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"Property" in the Fifth Amendment: A Quest for Common Ground in the Maze of Regulatory Takings

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I. INTRODUCTION

In 1922, the Supreme Court embarked on its first decision to protect property owners from unbridled, uncompensated government regulation.[1] Prior to *Pennsylvania Coal Co. v. Mahon*,[2] the courts applied the Just Compensation Clause of the Fifth Amendment[3] only to " 'direct appropriation[s]' of property . . . or the functional equivalent of a 'practical ouster of [the owner's] possession.' "[4] *Mahon* established that governmental regulation that affects an owner's use of his land may constitute a taking under the Fifth Amendment. In *Mahon*, Justice Holmes recognized the need for constitutional limits on the government's power to impair certain rights inherent in the ownership of property, especially when abolishing those rights has the same effect as appropriating or destroying the property itself.[5] Justice Holmes understood that human nature gradually would lead government officials to qualify the rights of ownership under the guise of police power until, at last, private property disappeared.[6] Without a check on their powers, officials may use regulation as an off-the-books method in lieu of taxation and compensation to achieve certain goals, particularly when funds are unavailable or when it appears that taxpayers will not support such a use of available funds. This abuse of the police power, Justice Holmes observed, amounts to "petty larceny."[7] The Just Compensation Clause

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1. *Pennsylannia Coal Co. v. Mahon*, 260 U.S. 393 (1922). In the eyes of many current Justices, *Mahon* remains the cornerstone for regulatory takings jurisprudence. *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 508 (1987) (Rehnquist, C.J., dissenting, joined by Powell, J., O'Conner, J., and Scalia, J.). At least one commentator views the case as the "Everest" of takings law. Bruce A. Ackerman, *Private Property and the Constitution* 156 (Yale U., 1977).

2. 260 U.S. 393 (1922).

3. The Just Compensation Clause of the Fifth Amendment states that private property may not be taken for public use without just compensation. U.S. Const., Amend. V. Although the Fourteenth Amendment does not include the requirement of just compensation, this limitation is applied to the states through due process requirements. *Chicago, Burlington and Quincy R.R. Co. v. Chicago*, 166 U.S. 226, 235-41 (1897).

4. *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886, 2892 (1992) (citations omitted). The regulatory takings issue did not arise before 1922 because nuisance law dealt with most land use conflicts on a post hoc basis. During the twentieth century, population pressures and intensive land use gave rise to the need to prevent foreseeable conflicts on an ad hoc basis through the use of regulations and the review of regulatory commissions' decisions. For an analysis of this general development, see Carol M. Rose, *Property Rights, Regulatory Regimes and the New Takings Jurisprudence—An Evolutionary Approach*, 57 Tenn. L. Rev. 577 (1990).

5. *Mahon*, 260 U.S. at 414-15 (stating: "For practical purposes, the right to coal consists in the right to mine it. . . . What makes the right . . . valuable is that it can be exercised with profit. To make it commercially impracticable to mine certain coal has very nearly the same effect for constitutional purposes as appropriation or destroying it.").

6. Id. at 415.

7. Neal S. Manne, Note, *Reexamining the Supreme Court's View of the Taking Clause*, 58 Tex. L. Rev. 1447, 1451 (1980) (citing 1 Holmes-Laski Letters 456-57 (M. Howe ed. 1953)).

of the Fifth Amendment provided the protection necessary to check this natural Hobbesian tendency.[8]

After more than seventy years, the Supreme Court continues to wander in its self-imposed maze when determining at what point government regulation of land use constitutes a compensable taking. The language of the takings clause poses three principal issues:[9] (1) what "property" is protected; (2) what acts constitute a "taking;"[10] and (3) what forms of compensation are "just." Although the text appears to present a straightforward analytical framework, the Court has created a labyrinth of "essentially ad hoc, factual inquiries" and avoided any "set formula."[11] Without a set formula, Supreme Court opinions reveal an admitted array of inconsistent and arbitrary results.[12] The absence of an intelligible guideline therefore presents a quagmire of uncertainty for real estate developers, municipal planners, environmental commissions, and courts alike. Although land use regulations expanded with

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8. For an examination of the philosophical underpinnings of the Fifth Amendment, see Richard A. Epstein, *Takings: Private Property and the Power of Eminent Domain* (Harvard U., 1985). For notable historical reviews of the takings jurisprudence, see James W. Ely, Jr., *The Guardian of Every Other Right: A Constitutional History of Property Rights* (Oxford U., 1992); James W. Ely, Jr., *"That due satisfaction may be made:" the Fifth Amendment and the Origins of the Compensation Principle*, 36 Am. J. Legal Hist. 1 (1992).

9. See *United States v. General Motors Corp.*, 323 U.S. 373, 377 (1945) (stating: "The critical terms are 'property,' 'taken,' and 'just compensation.' "). The Court has dismissed other possible issues as merely academic, including whether the phrase "for public use" requires the removal of property to the public domain for a taking to occur. See *Hawaii Housing Auth. v. Midkiff*, 467 U.S. 229, 243-44 (1984).

10. The Court does not limit the term "taken" to direct appropriations of title and possession, or the functional equivalents of a practical ouster of the owner's possession. *Lucas*, 112 S. Ct at 2892-93. Instead, the Court focuses on the "deprivation of the former owner rather than the accretion of a right or interest to the sovereign." *General Motors Corp.*, 323 U.S. at 378. The essence of a takings claim is not the extinction of private property, but rather the failure to tender fair compensation therefor. *First English Evangelical Lutheran Church v. Los Angeles County*, 482 U.S. 304, 314 (1987).

11. See *Lucas*, 112 S. Ct. at 2893 (citation omitted); *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 495 (1987).

12. Both courts and commentators acknowledge this open secret. Even the Supreme Court itself uncharacteristically admitted its own inconsistency. *Lucas*, 112 S. Ct. at 2894 n.7 (acknowledging that the "uncertainty regarding the composition of the denominator in our 'deprivation' fraction has produced inconsistent pronouncements by the Court") (comparing *Pennsylania Coal Co. v. Mahon*, 260 U.S. 393, 414 (1922) (holding that a statute restricting subsurface mining of coal effected a taking) with *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 497-502 (1987) (finding no taking under substantially the same law)). See also *Mid Gulf, Inc. v. Bishop*, 792 F. Supp. 1205, 1211 (D. Kan. 1992) (stating that "this entire area of the law is somewhat murky . . . ."). For commentators' colorful descriptions, see John A. Humhach, *A Unifying Theory for the Just-Compensation Cases: Takings, Regulation and Public Use*, 34 Rutgers L. Rev. 243, 244 (1982) (calling the cases "a farrago of fumblings which have suffered too long from a surfeit of deficient theories"); Carol M. Rose, Mahon *Reconstructed: Why the Takings Issue is Still a Muddle*, 57 S. Cal. L. Rev. 561, 561 (1984) (stating that takings analysis is currently "a muddle"); Joseph L. Sax, *Takings and the Police Power*, 74 Yale L. J. 36, 37 (1964) (deeming the cases "a welter of confusing and apparently incompatible results").

few checks by the Court after *Mahon*, recent Supreme Court opinions indicate that the Court no longer will extend the boundaries of its judicial deference.[13] Nevertheless, the Court still equivocates on what formula it should apply to takings cases and leaves unresolved the extent to which an owner's property is constitutionally protected.

Justice Holmes posited that whether government regulation of land amounts to a taking is a question of degree.[14] When a regulation "goes too far," he opined in *Mahon*, the Court should recognize it as a taking.[15] The diminution in value of the affected property, therefore, provides one relevant factor to determine whether a regulation goes too far. This analysis forms what is now commonly referred to as the "diminution in value test." Under this test, the Court compares the diminution in value of the property (the numerator) to the value of the whole property uncompensated after regulation (the denominator).[16] When a regulation diminishes the value or use of an owner's property "too much," it constitutes a taking and requires just compensation.[17] The 1992 Supreme Court opinion in *Lucas v. South Carolina Coastal Council*[18] demonstrates the current vitality of Justice Holmes' original test.[19] Moreover, *Lucas* arguably gives the test even greater force. Under *Lucas*, a taking occurs whenever a regulatory act deprives an owner of all economically viable use of his property regardless of other factors unless the restricted use constitutes a nuisance under state common law.[20]

Nevertheless, *Lucas* will add nothing to the test's certainty until the Court defines the most crucial element of the test: the unit of relevant "property" that constitutes the denominator in the "deprivation

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13. *Lucas* establishes that the government cannot deprive a landowner of all economically viable uses of his land, unless the proscribed use is already unlawful under the state's property and nuisance common law. *Lucas*, 112 S. Ct. at 2901-02. The *Lucas* rule is beneficial because it prevents the state from continually redefining and narrowing a landowner's rights of ownership. The categorical rule, however, may be criticized for being static because it potentially limits regulation to a state's traditional common law. Government cannot enforce new laws without compensating an owner. Moreover, the rule may provide unexpected protection of interests for owners who are accustomed to and accepting of the modern regulatory state. Whether contemporary regulations exceed their practical needs and efficient use is obviously a matter of great debate.

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

15. Id. (stating that "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking").

16. See note 180 and accompanying text.

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

18. 112 S. Ct. 2886 (1992).

19. Id. at 2894 n.7 (leaving the door open for expansion of the diminution test).

20. Id. at 2895-902. Although courts should adhere to this test without reference to other tests, the ambignity concerning the definition of property gives courts the opportunity to dodge this requirement and move on to a balancing test. See notes 52-67 and accompanying text.

fraction."[21] How much of *what* is affected?[22] What is "property" for the purpose of Fifth Amendment analysis? Without a clear definition of the relevant property, the diminution in value test will continue to produce an obfuscation of contradictory results.

This Note discusses the history and ramifications of the Court's failure to define Fifth Amendment "property" for regulatory takings of real property under the diminution in value test.[23] This Note observes that a broad charting of the denominator of "property" in the diminution in value test renders the original purpose of the test impotent. Part II traces the development of balancing tests that have resulted from the Supreme Court's dissatisfaction with the diminution in value test. In addition, Part II presents a background of Supreme Court analysis and opinions regarding the diminution in value test. Part III examines both the problems of defining a common denominator and the benefits of providing a clear definition. Part III also analyzes the potential effect of a clear and narrow definition of the relevant property on the diminution in value test, especially when considering the larger analytical framework of takings jurisprudence. Part IV delineates potential real property interests that could serve as independent denominators and examines whether categorical takings treatment of such interests would impose an undue burden on government. This Note concludes that the diminution in value test, as a per se taking category for the destruction of narrow real property interests, can provide greater certainty to this area of the law without imposing an undue burden on government.

II. REGULATORY TAKINGS ANALYSIS AND THE DIMINUTION IN VALUE TEST

A. *Background of Supreme Court Regulatory Takings Analysis*

After numerous cases that granted the utmost deference towards government land use regulations, the Supreme Court in *Nollan v. Cali-*

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21. Id. at 2894 n.7; *Keystone*, 480 U.S. at 497. See also Richard A. Epstein, *Takings: Descent and Resurrection*, 1987 S. Ct. Rev. 1, 16-17 (1987); Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 Harv. L. Rev. 1165, 1192, 1232-33 (1967).

22. See Rose, 57 S. Cal. L. Rev. at 566 (cited in note 12).

23. This Note does not address the issue of regulations of personal property. The Court distinguishes between real property and personal property interests because of the different expectations and historical understandings that apply to each. The "notion . . . that title [to real property] is somehow held subject to the 'implied limitation' that the State may subsequently eliminate all economically valuable use is inconsistent with the historical compact recorded in the Takings Clause . . . ." *Lucas*, 112 S. Ct. at 2900. By contrast, "[i]n the case of personal property, . . . [the owner] ought to be aware of the possibility that new regulation might even render his property economically worthless . . . ." Id. at 2899.

fornia Coastal Commission[24] promulgated a heightened means scrutiny requirement, requiring land use regulation to "substantially advance" a legitimate state interest. Although this approach appears to benefit owners, the test generally influences the result of a case only when land use regulations require exactions from owners in return for permission to use their land. This threshold test nevertheless indicates the Court's concern with the scope of land use regulations.

The Supreme Court currently recognizes two principal categories of regulatory action that result in per se compensable takings of land.[25] Per se compensable takings do not require a balancing of interests or fact-specific inquiries into the nature of the public interest advanced by the regulatory action. The first category consists of compelled physical takings, which occur when a regulation requires a property owner to suffer a permanent physical "invasion" by the government or a third party. The Court generally requires compensation in such cases regardless of the minuteness of the intrusion or the significance of the public purpose behind the regulatory action. For example, in *Loretto v. Teleprompter Manhattan CATV Corp.*,[26] a statute required landlords to permit cable television companies to install cable wires and a wiring box in their apartment buildings. The Court held that the regulation constituted a taking, even though the wire and box occupied no more than one and a half cubic feet of the property.[27]

In the 1992 case of *Lucas v. South Carolina Coastal Council*, the Supreme Court highlighted a second category of per se takings: when a regulatory action deprives owners of all economically beneficial or productive use of their land.[28] The category does not apply, however, if the proscribed use is a nuisance under state common law because no property right exists to create a nuisance.[29] This rule comports with both Justice Holmes' opinion in *Mahon*[30] and the landowner's perspective that a total deprivation of value amounts to the practical equivalent of

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24. 483 U.S. 825 (1987).

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

26. 458 U.S. 419 (1982).

27. Id. at 435-40.

28. 112 S. Ct. 2886, 2893 (1992). See also *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 834 (1987); *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 495 (1987); *Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 295-96 (1981); and *Agins v. Tiburon*, 447 U.S. 255, 260 (1980).

29. Determining whether the proscribed use is a nuisance under state common law also provides the government and Court with another tool to avoid compensation. It stands in a threshold position before the categorical viable use test. This issue should receive considerable attention from scholars in the near future. See note 205 and accompanying text for further discussion.

30. See note 15.

physical appropriation.[31] The rule also follows a traditional legal understanding of property ownership, which assumes land is owned for economic benefit.[32]

In addition, general judicial assumptions and presumptions do not apply when government regulation denies all economically beneficial use of the land. For example, the Court usually assumes that government regulation of land use merely " 'adjust[s] the benefits and burdens of economic life,' "[33] and that the burdened owner benefits from an "average reciprocity of advantage"[34] of similar burdens on other properties.[35] This assumption is less likely, if not impossible, however, when an owner suffers a complete deprivation of value. Reciprocity does not exist when certain owners retain some economic interests in their property while others are left with none.

Furthermore, many commentators have adopted Justice Holmes's observation that government could not function if it had to pay for every burden it imposed.[36] This argument also fails to supply an adequate justification for uncompensated regulation, because total deprivations rarely occur.[37] Additional considerations support a compensation requirement for total deprivations. First, there is a heightened risk of a disguised taking. It is more likely that the government's stated purpose is actually a pretense to force private property into public service.[38] Second, many federal and state statutes acknowledge the nature of such actions and provide for the exercise of eminent domain to accomplish the equivalent result of otherwise burdensome regulations.[39] Finally, in

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31. *Lucas*, 112 S. Ct. at 2894. See also *San Diego Gas & Elec. Co. v. San Diego*, 450 U.S. 621, 652 (1981) (Brennan, J., dissenting).

32. " '[F]or what is land but the profits thereof[?]' " *Lucas*, 112 S. Ct. at 2894 (quoting Sir Edward Coke, 1 *The First Part of the Institutes of the Laws of England* ch. 1, § 1 (Johnson and Warner, 1st Am. ed. 1812)).

33. *Lucas*, 112 S. Ct. at 2894 (quoting *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978)).

34. The term "average reciprocity of advantage" was used first by Justice Holmes in *Mahon*. See notes 68 and 209 and accompanying text.

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

36. Id. at 413.

37. See *Lucas*, 112 S. Ct. at 2894.

38. Id. at 2894-95.

39. Id. at 2895. In many circumstances, the government may acquire the property outright or impose servitudes that prevent its development. See, for example, Channel Islands National Park Act, 16 U.S.C. § 410ff-1(a) (1980) (authorizing acquisition of "lands, waters, or interests [within Channel Islands National Park] (including but not limited to scenic easements)"); Sawtooth National Recreation Area Act, 16 U.S.C. § 460aa-2(a) (1972) (authorizing acquisition of "any lands, or lesser interests therein, including mineral interests and scenic easements" within Sawtooth National Recreation Area); Emergency Wetlands Resources Act, 16 U.S.C. §§ 3921-3923 (1986) (authorizing acquisition of wetlands); Environmental Policy Act, N.C. Gen. Stat. § 113A-38 (1990) (authorizing acquisition of, *inter alia*, " 'scenic easements' " within the North Carolina natural and scenic rivers system); Tenn. Code Ann. §§ 11-15-101 to 11-15-108 (1992) (authorizing acquisition

a total deprivation case, in which an owner is deprived of all of her real property interest, compensation appears more deserved.

When a total deprivation of all economic use of the property or a compelled permanent physical intrusion does not occur, the Court will not apply a categorical compensation requirement. Thus, a landowner whose deprivation is "one step short" *may* appear entitled to compensation,[40] but the results of past takings cases demonstrate that in many, if not all, cases a landowner with even a ninety-five percent loss will recover nothing.[41] Presumptions of constitutionality and assumptions of reasonable burden further hinder the landowner's claim in the next stage of ad hoc takings analysis.[42]

For facial challenges, in which a statute's "mere enactment" allegedly constitutes a taking, regulatory takings analysis is relatively straightforward. Claimants must show that the regulation either (1) fails to advance substantially a legitimate state interest, or (2) denies them all economically viable use of their land.[43] Claimants therefore "face an uphill battle,"[44] carrying a heavy burden of proof and facing a great wall of presumptions of validity. Although recent cases apply the heightened means scrutiny requirement, which requires land use regulation to "substantially advance" a legitimate state interest, the results generally favor claimants only when land use regulations require exactions in return for permission for owners to use their land.[45] Otherwise, the Court implicitly reviews the legitimacy prong with the broadest and most deferential standard.[46]

A more common claim is the "as applied" challenge, in which the implementation of the statute, rather than its mere enactment, allegedly constitutes a taking. In these cases, the Court employs the two-pronged test noted above, then applies a balancing test to determine when "the public at large, rather than a single owner, must bear the

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of "protective easements" and other rights in real property adjacent to state historical, architectural, archaeological, or cultural resources).

40. See *Lucas*, 112 S. Ct. at 2895.

41. *Lucas*, 112 S. Ct. at 2895 n.8. The Court believes that noncompensation occurs in only "*some* cases" as an "occassional result." Id. (emphasis in original). Nevertheless, the results of Supreme Court cases speak for themselves. See, for example, *Hadacheck v. Sebastian*, 239 U.S. 394 (1915) (finding no taking even when regulation diminished the fair market value of a parcel from $800,000 to $60,000). See also *Andrus v. Allard*, 444 U.S. 51, 66 (1979) (emphasizing that "a reduction in the value of property is not necessarily equated with a taking" and finding no taking of personal property). See also *Pace Resources, Inc. v. Shrewsbury Township*, 808 F.2d 1023 (3d Cir. 1987) (finding no taking when regulation reduced the market value from $495,000 to $52,000).

42. See notes 60-63 and accompanying text.

43. *Keystone*, 480 U.S. at 485; *Agins v. Tiburon*, 447 U.S. 255, 260 (1980).

44. *Keystone*, 480 U.S. at 495.

45. See, for example, *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987).

46. See note 41 and accompanying text.

burden of an exercise of state power in the public interest . . . ."[47] The balancing test examines whether the public interests served justify the burden on the owner.[48] Although there is no strict formula for determining when a taking occurs,[49] courts usually consider three factors: (1) the economic impact of the regulation on the claimant; (2) the regulation's interference with the owner's reasonable, investment-backed expectations; and (3) the character of the government's action.[50] Although this might suggest some "firmly established" framework,[51] these factors are not used in every case, nor are they given equal or consistent weight.

This balancing test is not without significant criticism[52] and appears improper for a number of reasons. First, the government's interest should not determine whether a regulatory action constitutes a taking. Even when the most compelling interest justifies a physical appropriation for public use, the government must compensate an owner for physical takings.[53] This compensation requirement also is consistent with the doctrine of necessity, under which a person or the government has the right to destroy another's property in cases of emergency, but is

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47. *Keystone*, 480 U.S. at 492. This is a subtle change of wording that shifts the presumption of who should bear the burden of the regulation. Compare this language with the Court's original quote in *Armstrong v. United States*, 364 U.S. 40 (1960), in which the Court held that the Just Compensation Clause is "designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." Id. at 49.

48. In *Keystone*, the Court weighed the specific "important public interests" served by the regulation against the coal companies' economic interests. Id. at 485.

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

50. *Keystone*, 480 U.S. at 495; *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979); *Penn Cent. Transp. Co.*, 438 U.S. at 124.

51. See *Hodel v. Irving*, 481 U.S. 704, 713 (1987).

52. See, for example, John J. Costonis, *Presumptive and Per Se Takings: A Decisional Model for the Taking Issue*, 58 N.Y.U. L. Rev. 465, 524 n.240 (1983) (commenting that the "multifactor balancing test" is not a real test, but rather an "amalgam of standards" that serve different and often competing priorities); Glynn S. Lunney, Jr., *A Critical Reexamination of the Takings Jurisprudence*, 90 Mich. L. Rev. 1892, 1927 (1992) (stating that the Court's "factor test fails to achieve the purported purpose of the constitutional compensation requirement because it does not prevent the government from unfairly 'forcing some people alone to bear public burdens' ").

53. See Julius L. Sackman and Patrick J. Rohan, 2 *Nichols' The Law of Eminent Domain* § 6.05 at 6-36 (Matthew Bender, 3d ed. 1990 & Supp. 1992) (stating: "It is universally conceded that when land or other property is actually taken from the owner and put to use by the public authorities, the constitutional obligation to make just compensation arises, however much the use to which the property is put may enhance the public health, morals or safety"); W. Page Keeton, et al., *Prosser and Keeton on the Law of Torts* § 24 at 147 (West, 4th ed. 1971) (stating that "it is likely that if property is damaged after being seized to prevent a public disaster, compensation is required by the Fifth Amendment, unless the property was itself being used or likely to be used in a dangerous way").

required to compensate the owner for any damage.[54] Thus, for limited purposes the law permits both individuals and the government to infringe upon an individual's property provided the owner is compensated for any resulting damage. This per se compensation requirement should extend to total deprivations caused by regulatory takings as well.[55]

Although a technical "taking" occurs whenever public or private necessity requires a physical intrusion on an owner's property, compensation generally mitigates the apparent burdens imposed. For instance, if a government official destroys a house to prevent the spread of a fire, or destroys an infectious tree or animal to prevent the spread of disease, a layman might suggest that the house, animal, or tree was "taken" by government action. Indeed, the invasion in such circumstances is physical and not the regulatory equivalent. Nevertheless, the value of a house in the path of a fire arguably is worth nothing at the moment it is "taken," even if the fire takes an unexpected turn.[56] Similarly, a diseased tree or animal is worth nothing if the legal use for the diseased tree or animal is limited or its destruction by the disease is assured.[57] Thus, even if these properties are deemed "taken," the owners would be entitled only to nominal compensation. Similarly, if a building is not a common-law nuisance, but is destroyed due to its age and unsanitary conditions, the property normally should be deemed "taken," and the owner should be entitled to compensation. The owner, nevertheless, is entitled to compensation only for the value of the building destroyed less the cost of improving the building to a sanitary condition.[58] Under this type of analysis, it is clear that government may "take" an owner's property without paying compensation.

Compensation, rather than the issue of relevant "property" or the notion of "taken," therefore, should provide the underlying rationale behind such cases. In each case, a balancing test is unnecessary to protect the public's most substantial interests in health and safety; the compelled destructions of property would require compensation but for the lack of value of the destroyed property. Similar treatment, there-

54. See W. Page Keeton, et al., *Prosser and Keeton on the Law of Torts* § 24 at 147.

55. This premise logically flows from the understanding that a total deprivation of economically viable use or value "has very nearly the same effect for constitutional purposes" as a physical taking. See *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 414 (1922) (stating that the right to coal consists of the right to mine coal).

56. See *Bowditch v. Boston*, 101 U.S. 16, 18-22 (1879) (denying compensation to owners of houses destroyed to prevent the spread of fire). The reasoning is that the fire itself would have destroyed the house; therefore, it had no remaining value.

57. See W. Page Keeton, et al., *Prosser and Keeton on the Law of Torts* § 24 at 147 n.16 (cited in note 53).

58. See *Hoffman v. County of Greenville*, 129 S.E.2d 757 (S.C. 1963). This effectively reduces compensation to almost zero.

fore, may be extended under regulatory takings analysis without placing an undue burden on government.[59]

Another problem with the "balancing test" is its inherent weight in favor of the government; our Lady Justice discretely presses her thumb upon the scales like an unscrupulous butcher. For example, courts view all regulation with a presumption of constitutionality and reasonableness even though government agencies now perform many legislative functions. Such circumstances conflict with the traditional basis of judicial deference, when the Court presumed that an owner could reasonably "appeal . . . to the legislature, or to the ballot-box, not to the judiciary."[60] These presumptions were true in the past, when the legislature drafted most regulations. Today, however, regulations frequently are a set of skeletal rules that are developed and implemented by unelected officials and commissions. Accountability to the public, therefore, is not as direct as when judicial presumptions of constitutionality were first made. In addition, immediate health and safety issues constituted the principal police power justifications for land use regulations before the middle-twentieth century. By contrast, aesthetic and environmental concerns comprise an expanded use of the police power today.[61] The Court's role in examining exercises of police power is "an extremely narrow one[,]"[62] and its deference is so great that for the public use to be found illegitimate, it must be "palpably without reasonable foundation."[63]

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59. For example, compensation for ordinances restricting construction in coastal wetlands should be valued as property ineligible for federal flood insurance, which subsidizes the true cost of insurance in many coastal zones. Without such flood insurance, the value of the properties would be dramatically reduced.

60. *Powell v. Pennsylvania*, 127 U.S. 678, 686 (1888).

61. The Court in *Berman v. Parker*, 348 U.S. 26 (1954), accepted aesthetics alone as a regulatory justification. In *Berman*, Justice Douglas opined for the Court: "The concept of the public welfare is broad and inclusive. . . . The values it represents are spiritual as well as physical, aesthetic as well as monetary." Id. at 33. The use of aesthetics alone as a police power justification reached its judicial high-water mark in *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974), in which Justice Douglas again declared for the Court that the police power "is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people." Id. at 9.

The common categories of regulation and taking claims include mining regulation, protection of wetlands, protection of beaches, regulation of flood-prone areas, creation of open spaces in new subdivisions, control of population density, preservation of historic structures, time planning of residential development, and aesthetic controls. Fred P. Bosselman, David L. Callies, and John S. Banta, *The Taking Issue: An Analysis of the Constitutional Limits of Land Use Control* 141-94 (U.S. Government Printing Office, 1973).

62. *Berman*, 348 U.S. at 32.

63. *Hawaii Housing Auth. v. Midkiff*, 467 U.S. 229, 241 (1984) (citing *United States v. Gettysburg Elec. R. Co.*, 160 U.S. 668, 680 (1896)). This is the broadest standard to review the legitimacy prong of the takings equation, a form similar to the one used for substantive due process review.

More significantly, the balancing test subjects the takings claim to a muddle of due process and takings analysis.[64] This confusion is caused by the Court's overlap and mixing of the two analyses in almost every takings case. The Court's failure to distinguish the two analyses has led some commentators to suggest that a "Unified Model" now exists, under which the takings clause and due process clause are merged.[65] Others call for the Court simply to change its inquiry into an explicit due process analysis, either substantive or procedural, contending that the balancing test essentially is a due process inquiry.[66] Although this latter point is true, it is unclear that the Court ever intended to abolish the takings possibility for confiscatory regulations.

Justice Holmes originally used takings analysis because due process alone could not provide sufficient protection to landowners. Moreover, the *Lucas* opinion suggests that the Court recognizes a distinction in form, if not in substance, by adding a threshold takings step. Following *Lucas*, the Court apparently will examine whether the regulation compelled a permanent physical invasion or destroyed all economic use of the property. If so, the government must provide some form of just compensation. By contrast, if the property still retains some economically viable use and was not physically invaded, the Court then will balance the public and private interests.[67]

The diminution in value test, if given greater force as an independent method of takings analysis, would prevent claimants' cases from being thrown into the balancing test's hotchpot of due process and takings analyses. The remaining compensation issue would alleviate many apparent fiscal burdens on government by permitting alternative, nonmonetary forms of compensation.[68] In this manner, certainty as well as objective equity may prevail.

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64. See generally Rose, 57 S. Cal. L. Rev. 561 (cited in note 12).

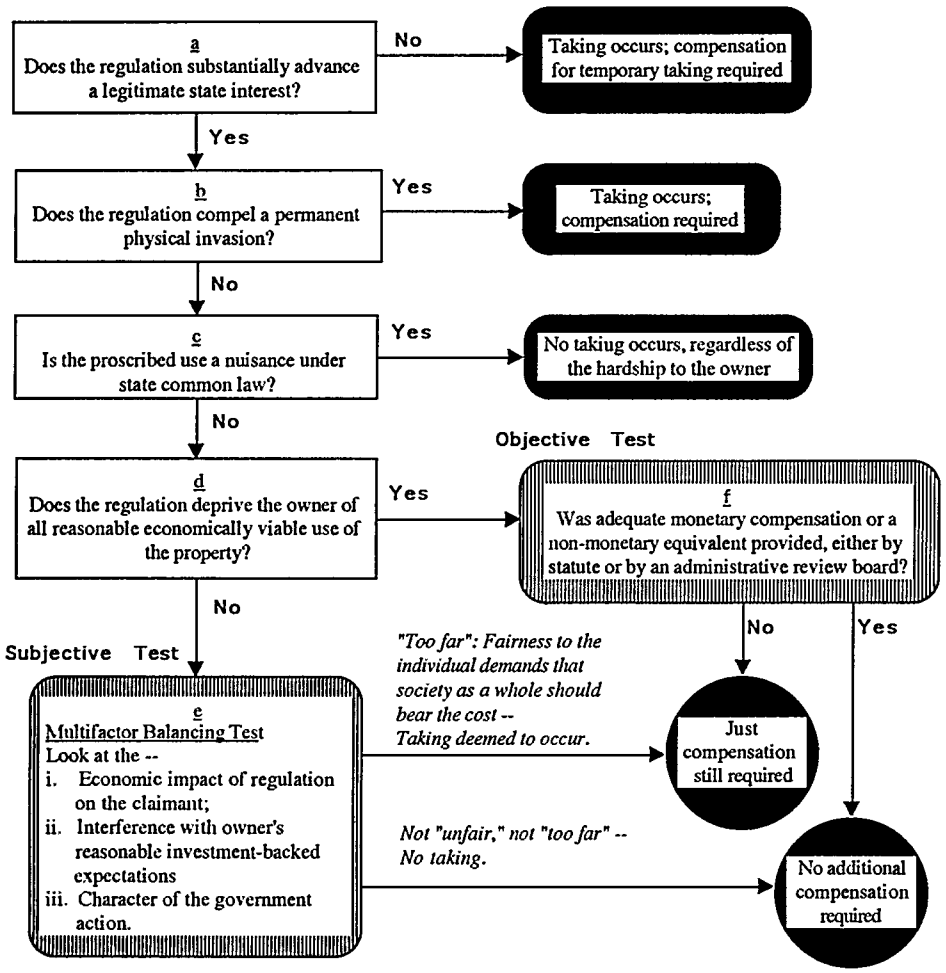
65. See Michael J. Davis and Robert L. Glicksman, *To the Promised Land: A Century of Wandering and a Final Homeland for the Due Process and Taking Clauses*, 68 Or. L. Rev. 393, 401 (1989).

66. See Sackman and Rohan, 2 *Nichols' The Law of Eminent Domain* § 6.21[5] at 146 (Supp. 1992) (cited in note 53) (quoting the amicus curiae brief that the United States Department of Justice submitted in *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985): "The reason there is so much confusion in the area of taking and land use development is that the Court should not consider whether or not there has been a compensable taking under the Fifth Amendment, but whether there has been a violation of due process, either substantive or procedural. . . . [W]hile the Court may have spoken in terms of property rights being taken, in actuality all of the tests set forth in the cases through the years have been based upon violation of due process. *Mugler v. Kansas* . . . *Mahon* . . . *Penn Central* . . . . All of the tests set forth in those prior decisions while couched in terms of property right really speak in terms of violation of due process.").

67. See notes 43-50 and accompanying text.

68. Even if "property" is defined narrowly for purposes of determining whether the "property" has been deprived of all economically viable use, the government or the Court, or both, still

Post-*Lucas* Regulatory Takings Analysis



a. *See Nollan v. California Coastal Commission*, 483 U.S. 825 (1987). See also text at note 24.
b. See *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). See also note 26 and accompanying text.
c. See *Lucas v. South Carolina Coastal Commission*, 112 S.Ct. 2886 (1992). See also notes 29 and 205 and accompanying text.
d. See *Lucas v. South Carolina Coastal Commission*, 112 S.Ct. 2886 (1992). See also notes 28-35 and accompanying text.
e. See *Keystone Bituminous Coal Ass'n v. De Benedictis*, 480 U.S. 470 (1987). See also notes 47-51 and accompanying text.
f. See note 68 and accompanying text.

may employ non-monetary compensation (such as granting transfer development rights (TDRs), if deemed legitimate compensation, or finding an "average reciprocity of advantage" to the owner) when a narrow property definition causes a total deprivation. Such treatment of "property" would allow the Court to avoid the subjectivity of the multifactor balancing test and shift the analysis into the objective realm of whether the form of compensation is "just." This route also separates the examination of whether such compensation is just, because non-monetary compensation is included within the muddle of the balancing test and too easily presumed "just" (as in *Penn Cent. Transp. Co.*).

B. Background of the Diminution in Value Test

In *Pennsylvania Coal Co. v. Mahon*,[69] Justice Holmes held that government regulation of private property could go only so far before courts would recognize it as a taking. As discussed earlier, Justice Holmes did not indicate what "property" or just how "far," but he set forth a number of competing considerations to determine when fairness requires the drawing of compensable metes and bounds. Proponents of both sides of the takings issue employ these considerations to justify either a narrow or a broad view of what property should constitute the "whole" in the diminution in value test. In favor of a narrow definition of the "whole" property that would provide greater protection for smaller interests of value, Justice Holmes opined: "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."[70] Supporting a broad and inclusive definition of the "whole," Justice Holmes recognized that government could not function if it was unable to decrease property values slightly without being liable for reparation.[71] Cases that deny landowners compensation for their losses frequently cite this quotation.[72]

These opinions, however, generally ignore Justice Holmes's warning that the implied limitation on the property rights of an owner "must have its limits, or the contract and due process clauses are gone."[73] Justice Holmes noted that government must exercise its power of eminent domain and pay just compensation in almost all cases when the diminution reaches a certain magnitude.[74] Although Justice Holmes's opinion arguably sides with a more protective view of property rights, subsequent Supreme Court opinions reflect both of these conflicting concerns.

Ambiguity presents the greatest problem with the diminution in value test[75] because the test leaves two principal issues unanswered.

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69. 260 U.S. 393 (1922).

70. *Mahon*, 260 U.S. at 416.

71. *Mahon*, 260 U.S. at 413. Justice Holmes specifically stated: "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. . . . [S]ome values are enjoyed under an implied limitation and must yield to the police power." Id.

72. See, for example, *Penn Cent. Transp. Co.*, 438 U.S. at 124.

73. *Mahon*, 260 U.S. at 413. Ironically, these protections appear to be gone. The takings arena remains the only substantial forum of protection for property interests from government regulation.

74. Id.

75. This fact has led some Justices to claim that the "deprivation of all economically beneficial use" rule is "wholly arbitrary." *Lucas*, 112 S. Ct. at 2919 (Stevens, J., dissenting). But see id. at 2895 n.8 (Scalia, J., writing for the Court, responding to Justice Stevens's dissent).

First, the test does not delineate precisely what *degree* of diminution in value constitutes a taking. The Court recently held in *Lucas*[76] that compensation is required whenever a regulation deprives property of all economically valuable use, unless such restricted use constitutes an historical common-law nuisance under state law.[77] Accordingly, a regulatory restriction that causes a one hundred percent devaluation clearly results in a per se taking.[78] The Court, however, has declined to state a "set formula" to determine when a diminution of less than one hundred percent constitutes a taking, preferring to decide cases on an ad hoc basis.[79] By contrast, the magnitude issue would not be as significant if the destruction of certain recognized and protected interests, rather than a broadly interpreted "parcel as a whole," constituted the relevant compensable interest.

Even if the Court could determine the magnitude of a permissible diminution, a more fundamental and antecedent question would remain: what unit of relevant property should serve as the denominator of the " 'deprivation' fraction"?[80] How much of *what* was affected?[81] The definition of "property" is crucial not only for determining a tangible magnitude of the diminution of value or interference with one's right to use, but also for determining the fairness of the regulation based on its economic impact on the individual property owner. Although the Court has indicated that a method exists for defining what "property" constitutes the denominator in the takings equation,[82] in *Lucas* the Court expressly denied the existence of such a method and suggested an alternative approach to the problem.[83] Before examining the *Lucas* opinion, it is helpful to review certain prior decisions to understand the present labyrinth and ongoing struggle in the field.

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76. 112 S. Ct. 2886 (1992).

77. Id. at 2901-02.

78. This presumes the case is ripe for review. See notes 161-65 and accompanying text for discussion of ripeness.

79. See *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 495 (1987). See also Epstein, 1987 S. Ct. Rev. at 4 (cited in note 21).

Some commentators also argue that the Constitution distinguishes "deprivations" and "takings." They point to the Fifth Amendment's explicit language and note that the compensation requirement only applies to takings, whereas deprivations only require due process scrutiny. See, for example, Leslie Bender, *The Takings Clause: Principles or Politics?*, 34 Buff. L. Rev. 735, 743-44 (1985).

80. *Lucas*, 112 S. Ct. at 2894 n.7; *Keystone*, 480 U.S. at 497. See also Epstein, 1987 S. Ct. Rev. at 16-17 (cited in note 21); Michelman, 80 Harv. L. Rev. at 1192, 1232-33 (cited in note 21).

81. See Rose, 57 S. Cal. L. Rev. at 566 (cited in note 12).

82. See *Hodel v. Irving*, 481 U.S. 704 (1987), in which the Court held: "The framework for examining the question whether a regulation of property amounts to a taking requiring just compensation is firmly established and has been regularly and recently reaffirmed." Id. at 713.

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

In a series of cases now commonly referred to as the "bundle of rights" cases, the Supreme Court considered whether the destruction of only one right in the "bundle" of ownership rights by government regulation constitutes a taking. These cases generally involved the regulation of personal property, and must be distinguished as such, but they provide the background for subsequent Supreme Court cases dealing with a single right alone as denominator property in real property cases. The Court currently recognizes three rights as fundamental: (1) the right of disposition (the *jus disponendi*); (2) the right of possession (the *jus possidendi*), which generally includes the right to exclude (the *jus prohibendi*); and (3) the right of use (the *jus utendi*).[84]

The Court considered the right to dispose of one's property in *Andrus v. Allard.*[85] In *Andrus,* the Court held that federal regulations that prohibit the sale of Indian artifacts containing feathers of protected birds did not effect a taking.[86] The Court observed that the regulations destroyed only the right to sell the artifacts.[87] The regulations expressly preserved the owners' rights to possess, transport, donate, or devise the artifacts.[88] The Court opined, therefore, that the destruction of a single "strand" in the whole "bundle" of property rights did not constitute a taking.[89] According to the Court, the regulations simply prohibited the most profitable use of the property.[90] Although the district court found that the prohibition deprived claimants of any opportunity to earn a profit from their property,[91] the Supreme Court categorized the effect as a mere "reduction in value."[92] The Court posited, albeit dubiously, that some economic benefit remained because the claimants could charge admission to see the artifacts.[93] By finding that value remained in the property, the Court avoided finding a taking. The Court con-

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84. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982). See also Restatement of Property § 5, cmt. e, at 11 (1936); Sackman and Rohan, 2 *Nichols' The Law of Eminent Domain* § 5.01 (cited in note 53) ("What Constitutes Property"). But see Roger A. Cunningham, William B. Stoebuck, and Dale A. Whitman, *The Law of Property* § 1.2 at 7 (West, 1984) (stating that property rights include: "(1) a right of possession (*jus possidendi*); (2) a right of exclusion (*jus prohibendi*); (3) a right of disposition (*jus disponendi*); (4) a right of use (*jus utendi*); (5) a right to enjoy fruits or profits (*jus fruendi*); (6) a right of destruction (*jus abutendi*)").

85. 444 U.S. 51 (1979).

86. Id. at 67-68. The regulations were adopted by the Secretary of the Interior pursuant to the Bald Eagle Protection Act, 16 U.S.C. § 668(a) (1978), and the Migratory Bird Treaty Act, 16 U.S.C. § 703 (1974).

87. *Andrus*, 444 U.S. at 65.

88. Id. at 64.

89. Id. at 65-66.

90. Id.

91. Id. at 64.

92. Id. at 66.

93. Id.

cluded that the loss of future profits, without a "physical property restriction," is a "slender reed" on which to base a takings claim.[94]

In *Kaiser Aetna v. United States*,[95] a developer converted a coastal pond into a marina and dredged a channel to allow boat access to and from an adjacent bay. Because the pond was private property under Hawaii law, the developer controlled access to and use of the pond. The United States Corps of Engineers nevertheless asserted that the improvements made the pond a "navigable water" and sued the developer to prevent it from denying the public access to the pond.[96] The Court recognized that the right to exclude others is "one of the most essential sticks in the bundle of rights that are commonly characterized as property . . . ."[97] The Court held that the right to exclude is universally recognized as a fundamental element of the property right, and therefore the Government had to compensate the owner if it denied him that right.[98] The Corps's consent to the dredging and its failure to condition the dredging operations did not "estop" the government from imposing its regulations, but it created a number of "expectancies" embodied in the concept of "property" protected by the takings clause.[99] The government ordinarily could guarantee the public a right of free access to "navigable waters" if it so chose,[100] but the government's actions in this case gave rise to a compensable taking.[101] The government action imposed "temporary" physical invasions on the owner's private property, not merely a "substantial devaluation" of the property.[102] The Court, therefore, held that a taking had occured.[103]

In *PruneYard Shopping Center v. Robins*,[104] a shopping center owner appealed the California Supreme Court's decision prohibiting his exclusion of students who sought to distribute political pamphlets and to solicit support for their cause on his premises. The Court held that the impairment of the right to exclude in this case did not amount to a

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94. Id.

95. 444 U.S. 164 (1979).

96. Id. at 166-67. The Corps originally acquiesced to the dredging of the channel to the bay when Kaiser Aetna notified the Corps of its plans in 1961. Id. at 167.

97. Id. at 176.

98. Id. at 179-80. In addition, the Court ruled that the right to exclude "falls within this category of interests that the Government cannot take without compensation." Id.

99. Id. at 179.

100. The government's power to impose a navigational servitude arises from the Commerce Clause rather than the power of eminent domain. Id. at 169. Here, however, the government's action went "too far" and required compensation. Id. at 180.

101. Id.

102. Id.

103. Id.

104. 447 U.S. 74 (1980).

compensable taking.[105] The restraint on the right to exclude did not "unreasonably impair the value or the use of [the] property as a shopping center."[106] Free speech concerns clearly motivated the Court's decision, indicating that *PruneYard* might be limited to its facts.[107] Moreover, the Court held that the shopping center still could regulate the location and the manner of solicitation to minimize interference with its retail operations.[108] The Court distinguished *Kaiser Aetna* because in *Kaiser Aetna* the government's interference would have infringed substantially on Kaiser Aetna's "reasonable investment backed expectations" and the federal government did not possess the "residual authority" to define property rights.[109] Subsequent opinions also distinguished *PruneYard* from compelled physical invasion cases such as *Loretto*,[110] because *Loretto* involved a "permanent" physical invasion rather than a mere "temporary" invasion.[111]

In *Hodel v. Irving*,[112] the Supreme Court revisited the right to dispose of one's property, previously addressed in *Andrus v. Allard*.[113] In *Hodel*, the Court invalidated a statute that provided for automatic escheat of minor Indian holdings of real property. The statute completely destroyed the owners' rights to dispose of their real property. The opinion strongly suggests that the Court will not apply *Andrus* to real property cases when a regulation completely destroys the right to dispose.[114]

The right to possession and the right to exclude, if totally destroyed, will result in one of two categorizations. *Loretto*[115] exemplifies

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105. Id. at 85.

106. Id. at 83.

107. Id. at 96-100 (Powell, J., and White, J., concurring in part and in the judgment) (stating that "our decision is limited to the type of shopping center involved in this case"). The Court in *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 832 n.1 (1987), also observed that a public right of permanent access was not imposed in *PruneYard* because the owner opened the shopping center to the public. Thus, the right to exclude is not "essential" to the use or economic value of the property in only limited circumstances.

But see Curtis J. Berger, PruneYard *Revisited: Political Activity on Private Lands*, 66 N.Y.U. L. Rev. 633 (1991), reprinted in 23 Land Use & Env't L. Rev. 79 (1992) (stressing the importance of accessible public forums for free speech and indicating the potential for expansion of First Amendment protection into other appropriate properties).

108. *PruneYard*, 447 U.S. at 83.

109. Id. at 84.

110. See notes 26-27 and accompanying text.

111. *Loretto*, 458 U.S. at 435 n.12.

112. 481 U.S. 704 (1987).

113. See notes 85-94 and accompanying text.

114. Although the majority opinion in *Hodel* does not expressly overturn *Andrus*, the concurrence of Justice Scalia, with whom Chief Justice Rehnquist and Justice Powell joined, held that *Hodel* effectively limited *Andrus* to its facts. *Hodel*, 481 U.S. at 719. The recent prominence of Justice Scalia and Chief Justice Rehnquist in takings jurisprudence may suggest that the majority would adopt this opinion in any subsequent Supreme Court review.

115. See notes 26-27 and accompanying text.

one such category; the statute compelled the owner to suffer a permanent physical invasion. A permanent physical invasion completely and permanently destroys the owner's right to exclude. The result is a per se taking that is clearly compensable. By contrast, *Kaiser Aetna*[116] provides an example of a second takings category in which the compelled invasions of public boats were merely "temporary" in nature.[117] Although such invasions may destroy the right to possess and exclude temporarily, the complete destruction of this right, whether permanent or temporary, appears to be a per se taking, with a narrow exception for shopping centers due to the conflicting constitutional interest.[118]

Although these cases involved the impact of physical invasions on the right to possess and exclude, other cases provide similar examples of regulations that infringe upon, but do not completely destroy, the right to possess and exclude. Therefore, the Court has not required government compensation.

For example, in *Yee v. City of Escondido*,[119] the Court found that a municipal rent control ordinance applicable to mobile home park owners did not compel an "unwanted" physical occupation.[120] The park owners asserted that the ordinance made the mobile home owners perpetual tenants on their properties. The ordinance required park owners to continue their leases at below-market rates unless their property was converted for other permitted uses. In effect, the claimants contended, the ordinance transferred to the tenants "a right of physical occupation" of their land.[121] In addition, the park owners claimed that the ordinance transferred an increase in the value to the tenants for their lots and mobile homes by mandating below-market rates.[122] The tenants would realize this gain if they sold their mobile homes and sites because the rental rates would remain below-market.[123]

The Court rejected these arguments and held that the government had authorized neither a mandatory nor a permanent physical occupation of the owners' lands.[124] The government did not compel a temporary invasion because the petitioners "voluntarily" leased their land to

116. See notes 95-103 and accompanying text.

117. In temporary invasion cases, the invading objects or persons do not remain on the property permanently.

118. See notes 104-11 and accompanying text (discussing *PruneYard Shopping Ctr. v. Robbins*).

119. 112 S. Ct. 1522 (1992).

120. Id. at 1531.

121. Id. at 1528.

122. Id. at 1529.

123. Id. at 1529-30.

124. Id.

mobile home owners.[125] Moreover, the owners were not compelled to rent their land because they could cease their mobile home park operations and convert the property to other permitted uses.[126] The occupation therefore was neither compelled nor permanent in the Court's view.[127] Unlike *Kaiser Aetna*, the right to exclude arguably was not abolished completely because of the park owners' initial "voluntary" acceptance of the rental tenants. Under this rationale, rent controls generally would not destroy completely the values associated with the right to possess and exclude. Rent controls under some circumstances, however, may become so onerous as to amount to a compensable taking.

Seawall Associates v. City of New York[128] provides an example in which compelled rent control amounted to a per se compensable taking by entirely destroying the right to exclude.[129] In *Seawall*, an ordinance prohibited the demolition, alteration, or conversion of certain low-cost rental properties. The ordinance required the owners to restore all units to a habitable condition and to lease them indefinitely at controlled rents. The ordinance also imposed substantial monetary penalties for noncompliance.[130] The New York Supreme Court held that these uncompensated obligations and restrictions amounted to a taking.[131] Under this court's analysis, the compelled rental requirements destroyed the owners' fundamental right to possess their properties.[132] Although the regulation did not destroy all uses of the properties, it compelled the owners to devote their property to a single, unanticipated, and potentially unprofitable use.[133] The law permitted the owners to dispose of or sell their properties, and thus did not totally destroy the right of disposition. The restrictions economically impaired this right, however, by reducing the potential sales price for the properties to an amount substantially lower than their pre-restriction purchase prices.

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125. Id. at 1530. See also *FCC v. Florida Power Corp.*, 480 U.S. 245 (1987), in which the claimants alleged that the Pole Attachments Act, 47 U.S.C. § 224 (1988), caused a physical taking of the utility company's poles. The FCC regulated certain rates that the utility company could charge cable television operators who lease poles to carry their television cables. The Court held that there was no "required acquiescence" in this case and found that there was no physical taking. *Florida Power Corp.*, 480 U.S. at 252-53.

126. *Yee*, 112 S. Ct. at 1530-31.

127. Id. at 1531.

128. 74 N.Y.2d 92, 542 N.E.2d 1059 (1989), cert. denied 110 S. Ct. 500 (1989).

129. Although denials of certiorari have no precedential force, the fact that the Supreme Court left the case undisturbed in subsequent possession cases suggests that the rationale may find support at the federal level as well.

130. *Seawall*, 542 N.E.2d at 1063.

131. Id. at 1065.

132. Id. at 1066.

133. Id.

Unlike *Yee*, the owners in *Seawall* did not "voluntarily" admit tenants onto their properties; no tenants resided on the premises at the time the ordinance was enacted. Additionally, the ordinance prohibited alternative uses not involving tenants, compelled the owners to accept tenants at controlled rental rates, and penalized the owners for using their property for personal use or even no use at all.[134] Under these circumstances, the rent control ordinance totally destroyed the right to possess and impaired values associated with other rights. The court, therefore, held that the ordinance amounted to a taking.[135]

The right of use represents the third fundamental right recognized and protected by the Supreme Court. This right also is the one most frequently affected by regulation. The protected right of use is defined more specifically as the right of *economically viable* use. The right of economically viable use appears to be abolished by the complete restriction of either of two essential uses: (1) the right to receive reasonable rents from one's land, or (2) the right to build something on one's land. This proposition is based on two common notions: first, that an owner expects to reap profits when purchasing land;[136] and second, that the common law rarely denies an owner the "essential uses" of her land.[137]

In *Nollan v. California Coastal Commission*,[138] the Court explicitly observed in dicta that building something on one's own land is a right of ownership, not a privilege granted by the government.[139] In *Nollan*, the state demanded an easement across the beach front of the owner's property before a building restriction would be lifted. The regulation did not completely destroy the right to build because it permitted the owner to develop his property provided construction did not exceed the size of his previous dwelling. Nevertheless, the Court invalidated the restriction.[140] The Court based its holding, however, on a close scrutiny of the nexus between the restriction imposed and the harm to be prevented.[141] It held that the exaction demanded by the state in return for lifting the restriction did not "substantially advance" a legitimate state interest.[142] The Court therefore did not employ the diminution in value test. Other courts examining the construction right through the diminu-

134. Id. at 1063.

135. Id. at 1065.

136. See *Lucas*, 112 S. Ct. at 2894 (quoting Sir Edward Coke, 1 *The First Part of the Institutes of the Laws of England* ch. 1, § 1 (Johnson and Warner, 1st Am. ed. 1812) (stating, "[F]or what is land but the profits thereof[?]")).

137. See *Lucas*, 112 S. Ct. at 2901 (quoting *Curtin v. Benson*, 222 U.S. 78, 86 (1911)).

138. 483 U.S. 825 (1987).

139. Id. at 833-34 n.2.

140. Id. at 841-42.

141. Id. at 833.

142. Id.

tion analysis have held, however, that restrictions which still allow an owner to construct a single family house do not constitute a total diminution.[143] Thus, the right to build something may be a fundamental use, but this right may be used in diminution analysis either to support or undermine an owner's claim.

Rent control presents another restriction that infringes upon the right to use and the above-mentioned right to exclude. As evidenced by *Yee*,[144] rent control ordinances are not facially per se takings of property.[145] The Court has noted and reaffirmed consistently the States' broad power to regulate housing conditions in general, and landlord-tenant relationships in particular, without compensating owners for every economic injury produced by such regulations.[146] Moreover, the Court remains firm in its position that " 'statutes regulating the economic relations of landlords and tenants are not *per se* takings.' "[147]

The Supreme Court has avoided direct consideration of the rent control issue on grounds of ripeness,[148] but certain opinions suggest that a close nexus test could be used to examine a rent control ordinance's effect on use. In *Pennell v. City of San Jose*,[149] a city rent control ordinance required officials to consider the "hardship to a tenant" when determining whether to approve a rent increase proposed by a landlord.[150] A landlord and landlords' association contended that the ordinance (1) violated the Due Process and Equal Protection Clauses, and (2) as applied, constituted a taking.[151] The plaintiffs alleged that when a hearing officer weighed the "hardship to a tenant" and reduced the rent below what otherwise would be "reasonable," the reduced amount would constitute a taking. Additionally, the reduction would not serve the legitimate purpose of prohibiting excessive rents because this goal was accomplished by consideration of six objective factors related to the landlord's costs and the condition of the rental market.[152] Rather, assistance to hardship tenants through rent reduction served only to transfer the landlord's property, his *jus fruendi*, to specific hardship tenants. In making this argument, plaintiffs pointed to the often-cited basis of

143. See, for example, *Moskow v. Comm'r of Dep't of Envir. Management*, 427 N.E.2d 750, 753 (Mass. 1981); *Lovequist v. Conservation Comm'n of Dennis*, 393 N.E.2d 858, 866 (Mass. 1979).

144. *Yee*, 112 S. Ct. at 1528.

145. *Pennell v. San Jose*, 485 U.S. 1, 12 n.6 (1988).

146. Id. (quoting *Loretto v. Teleprompter Manhattan CATV Corp.*, 485 U.S. 419, 440 (1982)).

147. Id. (quoting *FCC v. Florida Power Corp.*, 480 U.S. 245, 252 (1987)).

148. *Pennell*, 485 U.S. at 9-10.

149. 485 U.S. 1 (1988).

150. Id. at 5-6.

151. Id. at 4.

152. Id. at 9.

the Fifth Amendment's Just Compensation Clause, which is to prevent government from forcing an individual to bear a cost that the public as a whole should assume.[153]

The plaintiffs in *Pennell* clearly presented a powerful argument. Justice Scalia, joined by Justice O'Connor, concurring in part and dissenting in part, would have found a taking without just compensation.[154] Justice Scalia observed that traditional land-use regulations existed to prevent property uses that created social problems.[155] Traditionally, a cause-and-effect relationship existed, with a close nexus between the regulation and the problem that it sought to remedy. A landowner was targeted only when his use was the source of the public evil.[156]

By contrast, the landlords in *Pennell* did not cause the problems of poor tenants. The "hardship" tenant provision simply provided a politically attractive means to transfer wealth off the books.[157] This provision violated the general principle that one man's misfortunes do not justify shifting his burdens to his neighbor's shoulders.[158] The regulation permitted a use of funds that, if taken through taxation and made available to the government, the public might have allocated elsewhere. In sum, the regulation avoided the government's traditional method to provide cash, goods, or services to the poor by using taxes raised from the general public. Taxation, according to Justice Scalia's analysis, is the only constitutionally permissible method to provide welfare services.[159] This opinion appears derived from, or at least is supported by, Justice Holmes's opinion in *Mahon*, in which he recognized that a strong desire to provide for the general welfare cannot justify achieving that goal by any means other than "the constitutional way of paying for the change."[160]

Nevertheless, the Court refused to reach this issue in *Pennell* on ripeness grounds.[161] Ripeness remains the most significant barrier to a

153. The Just Compensation Clause's purpose is " 'to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.' " *Pennell*, 485 U.S. at 9 (quoting *First English Evangelical Lutheran Church v. Los Angeles County*, 482 U.S. 304, 318-19 (1987) (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960))).

154. *Pennell*, 485 U.S. at 24 (Scalia, J., concurring in part and dissenting in part).

155. Id. at 20.

156. Id.

157. Id. at 22.

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

159. *Pennell*, 485 U.S. at 21-22.

160. *Mahon*, 260 U.S. at 416.

161. *Pennell*, 485 U.S. at 10.

regulatory takings claim.[162] In an "as applied" challenge, a taking can arise only after an owner appeals to the proper administrative bodies and hearings officers rule on the issue.[163] In *Pennell*, the majority held that the parties failed to show that the challenged statute specifically took any property, and thus did not present a "sufficiently concrete factual setting" for the Court to rule on this claim.[164] Observers should note, however, that Justices Scalia and O'Connor did not believe ripeness to be a problem for the plaintiffs' case.[165] Given their prevailing role in *Lucas* and *Nollan* and their clear interest in hearing such claims, it is possible that the ripeness barrier will not stand as high for future claimants.

Other Supreme Court cases concern the use of a physical segment of property that is less than the general whole. These cases followed the "bundle of rights" cases when examining segments of space within the so-called "parcel as a whole."[166] For example, in *Penn Central Transportation Co. v. New York City*,[167] the Court examined whether the government's denial of the owner's request to build over New York's Grand Central Station constituted a taking. The Court observed that government regulation may deprive an owner of the most profitable use of his property without constituting an "unconstitutional taking."[168] Noting that general welfare legislation frequently burdens some owners more than others, the Court ruled that a disparate impact alone does not necessarily amount to a taking.[169] The Court mixed takings and due process considerations and held that regulations do not need to produce reciprocal benefits as long as restrictions (1) are reasonably related to

162. Ripeness and exhaustion of administrative remedies still present a tremendous hurdle for claimants, especially in "as applied" challenges. These issues have been used by the Supreme Court and many other courts to avoid deciding difficult takings issues. See, for example, *Pennell v. San Jose*, 485 U.S. 1, 10 (1988) (finding the factual setting not "sufficiently concrete" for ruling on the claim); *San Diego Gas & Elec. Co. v. San Diego*, 450 U.S. 621 (1981); *Agins v. Tiburon*, 447 U.S. 255 (1980). See also *Zilber v. Town of Moraga*, 692 F. Supp. 1195 (N.D. Cal. 1988) (finding an "as applied" claim not ripe for review); *Presbytery of Seattle v. King County*, 114 Wash.2d 320, 787 P.2d 907 (1990) (holding that failure to exhaust administrative remedies when the remedies were not futile precluded consideration of the case).

163. *Pennell*, 485 U.S. at 9-10.

164. Id. at 10.

165. Id. at 18-19.

166. *Keystone*, 480 U.S. at 497 (quoting *Penn. Cent. Transp. Co.*, 438 U.S. at 130-31).

167. 438 U.S. 104 (1978).

168. Id. at 123-28. Note, however, the rhetorical force of this commonly cited quotation. An "unconstitutional taking" is merely a taking without just compensation. The claimant's only remedy should be compensation. Although "compensable taking" would be more accurate, "unconstitutional taking" implies a greater restriction on the government's ability to act. The courts could impose an injunction or void a government regulation for pure due process violations, and this is what the term "unconstitutional" is intended to evoke. The Court's mixing of the two analyses in the majority of cases continues to obscure the proper remedy.

169. Id. at 133.

the implementation of a legitimate policy; (2) are expected to create a widespread public benefit; and (3) apply to all similarly situated property.[170] When examining the diminution suffered by the owner, the Court held that takings analysis does not divide a single parcel into discrete segments and then examine whether the regulation destroyed all of the rights in a particular segment.[171] Instead, the Court held that it must perform a balancing test to consider the character of the government's action and the extent of the interference with "rights in the *parcel as a whole* . . . ."[172] The Court found that Penn Central would receive a reasonable rent without building the denied renovation, and that it could resubmit different plans for future development.[173] Moreover, the city's interest in historic preservation weighed more in the mind of the Court, and it therefore denied the takings challenge.[174]

In *Keystone Bituminous Coal Ass'n. v. DeBenedictis*,[175] the Court revisited a statute substantially similar to the statute in *Mahon*. The Court distinguished the *Keystone* statute from the *Mahon* statute because of its artful designation of numerous public, rather than private, interests.[176] The Court categorized the *Keystone* statute as involving the general public, whereas the *Mahon* statute concerned only one homeowner.[177] Justice Stevens also delineated a framework that distinguished "mere restrictions" on use from takings of property.[178] Justice Stevens rationalized that the "ownership" of a thing is not "taken" if the owner can make some productive use of that thing.[179] Justice Stevens cited Professor Frank I. Michelman, a leading takings commentator, when deciding that the Court must compare the value taken with the value that remains in the property.[180] Nevertheless, Justice Stevens employed a test that Professor Michelman clearly discredited and reached a result that he seemingly would not support.[181]

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170. Id. at 133-34 n.30.

171. Id. at 130.

172. Id. at 130-31 (emphasis added).

173. Id. at 137.

174. Id. at 138.

175. 480 U.S. 470 (1987).

176. See id. at 476 n.6.

177. Id. at 483.

178. Id. at 485-97.

179. Id. at 501 (holding, "Because petitioners retain the right to mine . . ., the burden the Act places on the support estate does not constitute a taking.").

180. 480 U.S. at 497 (stating that "[b]ecause our test for regulatory taking requires us to compare the value that has been taken from the property with the value that remains in the property, one of the critical questions is determining how to define the unit of property 'whose value is to furnish the denominator of the fraction' " (quoting Michelman, 80 Harv. L. Rev. at 1192 (cited in note 21))). See also Epstein, 1987 S. Ct. Rev. at 16-17 (cited in note 21).

181. See Michelman, 80 Harv. L. Rev. at 1193 (cited in note 12):

The statute specifically targeted the support estates previously purchased by the coal companies. Under Pennsylvania law, this estate coexisted with the mineral and surface estates. The support estate gave its owner the right to demand support to the surface estate or, alternatively, to deprive the surface estate of its support through mining. Rather than treat the support estate independently for diminution analysis, the Court deemed it part of the mineral estate.[182] Using a multifactor balancing test, the Court decided that the statute's public interest outweighed the owner's interest and thus found no taking.[183]

In *Lucas v. South Carolina Coastal Council*,[184] a wetlands protection statute prohibited all construction on the claimant's land.[185] Lucas purchased the affected property before the enactment of the statute, which contained no grandfather clause or other relief.[186] The Court held that the total taking of all economically viable use of the land amounted to a taking and remanded the case to determine compensation.[187] The Court also posited that when determining the takings equation denominator, the state's common law of property may provide the answer because it shapes an owner's "reasonable expectations."[188] The Court, therefore, may examine whether and to what degree the state's law recognizes and protects the particular interest in land.[189]

This opinion is consistent with *PruneYard Shopping Center v. Robins*,[190] in which the Court held as a general proposition that the

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> Inasmuch as mining rights are well recognized, divisible interests in land, and inasmuch as "rights" to particular surface uses have come to be recognized as species of "property" under the label of "easement" or "servitude," why not say that my land consists of two "things"—mining rights and surface rights, or foundry rights and residue—and that *the relevant denominator in testing a regulation which impinges only on mining rights or foundry rights is the value of those rights—which the regulation totally destroys?*

Id. (emphasis added). See also Epstein, 1987 S. Ct. Rev. at 17 (cited in note 21).

182. *Keystone*, 480 U.S. at 500-01.

183. Id. at 506.

184. 112 S. Ct. 2886 (1992).

185. Id. at 2888-90.

186. Lucas purchased the lots in 1986. The South Carolina legislature enacted the Beachfront Management Act, S.C. Code § 48-39-250 et seq. (Supp. 1990) in 1988. The state amended this Act to authorize its Coastal Council to issue "special permits" in certain circumstances for the construction or reconstruction of habitable structures seaward of the Act's baseline. See S.C. Code § 48-39-290(D)(1) (Supp. 1991). The Court rejected South Carolina's argument that this amendment rendered Lucas's claim unripe. *Lucas*, 112 S. Ct. at 2891.

187. Upon remand, *Lucas v. South Carolina Coastal Council*, 424 S.E.2d 484 (S.C. 1992), the South Carolina Supreme Court held that the Coastal Council did not possess the authority under state common law to prohibit Lucas from constructing a habitable structure on his land. Id. at 485. In addition, the court held that Lucas suffered a compensable temporary taking, and directed the lower court to award compensation based on the period from the enactment of the 1988 Act and continuing through the date of this court order.

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

189. See id.

190. See notes 104-11 and accompanying text.

United States, as opposed to the several states, does not possess the authority to define "property" in the first instance.[191] Like other Supreme Court holdings, this opinion looks to state law to define property.[192] *Lucas* therefore expressly leaves open the issue of whether interests in land, rather than the entire "bundle," will constitute the denominator for the deprivation fraction.[193] Under the *Lucas* analysis, courts may focus on the recognition and protection of the interest under state law. This suggestion clearly is directed against the *Keystone* approach, in which the Court refused to recognize the support estate as an independent interest for diminution analysis, even though Pennsylvania common law recognized and protected it as a unique and independent estate coequal with the mineral and surface estates.[194] The usefulness of this distinction will determine whether the Supreme Court or other courts will adopt this suggested approach.

III. The Burdens and Benefits of a Common Denominator

A. *Problems Inherent in Defining a Common Denominator*

Two principal issues arise when defining the relevant bundle of property to which the "taken" portion is compared. First, if courts adopt an expansive definition of the relevant property, holders of extensive property must suffer a greater loss before a "total" taking occurs. This definition permits politicians to saddle large landowners with burdens that would constitute per se takings if imposed on lesser landowners. Under such an approach, the diminution in value test merely becomes a "deep pocket rule,"[195] rather than a test based on fairness. This violates the "bedrock principle"[196] underlying the Takings Clause: to prevent government from forcing individuals to bear burdens alone that, in all fairness and justice, ought to be shared by the public as a

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191. *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 84 (1980).

192. See, for example, *United States ex rel. Tennessee Valley Authority v. Powelson*, 319 U.S. 266, 279 (1943) (defining "property" by looking to state law), and *DeSylva v. Ballentine*, 351 U.S. 570, 580-81 (1956) (defining "children" by looking to state law). See also *United States v. Certain Property Located in Borough of Manhattan*, 344 F.2d 142, 145 (2d Cir. 1965); *In re Taylor & Dean Mfg. Co.*, 136 F.2d 370, 372 (3d Cir. 1943); *United States v. 252.36 Acres of Land*, 336 F. Supp. 667, 668 (W.D. Penn. 1972). But see *DeSylva*, 351 U.S. at 581 (observing that federal courts would be free to disregard an "entirely strange" idiosyncrasy in a particular state law).

193. *Lucas*, 112 S. Ct. at 2894 n.7. See also *Kaiser Aetna v. United States*, 444 U.S. 164, 179 (1979) (stating that "property" consists of recognized expectancies); *Perry v. Sinderman*, 408 U.S. 593, 601 (1972) (observing tbat "property" involves mutually explicit understandings).

194. See text accompanying notes 182-83.

195. Rose, 57 S. Cal. L. Rev. at 568 (cited in note 12).

196. *Colorado Springs Prod. Credit Ass'n v. Farm Credit Admin.*, 967 F.2d 648, 654 (D.C. Cir. 1992).

whole.[197] An expansive definition also fails to protect political minorities, such as large companies or wealthy individuals, from the whims of a voting majority, a concern shared by a number of the Framers.[198] Indeed, the wealth of the property owner appears to influence many courts. The results of numerous cases support the contention of some commentators that politics, not principles, guide the decisions in regulatory takings cases.[199]

Narrowly defining the "whole" property to comprise lesser property rights would cause many minor regulations to destroy completely the economic value of those rights. Any definition of property must consider the government's interest in efficiency when determining whether it is fair to place a burden on an individual rather than the public as a whole. Justice Holmes recognized this principle in *Pennsylvania Coal Co. v. Mahon*, writing, "Government hardly could go on" if it had to compensate owners for every negative effect on values.[200] Various commentators, and the Court at times, employ this comment to justify not compensating property owners for anything less than a total taking of a fee simple and all of its bundle of interests.[201] Whether this amounts to mere rhetoric to win judicial deference or a realistic concern remains open to debate. A narrow definition also could permit owners to split their property rights or sell them to other people, thereby making even a minor regulation a complete taking. Elaborate and socially useless splitting could result, ultimately forcing the courts to reunite the "bundle" of property rights to determine whether a taking has occurred.[202]

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197. *Armstrong v. United States*, 364 U.S. 40, 49 (1960). See also *Pennell v. San Jose*, 485 U.S. 1, 9 (1988); *First English Evangelical Lutheran Church v. Los Angeles County*, 482 U.S. 304, 318-19 (1987); *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 163 (1980); *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 123 (1978).

198. See Bender, 34 Buff. L. Rev. at 745 (cited in note 79). Bender contends that at least some of the Framers supported the takings clause in order to prevent strong political majorities from imposing unfair burdens on individual members of political minorities. Id. Bender states, without citation, that this was "clearly" Madison's motivation, arising from his fear that debtors and the poor would unite politically to take the property of "the rich and powerful." Id. at 745 n.21. Note, however, that Bender's statement does not explain what property could be taken from a poor, powerful person, or alternatively, presupposes that only "the rich" were powerful.

199. See id. at 829 (commenting that the Takings Clause is currently enforced by judges' and legislators' immediate social, economic, and political visions).

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

201. See, for example, *Penn Cent. Transp. Co.*, 438 U.S. at 124; Bender, 34 Buff. L. Rev. at 743 n.16 (cited in note 79) (stating, "Even Justice Holmes . . . recognized that government would be hamstrung if it had to regulate by purchase."). See also notes 70-74 and accompanying text.

202. See Rose, 57 S. Cal. L. Rev. at 568 (cited in note 12). But see *Lucas*, 112 S. Ct. at 2919 (Stevens, J., dissenting) (noting that developers may "market specialized estates to take advantage of the Court's new rule").

Commentators, however, have suggested various alternative methods to combat such abuse.[203]

Potential governmental and private abuses lurk at each end of the definitional spectrum, prompting the question of whether any definition can prevent these abuses. If property cannot be defined, the diminution in value test, both as a categorical test and as one factor in a balancing test, should be abolished and a new model sought out. If, however, the relevant property can be defined by certain specific interests that do not give rise to either of these abuses, such interests should receive per se protection from regulatory takings. The enhanced position of the diminution in value test as a potential per se takings category makes it timely to review the potential uses of clearly defined "property."

B. Benefit of a Narrowly Defined Common Denominator

A categorical diminution in value test represents one of the few regulatory taking tests that appears both manageable and sensible. Moreover, it avoids the subjectivity and confusion of a balancing test. Assuming no permanent physical invasion is compelled, a categorical diminution in value analysis requires four basic inquiries. First, reflecting a process threshold, the governmental act must substantially advance a legitimate government interest.[204] Second, the proscribed use must not constitute a nuisance under state common law.[205] Third, a total deprivation of the economically beneficial use of a property interest must occur. Finally, if a total deprivation has occurred, just compensation must be provided. If the government does not provide for just compensation in its regulatory scheme, the courts should provide a just remedy.

In general, the first prong requiring substantial advancement of a legitimate state interest is satisfied because today the scope of the police power has few limits.[206] The vast majority of governmental regulations or acts will find justification in some general welfare pretext.

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203. Professor Rose observes that if an owner split "property rights to correspond perfectly with a particular regulation," a court might solve the problem "by extending veil-piercing jurisprudence used in [tax] and [corporate] law, in order to compare the regulated property interest with the balance of the [owner's] property rights." *Rose*, 575 S. Cal. L. Rev. at 568 n.43.

204. *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 834 (1987); *Agins v. Tiburon*, 447 U.S. 255, 260 (1980).

205. *Lucas*, 112 S. Ct. at 2900. The case specifically refers to "background principles of nuisance and property law. . . ." Id. This approach unfortunately reinserts ambiguity into the equation because whether an act constitutes a nuisance is determined by a balancing test that considers (1) the degree of harm to the public, (2) the social value of the claimant's activities, (3) the suitability of such activities to the locality, and (4) the relative ease with which either the claimant or the government can avoid the alleged harm. Id. at 2901.

206. See notes 61-63 and accompanying text.

Moreover, the Court may presume that a regulation substantially advances some legitimate state interest in all "as applied" challenges because only the government action and not the statute itself is alleged to cause the taking. Thus, the heightened scrutiny apparent in *Nollan*[207] may afford the property owner some protection when the interest has little relation to the restriction imposed, but the majority of regulatory takings cases will pass easily through *Nollan*'s nexus test.

After satisfying the legitimate government interest requirement, and provided the proscribed use is not a nuisance, the Court analyzes whether the government regulation or act amounts to a taking of "property," which requires just compensation. Failure to define the relevant property produces an analytical quagmire because courts are unable to determine whether a regulation sufficiently affected the relevant property to constitute a taking. Under these circumstances, courts turn to a maze of balancing factors, mix the issues of taking and compensation, and produce an ambiguous analysis.[208] The failure to decide the required degree of interference with the relevant property prevents a separate inquiry into just compensation. Compensation instead becomes merely another factor in the balancing test. Separating the issues would provide greater clarity and precision. If the regulation does not affect a sufficient degree of a relevant property, then only a balancing test would follow. If a sufficient interference with a relevant property interest occurs, however, a taking automatically results and the focus would move directly to the compensation issue. A set of identifiable property interests therefore provides the cornerstone of an efficient takings test.

Shifting the focus to compensation rather than the other aspects of the takings analysis arguably yields greater fairness to the owner. Compensation analysis, with objective values of burdens and benefits, is less subjective than either the scope of police power or relevant property issues. An objective examination of value offers assurance that courts and regulators will consider the real equities of a case. The compensation issue requiries a reciprocal benefit in return for the imposed burden. Nevertheless, the compensation analysis still permits the courts a great deal of flexibility to determine both the nature and amount of compensation. For example, the courts may employ devices such as the "average reciprocity of advantage," which are unavailable when there is a permanent physical occupation. The term "average reciprocity of advantage" first appeared in Justice Holmes's opinion in *Mahon* to denote

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207. See note 24 and accompanying text.

208. See, for example, *Penn Cent. Transp. Co.*, 438 U.S. at 137 (presuming without any scrutiny that certain transfer development rights "undoubtedly mitigate" any financial burdens incurred by the landowner, thereby preventing the possibility of a total taking).

the additional benefits that an owner derives from other similarly situated properties burdened by the same regulation.[209] The benefits conferred by a zoning ordinance typically will outweigh the burdens imposed on particular owners, thus requiring no compensation.[210] For example, setback restrictions on buildings and houses may provide the reciprocal benefits of added beauty and safety to all owners. Similarly, the burden of height restrictions may be compensated in whole or in part by the reciprocal advantages of light and air. When such reciprocity does not exist, however, an owner may demand that the government either show or provide another form of compensation.

The average reciprocity of advantage method has some limitations. Courts cannot use this approach to justify a permanent physical occupation. The permanent interference with an owner's privacy interest demands compensation. If this were not the case, the state could deny compensation because everyone shared the same burden of providing easements for telephone or cable television lines. In more exaggerated circumstances, the state could find reciprocal benefits to owners in providing quarters for government employees.

This Note does not attempt to examine the myriad of possibilities for creative compensation by the legislature. The preceding analysis simply demonstrates the current clog in takings analysis and that a common denominator can enable the system to move on to other well-defined parts. Takings analysis may prove more intelligible and efficient by diverting the analysis away from the muddled issue of whether a prerequisite act of "taking" has occurred, and shifting the principal consideration into more objective areas.

IV. A Map for a Common Denominator

A. General Issues and Unprotected Territory

A categorical compensation requirement for the destruction of specified elements of an owner's land would provide greater certainty to takings analysis. A narrow delineation of protected property interests would identify a finite set of situations in which courts, planners, and regulators would have to consider seriously objective factors of adequate compensation. In addition, categorical compensation for narrow interests would force planners and regulators to address the takings issues before passing regulations as a matter of social policy. Such preemptive planning would allow courts to avoid choosing between the

209. See note 68 and accompanying text.

210. See *Penn Cent. Transp. Co*, 438 U.S. at 144-45 (Rehnquist, J., dissenting).

current extremes of denying compensation or disrupting an entire legislative scheme.

Professor Frank Michelman observed that the general public misses opportunities to employ more innovative methods of settlement and compensation by leaving the resolution of social conflicts exclusively to the courts.[211] Indeed, many proposals for novel compensation suggest that the legislature should prompt such change rather than the judiciary.[212] Legislative compensation also can provide affected owners with generous benefits beyond what the Constitution requires, a method previously used to solve a number of problems.[213]

Thus, the task remains to define the interests protected. The task is more difficult because scholars generally delineate the contours of property in ways that reflect different concerns with pragmatism, justice, social function, and philosophy.[214] One must decide what interests *should* be protected as Fifth Amendment property. Footnote seven in *Lucas* calls for commentators to suggest what rights should receive categorical protection as denominator property.[215] Moreover, one must consider what interests *could* be protected without placing undue fiscal restraints on the government's ability to function and whether such fiscal burdens to the government would outweigh the certainty gained by categorical takings treatment.

Values alone clearly are not Fifth Amendment "property," nor do they inhere in the title of land. Diminution in value alone, therefore, does not constitute a taking.[216] Similarly, no taking occurs merely because regulation prevents the owner's best or most profitable use of the property.[217] Property values represent a risk that a landowner assumes for better or for worse. Justice Holmes observed this reality, citing the traditional expectation that "some *values* are enjoyed under an implied

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211. Michelman, 80 Harv. L. Rev. at 1253 (cited in note 21). See also Manne, Note, 58 Tex. L. Rev. at 1466 (cited in note 7).

212. See, for example, John J. Costonis, *Development Rights Transfer: An Exploratory Essay*, 83 Yale L. J. 75, 127-28 (1973); Michelman, 80 Harv. L. Rev. at 1253-56 (cited in note 21). See generally Manne, Note, 58 Tex. L. Rev. at 1466-67 (cited in note 7); Donald G. Hagman and Dean J. Misczynski, eds., *Windfalls for Wipeouts: Land Value Capture and Compensation* (Planners, 1978).

213. See note 39 (listing various state and federal acts that provide for compensation); Highway Beautification Act, 23 U.S.C. § 131 (1988 & Supp. 1992) (providing for compensation for removal of outdoor advertising signs). See also *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104 (1978) (discussed in notes 167-74), in which New York City's landmark preservation law included a Development Rights Transfer scheme to mitigate the impact on affected landowners.

214. See *Nixon v. United States*, 978 F.2d 1269, 1275-76 (D.C. Cir. 1992). See generally Michelman, 80 Harv. L. Rev. 1165 (cited in note 21).

215. See note 188 and accompanying text.

216. *Penn Cent. Transp. Co.*, 438 U.S. at 124 (stating that "government may execute laws or programs that adversely affect recognized economic values").

217. Id. at 125.

limitation and must yield to the police power."[218] Justice Holmes noted that government could not function if it had to compensate landowners for every diminution of "*values* incident to property."[219] For example, when a state constructs a thoroughfare that diverts traffic, its actions may diminish commercial values incident to land located along the old roads. Nevertheless, the owners are not entitled to compensation. Similarly, if a city builds a fire station on the location of a former public park, the change in use does not amount to a taking of an adjacent landowner's property.[220] This is true even if the government's action on public property decreases the value of the abutting land because no private right is infringed. The Constitution does not protect value alone from government action.[221] Values, however, are not rights. In each of these examples the government action impacts the value of land but not the rights of the landowners. By contrast, when government regulations affect property values by directly infringing on the rights of the landowner, greater scrutiny should be given to the infringements. Nevertheless, courts usually refuse to apply such heightened scrutiny unless regulation takes all beneficial use in property.[222]

Certain harmful and noxious uses of land that are akin to public nuisances or other unlawful uses also are not part of a landowner's title.[223] Indeed, the state may require the destruction of property that poses an immediate threat to the safety or property of the community without paying compensation.[224] In order to determine which uses are not part of an owner's title, the *Lucas* Court held that a court must examine tbe "background principles" of a state's property and nuisance law.[225] When the proscribed use similarly would be unlawful under the state's law of property and nuisance, such use would not inhere in the title itself. The owner, therefore, would have no right or expectation to such use. Thus, the government has no obligation to compensate an owner for prohibiting the use, even if the regulation eliminates the value of the owner's remaining property.[226]

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218. *Mahon*, 260 U.S. at 403 (emphasis added).

219. Id. (emphasis added).

220. *Reichelderfer v. Quinn*, 287 U.S. 315 (1932).

221. Id. at 319 (stating that "the existence of value alone does not generate interests protected by the Constitution against diminution by the government, however unreasonable its action may be").

222. See *Lucas*, 112 S. Ct. at 2895.

223. See note 205 and accompanying text.

224. *Miller v. Schoene*, 276 U.S. 272, 279-81 (1928).

225. *Lucas*, 112 S. Ct. at 2901-02. But see *Miller*, 276 U.S. at 280 (stating, "We need not weigh with nicety the question whether the infected cedars [trees] constitute a nuisance according to the common law; or whether they may be so declared by statute.").

226. *Lucas*, 112 S. Ct. at 2900. *Lucas* recites two examples of landowners who would not be entitled to compensation for the effects of restrictions: an owner of a lake bed if denied a permit to

By contrast, when "background principles" of state property and nuisance law do not make a use unlawful, the landowner's other interests should be protected from regulatory takings,[227] especially when the restriction deprives these property interests of their value.[228] The extent of protection for these individual interests depends on the degree of protection and recognition given to such interests under the particular state's law.[229] To demonstrate that "background principles" actually would prevent the proscribed use, a state cannot merely proffer that the challenged uses are inconsistent with the public welfare;[230] the state must identify the specific background principles of property and nuisance law that would prohibit the use under the given circumstances.[231] This requirement is intended to protect landowners' reasonable expectations from the natural and gradual encroachment foreseen by Justice Holmes in *Mahon*.[232] The *Lucas* rule attempts to give force to the oft-cited holding that the "State, by *ipse dixit*, may not transform private property into public property without compensation . . . ."[233]

Thus, *Lucas* currently provides the launch pad for regulatory takings analysis. Mere value alone and uses that constitute a nuisance[234] clearly stand outside the scope of protectible interests as denominator property. All other interests remain open for consideration. If the Court's protectionist trend toward property continues, footnote seven in *Lucas*[235] potentially could revive the viability of the Just Compensation Clause for owners.[236] Footnotes often are overlooked as a source of change.

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fill property when filling would flood others' land or an owner of a nuclear power plant if directed to cease operations and remove hazardous material after discovery of an earthquake fault near the plant's location. Id.

227. *United States v. General Motors Corp.*, 323 U.S. 373, 378 (1945) (stating that "[t]he constitutional provision is addressed to every sort of interest the citizen may possess").

228. *Lucas*, 112 S. Ct. at 2901 (stating that "common-law principles . . . rarely support prohibition of the 'essential use' of land" (quoting *Curtin v. Benson*, 222 U.S. 78, 86 (1911))).

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

230. Id. at 2901.

231. Id. at 2901-02.

232. *Mahon*, 260 U.S. at 415. See text accompanying note 6.

233. *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980).

234. Whether this must be a common-law nuisance or merely a "noxious use" will depend on the approach adopted by the Court in future cases.

235. See note 188.

236. For example, footnote four in *United States v. Carolene Prod. Co.*, 304 U.S. 144, 153 n.4 (1938), formed the basis for special protection of "discrete and insular minorities" in substantive due process analysis.

B. Rights of Ownership as Denominator Property

Property in the Fifth Amendment is not merely the physical thing upon which a person exercises her legal rights; rather, "property" for Fifth Amendment purposes consists of the group of rights inherent to the owner's relation to the physical thing.[237] In *United States v. General Motors Corp.*,[238] the Supreme Court stated that a physical conception is "vulgar and untechnical."[239] The Court held that the Fifth Amendment protects an individual's interest in a thing and not the thing itself.[240] Thus, certain rights of ownership may stand alone as "property" in the deprivation fraction. Although commentators and courts differ on the degree of protection offered to various property rights, three property rights are recognized and protected with consistency.[241] These are the right to dispose, the right to use, and the right to possess and exclude.[242] Although certain courts already protect these rights as a per se taking if totally destroyed,[243] greater certainty in the area would exist if the Supreme Court clarified and gave categorical protection to such rights.

The rights overlap in their effect on the parcel's value. Each right alone, if totally destroyed, necessarily deprives the property of all or substantially all of its economic value. The precise deprivation in value of the entire bundle need not be examined in each case to prove this point. Certain commentators have observed that various rights would rise with time to a level of categorical protection through the process of judicial inclusion and exclusion.[244] Thus, although only the three rights

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237. *United States v. General Motors Corp.*, 323 U.S. 373 (1945).

238. Id.

239. Id. at 377.

240. Id. at 378.

241. See generally Richard A. Epstein, *Takings: Private Property and the Power of Eminent Domain* 58-62 (Harvard U., 1985) (commenting that the three traditional rights of ownership are possession, use, and disposition).

242. See note 84 and accompanying text.

243. See, for example, *Seawall Assoc. v. City of New York*, 74 N.Y.2d 92, 542 N.E.2d 1059, 1067 (1989) (stating that "the permanent abrogation of one of those [three] rights, without regard to its comparative value in relation to the whole, may well be sufficient to constitute a taking"); *Sintra, Inc. v. City of Seattle*, 119 Wash.2d 1, 829 P.2d 765, 771 (1992) (stating that the "court also asks if the regulation destroys one or more of the fundamental attributes of property ownership—the right to possess, to exclude others, and to dispose of property").

244. See Sackman and Rohan, 2 *Nichols' The Law of Eminent Domain* § 6.01[1] at 6-15 (cited in note 53):

> Constitutional rights rest on substance, not on form, and the liability to pay compensation for property taken cannot be evaded by leaving the title in the owner, while depriving him of the beneficial use of the property. . . . However, just how severe the interference with the owner's enjoyment of his property must be to constitute a taking . . . is not a question which can be answered in such a way as to furnish a concise rule readily applicable to all cases likely to arise. *Each case must be decided on its own merits until, by the gradual process of judicial*

previously noted are recognized and protected to a significant degree, others may arise depending on their level of recognition and protection under the common law of the several states.[245]

Recognizing this general proposition, however, certain qualifications must be made regarding when courts should extend categorical treatment. First, courts must clarify the nature and basis of protection for each right. Court opinions currently alternate between a prerequisite diminution of "all use" and "all *economically viable* use" when using the diminution in value test.[246] The proper boundary is "economically viable use," because some residual use of de minimus value usually will remain. Some courts unfortunately fail to recognize the requirement of "economically viable use" and point to remaining worthless uses to avoid the finding of a total deprivation of value.[247] Such trivial nit-picking leads to greater uncertainty in takings analysis instead of a coherent legal framework. Moreover, its arbitrary usage undermines the average citizen's respect for the law. The "economically viable" standard, although not explicit in cases to date, also should determine whether the destruction of other rights is complete.

1. The Right to Economically Viable Disposition

The right to dispose of one's property, like the right to use, contains both valuable and worthless elements. For example, the right to sell one's property embodies an extremely valuable right and is the sole source of profits for many owners. Without this right, an owner could not realize a gain on his investment when the market rises. By contrast, the right to give away or donate one's property, although part of the right to dispose, represents a de minimus value. The right to sell, rather

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exclusion and inclusion, it is possible to say which side of the line any given injury to private property rights may be said to fall.

In a general way, however, it may be said that when an interference with the use and enjoyment of land that would be actionable at common law is effected under legal authority and as an incident to the construction of a public improvement . . . or of an injury of such a character as substantially to oust the owner from the possession of the land and to deprive him of all beneficial use thereof, there is a taking of property in the constitutional sense, whether there has been any formal condemnation or not.

Id. (emphasis added).

245. See *Lucas*, 112 S. Ct. at 2894 n.7; *General Motors Corp.*, 323 U.S. at 377-78.

246. The government often cites trivial "uses" to attempt to show remaining value in a parcel. Whether these uses will prevent a total diminution in value for Fifth Amendment purposes will depend upon the attitude of the court. See, for example, *Lucas*, 112 S. Ct. at 2919 (Stevens, J., dissenting) (contending that fishing, camping, or selling land to a neighbor as a buffer make property "far from 'valueless' " and arguing that uses such as bird watching and sunbathing are "of value" to the owner). But see *Loveladies Harbor, Inc. v. United States*, 21 Cl. Ct. 153, 158 (Cl. Ct. 1990) (rejecting hunting, bird watching, and growing salt hay as valuable uses in an eminent domain case).

247. See discussion in note 246.

than the general right to dispose, therefore forms the fundamental core of the protectible "property." Therefore, the destruction of the right to sell should give rise to a compensable taking, regardless of the fact that de minimus disposition rights remain. *Andrus v. Allard*,[248] in which a statute prohibited the sale of certain feathers, may appear to contradict this view, but *Andrus* should be distinguished as a personal property case rather than a real property case. Personal property does not carry the same expectations of ownership as land, and therefore is provided lesser protection.[249] The Court in *Hodel v. Irving*[250] established the better view for real property when it stated that the right to sell real property interests should be compensable per se when totally destroyed.

Although the physical property is not totally deprived of value, the Court should find the deprivation of all economically viable disposition rights sufficient to constitute a taking. A categorical classification would bring certainty to this area and provide delineated boundaries for both government planners and property owners. Property owners could invest in land with the certainty that their right to dispose would not be impaired. When designing regulations, planners would have greater incentives to avoid their Hobbesian tendency to intrude into this sacred ground. Moreover, utmost discretion by the judiciary need not be granted for this rule because planners and regulators still could cross this line whenever necessary by providing for just compensation. The government's ability to act and to regulate is limited, therefore, only in fiscal terms, forcing it to use "the constitutional way" of taxation to pay for this type of change.

2. The Right of Economically Viable Possession and Exclusion

The rights of possession and exclusion are not fundamental property rights because of their inherent value alone; rather, their role in protecting an owner's privacy interest raises the rights to a higher domain. The Court's holdings do not explicitly separate the economic and privacy interests in these rights, but both interests underlie the Court's seemingly inconsistent results. In *PruneYard Shopping Center v. Robins*,[251] the owner voluntarily opened his property to the public for shopping purposes. His privacy interest therefore did not pose the same concern to the Court as would a private residence. Moreover, the Court's compelled toleration of political petition gathering did not un-

248. See notes 85-94 and accompanying text.

249. *Lucas*, 112 S. Ct. at 2899-900.

250. See notes 112-14 and accompanying text. But see *McAndrews v. New Bank of New England*, 796 F. Supp. 613 (D. Mass. 1992) (finding no taking when a statute deprived the plaintiff only of his right to terminate a lease with an insolvent bank).

251. See notes 104-11 and accompanying text.

reasonably impair the value or economic use of the property. Under such circumstances, one could redefine the Court's holding in diminution terms to state that the compelled temporary intrusions infringed upon only de minimus elements of the right to exclude, not the right as a whole. The economically viable elements of the right to exclude remained unscathed. Thus, even under a diminution equation, no taking would occur and the balancing test would reinforce the result.

By contrast, the right to exclude in all residential and most commercial contexts should receive categorical protection. The infringement of this right in these contexts would destroy a right that protects the economic viability of the property for such uses. Thus, results under a diminution in value test and a narrow definition of denominator property as the right of economically viable possession would remain consistent with the current Court's holdings. Explicitly raising this right to per se protection status would add certainty to the law without interfering with the government's ability to "go on."

3. The Right of Economically Viable Use

The right to use for purposes as a denominator in the diminution in value test is more accurately framed as the right to economically viable use. Courts should find a total deprivation of this right whenever a restriction prevents owners from either making any improvements on their land or receiving reasonable rents from their investment. De minimus uses such as bird watching, camping, and the like should not constitute sufficient uses to prevent a finding of a total taking when no other economic uses remain.

More difficult issues arise when the right of use in property is divided, such as by easements or licenses, or sold or devised to separate owners. Courts are split on whether such division creates independent "property" for the purpose of serving as the denominator in the deprivation fraction. A number of Supreme Court holdings, including *Keystone* and *Penn Central*, suggest that courts must look at a regulation's effect on the parcel as a whole, rather than its effect on individual interests in the land. In *Keystone*, the Court refused to define the claimant's "property" for diminution analysis separately as a support estate and a mineral estate, although Pennsylvania common law recognized and protected each of these. The *Keystone* Court reasserted that takings analysis should not subdivide single parcels in order to find the rights of one of the smaller parcels totally abrogated.[252] Instead, the Court chose to focus on the diminution in the rights of the "parcel as a whole."[253] The

252. *Keystone*, 480 U.S. at 497 (quoting *Penn Cent. Transp. Co.*, 438 U.S. at 130-31).
253. *Keystone*, 480 U.S. at 497.

opinion represents a division of the physical property interests (the surface, mineral, and support estates) still layered with all of the fundamental rights; the opinion does not explain how to treat the rights individually across the physical spectrum. Moreover, the opinion only states that *courts* should not separate the unity of property held by one owner to determine the denominator;[254] the opinion does not address the appropriate takings analysis when an *owner*, rather than a court, divides the property into discrete segments of rights among numerous owners. In this circumstance, a claimant's aggregate bundle would be only one right. Nevertheless, some courts interpret *Keystone* to require the consideration of the underlying parcel along with any intangible interest severed from that parcel when assessing the degree of diminution to the owner of that single severed interest.[255]

By contrast, other Supreme Court holdings appear to suggest that individual, intangible property interests should be protected separately under the diminution in value test, and *Lucas* clearly leaves this proposition open.[256] In *United States v. General Motors Corp.*,[257] the Court observed that government action might amount to a taking if its effects "deprive the owner of all or most of *his interest* in the subject matter. . . ."[258] The Court deliberately chose the wording "his interest" rather than "all interests" to ensure that a claimant with a tenancy for years rather than a fee simple would still recover his lesser interest. Moreover, the Court broadly held that the takings clause includes every type of property interest that a citizen may possess.[259] Although the case concerned an eminent domain proceeding by the government and a temporal division of fundamental property rights, the Court recognized that government action other than acquisition of title and occupancy can amount to a taking. The holding, therefore, also should apply to regulatory takings of citizens' other interests.

Liens that are valid under state law, although not a complete "bundle" of rights in property, have received protection as denominator property. In *Armstrong v. United States*,[260] the Court found that the

254. Id.

255. See, for example, *Grand Forks-Traill Water Users, Inc. v. Hjelle*, 413 N.W.2d 344 (N.D. 1987). The state used a restriction on construction within 100 feet of the highway center line to reduce the costs of possible future highway expansion. Id. at 345-47. The claimant purchased a utility easement within 100 feet of the line and used it for over 10 years before the state purchased the additional right of way and suffered pipe relocation costs to avoid damage. Id. at 345.

256. See discussion in note 20.

257. 323 U.S. 373 (1945).

258. Id. at 378 (emphasis added).

259. Id. The Court specifically stated that the "constitutional provision is addressed to every sort of interest the citizen may possess." Id.

260. 364 U.S. 40 (1960).

government's destruction of a materialman's lien in certain property amounted to a compensable taking.[261] The Court observed that the total destruction of this interest was compensable because it was not a mere consequence of a legitimate regulatory action.[262] The Fifth Amendment's sole concern with the owner's relation to the physical thing reinforces this interpretation.[263] If an owner's relation is only with one fundamental real property right, then the denominator should not consist of more than that right. Accordingly, when an owner holds a compensable property interest before a regulation, fairness dictates that a compensable taking should occur if a regulation eliminates that interest.

C. Temporal and Spatial Views of Denominator Property

The issue of how to define denominator property in temporal and spatial terms presents additional problems for the diminution in value test. This Author does not pretend to solve with one brush of the pen a riddle that has frustrated courts for over seventy years. This Note presents the most common questions and contexts on the takings issue and considers the effect of per se treatment for narrow protection.

1. Temporal Views of Denominator Property

a. Property Disposed of Before the Time of Taking

An owner may purchase a parcel and subsequently sell part of that parcel. An issue arises, therefore, concerning whether contiguous property disposed of before the time of the alleged taking should be considered as part of the denominator "parcel as a whole" for diminution analysis.

Keystone[264] provides some guidance on whether to consider all property included in the original purchase as part of the "parcel as a whole." In *Keystone*, the Court defined the value of the parcels as a whole as that remaining in the property when the alleged taking occurred.[265] The Court examined the value of all remaining coal at the time of the alleged taking as the whole.[266] This analysis did not include property held at the time of the original purchase but disposed of before the alleged taking. The Claims Court has followed this method

261. Id. at 48-49.
262. Id.
263. *General Motors Corp.*, 323 U.S. at 378.
264. See notes 175-83 and accompanying text.
265. *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 497 (1987).
266. Id. at 497-98.

in a number of cases,[267] and this approach appears to be the prevailing view. Thus, the value of property held just before the time of the alleged taking should serve as the denominator, and the value of the same property held just after the alleged taking should constitute the numerator of the deprivation fraction.

b. Market Value Versus Basis of an Owner's Investment

Whether an owner's investment basis or the fair market value of the property just before the alleged taking constitutes the denominator remains an open issue for some courts. Without a set formula for takings analysis, certain courts have indicated that it may be proper to compare the owner's investment or basis with the post-taking market value of the property to determine the regulation's effect on the owner.[268] Although the owner's basis is relevant in exercising a value judgment,[269] it should not be relevant in determining whether a total diminution has occurred. The diminution test demonstrates a regulation's effect on the owner's relation to his property. An owner with a loss in fair market value prior to a regulation cannot use such a loss to claim a total taking; the market, rather than the regulation, deprives him of such value. Similarly, the government cannot deny that a deprivation occurs because only extraordinary gains were destroyed. This could occur, for example, when property has been held for many years and has a very low basis. In order to depict accurately the regulation's effect on ownership, the fair market value just prior to the alleged taking, not an owner's basis, should be used to determine the denominator.

2. Spatial Views of Denominator Property

The most problematic determination remains the spatial definition of which property should be included after establishing the time of ownership.

a. Non-Contiguous Property

A regulation that deprives an owner of all economic value on one parcel may not deprive this owner of values in other land in the same area. An issue arises, then, concerning whether an owner's non-contigu-

267. See *Loveladies Harbor, Inc. v. United States*, 15 Cl. Ct. 381, 392 (1988); *Formanek v. United States*, 26 Cl. Ct. 332 (1992) (excluding portions of property sold before the date of the Corps of Engineers' permit denial).

268. See, for example, *Florida Rock Indus., Inc. v. United States*, 791 F.2d 893, 901 (Fed. Cir. 1986).

269. Id.

ous property in the same area should be considered as part of the denominator's "parcel as a whole" for the diminution in value test.

Physically non-contiguous or non-adjacent property owned by the same property owner generally has not been included in the denominator as part of the "whole." In *Penn Central Transportation Co.*, the Supreme Court defined the "parcel" to include only that property subject to the landmark designation.[270] Although the plaintiff owned other properties throughout the city, the Court excluded the non-contiguous properties from the denominator of the deprivation fraction. A number of other courts have followed this pattern when the regulatory act did not affect the excluded non-contiguous properties.[271]

Other eminent domain cases, however, have ignored these holdings and have included property far beyond the physical parcel affected. In *Ciampitti v. United States*[272] the Claims Court included non-contiguous properties held by the plaintiff in the deprivation fraction's denominator. The court based its decision on the claimant's treatment of both properties as a single parcel for purchasing and financing purposes.[273] The court reasoned that it would be inappropriate to permit the claimant to "sever" the connection for takings analysis because the claimant "forged" the connection for financing purposes.[274] The court also observed that the plaintiff retained ownership of certain lots in between the properties eventually acquired.[275]

This reasoning indicates the potential for expansive abuse in defining Fifth Amendment property as long as the Supreme Court refuses to define the relevant property and does not consider whether the tracts were used for a single integrated use.[276] This particularly broad view may cause developers to make inefficient separations of properties for financing purposes. Moreover, courts should proceed with great caution when unifying non-contiguous properties. Broadening the view of "property" to include non-contiguous properties carries with it substantial "demoralization costs" to current and potential owners.[277] Demoral-

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270. *Penn Cent. Transp. Co.*, 438 U.S. at 114-15, 130-31.

271. See, for example, *Am. Sav. and Loan Ass'n v. Marin County*, 653 F.2d 364, 369-70 (9th Cir. 1981); *Loveladies Harbor, Inc. v. United States*, 15 Cl. Ct. 381 (1988). In *Loveladies Harbor*, the court excluded parcels that were part of the plaintiff's original purchase but no longer contiguous to the property allegedly taken and were not affected by the Corps' permit denial. Id. at 391-93.

272. 22 Cl. Ct. 310 (1991).

273. Id. at 320.

274. Id.

275. Id.

276. See discussion in note 68.

277. See Michelman, 80 Harv. L. Rev. at 1214 (cited in note 21). Similarly, Judge Friendly implicitly recognized this demoralization cost when pointing out the need for uniformity between federal and state condemnations of property. In *United States v. Certain Property Located in the*

ization causes property owners to avoid productive risk-taking in enterprises, undermining the basis of our economic system.[278] Including only the owner's financing arrangements, without more, could lead takings analysis into another abyss of subjectivity. Courts must avoid subjectivity in order to produce a functional definition of denominator property for use by government planners and private investors.

b. Contiguous Property

One of the most problematic issues in this area is the consideration of an owner's contiguous property as part of the parcel as a whole. Property owners often own adjacent parcels. Sometimes the parcels are purchased at the same time; sometimes they are puchased at different times. In either case, the properties also may be listed under separate titles and different tax numbers. Whether this makes the interests different for purposes of "legal protection and recognition," as discussed in *Lucas*,[279] remains an open question.

The "rule of joinder" concept used in condemnation proceedings provides one set of analogous considerations for determining diminution.[280] This issue arises when the state formally condemns a particular parcel of land. If the individual owns property adjacent to that condemned, the owner may be entitled to compensation for the effects on the adjacent property.[281] Compensation for diminution on the adjacent but prima facie distinct parcel depends upon its "unity" with the affected parcel. The "unity of property" among these parcels generally requires a unity of title, contiguity of use, and unity of use.[282] The greatest emphasis usually is placed on the unity of use.[283] The unity of use concept applies to non-contiguous properties as well, but the circuit courts disagree over the proper standard for determining what use is

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Borough of Manhattan, 344 F.2d 142 (2d Cir. 1965), Judge Friendly noted that the convenience of the federal government was trivial when compared with the "need for New York business men planning to invest in trade fixtures to know that what is real property on Broadway if the city or state condemns it, will be no less real property if taken instead by the federal government." Id. at 144-45.

278. Michelman, 80 Harv. L. Rev. at 1214 (cited in note 21).

279. 112 S. Ct. at 2894 n.7.

280. Sackman and Rohan, 4 *Nichols' The Law of Eminent Domain* § 12.02[1] at 12-76 to 12-77 (cited in note 53) (concerning property "substantially identical" in ownership and used or foreseeably used as an "integrated economic unit").

281. Id.

282. See, for example, *Baetjer v. United States*, 143 F.2d 391, 395 (1st Cir. 1944) (stating that "[c]ontiguous tracts may be 'separate' ones if used separately . . . and tracts physically separated from one another may constitute a 'single' tract if put to an integrated unitary use"); *Sauvageau v. Hjelle*, 213 N.W.2d 381, 388-89 (N.D. 1973).

283. *Baetjer*, 143 F.2d at 395.

sufficient to constitute unity.[284] The potential ambiguity in this area therefore limits the effectiveness of the concept as a doctrinal tool. Accordingly, the focus should be centered only on the doctrine's use for contiguous parcels.

The unity of use concept, if used for regulatory takings analysis, would avoid unifying properties for diminution evaluation when objective uses clearly demonstrate that the properties are distinct investments. For example, when an owner possesses contiguous properties for two distinct uses, such as an apartment complex and a gas station, the contiguous properties should not be treated as two "segments" of the parcel as a whole. Rather, the properties should be considered separate entities for compensation purposes. This approach would comport with the owner's "distinct investment-backed expectations," a factor considered relevant in defining property.[285] This approach also would permit courts to presume that contiguous properties are held for an integrated use.

The "legal protection and recoguition" distinction proposed in *Lucas*[286] suggests another potential distinction. When parcels are held by an owner, but the state records two parcels as separate tracts of land and grants separate tax identification numbers to each property, the state's legal recognition of the two parcels as distinct for such purposes also could be held sufficient for diminution analysis. Under this approach, the state would control the division of property for takings analysis through the same avenues that it taxes and grants recognition of ownership. Landowners could reasonably expect that such state recognition affords them a distinct and protectible right in each parcel. Government planners would have objective data when defining the scope of regulations. No additional inquiries or piercing of corporate veils would be necessary; owners would not need to play hiding games. When partnerships consisting of some, but not all, of the same partners develop contiguous properties, this approach would avoid the potential problem of determining whether contiguous lots are "owned" by the same claimant. The state would incur no greater burden than if all the properties were owned by different individuals. Owners would not have to avoid contiguous ownership to reduce the risk of new regulation.

These two approaches offer greater certainty and fairness to the regulatory takings area. The unity concept would permit merger when an integrated use provided objective data of the owner's expectations.

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284. Compare *Baetjer*, 143 F.2d at 395, with *United States v. Mattox*, 375 F.2d 461, 463 (4th Cir. 1967).

285. *Penn Cent. Transp. Co.*, 438 U.S. at 124.

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

Integrated use could be presumed if courts decided to place greater burdens on the owner. If integrated use were not presumed, undeveloped land purchased as separate tracts would be protected individually. Similar protection for an owner would exist if the alternative approach of recording statutes and tax identification were used to distinguish parcels as a whole. Either approach would improve the clarity of denominator property.

As a final caveat to this discussion, it should be noted that courts have already recognized one exception to the general contiguous property rule when an owner purchases contiguous property without any anticipated economically viable use. A number of courts have held that when a claimant purchases contiguous property along with property later affected by regulation, and the properties were not expected to be viable for use, such property should not be included as part of the parcel as a whole for diminution analysis.[287] This would occur, for example, when a claimant purchased property that previously had been denied permits for construction or other improvements.[288] The courts reasoned that because the owners did not have an expectation of viable use for their properties, the owners did not consider the property part of the whole.[289] Therefore, the property should not be included as part of the whole after the enactment of new regulations.

D. Mineral and Surface Estates as Denominator Property

The common law of most states recognizes and protects two estates in land: the surface estate and the mineral estate.[290] Estates in land differ from easements and licenses because estates embody all three fundamental property rights, whereas easements and licenses are nonpossessory interests.[291] The owner of an easement or license may not subdivide her interests to other parties.[292] By contrast, estates may be subdivided by their owners. Estates, therefore, are afforded greater protection by the courts.

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287. See, for example, *Florida Rock Indus., Inc.*, 791 F.2d at 904-05; *Loveladies Harbor, Inc.*, 15 Cl. Ct. at 391-93.

288. *Loveladies Harbor, Inc.*, 15 Cl. Ct. at 393.

289. *Florida Rock Indus., Inc.*, 791 F.2d at 904-05; *Loveladies Harbor, Inc.*, 15 Cl. Ct. at 391-93.

290. This is in contrast to Pennsylvania, which also recognizes a support estate.

291. See Cunningham, Stoebuck, and Whitman, *The Law of Property* § 8.1 at 435 (cited in note 84) (noting that when an easement or profit is carved from a possessory estate, "[s]ome of the sticks have been taken from the bundle that comprise the estate and have been transferred to the holder of the easement or profit").

292. Id. See also A. James Casner, ed., 2 *American Law of Property* §§ 8.1-8.108 at 227-314 (Little, Brown, 1952) (noting that an easement is a limit on the possessory right of a land owner).

In both *Mahon* and *Keystone*, the Court considered the mineral estate distinct from the surface estate when determining the diminution of the claimants' property.[293] The Court did not subdivide the coal itself into segments.[294] The principal incongruity in these cases concerned the support estate, a unique estate recognized in only a few states. The Court in *Mahon* arguably treated the estate as separate for diminution purposes, held its taking to be whole, and denied the owner of the surface estate protection under the challenged Pennsylvania statute.[295] To the dismay of the four dissenting justices in *Keystone*,[296] the majority refused to view the damage to the support estate as complete, even though all "economically viable" strands—the right to cause damage to the surface—had been destroyed.[297] Moreover, the Court refused to view the support estate as a distinct estate with the same protections as the mineral or surface estates.[298] Although Pennsylvania common law recognized the estates as equal and independent, the Court viewed the estate "in practical terms" and observed that its value exists only insofar as it attaches to another estate.[299] The dissent disagreed, and the *Lucas* decision indicates that the debate is not yet over.

Estates also present a number of difficult issues when examining the restriction of their use under the diminution in value test. Although *Keystone* established their independence when owned separately, the case did not consider how estates should be addressed when held by the same person. For example, suppose an owner learns of a large oil reserve beneath his property. The surface, however, is located on the outskirts of an expanding metropolis. The owner sells a fifty percent mineral interest to an oil company. Before drilling commences, the city passes an ordinance prohibiting all drilling activities within city limits for the stated purpose of protecting the general welfare. The ordinance completely destroys all economically viable use of the mineral estate. Does such an act amount to a taking, and should it matter whether or not the surface estate owner also owns the mineral estate? The framework of takings jurisprudence determines how both the owners and the planners will approach this act.

The government planner could approach the issue along two principal avenues. First, the planner should consider whether the recovery of

293. See *Mahon*, 260 U.S. at 414; *Keystone*, 480 U.S. at 498-99.

294. *Mahon*, 260 U.S. at 414; *Keystone*, 480 U.S. at 498-99.

295. *Mahon*, 260 U.S. at 414 (recognizing the support estate to be "a very valuable estate").

296. Chief Justice Rehnquist and Justices Powell, O'Connor, and Scalia dissented. *Keystone*, 480 U.S. at 506.

297. Id.

298. Id. at 499-501.

299. Id. at 501.

the oil, through drilling or other methods, amounts to a common-law nuisance under the state's law or is a noxious use. If the use would amount to a common-law nuisance, the planner may look to *Lucas* as support for the regulation and put her pen to rest. She would not need to consider the second issue of whether there was a complete deprivation. If the use is merely a noxious use, *Hadacheck* and other cases may apply,[300] but the higher standard raised by *Lucas* may become the prevailing view. Most regulation of such activities will find common-law support for enjoining the use, especially when the proscribed use is not already underway.[301]

Nevertheless, suppose the company already began its oil recovery operations and had a well on-site before the ordinance is passed. Further suppose that the ban on the operation of oil wells could not be justified under the common-law doctrine of nuisance or as a noxious use. If the ordinance calls for an immediate end to all oil recovery operations, it still would destroy all value. As discussed earlier, the diminution test should compare the value of the property remaining just before the alleged taking with the value of the property afterwards. Thus, the oil already recovered would not be considered part of the parcel as a whole. The planner's dilemma then becomes how to ensure either that a total taking has not occurred or to provide for just compensation.

If the mineral and surface estates are considered together, the diminution clearly would not be complete. The use of the surface estate would remain. The oil company, however, clearly would lose its entire interest in the land. Ignoring its loss would not protect its ownership, which is viewed more properly in its relationship with the single estate. It would be difficult to argue that the oil company's interest is of lesser interest than that of the owner of a lease, who would be protected even though the entire fee simple was not taken. Indeed, the mineral estate often is many times more valuable than the surface estate, and in such circumstances always greater than the value of the lease. In this circumstance, too, it would be inequitable to provide compensation for only the company and not the owner of the surface estate, because both parties own an equal interest in the mineral estate.

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300. In *Hadacheck v. Sebastian*, 239 U.S. 394 (1915), the Court refused to "preclude development and fix a city forever in its primitive conditions." Id. at 410. The Court rationalized its holding on the belief that "[t]here must be progress, and if in its march private interests are in the way they must yield to the good of the community." Id. The Court overlooked the fact that progress could proceed alternatively along the road of taxation and formal condemnation.

301. Even if the use has been conducted for a long time, and the use is not a nuisance per se, it is within the city's police power to regulate this use. Id. at 411; *Reinman v. Little Rock*, 237 U.S. 171, 177 (1917).

In addition to failing to protect otherwise legally protectible rights, failure to consider the mineral estate separate from the surface estate produces the demoralization costs discussed by Professor Michelman.[302] Owners of surface estates would not receive protection, although companies that acquire only a mineral interest would be protected. Moreover, companies could not acquire surface estates without adding the risk of being unprotected.

The approaches suggested for treatment of contiguous properties could apply to different estates owned by the same entity. Under a unity of use theory, merger of the estates may or may not be presumed. If, however, the owner of the surface estate also conducts the mineral recovery operations, a unity of use would exist. Problems with this approach are clear. For example, separate partnerships could be formed to avoid unity of ownership. Under a record and taxation theory, the estates would achieve a clear distinction only insofar as the state permits such recognition.

In sum, mineral estates and surface estates owned by separate parties clearly should constitute independent denominator property according to either *Mahon* or *Keystone*. Whether other estates will receive such treatment will depend on the approaches adopted after *Lucas*. When a single party owns more than one estate in the same parcel, the estates should be treated as separate denominator properties according to their recognition under state law. The unity of use theory potentially applicable to contiguous properties presents problems of private abuse and market disruption. A record and taxation approach appears more objective and less likely to result in private abuse, because protection would be controlled by the actions of the state. In either case, a narrower protection of the denominator would provide greater clarity for both private investors and state regulators without placing an undue burden on government.

V. Conclusion

The greatest problem caused by the current muddle of takings jurisprudence in today's regulatory climate is neither its potential burden on landowners nor its interference with proper government activities. Rather, the problem is its uncertainty to owners and to planners and regulators. For owners, the uncertainty rests in whether their investment and privacy interests in land will be protected. For planners and regulators, the uncertainty lies in whether particular social and environmental regulations require compensation. A narrow and clear definition of particular units of relevant property would provide a set of identifi-

302. See notes 277-78 and accompanying text.

able situations when the burden on individuals is too great to pass without compensation.

The certainty derived from a per se model would protect an owner's investment-backed expectations and assist government planning decisions.[303] A stronger per se model would not prevent government planners from enacting a regulatory scheme; rather, a stronger per se model would force planners to consider the compensation issue seriously. As discussed earlier, unelected officials whose offices are not directly scrutinized by a public vote create and administer regulations. Accordingly, their actions are insulated more than those of elected officials. A stronger per se model would force government planners to observe clearly defined metes and bounds of property interests. If they decide that an invasion is necessary, adequate compensation rather than artful schemes of compelling reasons should occupy their minds. The current model provides no such incentives. The abolition of the harm-preventing and benefit-conferring distinction in *Lucas* will reduce the semantics to some degree, but the balancing test still encourages legislators to create fictional state interests to justify dubious means.

Under the diminution in value test, a precise definition eliminates much of the subjectivity in determining what percent of a taking must occur in the larger unit of property by delineating and protecting specific valuable and important property interests. Although discretion is reduced by per se rules in this area, other prongs such as the nuisance test remain in order to protect the state's interest in regulating certain externalities caused by land use. At the same time, a narrow definition of Fifth Amendment property interests balances this broad scope of the government's police power. A narrow definition of Fifth Amendment "property" protects the interests of the property owner, thereby forcing the primary focus to the issue of just compensation, the least subjective of the final prongs. Flexibility for government action still exists because a taking does not prohibit government action. Unlike due process claims, the takings claimant should recover only just compensation, not an injunction of the government's regulatory taking.[304]

Three distinct property rights already stand as readily protectible in the background of current Supreme Court case law. Estates in land

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303. By contrast, some commentators such as Dean John Costonis view the expectations of property owners as a fluid concept depending upon the politics and ideology of the age. Costonis, 58 N.Y.U. L. Rev. at 527 (cited in note 52) (stating that "each age must address the takings issue anew because perceptions of use-dependancy, like those of the concept of property itself, are closely bound up with the age's overall political and social currents"). Nevertheless, even Dean Costonis acknowledges that a consistent application of some coherent method is necessary to maintain the integrity of individual takings decisions. Id. at 524.

304. See discussion in note 168.

also present interests already recognized and protected in many states. Narrow protection in a per se analysis should extend to these interests regardless of whether the owner also owns other estates in the same land. Rules applicable to treatment of contiguous property may be used to determine circumstances when estates and parcels may be unified or separated for diminution analysis. The treatment of property in separate legal spheres such as recording and taxation may give rise to expectations of independent segments as well. Therefore, courts should respect such expectations when defining the common denominator. With a per se takings model presented by the most recent Supreme Court takings case, other courts should adopt narrower models of Fifth Amendment property to provide greater certainty to takings jurisprudence.

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