbitral functions do not. *See* Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1201 (1967); *see also* Berger, *A Policy Analysis of the Taking Problem*, 49 N.Y.U. L. REV. 165, 223-26 (1974) (Professor Berger suggests a series of pragmatic rules to determine when compensation under the takings clause is appropriate; the specific rules are derived from an analysis of the expectations of the property owner and the benefits and burdens accruing to the property owner and the public from the challenged government action); Costonis, *Presumptive And Per Se Takings: A Decisional Model For The Taking Issue*, 58 N.Y.U. L. REV. 465, 483-501 (1983) (Professor Costonis presents a model under which certain physical incursions and regulatory actions taken by the government would presumptively establish a taking; the government could overcome the presumption based on fairness considerations); Ellickson, *Suburban Growth Controls: An Economic and Legal Analysis*, 86 YALE L.J. 385, 418-24 (1977) (suggesting that questions include whether government action abates a nuisance, whether its costs exceed its benefits, and whether the costs of paying compensation exceed the burdens placed on the property owner).

158 One of the *Penn Central* factors, the impact of government regulation upon a property owner's "distinct investment-backed expectations" (Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978); *see also* Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 295 (1981)), apparently derives from the writings of Professor Michelman. Professor Michelman, describing the holding in *Pennsylvania Coal*, stated that the takings test established by that case was "whether or not the [governmental] measure in question can easily be seen to have practically deprived the claimant of some distinctly perceived, sharply crystallized, investment-backed expectation." Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1233 (1967).

159 Much of the extant literature has had little impact on the decided cases. *See* Rose, Mahon *Reconstructed: Why the Takings Issue Is Still A Muddle*, 57 S. CAL. L. REV. 561, 598 (1984) (Professor Rose notes that, despite the multitude of academic proposals, courts essentially rely upon an ad hoc analysis of takings claims; she suggests, among other things, that the courts "turn to ordinary language as a guide for what constitutes a taking of property"). My analysis, built upon the "ordinary language" of the Court's own opinions, is a pragmatic attempt to delineate the approach suggested by Professor Rose.

160 Connolly v. Pension Benefit Guar. Corp., 475 U.S. 211, 225 (1986).

161 *See supra* note 153.

162 *See supra* notes 127-33.

government action, the Court has rarely been moved by assertions that government action imposes undue economic burdens or improperly hampers investment-backed expectations.[163] As a result, *Penn Central* has become something of a tautology — an analysis that the Court reflexively invokes and quickly dispatches in the course of sustaining virtually any government regulation challenged under the takings clause. This is unfortunate. Unless the takings clause is to be relegated to the constitutional attic, the Court *must* demonstrate that the *Penn Central* factors have real substance.

I believe that the *Penn Central* factors, if properly reinvigorated, can provide property owners with significant constitutional protection. Reviving the takings clause under *Penn Central*, however, will require a modest recasting of that case's three inquiries. The presence or absence of a physical invasion, for example, should not be the sole relevant focus when the Court scrutinizes the character of government action. Instead, the Court should examine whether there is a compelling public need for the government action and whether it results in a true average reciprocity of advantage between affected property owners and the public.[164] The economic diminution inquiry, in turn, should focus on whether the government action has deprived the property owner of a valuable, identifiable property interest — not on whether the government has taken everything imaginable. The investment-backed expectation analysis, finally, should be used to determine whether compensation for a given economic loss would be "just" or merely a windfall. Under each factor, the Court must temper its current willingness to approve any injury short of total confiscation. Unless the character of the government action supports a different result, those regulatory actions which appropriate identifiable, valuable property interests that the owners legitimately expected were available for use or development should result in compensation. In short, I propose a construction of *Penn Central* that is rigorous enough to make the takings clause a real—rather than simply a storied—constraint on government action.

A. *Character of the Governmental Action: Is the Public Need Compelling or Is There an Average Reciprocity of Advantage?*

"Many cases before and since *Pennsylvania Coal* have recognized that the nature of the State's action is critical in takings analysis."[165] The focus the modern Court has given to this factor, however, has been exceedingly narrow. Although the Court's rhetoric has suggested the contrary,[166] unless the character of the government action "reaches the extreme form of a permanent physical occupation," the Court has been

163 *See supra* notes 124-26; *infra* notes 233-37.

164 This inquiry may alone be determinative in exceptional cases (Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926); Mugler v. Kansas, 123 U.S. 623 (1887)), but ordinarily an analysis of economic diminution and investment-backed expectations also will be required.

165 Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 488 (1987).

166 *E.g.*, Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 123 n. 25 (1978) ("we do not embrace the proposition that a 'taking' can never occur unless government has transferred physical control over a portion of a parcel").

loath to find that "a taking has occurred."[167] This hesitancy is unwarranted. While a physical invasion may represent the archetypal government action requiring compensation,[168] the takings clause protects against more than physical invasions. A careful analysis of the character of the government action, therefore, must be given considerably broader scope than is suggested by the Court's contemporary precedent.

Judicial insistence upon a physical invasion as the predicate for fifth amendment protection has an analogue in the fourth amendment context. Until relatively recently, the fourth amendment's protection against "unreasonable searches and seizures"[169] was limited to actual physical invasions.[170] As a result, electronic surveillance of private conversations escaped constitutional scrutiny — unless the government happened to cause a physical invasion by using a thumbtack to fasten the microphone to the wall.[171] This formalistic approach was rightly criticized,[172] and was ultimately abandoned by the Court. In *Katz v. United States*,[173] the Court eschewed physical intrusion as a constitutional litmus test and instead announced that the fourth amendment applies whenever police investigatory activities infringe an "expectation of privacy" that "society is prepared to recognize as 'reasonable.' "[174] Thus, the Court moved from a mechanical rule of thumb to an explicit, albeit more difficult,[175] analysis of the core concerns underlying the fourth amendment. A similar shift in analysis is mandated under the takings clause.

Isolating the core concerns animating a constitutional provision is no mean feat, of course. But, unlike the situation in *Katz* (where the Court was compelled to erect a new privacy rationale for the fourth amendment), the fundamental principles to guide construction of the takings clause have already been identified by the Court. The Court simply seems to have mislaid them. Nearly 100 years ago, the Court declared that the mission of the takings clause is to prevent the government "from loading upon one individual more than his just share of the burdens of government."[176] When a property owner "surrenders to the public something more and different from that which is exacted from other members of the public, a full and just equivalent shall be returned to him."[177] The clause, in short, "was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness

167 Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 426 (1982).

168 *Loretto*, 458 U.S. at 428.

169 U.S. CONST. amend. IV.

170 Wilkins, *Defining the "Reasonable Expectation of Privacy": An Emerging Tripartite Analysis*, 40 VAND. L. REV. 1077, 1081-86 (1987). *See generally* Clinton v. Virginia, 377 U.S. 158 (1964) (actual physical intrusion required as predicate for a search); Goldman v. United States, 316 U.S. 129 (1942) (same proposition); Olmstead v. United States, 277 U.S. 438 (1928) (same proposition).

171 Clinton v. Virginia, 377 U.S. 158 (1964) (the Court finds the predicate physical intrusion required for fourth amendment protection because a microphone was attached to a wall with a thumbtack).

172 *See, e.g.*, Olmstead v. United States, 277 U.S. 438, 474-78 (1928) (Brandeis, J., dissenting).

173 389 U.S. 347 (1967).

174 *Id.* at 361 (Harlan, J., concurring).

175 *See generally* Wilkins, *supra* note 170.

176 Monongahela Navigation Co. v. United States, 148 U.S. 312, 325 (1893).

177 *Id.*

and justice, should be borne by the public as a whole."[178] Thus, the Court should explicitly analyze the character of government action to determine whether the burdens created by that action, "in all fairness and justice, should be borne by the public as a whole."[179]

Whether or not the costs of government action should be borne by the public as a whole does not turn upon the form the action takes; i.e., whether the action results in a physical occupation or transfer of property. The presence or absence of a "permanent physical occupation"[180] is simply too blunt an analytical tool for that inquiry.[181] The inquiry, however, does require an analysis of *why* the sovereign is acting as well as a realistic appraisal of *how* the sovereign action affects the individual property owner vis-à-vis the public. The character of government action, therefore, should be scrutinized to determine (1) the justification for the particular action and (2) the impact of the action upon individual property owners and the general public. Explicit analysis of these issues should indicate, with a significant degree of reliability, whether the government is "forcing some people alone to bear public burdens."[182]

The first issue relevant to the above analysis is potentially the most troublesome. Judicial inquiry into the justification for government action creates the danger, exemplified by *Nollan*, that courts will intrude upon legislative or executive programs because they deem them unwise.[183] Some judicial inquiry into the justification for governmental action is required, however, if the takings clause is to have any substantive impact. It is preferable, furthermore, that this inquiry be established as a focused, substantive constitutional requirement. The "means/ends" test utilized in *Nollan*, by contrast, has indeterminate breadth. Indeed, the *Nollan* approach differs little (if at all) from a substantive due process analysis,[184] while the inquiry I propose here (and the one suggested by the decided cases) is relatively narrow: courts will essentially ask whether there is a strong or a weak police power justification for given governmental action. Governmental action possessing a compelling police power justification will be more readily upheld against a takings challenge. Absence of a compelling police power justification, moreover, is not automatically fatal. On the contrary, governmental action lacking a strong police power justification will be invalidated as a taking only if it lacks a true average reciprocity of advantage and an analysis of its economic impact and interference with investment-backed expectations demonstrates that compensation is required.[185] Thus, the judicial inquiry proposed here

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178 Armstrong v. United States, 364 U.S. 40, 49 (1960).

179 *Id.*

180 Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 426 (1982).

181 As the Court noted in United States v. General Motors Corp., 323 U.S. 373, 378 (1945), "[t]he . . . deprivation of the former owner rather than the accretion of a right or interest to the sovereign constitutes that taking."

182 Armstrong, 364 U.S. at 49.

183 *See supra* notes 84-89 and accompanying text.

184 *See supra* notes 69-71 and accompanying text. A strict scrutiny due process inquiry into the justification for government action, of course, knows no bounds.

185 *See infra* notes 202-06. This is perhaps the biggest difference between the test I propose and the "means/ends" analysis adopted in *Nollan*. As exemplified by that case, judicial disagreement with the justification for challenged governmental action — without more — results in invalidation.

does not create the same separation of powers difficulties as a strict "means/ends" test.

The various justifications for government actions adversely affecting property owners lie along a continuum. The stronger the police power justification for the action, the more likely the action will withstand a challenge under the takings clause. Over a century ago, for example, the Court "recognized that the government can prevent a property owner from using his property to injure others without having to compensate the owner for the value of the forbidden use."[186] In *Mugler v. Kansas*,[187] which involved a challenge to a statute prohibiting use of a distillery, the Court reasoned that the power of the state to prohibit uses of property "prejudicial to the health, the morals, or the safety of the public, is not — and, consistently with the existence and safety of organized society, cannot be — burdened with the condition that the State must compensate such individual owners for pecuniary losses they may sustain."[188] Thus, the authority of government to act is at its strongest — and the countervailing interests of affected property owners the weakest — when the government acts to prevent property owners, "by a noxious use of their property, to inflict injury upon the community."[189] As a result, forbidding the excavation of sand and gravel below the water line,[190] prohibiting the operation of a brickyard in a residential area,[191] interdicting the operation of a livery stable in a downtown area,[192] and the eradication of trees carrying a disease inimical to a state's agricultural interests[193] do not constitute takings. As Professor Michelman has noted, "no one can obtain a private vested right against regulation or improvement for the sake of public health, safety or welfare."[194]

Government action does not escape scrutiny under the takings clause, however, merely because *some* public purpose justifies that action. Although government may act to further the public health, safety and welfare, those concepts are not so broad that they swallow the takings clause. As Justice Holmes noted, "[t]he protection of private property in the fifth amendment presupposes that it is wanted for a public use, but provides that it shall not be taken for such use without compensation."[195] Thus, governmental power to limit the use of property without compen-

186 Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 144 (1978) (Rehnquist, J., dissenting) (citing Mugler v. Kansas, 123 U.S. 623, 669 (1887)).

187 123 U.S. 623 (1887).

188 *Id.* at 669.

189 *Id.*; *see* Ellickson, *Suburban Growth Controls: An Economic and Legal Analysis*, 86 YALE L.J. 385, 418-24 (1977) (suggesting that the compensation issue, at least in part, should turn upon whether government action abates a nuisance).

190 Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962).

191 Hadacheck v. Sebastian, 239 U.S. 394 (1915).

192 Reinman v. City of Little Rock, 237 U.S. 171 (1915).

193 Miller v. Schoene, 276 U.S. 272 (1928).

194 Michelman, *Property as a Constitutional Right*, 38 WASH. & LEE L. REV. 1097, 1108 (1981).

195 Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922); *cf.* Epstein, *The Public Purpose Limitation On The Power of Eminent Domain : A Constitutional Liberty Under Attack*, 4 PACE L. REV. 231, 264-65 (1984) (criticizing the broad definition of "public use" approved in Poletown Neighborhood Council v. City of Detroit, 410 Mich. 616, 304 N.W.2d 455 (1981), which involved the condemnation of a large residential and commercial neighborhood for construction of a General Motors assembly plant, as "oppressive to property rights and to liberty").

sating affected property owners "is not coterminous with the police power itself."[196] The *Mugler* line of cases simply "does not grant carte blanche to government agencies to regulate private property into oblivion."[197] Unless governmental action involves "prevention of a *misuse* or *illegal use*" of property,[198] it does not — without further inquiry — escape the requirements of the takings clause. In short, the public need must be truly compelling before government action will receive the same deferential treatment accorded *Mugler* and its progeny.[199]

The Court's most recent cases dangerously ignore the importance of the police power justification for government action challenged under the takings clause. Contemporary pronouncements of the Court suggest that government actions taken to promote aesthetics are entitled to the same deferential treatment accorded regulations prohibiting life-threatening uses of property. In *Penn Central*, for example, the Court echoed Justice Brandeis' dissent in *Pennsylvania Coal*[200] by dramatically rereading *Mugler* and its progeny to dispose of the contention that stricter constitutional scrutiny is required if government regulation does not involve a truly "noxious" use of property. "These cases," the Court asserted, "are better understood as resting not on any supposed 'noxious' quality of the prohibited uses but rather on the ground that the restrictions were reasonably related to the implementation of a policy . . . expected to produce a wide-spread public benefit and applicable to all similarly situated property."[201] This reading of *Mugler*, however, virtually repeals the takings clause. Under the analysis proposed by the Court, *any* regulation of property rights — no matter how draconian — would pass constitutional muster so long as the regulation produced a "wide-spread public benefit" and did not unduly discriminate between property owners. As a result, a requirement that all checking account balances be invested in non-interest bearing government bonds would be unobjectionable because the regulation would apply to all users of checking accounts and would reduce the national debt. This, of course, cannot be correct.[202] Government actions bearing only a tenuous relation to public health and safety do not stand on the same constitutional ground as regulations aimed directly at those core concerns. The Court's recent refusal to recognize that fact is erroneous.

196 Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 145 (1978) (Rehnquist, J., dissenting).

197 Berger, *The Year of the Taking Issue*, 1 B.Y.U. J. PUB. L. 261, 279 (1987). At least one commentator has suggested that *Mugler* is essentially inconsistent with the analysis set out in *Pennsylvania Coal*. Stoebuck, *Police Power, Takings, and Due Process*, 37 WASH. & LEE L. REV. 1057, 1059-69 (1980). But, while there is tension between the cases, they are not in irreconcilable conflict. *Mugler* merely establishes that the public necessities impelling some government actions are entitled to significant weight.

198 Curtin v. Benson, 222 U.S. 78, 86 (1911) (emphasis added).

199 It bears emphasis that a use does not become a "misuse" or "illegal use" simply because the government has declared it so. In *Curtin*, 222 U.S. at 86, the Court held that the federal government, by prohibiting the grazing of cattle on private land located within the boundaries of Yosemite National Park, had taken property without just compensation.

200 *See supra* notes 102-05 and accompanying text.

201 *Penn Central*, 438 U.S. at 134 n.30.

202 *See* Webb's Fabulous Pharmacies v. Beckwith, 449 U.S. 155 (1980) (striking down as a taking a statute which appropriated all interest earned on funds deposited with state courts).

Mugler and related cases suggest that government action backed by a compelling public need may, without more, withstand scrutiny under the takings clause. If, however, government action lacks a compelling police power justification—such as the abatement of a nuisance or a noxious use of property—a court should undertake a careful analysis of the impact the action has upon the individual property owner and the public at large. Justice Holmes has again provided the key analytical element: "various laws" adversely impacting the interests of individual property owners can be sustained against a takings challenge so long as they "secure[] an average reciprocity of advantage" for the property owner and the public.[203] Such an "average reciprocity of advantage" exists if, despite the costs or losses imposed by the challenged government action, the complaining property owner receives benefits in some rough, but approximately offsetting, proportion. The concept is similar to that which supports the validity of so-called "special assessment taxes" (i.e., taxes levied upon particular landowners to pay for the construction of public improvements). While "moneys raised by general taxation may constitutionally be applied to purposes from which the individual taxed may receive no benefit," special assessments "laid upon particular property owners are ordinarily constitutional only if based on benefits received by them."[204] Zoning ordinances, which often have a dramatic impact upon the value of property held by individual owners but which nevertheless broadly serve the collective interests of all property owners, are the paradigm example of government action that generally passes muster under an "average reciprocity of advantage" analysis.[205]

The asserted justification for government action and the relative impact of the action upon the property owner and the public at large do not exist in separate, hermetically sealed compartments. The fact that the government is acting to abate a serious nuisance will have a substantial impact upon the "average reciprocity of advantage" inquiry. Indeed, the Court has recently noted that when a state "restrains uses of property that are tantamount to public nuisances," such action is "consistent with the notion of 'reciprocity of advantage' . . . referred to in *Pennsylvania Coal*."[206] The obverse is also quite true; if the government is acting to preserve aesthetics—such as the unique architectural characteristics of an individual building—the adversely affected property owner likely will not receive in return anything even approximating the costs imposed upon

203 Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).

204 Nashville, Chattanooga & St. Louis Ry. v. Walters, 294 U.S. 405, 429-30 (1935); *see also* Norwood v. Baker, 172 U.S. 269, 278-79 (1898):

> There is a point beyond which the legislative department, even when exerting the power of taxation, may not go consistently with the citizen's right of property . . . . [T]he guarantees for the protection of private property would be seriously impaired, if it were established as a rule of constitutional law, that the imposition by the legislature upon particular private property of the entire cost of a public improvement, irrespective of any peculiar benefits accruing to the owner from such improvement, could not be questioned by him in the courts of the country.

205 *E.g.*, Welch v. Swasey, 214 U.S. 91 (1909) (upholding citywide height limitations); Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926) (upholding general zoning ordinance).

206 Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 491 (1987).

her.[207] In such cases, courts should be especially sensitive to the claim that a taking has occurred.

Application of the preceding criteria to the hypothetical landowners set out at the start of this Article suggests that, in each case, the nature of the government action raises serious constitutional concerns. While the government is acting in furtherance of a strong police power interest in building a road, the vegetable garden owner has been physically dispossessed and has received little in the way of an offsetting "average reciprocity of advantage" for the loss of her garden.[208] The condemnation of the scenic easement across the developer's property is equally suspect. There, the government is not acting to abate a classic noxious use of property.[209] The government, instead, is acting to further an aesthetic goal: the preservation of a scenic view. And, while that police power objective demands respect, the costs that it imposes upon the individual property owner are not reduced in any significant degree by reciprocal advantages. The public has demanded the benefit of an unrestricted view across the developer's property and has accordingly imposed upon the developer a sixty-five percent loss in property value. Any concrete benefit flowing to the aggrieved property owner in these circumstances is exceedingly hard to identify.[210]

A realistic appraisal of the nature of government action, therefore, if freed from reflexive reliance upon physical intrusion, gives both hypothetical property owners constitutional comfort. Whether or not the developer will ultimately succeed on her takings claim, however, turns upon an analysis of the economic impact of the government action and its interference with her investment-backed expectations.

B. *Economic Diminution: Has The Government Appropriated A Valuable, Identifiable Property Interest?*

The economic impact of government action upon a property owner has obvious relevance to takings clause analysis. Because the primary mission of the clause is to prevent government from "loading upon one

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207 As Justice Rehnquist noted in his *Penn Central* dissent:

> While zoning at times reduces *individual* property values, the burden is shared relatively evenly and it is reasonable to conclude that on the whole an individual who is harmed by one aspect of the zoning will be benefited by another.
>
> Here, however, a multimillion dollar loss has been imposed on appellants; it is uniquely felt and is not offset by any benefits flowing from the preservation of some 400 other "landmarks" in New York City. Appellees have imposed a substantial cost on less than one-tenth of one percent of the buildings in New York City for the general benefit of all its people. It is exactly this imposition of general costs on a few individuals at which the "taking" protection is directed.

Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 147 (Rehnquist, J., dissenting).

208 Although the property owner as well as the public at large gain a new road, the property owner's access to that road does not diminish in any significant degree the particularized costs imposed upon her.

209 The proposed office tower is in full compliance with all applicable (and long-standing) zoning regulations.

210 One can argue, of course, that the developer, along with the public at large, "benefits" by the unrestricted view of the mountains. But, compared with the millions of dollars in costs imposed upon the property owner, whatever pleasure she may derive from the view hardly approximates a real "average reciprocity of advantage."

individual more than his just share of the burdens of government,"[211] it is essential to know precisely what costs have been thrust upon the property owner by a challenged government action. But, while the relevance of economic diminution is plain, its analytical force has waned considerably since Justice Holmes authored *Pennsylvania Coal*. Recent decisions, in fact, suggest that except in the most egregious circumstances economic loss will have very little effect on the question whether a taking has occurred.[212] The takings clause, however, protects against more than outrageous confiscations of property values. The Court, therefore, should give this *Penn Central* factor more sensitive attention.

Until quite recently, courts frequently relied upon economic diminution to conclude that a particular government action required compensation. Courts declared that a taking occurred whenever government action substantially diminished the use or value of property.[213] According to these decisions, government action need not have destroyed every reasonable use; rather, there was a taking if government action substantially impaired the owner's interest, free use or enjoyment of property.[214] Thus, when a property owner bought land near a municipal airport with the express intention of building several multi-story buildings and the city (to accommodate airport expansion) thereafter dramatically restricted the height of the buildings that could be placed on the property,

211 Monongahela Navigation Co. v. United States, 148 U.S. 312, 325 (1893).

212 *E.g.*, Andrus v. Allard, 444 U.S. 51 (1979).

213 *E.g.*, Redevelopment Auth. of Oil City v. Woodring, 498 Pa. 180, 445 A.2d 724 (1982) (to be classified as a taking, state action need only substantially deprive an owner of the beneficial use and enjoyment of his property); Kasparek v. Johnson County Bd. of Health, 288 N.W.2d 511 (Iowa 1980) (taking occurs when state action deprives a property owner of the substantial use and enjoyment of his property); Ventures In Property I v. City of Wichita, 225 Kan. 698, 594 P.2d 671 (1979) (restrictions precluding development on certain parts of subdivided property held to be a taking, even though property could be used for their reasonable purposes); Pleasant View Util. Dist. v. Vrandenburg, 545 S.W. 2d 353 (Tenn. 1977) (state actions which destroy, interrupt or interfere with common and necessary use of real property constitute a taking); Lincoln Loan Co. v. State, 274 Or. 49, 545 P.2d 105 (1976) (taking is any destruction, restriction or interruption of the common and necessary use and enjoyment of property); Cayon v. City of Chicopee, 360 Mass. 606, 277 N.E.2d 116 (1971) (taking is a substantial interference with the use or enjoyment of property); State v. Johnson, 265 A.2d 711 (Me. 1970) (conditions so burdensome may be imposed that they are equivalent to a taking, even though some vestiges of property uses remain in the owner); Roark v. City of Caldwell, 87 Idaho 557, 394 P.2d 641 (1964) (zoning ordinance restricting use of airspace above land was a taking, even though owner could use the land for other reasonable purposes); Board of Comm'rs v. Joeckel, 407 N.E.2d 274 (Ind. Ct. App. 1980) (taking is any substantial interference with private property which impairs one's interest, free use or enjoyment in the property); Scates v. State, 178 Ind. App. 624, 383 N.E.2d 491 (1978) (taking is a substantial interference with private property which destroys or impairs one's free use of property); City of Austin v. Teague, 556 S.W.2d 400 (Tex. Civ. App. 1977), *rev'd on other grounds*, 570 S.W.2d 389 (Tex. 1978) (governmental restrictions on the use of property can become so burdensome as to constitute a taking); J.P. Sand & Gravel Co. v. State, 51 Ohio App. 2d 83, 367 N.E.2d 54 (1976) (state's substantial interference or domination of private property is a taking); Schwing v. City of Baton Rouge, 249 So. 2d 304 (La. Ct. App.), *application denied*, 259 La. 770, 252 So. 2d 667 (1971) (city ordinance requiring that easement be given to city before subdivision would be approved held a taking); State *ex rel.* Herman v. Hague, 10 Ariz. App. 404, 459 P.2d 321 (1969) (state act in limiting landowner's direct access to highway was a taking since it substantially impaired use of property); Hillsborough County Aviation Auth. v. Benitez, 200 So. 2d 194 (Fla. Dist. Ct. App.), *cert. denied*, 204 So. 2d 328 (Fla. 1967) (ordinance appropriating navigational easement in airspace over land is a taking, even though property below is only insignificantly affected).

214 Board of Comm'rs v. Joeckel, 407 N.E.2d 274 (Ind. Ct. App. 1980).

the Idaho Supreme Court found that a taking had occurred.[215] Why? Because even though the ordinance served an important public purpose, it nevertheless imposed distinct costs upon the affected landowner. The city had reduced the value of the land by appropriating the owner's airspace, and the city was required to pay for that property interest.[216]

An analysis similar to that one just set out would now receive an unduly chilly reception by the Supreme Court. In *Penn Central*, the Court recognized the analytical import of economic diminution,[217] but almost immediately turned aside the assertion that a taking has occurred when government action "has significantly diminished the value of [property]."[218] The Court, citing earlier cases upholding zoning restrictions and proscriptions of noxious uses, noted that government may destroy 75% to 87.5% of a property's value without effecting a taking.[219] The only conclusion to be drawn from the Court's analysis is that, while economic diminution may have some constitutional import, it is relatively insignificant unless the government appropriates something in excess of 87.5% of a property's value. That line of reasoning was carried to its logical conclusion in *Andrus v. Allard*,[220] where the Court concluded that Congress, for all practical purposes, could destroy the entire value of various Indian artifacts by making it illegal to sell, purchase, barter, transport, export or import the items. The fact that the aggrieved owners of the once-valuable items "might exhibit the artifacts for an admissions charge" was sufficient to turn aside any constitutional complaint.[221] Thus, under *Penn Central* and *Allard*, it seems that economic impact becomes relevant to a takings clause analysis only if government action leaves the property owner almost totally bereft.

Following *Penn Central* and *Allard*, lower courts understandably began to turn away from their previous reliance upon economic impact. Instead of finding a taking whenever there has been a "substantial" decrease in the use or value of an identifiable property interest, courts began asserting that a taking occurs only if government action deprives the owner of all value or use.[222] If government action merely prohibits some

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215 Roark v. City of Caldwell, 87 Idaho 557, 394 P.2d 641 (1964).

216 The court reasoned that the property owner had the right to "reasonable use of the airspace above his land," and "[e]ven though there is great public benefit to be derived in the maintenance of an adequate airport and . . . [even though] the purposes of this ordinance are meritorious, public benefit is not in most cases sufficient reason in and of itself to destroy the use of private property without payment of just compensation." *Id.* at 564, 567, 394 P.2d at 645, 646.

217 438 U.S. at 124.

218 *Id.* at 131.

219 *Id.* (citing Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926) (75% diminution in value caused by zoning law); Hadacheck v. Sebastian, 239 U.S. 394 (1915) (87.5% diminution in value).

220 444 U.S. 51 (1979).

221 *Id.* at 66.

222 *E.g.*, Landmark Land Co. v. City of Denver, 728 P.2d 1281 (Colo. 1986), *appeal dismissed sub nom.* Harsh Inv. Corp. v. City of Denver, 107 S. Ct. 3222 (1987) (land use regulations must deprive owner of all value before they constitute a taking); Commonwealth v. Stearns Coal & Lumber Co., 678 S.W.2d 378 (Ky. 1984) (to be a taking, state action must deprive owner of all beneficial enjoyment); State v. Good Samaritan Hosp., 299 Md. 310, 473 A.2d 892 (1984) (there is a taking only if state restriction essentially deprives the owner of all beneficial uses of his property); Ramer v. City of Hoover, 437 So.2d 455 (Ala. 1983) (there is no taking unless the interference is so substantial as to render the property worthless or useless); Spears v. Berle, 48 N.Y.2d 254, 397 N.E.2d 1304, 422

property uses, or only substantially diminishes the property's value, no taking has occurred.[223] Thus, a landowner whose property value is severely diminished when the city denies him access to the municipal sewer has no constitutional complaint; "there is no taking in the constitutional sense unless the interference is so substantial as to render the property worthless or useless."[224]

A "total loss of value" test under the takings clause is justifiable only in limited circumstances. If a property owner mounts a facial attack upon government regulation, arguing that the mere enactment or adoption of a regulatory scheme constitutes a taking, a "total loss of value" analysis may be appropriate.[225] A facial attack, of course, does not present a "concrete controversy concerning either application of [a regulation] . . . to particular [property uses] . . . or its effect on specific [property interests]."[226] In the absence of a factual record, a court cannot carefully analyze the economic impact of government action on the property owner. As a result, a court presented with a facial challenge to regulatory action might well be justified in applying a "fairly straightforward" test: "A statute regulating the uses that can be made of property effects a taking if it 'denies an owner economically viable use of his land . . . .' "[227] Once beyond the setting of a facial challenge, however, judicial analysis of economic impact should be considerably more sensitive than is suggested by *Penn Central* and *Allard*. In the majority of takings clause challenges, a court will have a factual basis to analyze the actual economic impact of challenged government action. Accordingly, the economic impact inquiry should not turn simply upon whether or not the government has taken "all economically viable use" of particular property.

The recent emasculation of economic diminution as a viable factor in takings clause analysis is regrettable. The Court has attempted to buttress its results by suggesting that, where an owner "possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking, because the aggregate must be viewed in its entirety."[228] But whatever the surface appeal, the assertion that the Constitution shields property owners when government grabs the entire "bundle" but affords little or no protection when the government snatches one

N.Y.S.2d 636 (1979) (in order to be classified as a taking, state action must render property unsuitable for any reasonable income, totally destroying its economic value); *see also* Metzger v. Town of Brentwood, 117 N.H. 497, 374 A.2d 954 (1977) (a taking is a restriction which deprives the owner of any reasonable use of his land) (decided before *Penn Central* and *Allard*); Zygmont v. Planning and Zoning Comm'n, 152 Conn. 550, 210 A.2d 172 (1965) (to constitute a taking, zoning regulations must do more than devalue property — they must also deprive the owner of any reasonable property use) (decided before *Penn Central* and *Allard*).

223 Spears v. Berle, 48 N.Y.2d 254, 397 N.E.2d 1034, 422 N.Y.S.2d 636 (1979).

224 Ramer v. City of Hoover, 437 So.2d 455, 460-61 (Ala. 1983) (quoting Kent Island Joint Venture v. Smith, 452 F. Supp. 455, 460 (D. Md. 1978)).

225 *E.g.*, Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 494-97 (1987).

226 Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc., 452 U.S. 264, 295 (1981).

227 *Id.* at 296 (quoting Agins v. City of Tiburon, 447 U.S. 255, 260 (1980)); *accord Keystone*, 480 U.S. at 494-97; *cf.* Pennell v. City of San Jose, 108 S. Ct. 849, 857 (1988) (dismissing claim that a rent control ordinance constituted a taking as "premature" because the challenged elements of the ordinance had never been applied) (quoting Hodel v. Virginia Surface Mining and Reclamation Ass'n, Inc., 452 U.S. at 296 n.37).

228 Andrus v. Allard, 444 U.S. 51, 65-66 (1979).

"strand" at a time does not withstand scrutiny. Its logic rests on the assumption that the fifth amendment protects the whole, but not the component parts, of that amalgam of rights known as "property." It should be clear, however, that the term "property," as used in the takings clause, embraces the component elements of the "bundle."[229] The term is not used in the "vulgar and untechnical sense of the physical thing with respect to which the citizen exercises rights recognized by law."[230] Rather, the fifth amendment protects the entire "group of rights inhering in the citizen's relation to the physical thing, as the right to possess, use and dispose of it."[231] The constitutional rationalization that the government cannot take the whole "bundle" but can take any number of "strands" just short of that is a modern heresy. "The constitutional provision is addressed to every sort of interest the citizen may possess."[232]

The Court's "strand-at-a-time" exception to the takings clause derives from its failure carefully to scrutinize the first *Penn Central* factor, which requires an analysis of the character of the government action. The Court has failed to assess the importance of the police power justification for given regulatory actions by suggesting that such an inquiry is unnecessary or satisfied upon the flimsiest of showings.[233] Under the Court's approach, moreover, an "average reciprocity of benefit" exists almost as a matter of definition. Any regulation affecting the use of property, after all, is enacted "because the public wanted it very much."[234] Since the aggrieved property owner is also part of the public, there must be *some* benefit — which apparently equals an average reciprocity of advantage.[235]

Once the police power justification for government regulation is ignored and the average reciprocity of advantage inquiry anesthetized, the Court's prior cases virtually compel the conclusion that unless government regulation takes virtually *everything*, any action short of that passes muster. The *Mugler* line of cases and the early zoning decisions, relied upon by the Court in *Penn Central* to support its "strand-at-a-time" approach, are instances where government regulations dramatically reduced the value of property owners' "bundles" without resulting in a taking.[236] As demonstrated above, however, these cases turned on the

229 United States v. General Motors Corp., 323 U.S. 373, 378 (1945).

230 *Id.* at 377.

231 *Id.* at 377-78.

232 *Id.* at 378.

233 Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 133-34 n. 30 (1978); *see supra* notes 103-05.

234 Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).

235 Indeed, in *Penn Central*, the court explicitly adopted the above analysis:

> Unless we are to reject the judgement of the New York City Council that the preservation of landmarks benefits all New York citizens and all structures, both economically and by improving the quality of life in the city as a whole — which we are unwilling to do — we cannot conclude that the owners of the Terminal have in no sense been benefited by the Landmarks Law.

438 U.S. at 134-35.

Cf. id. at 147 (Rehnquist, J., dissenting) (disputing that the New York landmark law resulted in any cognizable reciprocity of advantage).

236 *Id.* at 131 (citing Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926) and Hadacheck v. Sebastian, 239 U.S. 394 (1915)).

character of the government action — not on the fact that the government wisely refrained from total confiscation.[237]

The proper role of economic diminution in a takings clause analysis is reflected in Justice Holmes' opinion in *Pennsylvania Coal*. There, after rejecting the contention that the coal mining subsidence act under consideration abated a public nuisance[238] or secured an average reciprocity of advantage,[239] the Court concluded that because the act forbade the mining of "certain coal," it was constitutionally infirm.[240] The regulatory burden placed upon a single of the coal miners' discrete property rights — the right "to mine certain coal" — was sufficient to constitute a taking because it "has very nearly the same effect for constitutional purposes as appropriating or destroying it."[241] The fact that the government had taken only a single "strand" from the mine operators was not determinative. On the contrary, the State of Pennsylvania had gone "too far" in requiring coal mine operators to leave identifiable coal in place, even though the right to mine other coal was unaffected.[242] The operators had valuable, marketable interests in the minerals that *were* affected by the subsidence act and, in the absence of a strong police power justification for the act or a true average reciprocity of advantage, Pennsylvania could not pluck identifiable, marketable "strands" from their "bundles" without compensation.

The modern Court has not completely abandoned Justice Holmes' economic diminution analysis.[243] In *Ruckelshaus v. Monsanto Co.*,[244] the Court concluded that public disclosure of certain proprietary data that had been revealed to the Environmental Protection Agency under an assurance of confidentiality would constitute a taking.[245] Had the Court

237 *See supra* notes 186-98 and accompanying text.

238 *Pennsylvania Coal*, 260 U.S. at 413.

239 *Id.* at 415.

240 *Id.* at 414.

241 *Id.*

242 *Id.* at 415 ("We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change.").

243 The Court, of course, has recently upheld a second Pennsylvania subsidence act virtually indistinguishable from that struck down in *Pennsylvania Coal*. Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1987); *see* Berger, *The Year of the Taking Issue*, B.Y.U. J. Pub. L. 261, 298 (1987) ("any differences" between the statute struck down in *Pennsylvania Coal* and the one upheld in *Keystone* "are trivial"). It is at least arguable, however, that *Keystone* does not depart from the analysis described above. The statute at issue in *Pennsylvania Coal* was described by Justice Holmes as "a 'private benefit' statute since it 'ordinarily does not apply to land when the surface is owned by the owner of the coal.' " *Keystone*, 480 U.S. at 486 (quoting *Pennsylvania Coal*, 260 U.S. at 414). By contrast, the Court found that Pennsylvania was "exercising its police power to abate activity akin to a public nuisance" in passing the new statute. *Keystone*, 480 U.S. at 488. "[T]he public interest in preventing activities similar to public nuisances is a substantial one, which in many instances has not required compensation." *Id.* at 492. Thus, while *Keystone* reaches a different result than *Pennsylvania Coal*, it nevertheless reaffirms the analysis of the earlier case. The nature of the state's interest in *Keystone* — the abatement of a public nuisance — was simply so substantial that any asserted "diminution of value" was insufficient "to satisfy the test set forth in *Pennsylvania Coal*." *Id.*; *see id.* at 488 ("the nature of the state's interest in the regulation" is "critical in takings analysis"). *But see supra* notes 2-3.

244 467 U.S. 986 (1984).

245 Monsanto had argued that any government disclosure of scientific data the company had revealed to the EPA in order to obtain registration of its chemical products would constitute a taking. *Id.* at 1005-08. The Court rejected that broad assertion because Monsanto revealed the information

followed the analysis in *Penn Central* or *Allard*, which suggests that economic diminution must be nearly complete before it raises constitutional concern, the government disclosure at issue in *Monsanto* would not have constituted a taking. The challenged disclosure, after all, did not destroy the entire value of the proprietary data: "The data retain usefulness for Monsanto even after they are disclosed — for example, as bases from which to develop new products or refine old products, as marketing and advertising tools, or as information necessary to obtain registration in foreign countries."[246] The fact that disclosure would not destroy the entire value of the data, however, was "irrelevant to the determination of the economic impact of the EPA action on Monsanto's property right."[247] The economic value of the proprietary data was the "competitive advantage over others that Monsanto enjoys by virtue of its exclusive access to the data, and disclosure or use by others of the data would destroy that competitive edge."[248] Thus, the diminution in value of a single property "strand" — identified by the Court as "competitive advantage" — was sufficient to raise constitutional concern even though the value of Monsanto's entire "bundle" was not destroyed.

Application of an economic diminution analysis similar to that used in *Pennsylvania Coal* or *Monsanto* to my hypothetical property owners suggests that a taking may have occurred in each case. As already noted, the nature of the government action in each instance is such that some analysis of economic impact is required.[249] The government, of course, has not taken the entire "bundle" of either property owner. Therefore, if one were to take *Penn Central*'s suggestion that any diminution in value short of 100% is insufficient to constitute a taking,[250] neither property owner would have a constitutional complaint. It is virtually certain, however, that the owner of the vegetable garden will have a valid fifth amendment claim because the government has physically seized a corner of her backyard. Thus, the "total loss of value" test for economic diminution cannot be applied to deny the home gardener relief.

But, while most courts would never think of refusing the home gardener just compensation simply because the government did not take her entire backyard, many would indulge in identical reasoning in the case of the commercial developer.[251] Such a rigid analysis of economic diminu-

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to the government to obtain permission to market its chemical products and the company knew, at the time it made the revelations, that the information might be disclosed. *Id.* Accordingly, government disclosure of the bulk of Monsanto's proprietary data would not impinge upon the company's investment-backed expectations and would not, therefore, constitute a taking. *Id.* at 1007. Certain information revealed by Monsanto between the years 1972 and 1978, however, had been disclosed under an explicit assurance of confidentiality. *Id.* at 1010-11. Accordingly, the Court concluded that disclosure of that information would transgress the company's investment-backed expectations and would constitute a taking. *Id.* at 1011-13.

246 *Id.* at 1012.

247 *Id.*

248 *Id.*

249 *Supra* notes 208-11.

250 Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 131 (1978).

251 Landmark Land Co. v. City and County of Denver, 728 P.2d 1281 (Colo. 1986), *appeal dismissed sub nom.* Harsh Inv. Corp. v. City of Denver, 107 S. Ct. 3222 (1987) (no taking because mountain view ordinance did not deprive commercial property owner of all value).

tion is erroneous. Although the government did not appropriate the entire value of the developer's property when it enacted the mountain view ordinance, it nevertheless plucked a valuable and marketable "strand" from the developer's "bundle." The ordinance, in effect, burdened the developer's property with a scenic easement, with all benefits flowing to the public. Moreover, that easement — like the corner of the gardener's backyard — can be legally described, parcelled out, bought and sold.[252] Accordingly, even though the commercial property owner has not lost everything, she — like the mine operators in *Pennsylvania Coal* and the chemical company in *Monsanto* — has lost to the public an identifiable, marketable property interest. This diminution in the value of her "bundle" deserves constitutional protection. Whether or not this diminution in value must be compensated under the takings clause, however, requires consideration of the final *Penn Central* factor.

C. *Investment-Backed Expectations: Is An Award Of Compensation "Just"?*

The third factor under the Court's analysis in *Penn Central* is whether government action interferes with a "distinct investment-backed expectation."[253] This factor is related to, but is nevertheless analytically separable from, economic diminution. There cannot be any significant interference with investment-backed expectations unless there has been some economic diminution. But, while an inquiry into economic diminution relates primarily to the question whether there has been injury to a cognizable property interest, an analysis of investment-backed expectations goes to the fundamental issue of compensability; if a given instance of economic diminution does not interfere with the reasonable expectations of the property owner, no compensation is due. The factor is akin to the "antitrust injury" requirement of the Sherman Act; the takings clause does not protect a citizen against *any* diminution in property values—only against a diminution that interferes with the reasonable expectations of the citizen as a property owner.[254] If particular government actions do not interfere with the legitimate expectations of an owner in relation to her property, an award of compensation, rather than just, would be a windfall.

Although the concept has been frequently invoked,[255] the decided cases give little practical guidance as to what constitutes interference with an "investment-backed expectation." Indeed, the Court's elaboration of this prong of the takings analysis is rather confused — and con-

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252 Scenic easements have demonstrable value and can be purchased. *See* Cantrell, *Scenic Easements: Evaluation Considerations*, 49 REAL EST. APPRAISER & ANALYST 61 (1983); SUTEE, *Scenic Easements*, 34 APPRAISAL J. 531 (1966).

253 *Penn Central*, 438 U.S. at 124.

254 *Cf.* Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, *cert. denied sub nom.* Treadway Co. v. Brunswick Corp., 429 U.S. 1090 (1978) (Clayton Act does not protect against any loss causally linked to an antitrust violation; rather, successful plaintiffs must show that their particular injuries are of the type that the statute was intended to forestall).

255 *E.g.*, Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 493-97 (1987); Connolly v. Pension Benefit Guar. Corp., 475 U.S. 211, 226 (1986); Kirby Forest Indus. v. United States, 467 U.S. 1, 14-15 (1984); Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1005 (1984); Pruneyard Shopping Center v. Robins, 447 U.S. 74, 84 (1980); Kaiser Aetna v. United States, 444 U.S. 164, 179 (1979).

fusing. For example, although the "investment-backed expectation" inquiry almost certainly flows from Justice Holmes' conclusion in *Pennsylvania Coal* that the state could not interfere with the mine operators' expectation that they could harvest "certain coal,"[256] the *Penn Central* Court flatly stated that property owners do not establish a taking "by showing that they have been denied the ability to exploit a property interest that they heretofore had believed was available for development."[257] The *Penn Central* dictum, of course, contradicts the *Pennsylvania Coal* analysis. Contrary to the Court's later assertion, Justice Holmes obviously concluded that government interdiction of "a property interest that [the mine operators] heretofore had believed was available for development"[258] was an essential element of their takings claim. This tension between *Penn Central* and *Pennsylvania Coal* suggests that the Court itself is not quite sure what it should look for under the "expectation" prong.

In addition to the confusion just noted, investment-backed expectations, as construed by the Court, are subject to a significant amount of government manipulation. "Property" exists only to the extent that an "owner" has enforceable rights. (A suburbanite's "ownership" of her home, after all, is valid only to the extent that government will enforce the provisions of her deed.)[259] Accordingly, the foundation for many (perhaps most) investment-backed expectations is the property owner's reliance upon various government regulatory schemes. Yet, despite the necessary relationship between legitimate expectations and government regulation, the Court has suggested that property owners cannot justifiably rely upon any given regulatory structure. Recent cases, in fact, suggest that government actions which upset expectations founded upon regulatory regimes do not ordinarily give rise to a taking.[260] A property

256 Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 414 (1922); *see* Michelman, *Property, Utility and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1233 n.116 (1967) (ascribing the "investment-backed expectation" test to *Pennsylvania Coal*).

257 *Penn Central*, 438 U.S. at 130.

258 *Id.*

259 *See generally* Weidenbach, *The Meaning of* First English *In The Context of Takings Clause Jurisprudence*, 28 MUN. ATT'Y 6, 7 (1987).

260 *See* Connolly v. Pension Benefit Guar. Corp., 475 U.S. 211, 226-27 (1986) (a severe withdrawal penalty enacted under a 1980 amendment to the Employee Retirement Income Security Act [ERISA] does not interfere with employers' investment-backed expectations because "[p]ension plans . . . were the objects of legislative concern long before the passage of ERISA . . . [the 1980 amendments gave] sufficient notice not only that pension plans were currently regulated, but also that withdrawal itself might trigger additional financial obligations"); Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1022 (1984) (O'Connor, J., concurring in part and dissenting in part) (criticizing the Court's conclusion that, despite a provision of the Trade Secrets Act which forbids government disclosure of trade secrets, "an 'industry that long has been the focus of great public concern and significant government regulation' can have no reasonable expectation that the Government will not later find public disclosure of trade secrets to be in the public interest") (quoting *id.* at 1008); *see also* Consolidated Rail Corp. v. Metro-North Commuter R.R., 638 F. Supp. 350, 357 (Regional Rail Reorg. Ct. 1986) (railroad has no reasonable investment-backed expectations where "no industry has a longer history of pervasive federal regulation than the railroad industry" and where "no sector of the railroad industry has been more heavily regulated than the passenger service sector"); Gateway Apartments, Inc. v. Mayor of Nutley, 605 F. Supp. 1161 (D.N.J. 1985) (requirement that landlord return 75% of tax rebates to his tenants does not infringe any investment-backed expectation because the ordinance was ensconced in the heavily regulated landlord-tenant area); *cf.* Pruneyard Shopping Center v. Robins, 447 U.S. 74, 84 (1980) (requirement that shopping center make its

owner, it seems, has little room for complaint when the government changes its mind regarding which property interests it will foster and protect.

Because of the *Penn Central* dictum and the Court's reluctance to recognize expectations founded upon regulatory regularity, the Court has rarely found that government action interferes with a distinct investment-backed expectation. The property owner who proves that the government has taken a discrete, valuable property right she previously possessed will be dismissed with the *Penn Central* observation that such losses do not constitute takings: no reasonable expectation has been infringed because the asserted injury is merely a "unilateral expectation or an abstract need."[261] The property owner who attempts to buttress her claim by showing that a prior regulatory scheme rendered her expectation more than "unilateral" or "abstract" is met with the submission that past official actions do not preclude the government from changing its mind.[262] As with economic diminution inquiry addressed above, the net effect has been that the Court finds no interference with distinct investment-backed expectations unless government action physically appropriates or essentially destroys the entire value of the property owner's holdings.[263]

premises available for informational picketing does not constitute a taking; "the state-authorized limitation" of the shopping center's " 'right to exclude others' " is not "essential to the use or economic value of [its] property").

261 Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 161 (1980).

262 Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1008-09 (1984).

263 Keystone Bituminous Coal Ass'n v. DeBendictis, 480 U.S. 470, 499 & n.27 (1987) (Court concludes that a statute which requires mine operators to leave valuable minerals in place does not infringe the operators' investment-backed expectations because the statute does not deny them "the economically viable use of [their] property." In a footnote, the Court clarifies that, under its analysis, a physical intrusion or a regulatory action resulting in total loss of value *would* violate a reasonable investment-backed expectation: "We do not suggest that the State may physically appropriate relatively small amounts of private property for its own use without paying just compensation. The question here is whether there has been any taking at all when no coal has been physically appropriated, and the regulatory program places a burden on the use of only a small fraction of the property that is subjected to regulation"); Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1006, 1008-09 (1984) (despite provision of the Trade Secrets Act which prohibits government dissemination of trade secrets, government disclosure of proprietary data submitted by a chemical company does not transgress the investment-backed expectations of the company because the government, "upon focusing on the issue, [found] disclosure to be in the public interest"); Connolly v. Pension Benefit Guar. Corp., 425 U.S. 211, 227 (1986) (change in a regulatory structure imposing significant costs upon participants in regulated retirement funds does not violate any investment-backed expectations of fund participants; "[p]rudent employers . . . had more than sufficient notice not only that pension plans were . . . regulated, but also that withdrawal might trigger additional financial obligations . . . . 'Those who do business in the regulated field cannot object if the legislative scheme is buttressed by subsequent amendments to achieve the legislative end' ") (citations omitted); Andrus v. Allard, 444 U.S. 51, 67-68, 65 (1979) (a prohibition "of the sale of lawfully acquired [Indian artifacts]" does not effect a taking because "[t]he regulations challenged here do not compel the surrender of the artifacts, and there is no physical invasion or restraint upon them. Rather, a significant restriction has been imposed on one means of disposing of the artifacts. But the denial of one traditional property right does not always amount to a taking. At least where an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking because the aggregate must be viewed in its entirety"); Kirby Forest Indus. v. United States, 467 U.S. 1, 15 (1984) (pendency of condemnation proceedings does not effect a taking requiring compensation; "[a]t least in the absence of an interference with an owner's legal right to dispose of his land, even a substantial reduction of the attractiveness of the property to potential purchasers does not entitle the owner to compensation under the Fifth Amendment").

The Court's draconian construction of what constitutes interference with an investment-backed expectation is unwarranted. Property owners surely have the right to expect that the takings clause guards against more than total confiscation. The Court's apparent refusal to recognize that fact, moreover, like its hesitancy to accord constitutional importance to anything but the most severe diminution in economic value, is linked to its failure carefully to consider the precise analytical content of each *Penn Central* prong. In *Penn Central* itself, for example, the Court cited two early zoning cases and one relatively recent nuisance case to support its assertion that an investment-backed expectation is not infringed simply because government action deprives an owner of previously available property rights.[264] Those cases, however, simply do not stand for the proposition that government may, without consequence, ignore a property owner's actual expectations. Rather, those cases establish that government regulations which indeed interfere with the expectations of property owners may nevertheless withstand scrutiny under the takings clause if they are supported by a strong police power justification[265] or secure a true average reciprocity of advantage.[266] Despite the *Penn Central* dictum, analysis of investment-backed expectations *should* hinge upon whether government action deprives the owner of "the ability to exploit a property interest that [she] heretofore had believed was available for development,"[267] *not* on whether the character of the government action justifies the intrusion upon those expectations. The character of government action is important to the takings analysis, but so is whether that action impinges upon the property owner's investment-backed expectations. The Court should not dismiss a contention that a given government action infringes a property owner's subjective expectations by citing cases that turn upon an antecedent prong of the *Penn Central* analysis.

A property owner's expectations, of course, must be "reasonable."[268] As Justice Holmes recognized in *Pennsylvania Coal*, "[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law."[269] Accordingly, a property owner has no right either to expect that regulatory schemes will remain unaltered or to demand

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264 Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 130 (1978) (citing Welch v. Swasey, 214 U.S. 91 (1909); Gorieb v. Fox, 274 U.S. 603 (1927); Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962)).

265 *E.g.*, Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962) (proscription of excavations below the water table as a public nuisance); *supra* notes 186-99 and accompanying text.

266 Welch v. Swasey, 214 U.S. 91, 106 (1909) (height limitation established in general zoning law does not constitute a taking; "legislative enactments for the safety, comfort or convenience of the people *and for the benefit of property owners generally* are valid") (emphasis added); Gorieb v. Fox, 274 U.S. 603, 608 (1927) (property setback requirements contained in zoning ordinance does not constitute a taking; "we recently have held . . . that *comprehensive zoning laws* and ordinances . . . are, in their general scope, valid under the federal Constitution") (emphasis added); *supra* notes 202-204 and accompanying text.

267 *Penn Central*, 438 U.S. at 130.

268 *E.g.*, Connolly v. Pension Benefit Guar. Corp., 475 U.S. 211, 227 (1986) ("The final inquiry suggested for determining whether the Act constitutes a 'taking' under the Fifth Amendment is whether [it] has interfered with reasonable investment-backed expectations.").

269 260 U.S. 393, 413 (1922).

compensation for each change that adversely affects her interests. The Court, however, should temper its recent tendency to conclude that property owners may not reasonably rely upon the interests created by a regulatory regime.[270] A property owner's reliance upon some regulatory schemes — including, for instance, generally applicable zoning ordinances — can give rise to legitimate expectations that should be protected under the takings clause.[271] Although the Court has noted that "[p]roperty interests . . . are not created by the Constitution" but rather "are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law,"[272] recognition of this fact does not lead inexorably to the positivistic conclusion that what the government gives it can also take away.[273] Rather, the fact that property rights are founded upon government regulation underscores the reality that changes in the rules which *define* property may in fact *take* property.

To successfully claim interference with an investment-backed expectation, a property owner must be able to point to specific facts and circumstances which make her expectation reasonable. This requires an inquiry into the circumstances surrounding the property owner's use and enjoyment of the property — including the impact of any regulatory changes on that use or enjoyment. In short, "[a] reasonable investment-backed expectation must be just that. The owner must have some investment at stake made in contemplation of a purpose or use based upon a reasonable expectation."[274] Government actions which interfere with such a contemplated purpose or use transgress a reasonable, investment-backed expectation. And, despite the rather categorical approach of *Penn Central* and other cases,[275] the Court has undertaken such a fact-sensitive inquiry on at least one occasion.

In *Kaiser Aetna v. United States*,[276] Kaiser Aetna, the lessee of a shallow, non-navigable pond on the island of Oahu, Hawaii devised a plan to dredge the pond and connect it by means of an eight-foot deep channel to the Pacific Ocean. The pond, as altered, would become a marina to

270 *E.g.*, Ruckelshaus v. Monsanto, Co. 467 U.S. 986, 1008-09 (1984).

271 *Compare* Roark v. City of Caldwell, 87 Idaho 557, 564-67, 394 P.2d 641, 645-46 (1964) (property owner who bought land zoned for high-rise development with the express intention of building multistory buildings is entitled to compensation when the city thereafter passes an ordinance dramatically reducing the height of construction permitted on the property to facilitate expansion of a municipal airport) *with* Habersham at Northridge v. Fulton County, 632 F. Supp. 815, 823 (N.D. Ga. 1985), *aff'd*, 791 F.2d 170 (11th Cir. 1986) (property owner who bought property hoping that county would rezone it to permit highly profitable development is not subjected to a taking when the rezoning request is denied; "the purchase of the subject property and the subsequent application for rezoning do not evidence a reasonable investment-backed expectation but, rather, a business gamble").

272 Webb's Fabulous Pharmacies v. Beckwith, 449 U.S. 155, 161 (1980) (quoting Board of Regents v. Roth, 408 U.S. 564, 577 (1972)).

273 *See supra* notes 143-49.

274 Kinzli v. City of Santa Cruz, 620 F. Supp. 609, 619 (N.D. Cal. 1985), *rev'd and vacated as not ripe*, 818 F.2d 1449, 1453-54 (property owners had neither submitted a development plan nor applied for a variance, and the city had made no final decision regarding acceptable uses for the property), *opinion amended*, 830 F.2d 968 (9th Cir. 1987), *cert. denied*, 108 S. Ct. 775 (1988).

275 *E.g.*, Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1022 (1984) (O'Connor, J., concurring in part and dissenting in part).

276 444 U.S. 164 (1979).

serve as the centerpiece of an exclusive subdivision development. The Army Corps of Engineers advised Kaiser Aetna that no government permits were needed for the dredging operation inside the pond and the Corps acquiesced in the proposal to connect the pond with the ocean. Once the new marina was operational, however, the Corps asserted that, as navigable waters of the United States, the marina was subject to a federal navigational servitude which precluded Kaiser Aetna from denying public access to the pond. Kaiser Aetna understandably balked at the government's imposition and the government eventually sued Kaiser Aetna to enforce the servitude.[277] The district court denied the government's request for an injunction to require public access, reasoning "that the Government lacked the authority to open the now dredged pond to the public without payment of compensation."[278] The court of appeals reversed and the Supreme Court granted certiorari to consider whether Kaiser Aetna's dredging of the pond had "convert[ed] into a public aquatic park that which [Kaiser Aetna] had invested millions of dollars in improving on the assumption that it was a privately owned pond."[279]

The Court concluded that the government's attempt to impose a right of public access to the marina "goes so far beyond ordinary regulation or improvement for navigation as to amount to a taking."[280] Although the Court stated that "[m]ore than one factor contributes to this result,"[281] the analysis of the opinion focuses most closely on the impact of the navigational servitude on Kaiser Aetna's investment-backed expectations.[282] The pond, the Court noted, was incapable of navigation prior to Kaiser Aetna's efforts and had "always been considered to be private property under Hawaiian law."[283] And, while the government could have refused consent to dredge the pond, or placed various conditions on its consent, it did not do so. Accordingly, "what petitioners now have is a body of water that was private property under Hawaiian law, linked to navigable water by a channel dredged by them with the consent of the Government."[284] The Court reasoned that, "[w]hile the consent of individual officials representing the United States cannot 'estop' the United States, . . . it can lead to the fruition of a number of expectancies embodied in the concept of 'property' — expectancies that, if sufficiently important, the Government must condemn and pay for before it takes

277 *Id.* at 166-68.
278 *Id.* at 169.
279 *Id.*
280 *Id.* at 178.
281 *Id.*
282 To be sure, the Court's analysis did not rest entirely upon the government's interference with investment-backed expectations. The Court, in fact, addressed all three *Penn Central* factors. The opinion noted that the character of the government action raised substantial concern because it "result[ed] in an actual physical invasion of the privately owned marina," thereby depriving Kaiser Aetna of "the 'right to exclude.' " *Id.* at 179-80. The servitude, moreover, would cause a substantial "devaluation of petitioners' private property." *Id.* at 180. These factors, in combination with the government's interference with Kaiser Aetna's investment-backed expectations, resulted in the Court's conclusion that the government "may not, without invoking its eminent domain power and paying just compensation, require [Kaiser Aetna] to allow free access to the dredged pond." *Id.* at 180.
283 *Id.* at 179.
284 *Id.*

over the management of the landowner's property."[285] The government's imposition of the navigational servitude interfered with just such an expectancy because the record demonstrated that Kaiser Aetna legitimately believed that it could treat the improved pond as private property.[286]

The Court's investment-backed expectation analysis in *Kaiser Aetna* is considerably more rigorous than that suggested by *Penn Central*[287] or, for that matter, *Ruckelshaus*. The government, after all, had done nothing more than attempt to strip a real estate developer of an interest that it "heretofore had believed was available" for its use and enjoyment.[288] There was, moreover, a substantial argument that the developer in *Kaiser Aetna* could not legitimately rely upon the Corps' acquiescence in the dredging plans because, once the pond became navigable, the developer should have foreseen that the Corps, "upon focusing on the issue, would find [access] to be in the public interest."[289] These arguments, however, were not dispositive. Instead, the Court focused upon the subjective expectations of the developer regarding the use and development of the pond. Because the record demonstrated that the developer created a navigable marina with the express intention of operating it as private property, government interposition of a public navigational servitude infringed a distinct investment-backed expectation.

Application of the above analysis to my hypothetical backyard gardener and real estate developer demonstrates that the government action in each case has interfered with a reasonable, investment-backed expectation. That conclusion as regards the homeowner, of course, is relatively straightforward: she bought and developed her backyard for the purpose, among others, of maintaining a garden and the construction of the road frustrates that expectation. Similar reasoning shows that the mountain view ordinance has likewise intruded upon the investment-backed expectations of the developer.

The commercial developer obtained her property with a specific purpose in mind — the construction of a high-rise office tower. The mountain view ordinance, of course, totally frustrates that expectation. Although the city could argue that any expectation regarding future construction of an office tower is "unilateral" or "abstract"[290] because the mountain view ordinance merely stripped the property owner of an interest that she "heretofore had believed was available for development,"[291] the surrounding facts suggest that the developer had a legitimate basis

285 *Id.* (citations omitted).

286 *Id.*

287 *See generally* Michelman, *Property as a Constitutional Right*, 38 WASH. & LEE L. REV. 1097 (1981).

288 Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 130 (1978).

289 Ruckelshaus v. Monsanto Co., 467 U.S. at 1008-09. The *Kaiser Aetna* Court, in fact, expressly noted that "the strict logic of the more recent cases limiting the Government's liability to pay damages for riparian access, if carried to its ultimate conclusion, might completely swallow up any private claim for 'just compensation' " under the facts of the case. Kaiser Aetna v. United States, 444 U.S. 164, 177 (1979).

290 Webb's Fabulous Pharmacies v. Beckwith, 449 U.S. 155, 161 (1980) (referencing Board of Regents v. Roth, 408 U.S. 564, 577-78 (1972)).

291 *Penn Central*, 438 U.S. at 130.

for expecting that she could exploit that interest. The government, after all, had indicated that the proposed use of the property was permissible because the contemplated development was in accord with existing zoning regulations. This fact should be given at least as much weight as the government "acquiescence" noted in *Kaiser Aetna*.[292] The developer's reliance upon the zoning regulations, moreover, was not unreasonable. Indeed, the citizens who opposed the developer were unsuccessful in changing the zoning regulations to block the proposed construction. Thus, this is not a case where a property owner was "gambling" that a regulatory scheme would be altered in her favor[293] or where she should have recognized that the government, "upon focusing on the issue," would refuse to recognize her interests.[294] On the contrary, the surrounding facts demonstrate that the developer made an investment "in contemplation of a purpose or use based upon a reasonable expectation."[295] The mountain view ordinance infringed that reasonable investment-backed expectation.

Conclusion

The takings clause has not had a happy history. The Court's construction of the clause has been tortuous, inconsistent and "essentially ad hoc."[296] Complaining property owners with closely analogous interests have obtained exceedingly different results, as demonstrated by the disparate treatment that would almost certainly be accorded the hypothetical homeowner and developer. The homeowner's invocation of the takings clause would quite predictably result in a monetary award. By contrast, the developer who lost sixty-five percent of her commercial property value would receive nothing. For her, the compensation promised by the fifth amendment is a fairy tale; a chimera floating on the constitutional horizon that is, somehow, always barely beyond grasp.

The Supreme Court is undoubtedly aware of the unsatisfactory results dictated by its takings clause jurisprudence. Indeed, the Court has recently tried to buttress its analysis by closely scrutinizing the rationality of regulations which adversely affect property interests.[297] The Court, however, should be wary before subjecting all regulations affecting the use or enjoyment of property to strict "means/ends" scrutiny. In most other areas of the law, absent substantive constitutional infirmity, government regulation is tested against a standard of bare rationality. There is little reason to suppose that property regulations should be accorded different treatment. If, as is undoubtedly the case, takings clause values deserve more rigorous protection than is secured by existing precedent,

292 *Kaiser Aetna*, 444 U.S. at 179.

293 *Cf.* Habersham at Northridge v. Fulton County, 632 F. Supp. 815, 823 (N.D. Ga. 1985) *aff'd*, 791 F.2d 170 (11th Cir. 1986) (developer purchases property hoping that it will be rezoned to permit highly profitable construction).

294 Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1008 (1984).

295 Kinzli v. City of Santa Cruz, 620 F. Supp. 609, 619 (N.D. Cal. 1985), *rev'd and vacated as not ripe*, 818 F.2d 1449, 1453-54, *opinion amended*, 830 F.2d 968 (9th Cir. 1987), *cert. denied*, 108 S. Ct. 775 (1988).

296 *Kaiser Aetna*, 444 U.S. at 175.

297 Nollan v. California Coastal Comm'n, 107 S. Ct. 3141, 3150 (1987).

the Court should provide that protection by shoring up the substantive requirements of the clause itself.

Delineating the precise requirements of the takings clause has proven to be a daunting task. The Court, in fact, has despaired of its ability to distill "objective rules" to govern the area.[298] Nevertheless, the Court has derived a three-factor test, first announced in *Penn Central*, to aid the fifth amendment analysis. But, while repeatedly invoking the character of the government action, economic diminution, and interference with investment-backed expectations, the Court has failed to give these factors precise content or substantive bite. For example, in analyzing the character of government action, the Court has focused almost exclusively upon physical dispossession. Then, in considering economic diminution and interference with investment-backed expectations, it has approved any outcome short of complete confiscation. As a result, only those government actions which physically dispossess the property owner or totally destroy the value of her holdings have resulted in an award of compensation. I believe this result is improper and have suggested a recasting of the *Penn Central* factors which gives government considerably less latitude.

The central inquiry under the first *Penn Central* factor — the character of the government action — should be whether the government action imposes burdens that are appropriately carried by the community as a whole rather than individual property owners. This requires an analysis of why the government is acting, and how the action affects the individual property owners. The Court's traditional approach, which focuses upon the presence or absence of physical intrusion, does not adequately answer these questions. The Court's inquiry here should instead hinge upon whether the government action furthers an important police power objective and whether the action results in an average reciprocity of advantage between the affected property owner and the public. If the government action serves a truly compelling public need,[299] or unquestionably secures an average reciprocity of advantage,[300] this prong of the analysis may be determinative of the takings issue. In most cases, however, further inquiry into the *Penn Central* factors will be required.

The Court's analysis of economic diminution, the second *Penn Central* factor, has been decidedly permissive. Almost any economic impact short of complete confiscation passes scrutiny. The takings clause, however, protects against more than absolute appropriation. Therefore, the focus of the economic diminution inquiry should not be whether the property owner has lost her entire "bundle" or suffered a total loss of value. Rather, the Court should inquire whether the property owner has been deprived of a valuable, identifiable property interest. Loss of a single "strand" is a real injury that raises consitutional concern.

298 First English Evangelical Lutheran Church v. County of Los Angeles, 107 S. Ct. 2378, 2399 n.17 (1987) (Stevens, J., dissenting).

299 Mugler v. Kansas, 123 U.S. 623 (1887).

300 Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

An analysis of investment-backed expectations is necessary to determine whether particular economic injuries should result in an award of compensation. If particular government actions do not interfere with the legitimate expectations of the property owner, no monetary award is due. The takings clause, after all, only requires "just" compensation. The Court has given little guidance here. Indeed, the Court's explorations of this factor have rarely focused on the actual expectations of affected property owners, and dictum in *Penn Central* itself seemingly rejects explicit consideration of such evidence. The classic decision in *Pennsylvania Coal Co. v. Mahon*,[301] however, turned upon the Court's analysis of the property owner's actual expectation. And, as evidenced by its own decision in *Kaiser Aetna v. United States*,[302] the Court has not completely abandoned that original understanding.

The preceding analysis provides protection to the hypothetical real estate developer as well as the homeowner. The mountain view ordinance, while a legitimate exercise of the police power, does not serve a compelling public need or secure anything even closely approximating an average reciprocity of advantage between the developer and the public. Because the character of the government action does not, by itself, sustain the imposition upon the property owner, a careful inquiry into whether the developer has sustained a substantial economic loss is required. The result of the inquiry is apparent: the developer has been forced to cede a scenic easement having definite and ascertainable value to the public. Even though she has not lost everything, she has lost a significant "strand" from her "bundle" of rights. That loss, moreover, is compensable because enactment of the mountain view ordinance deprived the developer of a distinct investment-backed expectation: her otherwise well-founded right to construct a multi-story office tower.

The analysis outlined above infuses the *Penn Central* analysis with significant new vigor. Under my approach, both the vegetable gardener and the commercial developer can legitimately lay claim to the protection of the takings clause. This is justifiable, I believe, because both property owners have been deprived of closely analogous property rights. They deserve analogous treatment. My approach, of course, fetters somewhat the ability of government to accomplish, without cost, all public objectives that it might deem desirable. That fact does not give me significant pause; that is, after all, the primary mission of the takings clause. That mission, moreover, is not well served by a shifting or weak-kneed constitutional analysis. The Court's elaboration of the takings clause has been too long without a consistent, workable plot. The *Penn Central* factors, if carefully and thoughtfully applied, can provide that missing element. Property owners invoking the takings clause deserve a happy ending.

301 260 U.S. 393 (1922).
302 444 U.S. 164 (1979).