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DEFINING PRIVATE PROPERTY INTERESTS IN AMERICA'S NEW ECONOMIC REALITY: THE CASE FOR THE PRIMACY OF FEDERAL LAW IN TAKINGS LITIGATION

Laura E. Allen

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ABSTRACT

In federal takings litigation, the threshold question of whether a property interest exists is an unresolved matter and the source of a recent split in the circuit courts. The Ninth Circuit has recently shown a willingness to circumvent constitutional protections for private property owners by defining the property interest at issue in terms of state law. This Note argues that, on the basis of both precedent and economic policy, the Supreme Court should follow the First Circuit's approach to takings litigation and hold that state or local regulations that interfere with property rights should be at least minimally restrained by the application of a definition of private property that is rooted in federal law.

[*] J.D. Candidate, University of Pittsburgh School of Law, 2013; B.A., University of Colorado, 2006. I would like to thank my colleagues on the Journal of Law and Commerce for their assistance in editing this note, as well as my family and Kasey for their love and support throughout my time in law school.

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I. INTRODUCTION

The language of the Fifth Amendment's Takings Clause requires claimants to satisfy four elements: that (1) private property (2) was subjected to a physical or regulatory taking by a governmental authority (3) for a public use and (4) without the requisite payment of just compensation.[1] Professors David A. Dana and Thomas W. Merrill have suggested that "[a]lthough the question does not arise that often, the meaning of private property is arguably the most important determinant of the scope of the Takings Clause."[2] In regulatory taking adjudications, the threshold question of whether a property interest exists in the first place has generated the recent emergence of a circuit split between the First and Ninth Circuits.

The nature of this split is how the property interest claimed in takings litigation is defined. In the analysis followed by the First Circuit, federal law is applied to determine both the precise property interest at stake and whether an unconstitutional taking of that property has occurred.[3] Conversely, in the Ninth Circuit, state law controls with respect to the property interest, while federal law is applied to determine the constitutionality of the alleged taking.[4] The establishment of a circuit split on this issue suggests that uncertainty in the federal courts will become increasingly pronounced as future Takings Clause cases are litigated. Even though the Supreme Court recently denied *certiorari* with respect to the Ninth Circuit case that generated this problematic split,[5] the need for the Supreme Court's resolution of this issue is predicated upon the constitutional right to just compensation afforded to all private property owners where governmental action effectuates a taking, and the untenable possibility of having different results in similar Takings Clause cases across different courts within the same federal system.

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[1] DAVID A. DANA & THOMAS W. MERRILL, PROPERTY: TAKINGS 58 (2002).
[2] *Id.* at 60.
[3] *See* Hoffman v. City of Warwick, 909 F.2d 608 (1st Cir. 1990).
[4] *See* Vandevere v. Lloyd, 644 F.3d 957 (9th Cir. 2011), *cert. denied*, 132 S. Ct. 850 (2011).
[5] *Id.*

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This Note explains why the Supreme Court should resolve this circuit split in favor of the First Circuit's approach and enact a federal definition of private property that is consistently applied in takings litigation. Part II of this Note provides general background information with respect to the Takings Clause and, of particular relevance here, regulatory takings. Part III discusses specifics of the current circuit split and the differences in the analytical approaches used by the circuit courts from which the split derived. Part IV describes the Supreme Court precedent relied upon by the circuit courts with respect to this issue and explains that basing the private property interest on federal law is justified by Supreme Court cases that have generally recognized the primacy of federal law in maintaining property rights where state law would otherwise impermissibly minimize or fully abrogate those rights. Part V applies an extrinsic economic policy argument to the circuit split, advocating greater skepticism of regulatory action in light of the current economic crisis, and favoring the application of federal law because of its beneficial effect on individual property owners and the economic interests of society as a whole. Finally, Part VI provides insight into what a federal definition of private property might look like and its likely effect on takings jurisprudence.

II. LEGAL PRINCIPLES IMPLICATED IN THE CIRCUIT SPLIT

The possession of private property is a concept that is fundamental and deeply embedded in the American legal tradition. The idea of individual property ownership emanates from the English common law, as educed by William Blackstone, who described property ownership as an absolute and inherent right of every Englishman.[6] In accordance with this common law notion, the Fifth Amendment of the United States Constitution protects the sanctity of property ownership through the Takings Clause, which, among other limitations on the use of governmental authority, states, "nor shall private property be taken for public use, without just compensation."[7] Even though this provision of the Constitution was originally intended to have "narrow legal consequences" in applying only to the federal government's

[6] Michael W. McConnell, *Contract Rights and Property Rights: A Case Study in the Relationship Between Individual Liberties and Constitutional Structure*, 76 CALIF. L. REV. 267, 274 (1988).

[7] U.S. CONST. amend. V.

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acquisition of physical property, it was simultaneously intended to carry "broad moral implications as a statement of national commitment to the preservation of property rights."[8]

Takings jurisprudence today reflects a much broader application of the Takings Clause. The Supreme Court has long held that the Constitution's just compensation requirement applies not only to the federal government, but to state governments as well, in accordance with the Fourteenth Amendment.[9] Moreover, the Takings Clause no longer applies exclusively to the government's acquisition of physical property through the exercise of eminent domain, but also to situations in which government regulation of property negatively impacts its value.

The Supreme Court first expanded the scope of the Takings Clause in *Pennsylvania Coal Co. v. Mahon*,[10] where the Court held that "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."[11] In essence, the Court recognized that a state's exercise of its police power could result in regulations that had "an impact functionally equivalent to an exercise of eminent domain."[12]

The Court's holding in *Mahon* was of broad significance in that it gave rise to an expanded reading of the Takings Clause in order to limit the government's ability to interfere with property rights.[13] From *Mahon* emerged the "regulatory takings" doctrine, where "[i]f an exercise of the police power 'goes too far' in interfering with property rights, it will be invalidated unless the government pays just compensation."[14] In takings situations where the government "affirmatively exercises its eminent domain power, there usually is no issue whether the thing to be taken qualifies as property."[15] The inquiry becomes more complicated in regulatory takings cases, however, where "the foundational issue

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[8] William Michael Treanor, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 YALE L.J. 694, 708 (1985).

[9] *See, e.g.*, Chi., B. & Q. R. Co. v. City of Chi., 166 U.S. 226, 238–39 (1897).

[10] Pa. Coal Co. v. Mahon, 260 U.S. 393 (1922).

[11] *Id.* at 45.

[12] DANA & MERRILL, *supra* note 1, at 4.

[13] *See id.* at 5.

[14] *Id.*

[15] Robert H. Thomas, *Recent Developments in Regulatory Takings Law: What Counts as "Property?"*, 34 ZONING & PLANNING LAW REPORT, No. 9, 1 (2011).

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considered by the courts is whether the right allegedly taken is 'property' at all."[16]

III. THE NATURE OF THE CIRCUIT SPLIT

In analyzing the existence of private property in a takings claim, the First Circuit uses a single step that applies exclusively federal law in determining both the scope of the property interest claimed and the constitutionality of the alleged taking. In contrast, the Ninth Circuit utilizes a two-step analysis that applies state law to discern the scope of the property interest claimed before applying federal law to determine the constitutionality of the alleged taking.[17] In effect, this circuit split has the potential to be detrimental to property owners because the forum in which future Takings Clause cases are litigated may be a significant determinant in whether a court establishes that an alleged property interest exists in the first place, and thus, whether the claimant is entitled to just compensation where a taking of that property interest has occurred.

A. The Ninth Circuit

The Ninth Circuit's recent decision in *Vandevere v. Lloyd*[18] is the source of the circuit split. In that case, a group of commercial fishers in Alaska challenged new regulations promulgated by the state's Board of Fisheries, to which the state legislature had delegated the power to "regulate 'commercial . . . fishing as needed for the conservation, development, and utilization of fisheries.'"[19] The basis for the enactment of the regulations at issue was a provision of the Alaska constitution that allowed limitations on entry into state fisheries "for purposes of resource conservation, to prevent economic distress among fishermen . . . and to promote the efficient development of aquaculture in the [s]tate."[20] The effect of regulation was to institute various restrictions on commercial salmon fishing that were

[16] *Id.*
[17] *Vandevere*, 644 F.3d at 957.
[18] *Id.* at 957.
[19] *Id.* at 960 (quoting ALASKA STAT. § 16.05.251(a)(12) (2006)).
[20] *Id.* at 959–60 (quoting ALASKA CONST. art. VII, § 15).

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gradually implemented over a six-year period between 1996 and 2002 in various parts of Alaska's coastal waters.[21] The plaintiffs filed a claim in the United States District Court for the District of Alaska following the enactment of the 2002 regulations, alleging, *inter alia*, that the Takings Clause of the federal Constitution required the state of Alaska "to provide just compensation equal to the amount by which the Board's recent regulations . . . reduced the value of their permits" to fish in regulated areas.[22]

The Ninth Circuit evaluated the plaintiffs' takings claim using the aforementioned two-part inquiry. The court explained that the threshold question was whether the plaintiffs had a property interest in their entry permits, which was determined to be a matter of state law.[23] The court relied on Supreme Court dictum that property interests are not created by the Constitution, but instead, are "'created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law.'"[24] The second part of the court's inquiry was "whether a property right has been abridged improperly," that is, "taken without just compensation."[25] Unlike the first part of its inquiry, the court explained that this question was strictly a matter of federal law, to which the court owed "no deference to state courts."[26]

In keeping with the deference owed to state courts under the first part of its analysis, the Ninth Circuit ultimately held that because the Alaska Supreme Court had previously ruled that entry permits issued to commercial fishers did not constitute property under takings analysis, it must defer to the meaning of the state law and likewise declare that the permits in question in the instant case did not constitute compensable property interests.[27] Accordingly, the court declared that it did not need to

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[21] *Id.* at 962.
[22] *Id.*
[23] *Id.* at 963.
[24] *Id.* (quoting Bd. of Regents of State Colls. v. Roth, 408 U.S. 564, 577 (1972)).
[25] *Id.*
[26] *Id.* at 964.
[27] *Id.* at 966–67. The relevant case was *Vanek v. State*, 193 P.3d 283 (Alaska 2008), wherein the Alaska Supreme Court relied upon the statutory language of the state's commercial fisheries regulatory scheme to hold that entry permits "[were] not property interests for purposes of takings analysis under the Federal or Alaska Constitutions." *Id.* at 285. In particular, the Alaska Supreme Court noted the language of the relevant state statute, under which entry permits were conceptualized not as property but

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complete a full takings analysis,[28] and the District Court's grant of summary judgment in favor of the state's Commissioner of Fisheries was ultimately affirmed.[29]

B. The First Circuit

Notably, the Ninth Circuit acknowledged the fact that its takings analysis in *Vandevere* departed from the approach utilized by the First Circuit over twenty years earlier. As described by the Ninth Circuit, in a prior takings case, the First Circuit had "essentially collapse[d] the two-step process" utilized in *Vandevere* "into a single step, in which the federal courts, guided by their own precedents, decide *both* the extent of a person's property interest *and* the question whether the state sufficiently has invaded that interest such that it owes just compensation."[30] In the First Circuit case, *Hoffman v. City of Warwick*,[31] veterans employed by the cities of East Providence and Warwick, Rhode Island brought class action lawsuits against both their employers and state and city officials, alleging that the defendants' "failure to properly administer a Rhode Island statute, providing for seniority credits for certain veterans, and the retroactive repeal of that statute, violated plaintiffs' rights under the federal Constitution."[32]

In its analysis of the Rhode Island legislature's repeal of the statute under which "enhanced seniority in employment" for war veterans was established, the First Circuit made clear, contrary to the Ninth Circuit, that state law is irrelevant to claims made pursuant to the Takings Clause. The defendants asserted that "any property interest in enhanced seniority [arose] from state law,"[33] and that the plaintiffs were foreclosed from asserting ownership of a property interest. The defendants relied on a prior case wherein the Rhode Island Supreme Court had ruled that the enhanced

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as use privileges, the modification or revocation of which did not require the payment of compensation. *Id.* at 288–89.

[28] *Vandevere*, 644 F.3d at 967.

[29] *Id.* at 969.

[30] *Id.* at 966 (emphasis in original).

[31] Hoffman v. City of Warwick, 909 F.2d 608 (1st Cir. 1990).

[32] *Id.* at 610.

[33] *Id.* at 615.

seniority credits at issue did not constitute property interests, but instead "merely created 'gratuities or floating expectancies,' until the benefits that would flow from enhanced seniority [were] actually received by employees."[34]

The First Circuit explicitly rejected this assertion, stating that the defendants "misconstrue[d] the role of state law in determining the scope of protection afforded to property rights under the federal Constitution."[35] The court continued,

> [t]hat the property interest allegedly protected by the federal Due Process and Takings Clauses arises from state law does not mean that the state has the final say as to whether that interest is a property right for federal constitutional purposes. Rather, federal constitutional law determines whether the interest created by the state rises to the level of "property," entitled to the various protections of the Fifth and Fourteenth Amendments.[36]

Although similar to the Ninth Circuit in *Vandevere*, the First Circuit ultimately held for the defendants. The court's denial of just compensation under the Takings Clause was based not upon the state law of Rhode Island, but rather, upon its own analysis of the property interest claimed by the plaintiff veterans.[37] Essentially, the First Circuit held that because the rights granted in the Fifth Amendment of the federal Constitution ultimately protect property interests, Takings Clause claims fall solely under the jurisdiction of federal law. Accordingly, state law determinations as to alleged property interests were flatly disregarded.

IV. RELEVANT SUPREME COURT PRECEDENT

This fundamental split in evaluating Takings Clause claims introduces into federal appellate court case law an academic debate that has been developing since the early 1970s. While federal law has not always required that claimants seeking just compensation under the Takings Clause

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[34] *Id.* at 613–14 (quoting Brennan v. Kirby, 529 A.2d 633, 641 (R.I. 1987)).
[35] *Id.* at 615.
[36] *Id.*
[37] *Id.* at 616–18. The court's denial of a compensable takings claim was rooted in the lack of "a contractual right to enhanced seniority" for prospective seniority claims and in the absence of factors of "particular significance" for Takings Clause challenges, as determined by relevant Supreme Court case law. *Id.*

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establish the existence of a private property interest, the Supreme Court's decision in *Board of Regents v. Roth*[38] instituted this requirement.[39] In that case, the Court evaluated, *inter alia*, whether a non-tenured professor at a university had a property interest in continued employment that was protected by the Fourteenth Amendment's procedural due process requirement. In holding that there was no due process violation, the Court focused on the fact that the plaintiff-respondent had no discernible property interest to which the Fourteenth Amendment could apply, stating that "the terms of the respondent's appointment secured absolutely no interest in re-employment for the next year."[40] Significantly, no "state statute or University rule or policy" either guaranteed reemployment or "created any legitimate claim to it."[41]

A. The Source of Ambiguity

While subsequent cases have relied on *Roth* for the proposition that takings claimants must, as an initial matter, establish that they have a "cognizable interest in property,"[42] legal scholars have pointed to dictum in that case as creating ambiguity in how such cognizable interests should be determined. The relevant passage, also quoted by the Ninth Circuit in *Vandevere*, states that

> [p]roperty interests, of course, are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.[43]

As Professors Dana and Merrill have explained, the passage is vague in that it could mean two different things, and it is that very ambiguity that underlies the current circuit split. First, the passage could be interpreted as endorsing the application of positive law, "'meaning, in this context,

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[38] Bd. of Regents v. Roth, 408 U.S. 564 (1972).

[39] Thomas W. Merrill, *The Landscape of Constitutional Property*, 86 VA. L. REV. 885, 887–88 (2000).

[40] *Roth*, 408 U.S. at 578.

[41] *Id.*

[42] Merrill, *supra* note 39, at 888.

[43] *Roth*, 408 U.S. at 577.

nonconstitutional law' to determine both the definition of private property and whether any private property, as defined, has been created."[44] This is the approach embodied by the Ninth Circuit's decision in *Vandevere*. Conversely, the Supreme Court's dictum "could mean that courts must adopt a federal constitutional definition of private property, and then, armed with this definition, look to [the nonconstitutional] law to determine whether any private property, as defined, has been created."[45] This is the approach that was favored by the First Circuit in *Hoffman*.

B. Case Law Invalidating the Application of State Law and the Argument in Favor of Federal Law

While acknowledging the tension between its own analysis and that employed by the First Circuit in *Hoffman*,[46] the Ninth Circuit in *Vandevere* supported its two-step approach through reliance on Supreme Court case law that followed the same methodology. Specifically, the court's decision referenced *Lucas v. South Carolina Coastal Council*[47] and *Memphis Light, Gas & Water Division v. Craft*.[48] Even though legal scholars acknowledge that the dictum in *Roth* could be interpreted as lending support to the decisions of either the First or Ninth Circuits, the existence of Supreme Court decisions post-dating *Roth* suggest that reliance on state law to establish the existence of a property interest is perhaps incorrect, thereby cutting against the Ninth Circuit's *Vandevere* approach.

Professors Dana and Merrill point to two cases in particular, *Keystone Bituminous Coal Ass'n v. DeBenedictis*[49] and *Palazzolo v. Rhode Island*,[50] as being inconsistent with Ninth Circuit's reliance on state law to define the property interest at issue.[51] In *DeBenedictis*, Pennsylvania coal companies brought a claim against the head of the state's Department of

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[44] DANA & MERRILL, *supra* note 1, at 62–63.

[45] *Id.* at 63.

[46] *Vandevere*, 644 F.3d at 965 ("We recognize the tension between our analysis . . . and the First Circuit's Takings Clause analysis in *Hoffman v. City of Warwick* . . . but we continue to think that [the two-step analysis] embodies the better view.").

[47] 505 U.S. 1003 (1992).

[48] 436 U.S. 1 (1978).

[49] 480 U.S. 470 (1987).

[50] 533 U.S. 606 (2001).

[51] *See* DANA & MERRILL, *supra* note 1, at 65–66.

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Environmental Resources, alleging that the state's Subsidence Act "constitute[d] a taking of their private property without compensation in violation of the Fifth and Fourteenth Amendments."[52] The statute in question proscribed mining activities in areas that caused damage to public buildings, homes, or cemeteries.[53] Even though Pennsylvania property law uniquely recognized three separate interests in a parcel of land—the mineral estate, the surface estate, and the support estate[54]—the Supreme Court declined to acknowledge the support estate as a distinct segment of property, and instead viewed the three estates in land as a single property interest, in direct contradiction of Pennsylvania law. In declining to consider of the existence of an interest in the support estate, as established by state law, the Court denied the coal companies' takings claim with respect to that estate.[55]

Similarly, in *Palazzolo*, a landowner brought a takings claim against the Rhode Island Coastal Resources Management Council (Council) for promulgating regulations that limited development in areas designated as wetlands.[56] The Supreme Court invalidated a ruling by the Rhode Island Supreme Court that barred the landowner's takings claim because he had acquired title to the property at issue after the effective date of the regulations.[57] The Supreme Court suggested that the promulgation of regulatory measures may not eliminate a property owner's right to assert a takings claim, explaining that

> [w]ere we to accept the [s]tate's rule, the postenactment transfer of title would absolve the [s]tate of its obligation to defend any action restricting land use, no matter how extreme or unreasonable. A [s]tate would be allowed, in effect, to put an expiration date on the Takings Clause. This ought not to be the rule.[58]

As Professors Dana and Merrill speculated, the Supreme Court's blatant rejection of a state's ability to proscribe an otherwise actionable takings claim based upon the enactment of regulatory measures "presupposes that

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[52] *DeBenedictis*, 480 U.S. at 478–79.
[53] *Id.* at 476.
[54] *Id.* at 478.
[55] *Id.* at 501–02.
[56] *Palazzolo*, 533 U.S. at 611.
[57] *Id.* at 632.
[58] *Id.* at 627.

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property has some meaning independent of the collection of rules under state law about how resources may be used."[59]

While far from clarifying the ambiguous dictum found in *Roth*, taken together, *DeBenedictis* and *Palazzolo* strongly suggest that what constitutes a property interest need not be defined solely by state law. To be sure, in these two cases, the Supreme Court went so far as to invalidate state law conceptualizations of the property interests at issue. Since *DeBenedictis* and *Palazzolo*, like *Lucas* and *Craft*, post-date *Roth*, there is a strong argument that, in terms of following relevant Supreme Court case law, the Ninth Circuit's exclusive focus on the law of Alaska concerning the property interest at issue in *Vandevere* was imprudent.

It terms of the precedential value of Supreme Court decisions, it is unsettling that the Ninth Circuit went so far as to state that, in contrast with the First Circuit's decision in *Hoffman*, its own analytical rule "more faithfully adhere[d] to the Supreme Court's case law."[60] *DeBenedictis* and *Palazzolo* demonstrate that the Supreme Court does not unequivocally defer to state law on the question of whether a property interest exists for the purpose of making a Takings Clause claim. The appellate court's decision would be more convincing in terms of its analytical method had it addressed the qualifying effect that other cases have had on its interpretation of *Roth*. Instead, one is left to speculate about how a more deliberative analysis of the relevant case law may have affected the outcome in *Vandevere*.

This is not to say that the First Circuit's approach in *Hoffman* is superior simply because of the Ninth Circuit's failure to take a more comprehensive view. The strength of the First Circuit's approach lies in its more nuanced inquiry into the relevant decisions of the high court, examining the purpose behind the analysis applied in each case. Unlike *Vandevere*, *Hoffman* did not rely on certain Supreme Court cases for the mere purpose of presenting high court cases that likewise used a one-step analytical model. Instead, the First Circuit analyzed Supreme Court precedent to discern the Takings Clause's protective quality with respect to private property.

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[59] DANA & MERRILL, *supra* note 1, at 65–66.
[60] *Vandevere*, 644 F.3d at 966.

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The *Hoffman* court, like the court in *Vandevere*, used both *Webb's Fabulous Pharmacies, Inc. v. Beckwith*[61] and *Craft* in its analysis, yet the First Circuit delved deeper into the case law by examining not the analytical approach used by the high court in each case, but instead, the ultimate result. In the First Circuit's estimation, the results reached by the Supreme Court in prior takings litigation endorsed the notion that federal constitutional law must ultimately guide the property interest element of the claim, since the right to the protection of that interest is rooted in the Constitution's Due Process and Takings Clause provisions.[62] For instance, the First Circuit cited the Supreme Court's finding in *Webb's Pharmacies* that "a [s]tate, by *ipse dixit*, may not transform private property into public property without compensation."[63] Thus, in line with the Supreme Court's conceptualization of the Takings Clause as "a shield against the arbitrary use of governmental power,"[64] *Hoffman* drew upon *Webb's Pharmacies* for a more protective stance toward private property. According to the First Circuit, even when a court's takings analysis looks to state law to inform the nature of the property interest at issue, federal law will intercede where the state law unfairly places governmental burdens on certain classes of property owners, since the Fifth Amendment was specifically designed to yield such a result.[65]

Moreover, the First Circuit cited the Supreme Court's proposition, laid out in *Craft*, that federal constitutional protections are virtually meaningless where state law places so little emphasis on protecting property from governmental intrusion that it effectively precludes application of the Fourteenth Amendment's "procedural constraints" on such intrusions.[66] The *Hoffman* court's application of federal law in place of that pronounced by the Rhode Island Supreme Court with respect to the scope of protection afforded to the property interest at issue was remarkably anticipatory. Indeed, the First Circuit seemed to share the same aforementioned concern, expressed by the Supreme Court eleven years later in *Palazzolo*, that a

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[61] 449 U.S. 155 (1980).
[62] *See Hoffman*, 909 F.2d at 615.
[63] *Id.* (quoting *Webb's Pharmacies*, 449 U.S. at 164).
[64] *Webb's Pharmacies*, 449 U.S. at 164.
[65] *See Hoffman*, 909 F.2d at 615.
[66] *See id.* (citing *Craft*, 436 U.S. at 9).

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state's law regarding property interests could extend such a limited a scope of protection that "a [s]tate would be allowed, in effect, to put an expiration date on the Takings Clause."[67]

The fact that Supreme Court's case law is unclear in this area, to the extent that it has been interpreted by the appellate courts to yield two different analytical models for takings litigation in the federal system, is problematic, and ultimately, must be resolved by the Supreme Court through the establishment of a clear rule. Even though property law is, admittedly, generally a matter of state law,[68] the First Circuit's reliance on federal constitutional law to determine the existence of a property interest in a Takings Clause claim seems the better approach in that it gives weighted consideration to the constitutional provisions that underlie the existence of the claim in the first place. To hold that state law should always control could allow for results that are not in keeping with the protections afforded property owners by the Constitution.

V. ECONOMIC POLICY RATIONALE

In addition to finding support in Supreme Court case law, there is a broader policy argument to be made for the proposition that the First Circuit's focus on federal law provides a better model for analysis. While the issue concerning whether the property the government acquires through regulation constitutes private property is "the least litigated of the four doctrinal requirements that flow from the language of the Takings Clause,"[69] the timing of the Ninth Circuit's *Vandevere* decision makes the court's permissive view towards regulatory takings particularly unsettling. When property interests are defined with deference to state or local laws that deny their very existence, the necessary consequence is the inability of claimants to receive the compensation necessary to offset the loss they have suffered. That result has the potential to severely affect the economic well-being of those negatively impacted by state or local regulation. In the midst of what is widely considered the most severe economic downturn since the

[67] 533 U.S. at 627.
[68] Ethicon, Inc. v. U.S. Surgical Corp., 135 F.3d 1456, 1471 (Fed. Cir. 1998).
[69] DANA & MERRILL, *supra* note 1, at 59.

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Great Depression,[70] the current state of the economy compels consideration of the practical consequences emanating from this issue.

The Supreme Court has acknowledged the fact that government regulation of private property can be tremendously detrimental to the economic viability of individual property owners. For instance, in *Lucas*, the plaintiff filed a takings claim after the passage of a state law that sought to mitigate erosion by prohibiting the construction of "permanent habitable structures" on certain beachfront properties in South Carolina.[71] The severely negative effect that this newly-enacted law would have upon the plaintiff, who had purchased the property to construct single-family homes,[72] was obvious—the fact that the law prompting the lawsuit provided no exceptions meant that he stood to lose the nearly one million dollar sum that he had paid for the two parcels of land at issue.[73] The Court, in requiring that compensation be paid, explained that, "when the owner of real property has been called upon to sacrifice *all* economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking."[74] *Lucas* thus stands for the idea that even where "weighty" public interests are served through the enactment of regulatory takings schemes by local or state governments, the courts play a vital role in protecting against the economic hardship imposed by such laws.[75]

Since *Lucas* was decided in 1992, some courts, including the Ninth Circuit, have relied on the malleability of regulatory takings law to give a less protective gloss to the Court's holding in that case.[76] The soundness of any court's decision, however, must be measured against the backdrop of the socioeconomic context in which the decision was made. In the face of America's new and difficult economic reality, the better approach in litigating takings claims is to avoid utilization of "logical tricks to avoid

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[70] Nestor M. Davidson & Rashmi Dyal-Chand, *Crisis and the Public-Private Divide in Property*, *in* THE PUBLIC NATURE OF PRIVATE PROPERTY 65, 65 (Robin Paul Malloy & Michael Diamond eds., 2011).

[71] *Lucas*, 505 U.S at 1006.

[72] *Id.*

[73] *Id.* at 1006–09.

[74] *Id.* at 1019 (emphasis in original).

[75] *See id.* at 1028.

[76] TIMOTHY SANDEFUR, CORNERSTONE OF LIBERTY: PROPERTY RIGHTS IN 21ST-CENTURY AMERICA 87 (2006) (emphasis in original).

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compensating property owners,"[77] such as by post-*Lucas* courts favoring less protective measures for property owners. Instead, courts should recognize that regulatory takings have, for the most part, occurred in the context of a post-World War II economy that was predominantly characterized by growth and that allowed for courts to more easily evaluate regulatory takings using "ad hoc, factual inquiries"[78] rather than by developing concrete categorical rules.

The regulation of property is but one component of a regulatory environment that "privileged unfettered risk and reward" and, accordingly, saw significant expansion in the decades following the Great Depression.[79] Despite the judiciary's general acceptance of the limitations placed on property ownership by the growing regulatory state, "times of economic and social crises throw into stark relief perennial tensions in the discourse of property around the balance between the individual and community."[80] Thus, America's current economic crisis has implications for how we view the effect of regulation on property ownership.

A. The Economic Crisis and Its Impact on Private Property

In a society such as ours, founded on Lockean natural law principles,[81] property rights are respected, and property ownership is generally considered good for both individuals and society as a whole in that it creates profit incentives that motivate productive work and the emergence of creative processes that ultimately benefit society at large.[82] In the current economic crisis, however, the accessibility of property ownership and the economic well-being that flows from it have become increasingly tenuous. The crisis has been characterized by widespread foreclosures and high levels of unemployment,[83] and the separation of individuals from

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[77] *Id.*

[78] *Lucas*, 505 U.S at 1006 (quoting Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978)).

[79] Davidson & Dyal-Chand, *supra* note 70, at 65.

[80] *Id.*

[81] SANDEFUR, *supra* note 76, at 52–55.

[82] *Id.* at 36–37.

[83] Martin Neil Baily & Douglas J. Elliott, *The US Financial and Economic Crisis: Where Does It Stand and Where Do We Go From Here?* 2 (June 2009), http://www.brookings.edu/~/media/Files/rc/papers/2009/0615_economic_crisis_baily_elliott/0615_economic_crisis_baily_elliott.pdf.

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significant assets, such as their homes or regular wages earned through employment opportunities, has had a negative effect on the well-being of both the affected individuals and society as a whole. Without a doubt, the effect of the crisis on property ownership has been so widespread that is has touched upon not only home ownership and wage-earning potential, but upon people's retirement accounts, savings, and investments as well.[84]

The economic crisis and the correlating widespread loss in various forms of property are troubling, and there is evidence that such loss contributed to the declining economic well-being of individuals. A recent study by the Rockefeller Foundation found that "[e]conomic insecurity is likely to have increased dramatically in the last few years" to the degree that "in 2009, the level of economic insecurity experienced by Americans was greater than at any time over the past quarter century, with approximately one in five Americans (20.4 percent) experiencing a decline in available household income of 25 percent or greater."[85] This widespread economic insecurity is in some ways facilitated by the lack of a "safety net of liquid financial wealth" for the majority of Americans over the past two decades.[86]

B. The Economic Crisis Applied to the Circuit Split

What is perhaps most troubling about the results in both *Vandevere* and *Hoffman*, viewing those cases in light of America's growing economic insecurity, is the fact that the property interests claimed by the plaintiffs in both cases, and for which there was no compensation awarded, were perceived interests that arose in the course of employment. In *Hoffman*, the plaintiffs claimed an interest in seniority credits, statutorily extended to veterans, which would have augmented their salaries and other monetary benefits commensurate with employment,[87] whereas in *Vandevere*, the plaintiffs claimed an interest in entry permits to fish in certain areas vital to

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[84] Davidson & Dyal-Chand, *supra* note 70, at 78.

[85] Jacob S. Hacker et al., *Economic Security at Risk: Findings From the Economic Security Index* 11 (July 2010), http://www.economicsecurityindex.org/upload/media/Economic_Security_Index_Full_Report.pdf.

[86] *Id.* at 16.

[87] *See Hoffman*, 909 F.2d at 612.

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their economic livelihood as commercial fishers.[88] In both cases, the continued existence of the property interest claimed presumably would have enhanced wage-earning potential.

In an economic climate characterized by widespread unemployment, the loss of property interests tied to unemployment through regulatory action has the potential to have significant consequences for the economic security of those affected. Particularly striking in this context is the result in *Vandevere*. Where the government is able to regulate in a way that limits access to certain previously-perceived property interests (fishing permits) necessary to success in the course one's employment (commercial fishing), the economic well-being of those employed in the regulated industry stands to be substantially diminished where compensation is denied. Moreover, as in *Vandevere*, where a regulatory structure exists with regard to one of the most important industries within the state at issue,[89] it is fair to assume that individuals employed within that particular industry rely on the continued existence of that structure in shaping their employment choices. In an economic climate characterized by high unemployment and high levels of competitions for those employment opportunities that do exist, individuals who are negatively impacted by the imposition of noncompensable regulatory actions that substantially change a previously existing regulatory structure cannot necessarily easily recoup their losses through a simple career change.

Notably, the negative consequences of regulation that affect the economic well-being of the individuals employed in a certain industry might be relevant in Takings Clause adjudications if those claiming a compensable loss were, in cases such as *Vandevere*, able to get past the threshold matter of whether they had a recognized property interest in the first place. As *Hoffman* makes clear, in regulatory takings litigation, a property owner's reasonable investment-backed expectations (in *Vandevere*, the pursuance of a commercial fishing career in reliance on the ability to acquire permits to fish in certain, lucrative waters) is a factor that

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[88] *See Vandevere*, 644 F.3d at 960.

[89] The official website of the Alaska Department of Fish and Game states that "[e]conomists have estimated the seafood industry to contribute $5.8 billion and 78,500 jobs to the Alaskan economy." Alaska Department of Fish and Game, *Commercial Fisheries*, http://www.adfg.alaska.gov/index.cfm?adfg=fishingcommercial.main (last visited Mar. 25, 2012).

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weighs heavily in the determination of whether the enactment of the challenged regulation warrants the payment of just compensation.[90] Indeed, the Supreme Court has made clear that where the deprivation imposed by regulation has interfered with distinct investment-backed expectations, the court is more likely to find a compensable claim.[91]

C. Society's Economic Interest

While the mechanical denial of just compensation where no property interest is found clearly has the potential to have an immediate impact on the claimant, there is a strong likelihood that, in the long run, the loss of various forms of property has a broader impact on the local economy in which the claimant is situated. Professor Joseph L. Sax explains that property interests are "tied to one another in complex ways, and property is more accurately described as being inextricably part of a network of relationships that is neither limited to, nor usefully defined by, the property boundaries with which the legal system is accustomed to dealing."[92] Given this interconnectedness of property interests, property ownership is generally understood to be "an essential ingredient for economic growth and prosperity, for secure savings and intelligent investment and for the sophisticated transactions that raise the standard of living for everybody in society."[93]

The widespread nature of the economic crisis makes its "distributional consequences . . . difficult to ignore."[94] Using the ongoing foreclosure crisis as an example, Professors Nestor M. Davidson and Rashmi Dyal-Chand state that "[w]e have always known that foreclosures, as devastating as they might be for an individual borrower in immediate terms, have an impact on others."[95] While this "spillover" was, in the past, "fairly localized," the unprecedented rate of foreclosures in the past few years "has reached levels not seen since the Great Depression," and, as a result, "entire communities

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[90] *See Hoffman*, 909 F.2d at 617.
[91] *Penn Cent. Transp. Co.*, 438 U.S. at 124.
[92] Joseph L. Sax, *Takings, Private Property and Public Rights*, 81 YALE L.J. 149, 152 (1971).
[93] SANDEFUR, *supra* note 76, at 2.
[94] Davidson & Dyal-Chand, *supra* note 70, at 78.
[95] *Id.* at 77.

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are being devastated."[96] Professors Davidson and Dyal-Chand conclude that, "[i]n the light of crisis, the interdependence of the value of individual property holding becomes inescapable."[97]

The fragile state of the economy thus provides a compelling reason for the federal judicial system to fulfill what Professors Davidson and Dyal-Chand call the state's role in protecting "the integrity of market interactions" by moving to protect Takings Clause claimants from property loss that is not triggered by inevitable, unpredictable, and seemingly unstoppable market swings, but instead by governmental regulation. The economic crisis has demonstrated that property ownership is more tenuous now than at any time since the rise of the regulatory state. Home ownership seems out of reach for many, and there is no guarantee that high unemployment figures will not stagnate or possibly rise in the future as economic globalization continues.

In view of the interconnection between individual economic well-being and the strength of the broader economic system in which an individual is situated, individual property owners and American society alike simply cannot afford a judicial scheme that dismisses takings claims through deference to state or local laws that readily deny the existence of perceived property interests. Such deference and the resulting immediate dismissal of takings claims results in the failure of courts to adjudicate the heart of the matter and that which ultimately affects society's economic well-being: whether an individual has experienced an unconstitutional economic loss as a result of a taking.

An evaluation of takings claims that is more permissive toward state law, as exemplified in *Vandevere*, may have been acceptable in decades past when America's economy was more prosperous. During periods of economic growth, regulations that denied the existence of property interests were perhaps viewed with less skepticism than they should be viewed now. Conversely, the current economic state shows the detrimental effect of regulation. As a result, a court's evaluation of when a regulatory taking has occurred should be modified to establish an analytical scheme for takings

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[96] *Id.*
[97] *Id.*

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claims that does not exasperate the economic downturns that are inevitable in a free market economy.

D. Protecting the Economy Through the Application of Federal Law in Takings Litigation

In America's new economic reality, state or local regulations that interfere with property rights should be more restrained, or at the very least, the adjudication of takings claims should more frequently result in the provision of just compensation where perceived property interests are at stake. Certainly *stare decisis*, predicated upon decades of takings jurisprudence, demands that the federal framework for claims arising as a result of regulatory enactments be left mostly intact. Today's economy, however, provides a compelling reason beyond the relevant Supreme Court precedent set forth in Section IV above for the adoption of the First Circuit's federal definition of private property. This framework would provide greater protection for property owners, while at the same time modifying existing takings jurisprudence in only a subtle way.

The Supreme Court's affirmation of the First Circuit's *Hoffman* approach would result in the establishment of a minimum, non-ad hoc standard for what constitutes private property. In adopting the First Circuit's analytical model across the federal system, courts would adopt a specific "federal constitutional definition of private property" and then consistently apply that standard definition when looking at state or local law to determine whether any private property interest had been created.[98] The practical consequence of the adoption of a federal definition would be greater protection for takings claimants where state or local laws manipulated the existence of property interest, a risk alluded to by the Supreme Court in *Palazzolo*,[99] possibly at the behest of powerful interest groups engaged in rent-seeking behavior.[100] The adoption of a federal standard, in effect, would allow plaintiffs claiming a loss of property as a result of a regulatory taking to have their claim subject to more substantive

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[98] DANA & MERRILL, *supra* note 1, at 63.
[99] *See* 533 U.S. at 627.
[100] *See* DANA & MERRILL, *supra* note 1, at 64.

judicial analysis by removing obstacles in meeting the threshold element of a compensable claim.

It is true that regulatory takings make for difficult cases, and that "[c]ase-by-case adjudication is inevitable in an area where bright lines are impossible and courts are forced to review an infinite variety of state regulatory actions."[101] In this area of the law, courts are required to engage in "imprecise balancing" as they "consider the complex impacts of a regulation on property rights, as well as the complex political and policy decisions a government agency made in imposing that regulation."[102] At the same time, consistent application of federal law in the threshold element of a takings claim would bring greater predictability to at least one element of takings litigation, thus embracing the Supreme Court's recognition in *Lucas* of "the desirability of finding a way to make takings law less 'ad hoc.'"[103]

Reliance on federal law in defining private property is well-grounded in a popular rationale underlying the Fifth Amendment's compensation requirement: the idea of basic fairness in the government's treatment of its citizens.[104] The Supreme Court famously encapsulated this rationale in *Armstrong v. United States*,[105] where it explained that "[t]he Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar [g]overnment from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[106] Even though this "equal treatment rationale is relatively straightforward" in eminent domain cases, Professors Dana and Merrill note that beyond these types of cases, "it becomes more difficult to say when fairness and justice require compensation in order to preserve the principle of equal treatment."[107]

In the context of today's poor economic climate, however, it seems reasonable to suggest that courts should employ a broader perspective as to

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[101] Mark Fenster, *The Stubborn Incoherence of Regulatory Takings*, 28 STAN. ENVTL. L.J. 525, 529 (2009).

[102] *Id.*

[103] Roger Clegg, *Reclaiming the Text of the Takings Clause*, *in* REGULATORY TAKINGS: RESTORING PRIVATE PROPERTY RIGHTS 54 (Roger Clegg ed., 1994).

[104] *Id.* at 33–34.

[105] 364 U.S. 40 (1960).

[106] *Id.* at 49.

[107] DANA & MERRILL, *supra* note 1, at 34–35.

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when regulatory takings result in unequal treatment. In a time of slow economic growth and poor job prospects, it seems readily apparent that citizens have much more at stake when the government takes any perceived property interest, be it real or personal property or more tangential interests, thus leading to possible divergence from the equal treatment principle when just compensation is not awarded. Whether the taking at issue is a routine exercise of eminent domain or a more complex regulatory taking, the same rationale for providing just compensation should inform the way in which courts determine the property interest at stake.

VI. A FEDERAL DEFINITION OF PRIVATE PROPERTY AND ITS EFFECT ON TAKINGS JURISPRUDENCE

While beyond the scope of this note, establishing the precise components of a federal definition of private property is a key aspect in moving beyond the current circuit split and toward a workable standard for future takings litigation in the federal system. Accordingly, I pause to offer the reader some insight into what that federal definition might look like, as informed by the scholarship of Professors Dana and Merrill, who have discerned "two elements of a federal definition that are implicitly supported by the general run of decided cases and explicitly recognized in Supreme Court decisions."[108] These two elements are what Dana and Merrill describe as "discrete assets" and the "right to exclude."[109]

First, under the "discrete assets" element, private property refers to some tangible "thing," and excludes from consideration more intangible property interests such as "bodily security, or personal privacy, or general shares of wealth, or a particular distribution of income."[110] This element of private property finds support in *Eastern Enterprises v. Apfel*,[111] in which the Court held that a federal statute that required coal companies to provide

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[108] DANA & MERRILL, *supra* note 1, at 68. In addition to the two elements described, Dana and Merrill also recommend a third element, the characterization of the property at issue as "exchangeable on a stand-alone basis" as an important component of making a federal definition of private property more complete and less broad. I exclude discussion of this third element because, as Dana and Merrill admit, there is "little explicit authority for such a requirement" within the existing case law. *Id.* at 77.

[109] *Id.*

[110] *Id.* at 68–69.

[111] 524 U.S. 498 (1998).

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lifetime health benefits for both retirees and their families was unconstitutional, not on the basis of the Takings Clause, but instead, under the Due Process Clause.[112] According to Dana and Merrill, in rejecting application of the Takings Clause where a law imposes "only a general financial liability,"[113] the Court implicitly confirmed the notion that private property must constitute a "discrete asset."

Second, under the "right to exclude" element, "the person who is identified as the owner of the property interest at issue has "the general power to exclude trespasses and other unwanted incursions by a large and indefinite class of others."[114] In support of this element, Dana and Merrill cite the Supreme Court's decisions in *Kaiser Aetna v. United States*,[115] describing the right to exclude others as "fundamental element of the property right"[116] and *Loretto v. Teleprompter Manhattan CATV Corp.*,[117] explaining that "[t]he power to exclude has traditionally been considered one of the most treasured strands in an owner's bundle of property rights."[118]

While establishing a federal definition of private property would enhance private property ownership by giving teeth to the threshold inquiry in takings litigation, such a significant change in this area of jurisprudence would also, admittedly, open the door to critique. The establishment of a federal definition, however, is practical in its relative moderation. A federal definition would provide greater protection for property owners without going as far as property absolutists who "contend the police power may not extend to any 'use' of property" and that "any governmental action affecting a person's use of property, in any fashion, constitutes a taking entitling that person to compensation."[119] These proponents of unfettered property ownership "deny the importance of the police power as a

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[112] *Id.* at 545–47.

[113] DANA & MERRILL, *supra* note 1, at 70 (citing *Eastern Enterprises*, 524 U.S. at 540 (Kennedy, J., concurring in part and dissenting in part); *id.* at 554 (Breyer, J., dissenting)).

[114] *Id.* at 73.

[115] 444 U.S. 164 (1979).

[116] *Id.* at 179–80.

[117] 458 U.S. 419 (1982).

[118] *Id.* at 435.

[119] Philip A. Talmadge, *The Myth of Property Absolutism and Modern Government: The Interaction of Police Power and Property Rights*, 75 WASH. L. REV. 857, 858–59 (2000).

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fundamental attribute of the government in the regulation of property."[120] In contrast, the federalization of the inquiry into the existence of a property interest clearly envisions the continued adjudication of takings claims, thus recognizing the occasional necessity of state regulation of private property—such as to address "known conservation problems," as in *Vandevere*,[121] or to change state employment policies to address administrative issues arising in conjunction with the operation of a certain statute, as in *Hoffman*.[122]

Furthermore, reliance on federal law would add protection for property owners with respect to only one of the four elemental requirements of compensable takings claim; thus guarding against what Justice Stevens warned of in his dissent in *Lucas*, namely, the establishment of categorical rules that "hamper the efforts of local officials and planners" who deal with "increasingly complex problems" in matters typically subject to regulation.[123] Establishing a more categorical approach in favor of greater protection for property owners with respect to but one of four elements certainly does not transform takings jurisprudence so substantially as to abrogate the effective execution of a state's police power in response to those state-specific issues that require redress. Even if this move toward a categorical rule for one of the elements of a claim in some way constitutes a more categorical approach in takings litigation overall, it is questionable whether Justice Stevens' fear has ever materialized. The Court's decisions in such cases as *Kelo v. City of New London*[124] and *Lingle v. Chevron U.S.A., Inc.*,[125] both decided more than a decade after *Lucas*, demonstrate

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[120] *Id.* at 861. In Takings Clause scholarship, this is the classic libertarian view advanced by Professor Richard A. Epstein, who argued that virtually any governmental regulation resulting from rent-seeking behavior warranted just compensation under the Fifth Amendment. *See* RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN (1985). As Professors Dana and Merrill succinctly explain Epstein's argument, "we should construe the Takings Clause as requiring the payment of just compensation whenever a person experiences a decline in property values . . . unless it can be shown that implicit compensation has been provided or the police power exception applies." Accordingly, "[t]he state could no longer be used as an instrument for wealth redistribution." DANA & MERRILL, *supra* note 1, at 50.

[121] 644 F.3d at 962.

[122] 909 F.2d at 611.

[123] *Lucas*, 505 U.S. at 1070 (Stevens, J., dissenting).

[124] 545 U.S. 469 (2005).

[125] 544 U.S. 528 (2005).

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that government actions that conflict with property interests continue to be upheld even against charges of government overreaching.[126]

Nor does the use of a federal definition of private property automatically transform questionable property interests into existence. As demonstrated by the First Circuit's decision in *Hoffman*, using a federal standard to determine the existence of a property interest does not necessitate a win for property owners in all takings claims. Besides the absence of a contractual right to enhanced seniority benefits, the property interest claimed by the plaintiffs in *Hoffman*, the court also found that various significant factors in takings claims, as laid out by prior Supreme Court case law, were absent such that the repeal of the statute granting the seniority benefits in the first place did not constitute a compensable taking.[127] Even if the Ninth Circuit in *Vandevere* had analyzed the existence of the plaintiff's property interest using a federal standard, there is no guarantee that the court would have declared the existence of a property interest. In *Vanek v. State*,[128] a case similar to and preceding *Vandevere*, the Alaska Supreme Court affirmed a lower court's ruling that entry permits issued to commercial salmon fishers did not constitute property under the federal Constitution.[129] The Alaska Supreme Court relied on prior federal case law addressing takings claims with respect to regulation of the fishing industry for its determination that commercial fishers "[do] not suffer the taking of a property interest legally cognizable under the Fifth Amendment when previously issued permits [are] revoked through special legislation and regulations.[130]

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[126] James B. Baron, *Winding Toward the Heart of the Takings Muddle:* Kelo*,* Lingle*, and Public Discourse About Private Property*, 34 FORDHAM URB. L.J. 613, 613 (2007).

[127] *Hoffman*, 909 F.2d at 617. The Court focused particularly on "(1) the economic impact of the [statute] on the claimant; (2) the extent to which the [statute] has interfered with distinct investment-backed expectations; and (3) the character of the governmental action." *Id.*

[128] 193 P.3d 283 (Alaska 2008).

[129] *Vanek*, 193 P.3d at 292 (citing Am. Pelagic Fishing Co. v. United States, 379 F.3d 1363, 1374 (Fed. Cir. 2004)).

[130] *Id.*

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VII. CONCLUSION

While the question of whether state or federal law defines the property interest claimed in takings litigation remains an unresolved matter in federal courts, both relevant Supreme Court case law and the vulnerability of the nation's economic health where takings claims are overly deferential to state law recommend the resolution of the recent circuit split on this issue in favor of federal law. The primacy of federal law with respect to this issue strikes an essential balance between allowing for the continuation of takings—recognizing that they are essential to the state police power—while at the same time adding protective measures for both property owners and society at large, who are more economically vulnerable today than at any time since the rise of the regulatory state.

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