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Maureen Straub Kordesh
John Marshall Law School

"I WILL BUILD MY HOUSE WITH STICKS": THE SPLINTERING OF PROPERTY INTERESTS UNDER THE FIFTH AMENDMENT MAY BE HAZARDOUS TO PRIVATE PROPERTY

*Maureen Straub Kordesh**

INTRODUCTION

The Fifth Amendment to the United States Constitution[1] and the state's police power are the endpoints of a continuum of governmental interference with private property. The Fifth Amendment prohibits the taking of private property for public use without just compensation. This constitutional protection of the rights of property owners promotes fairness and protects autonomy and private incentive.[2] A Fifth Amendment taking is most clearly exemplified by the government's power of eminent domain.[3] At the other end of the continuum is the state's police power to promulgate regulations that promote the public health, safety, and morals.[4] The Supreme Court has characterized the police power as "one of the most essential powers of government—one that is the least limitable."[5]

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* Associate Professor and Director, Lawyering Skills Program, The John Marshall Law School, Chicago, Illinois. B.A., Kalamazoo College, 1981; M.A., Indiana University-Bloomington, 1984; J.D., Indiana University-Bloomington, 1986. The author gratefully acknowledges the financial assistance of Widener University School of Law in the completion of this project. The author would like to acknowledge the exceptional effort of John F. Nivala, who read several drafts of this Article, offered his wisdom, and generally provided the mentoring that made the completion of this project possible. The author extends her thanks to Richard Lazarus and Emily Field van Tassel for their time and effort in reading previous drafts of this Article. The author would also like to extend her appreciation to Valerie Canino for her research assistance. Beth Schaffer deserves credit for her secretarial assistance in typing much of the draft. Finally, the author would like to thank Richard Straub Kordesh, without whose ideas, intellectual spark, and daily support this effort would never have come to fruition. This Article is dedicated to him.

1. "[N]or shall private property be taken for public use, without just compensation." U.S. CONST. amend. V.

2. *See infra* text accompanying notes 43–53.

3. The government is not precluded from taking title to private property: it may do so when it is necessary to satisfy a public purpose. When the government does require a property owner to deed an interest in private property to the government—and it pays the owner the fair market value of the property—that is an exercise of the power of eminent domain.

4. *See, e.g.*, Goldblatt v. Town of Hempstead, 369 U.S. 590, 593 (1962).

5. Hadacheck v. Sebastian, 239 U.S. 394, 410 (1915) (upholding city ordinance banning manufacture of bricks on private property within city limits, even though brick business was established prior to city annexation of land and ordinance taking effect).

The police power facilitates planning, encourages public citizenship, and protects social institutions.[6] The state's exercise of its police power is not considered to be a taking requiring just compensation, except where such regulation goes so far as to be the functional equivalent of seizure.[7] It is the application of this exception, falling in the middle of the conceptual continuum, which is the subject of regulatory takings litigation.[8]

The law of regulatory takings appears to be increasingly protective of private property rights.[9] However, this trend is actually the result of a splintering of property rights into narrow interests that are then treated as distinct property rights deserving of full protection in and of themselves. This splintering, or rationalization, of property *interests* may be explained by the court's adoption of

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6. *See infra* text accompanying notes 54–69.

7. *See* Pennsylvania Coal v. Mahon, 260 U.S. 393, 415 (1922).

8. *See. e.g.*, Dolan v. City of Tigard, 114 S. Ct. 2309 (1994); Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987); Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1987); First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304 (1986); MacDonald, Sommer & Frates v. County of Yolo, 477 U.S. 340 (1986); Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172 (1985); Ruckelshaus v. Monsanto, 467 U.S. 986 (1984); San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621 (1981); PruneYard Shopping Ctr. v. Robins, 447 U.S. 74 (1980); Kaiser Aetna v. United States, 444 U.S. 164 (1979); Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104 (1978); Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962); Pennsylvania Coal v. Mahon, 260 U.S. 393 (1922); Hadacheck v. Sebastian, 239 U.S. 394 (1915).

9. Developments in both federal and state legislation manifest this trend. For example, in 1993, adopting an approach used in other jurisdictions, Utah passed the Private Property Protection Act, which requires state agencies to evaluate their regulations to determine if such regulations could generate constitutional takings. UTAH CODE ANN. §§ 63-90-1 to -4, 63-90a-1 to -4 (Supp. 1995). *See, e.g.*, DEL. CODE ANN. tit. 29, § 605 (Supp. 1994); IDAHO CODE §§ 67-8001 to -8004 (Supp. 1994); IND. CODE ANN. § 4-22-2-32 (1996); MO. ANN. STAT. § 536.017 (Vernon Supp. 1996); TENN. CODE ANN. §§ 12-1-201 to -206 (Supp. 1995); WASH. REV. CODE ANN. § 36.70A.370 (West Supp. 1996); W. VA. CODE §§ 22-1A-1 to -6 (1994). *See also* H.R. 925, 104th Cong., 1st Sess. (1995) (requiring compensation any time property interest is reduced in value by 20% or more); Exec. Order No. 12,630, 3 C.F.R. 554 (1988), *reprinted in* 5 U.S.C. § 601 (1994) (requiring federal agencies to conduct takings impact analyses to determine whether federal regulations were resulting in the taking of private property); Recent Legislation, 108 HARV. L. REV. 519, 524 n.3 (1994).

Developments in the judicial arena also demonstrate this trend toward a greater protection of property. Professor Richard Lazarus points out that landowners get into court more frequently than they have in the past, but that the Supreme Court is not likely to rule in their favor. Richard J. Lazarus, *Putting the Correct "Spin" on* Lucas, 45 STAN. L. REV. 1411, 1415 (1993). His main point, however, is that the Supreme Court was so eager to confer property rights on landowners in the face of environmental regulation that it "surmounted a range of obstacles," including problems with ripeness, standing, and the "sheer improbability of the lower court's factual findings[]" to reach the merits of the *Lucas* case. *Id.* at 1418. *See, e.g.*, Florida Rock Indus. v. United States, 791 F.2d 893 (Fed. Cir. 1986) (finding taking of segmented parcel of larger piece of property).

not only economic analysis of the law, but also economic—or market—logic in its assumptions about what the law is. Markets encourage the rationalization, or splintering, of resources into saleable commodities.[10] The adoption of market logic to the analysis of property rights results in the splintering of property into commodifiable interests,[11] without regard to whether it is legally appropriate or valuable to do so.[12] Many courts accept that the injury occasioned by a contested regulation *is* the property right being harmed.[13] When property rights are rationalized in this way, courts can identify the full deprivation of an entire property right in every case, and require just compensation under the Fifth Amendment for this regulatory taking.

This trend has begun to erode the police power and, if unchecked, will engulf it. At risk are those exercises of the police power that *protect* private property and the economy, not just those that constrain these social institutions. Taken to its extreme, this trend will weaken the very governmental authority that protects private property, as well as the economy that private property makes possible. A well-developed police power is advantageous to an economy based on private property because it provides the stability necessary to promote long-term investment and marketplace risk. Therefore, the Supreme Court's decisional framework must recognize the police power's beneficial impact on private property.[14]

A complete understanding of the application of market logic to the law of regulatory takings requires tracing the roots of this

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10. *See* discussion *infra* parts IV, V.A.

11. *See* discussion *infra* parts IV, V.A.

12. This is a criticism commonly leveled at utilitarian thinking. *See* STEVEN E. RHOADS, THE ECONOMIST'S VIEW OF THE WORLD: GOVERNMENT, MARKETS AND PUBLIC POLICY 62 (1985). Utilitarianism is one philosophical justification for economic and market logic. *See, e.g.*, JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION (J.H. Burns & H.L.A. Hart eds., Althone Press 1970) (1823).

13. *See, e.g., infra* text accompanying notes 196–197, 200–205.

14. There is a large body of literature exploring the relationship between the regulatory state and private property. *See, e.g.*, BENJAMIN R. BARBER, STRONG DEMOCRACY: PARTICIPATORY POLITICS FOR A NEW AGE 144 (1984) (arguing that free markets are illusionary and that believing pursuit of private interests yields public good is simplistic utilitarianism); STEPHEN SKOWRONEK, BUILDING A NEW AMERICAN STATE: THE EXPANSION OF NATIONAL ADMINISTRATIVE CAPACITIES 1877-1920 (1982) (arguing that complexity of post-industrial economy requires expansion of administrative capacities in order to allocate power and protect private property); Charles A. Reich, *The New Property*, 73 YALE L.J. 733 (1964) (arguing administrative state has become source of wealth, even replacing private property as main source of wealth for many poorer citizens).

phenomenon back to the Industrial Revolution and the birth of the market economy.

From the invention in 1450 of movable type, to the invention of the cotton gin (which established the cotton industry, the "vehicle of the Industrial Revolution,"[15]) to the harnessing of water power for mills,[16] to the revolutionary line production used for the Ford Motor Company's Model A,[17] modern Western history has been the history of the development of a market economy.[18] Critical, certainly, to the development of the market economy have been competition,[19] private property,[20] freedom of contract,[21] land,[22] plentiful resources,[23] and capital.[24] However, possibly the greatest triumph of industrialization and the market economy was the rationalization of production.[25] The concept of rationalized production is the reduction of the production process to its most efficient units, so that each worker has only to perform a simple, repetitive task. This increases the efficiency and speed with which that task is completed, thus greatly increasing the overall volume of commodities that can be produced in a given time period. Therefore, rationalization of production allows the producer to generate a supply of goods sufficient to meet periods of fluctuating demand.[26]

As technology in rationalization of production has advanced, so, too, has access to commodities: mass production lowers prices, allowing those of modest income to purchase such commodities and raise their standard of living.[27] Indeed, the technology of ra-

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15. *See* KARL POLANYI, THE GREAT TRANSFORMATION, THE POLITICAL AND ECONOMIC ORIGINS OF OUR TIME 37 (1944).

16. *See* MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1780–1860, at 49–53 (1977) [hereinafter HORWITZ I]; Gary Kulik, *Dams, Fish, and Farmers, in* THE COUNTRYSIDE IN THE AGE OF CAPITALIST TRANSFORMATION (Steven Hahn & Jonathan Prud eds., 1985) (arguing Mill Acts damaged subsistence-style economy by reducing fish available for consumption by farm families).

17. *See* JOHN K. GALBRAITH, THE NEW INDUSTRIAL STATE 11–17 (1967).

18. *See generally* ARNOLD TOYNBEE, THE INDUSTRIAL REVOLUTION (Beacon 1956) (1884).

19. *See id.* at 58–60.

20. *See* HORWITZ I, *supra* note 16, at 31–36.

21. *See* MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1870-1960, at 33–34 (1992) [hereinafter HORWITZ II].

22. *See* HORWITZ I, *supra* note 16, at 32–34; POLANYI, *supra* note 15, at 34–36.

23. *See* POLANYI, *supra* note 15, at 41.

24. *See* GALBRAITH, *supra* note 17, at 57–58 and n.1.

25. 1 ADAM SMITH, THE WEALTH OF NATIONS 4–8 (ed. 1910 rpt. 1964) [hereinafter SMITH, WEALTH OF NATIONS].

26. *See id.* at 4–9.

27. *See generally* RHOADS, *supra* note 12 (discussing change in workers' salaries

tional production itself gives rise to ideas for new and more affordable commodities.[28] Thus, rationalization of production has provided the fundamental creative spark of the market: the creation and production of new commodities that make life easier, more efficient, and more valuable to individuals.[29]

These principles of market economics, as well as the philosophy of utilitarianism and the jurisprudence of positive law, contributed to the development of economic analysis of law,[30] an established jurisprudence that has achieved a well-deserved place in legal thought.[31] The experience of the market economy has rightly found its way into legal decision-making.[32] Economics has pro-

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resulting from industrialization). Professor Rhoads argues that Joseph Singer's automatic sewing machine did more to provide decent clothing to the masses than did "labor unions or political reforms." *Id.* at 93.

28. *See* 1 SMITH, WEALTH OF NATIONS, *supra* note 8, at 11.

29. *Id.* at 10–11.

30. Economic analysis of the law finds its intellectual roots in such venerable authors as Adam Smith, see 1 SMITH, WEALTH OF NATIONS, *supra* note 25 (providing calculus of efficiency, used in legal disputes to determine whether gainers gain more than losers lose), Jeremy Bentham, see BENTHAM, *supra* note 12, at 6–10 (creating framework for concept of utility, concept of which has been adopted by negligence law and nuisance law), and even Karl Marx, see 1 KARL MARX, DAS KAPITAL (1867), *reprinted in* THE MARX-ENGELS READER 294 (Robert C. Tucker, ed., 2d ed. 1978) (providing law with framework to discuss redistributive issues in tort and takings law).

31. The earliest examples of cost-benefit analysis in law were 19th- and mid-20th-century common-law negligence cases. The early cost-benefit procedure was spelled out in *Chicago, B. & Q.R.R. Co. v. Krayenbuhl*:

> The business of life is better carried forward by the use of dangerous machinery; hence the public good demands its use, although occasionally such use results in the loss of life or limb. It does so because the danger is insignificant, when weighed against the benefits resulting from the use of such machinery, and for the same reason demands its reasonable, most effective, and unrestricted use, up to the point where the benefits resulting from such use no longer outweigh the danger to be anticipated from it. At that point the public goods demands restrictions

Chicago, B. & Q.R. Co. v. Krayenbuhl, 91 N.W. 880, 882–83 (Neb. 1902).

Other early examples of cost-benefit analysis include United States v. Carroll Towing Co., 159 F.2d 169, 173 (2d Cir. 1947) (holding barge owner contributorily negligent for failing to keep barge on board vessel; Judge Hand used three variables to make this determination: "(1) The probability [of the event occurring]; (2) the gravity of the resulting injury . . . 3) the burden of adequate precautions."); Davison v. Snohomish County, 270 P. 422 (Wash. 1928); and Stephani v. City of Manitowoc, 62 N.W. 176 (Wis. 1895). A more complex cost-benefit analysis can be found in modern works such as GUIDO CALABRESI, COST OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS (1970); RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN (1985) [hereinafter EPSTEIN, TAKINGS]; RICHARD A. POSNER, ECONOMIC ANALYSIS OF THE LAW (4th ed. 1992); and Bruce A. Ackerman, *Law, Economics and the Problem of Legal Culture*, 1986 DUKE L.J. 929.

32. *See* POSNER, *supra* note 31.

vided the law with such concepts as efficiency,[33] commodities,[34] incentive,[35] and utility.[36] Such concepts have allowed legal decisions to more accurately reflect the nonlegal decisional framework used in both commercial and noncommercial contexts.[37]

However, there is a danger to the integrity of the market itself, as well as to a clear understanding of the expectations that inform the law of property, in allowing market logic to inform legal decision-making. Allowing market epistemology to invade spheres of interaction where it does not belong, it can only result in harm to what it redefines.[38] Such a phenomenon is occurring as the logic of rationalization of production has begun to invade land-use planning, specifically regulatory takings and the limits of the police power. Applying a rationalization of production logic to decisions about property interests is not constitutionally sound,[39] introduces

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33. *See, e.g.*, RHOADS, *supra* note 12, at 63.

34. *See* 1 KARL MARX, DAS KAPITAL (1867), *reprinted in* THE MARX-ENGELS READER 294, 313–19 (Robert C. Tucker, ed., 2d ed. 1978).

35. *See* RHOADS, *supra* note 12, at 39–58.

36. *Id.* at 62.

37. In other words, economic concepts such as these have provided a language to explain an aspect of interaction that had theretofore gone unnamed: the economic calculus of interaction. The most obvious example comes from the law of torts, where the cost/benefit approach to liability issues is well-established. *See supra* note 31 and accompanying text. Ideas have been metaphorically referred to as commodities in a marketplace. Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969) (referring to "marketplace of ideas"); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 35 (1973) (same). Children have been described as future capital. Jonathan Rauch, *Kids as Capital*, ATLANTIC MONTHLY, Aug. 1989, at 56. A metaphor that reflects the market calculus is informative and helpful in understanding an aspect of interaction, both in nonlegal and legal settings.

38. Adam Smith appreciated the danger of this phenomenon when he advocated that certain spheres of life be protected from the workings of the market and its mindset. ADAM SMITH, THE THEORY OF MORAL SENTIMENTS (1759) [hereinafter SMITH, THEORY OF MORAL SENTIMENTS] (arguing that civic and religious life must place constraints on economic conduct). For discussion of the tension between markets and other spheres of life, see BARBER, *supra* note 14, at 172–73 (arguing that relying on base motive of material self-interest "undermines citizenship by compelling [persons] to think privately rather than publicly and to substitute private for political judgment"); DANIEL BELL, THE CULTURAL CONTRADICTIONS OF CAPITALISM 55 (1976) (arguing Protestant ethic and Puritan temper, bourgeois systems of values that emphasized work, sobriety, frugality, sexual restraint, and forbidding attitude toward life were broken down by bourgeois economic system that those values generated); THEODORE J. LOWI, THE END OF LIBERALISM: THE SECOND REPUBLIC OF THE UNITED STATES 295–97 (1979) [hereinafter LOWI, END OF LIBERALISM] (arguing applying market model to politics has caused interest-group liberalism, which in turn has paralyzed, demoralized, and corrupted democratic government).

39. The framework for deciding what state action is non-compensable is as malleable or as stable as the forces that shape it. The current standard by which owners, states, and courts test whether an owner is entitled to compensation remains problematic because it is too changeable to be appropriate for constitutional jurisprudence. Takings decisions

new uncertainty into private ownership[40] and land use planning, and ultimately prevents the Fifth Amendment from extending its time-honored protections to private interests that have been regulated beyond the limits of the police power.[41] Thus, the law of regulatory takings is being overrun by a conceptual framework unsuited to it. By mirroring the industrialized model it seeks to emulate, takings jurisprudence grounded in market logic will ultimately become beholden to splintered and commodified property interests and will no longer control the rights at stake.[42]

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have turned on questions of notice, Ruckelshaus v. Monsanto, 467 U.S. 986 (1984), Kaiser Aetna v. United States, 444 U.S. 164 (1979); denominator, Dolan v. City of Tigard, 114 S.Ct. 2309 (1994), Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1987), Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104 (1978); economic benefit, Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992); expectations, Agins v. City of Tiburon, 447 U.S. 255 (1980), *abrogated by* First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304 (1986), Pennsylvania Coal v. Mahon, 260 U.S. 393 (1922); invasion, Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982); quasi-invasion, Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987); nuisance, Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962), Miller v. Schoene, 276 U.S. 272 (1928), Hadacheck v. Sebastian, 239 U.S. 394 (1915), Mugler v. Kansas, 123 U.S. 623 (1887); public benefit, PruneYard Shopping Ctr. v. Robins, 447 U.S. 74 (1980); see also First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304 (1986) (also based on nuisance). While these are all arguably tenable holdings, even when they contradict prior holdings without overruling them, the proliferation of doctrinal bases for takings cases leads to a disconcerting lack of coherence in takings jurisprudence. The resulting ambiguity and uncertainty may be attributable to the improper infusion of market logic, rather than traditional precepts of constitutional law into the law of takings. As is developed later in this Article, these cases all share the same fundamental constitutional weakness of permitting the dispute to define the constitutional issue, rather than allowing the Constitution to delimit the dispute. The market logic compensation standard is driven by owner-defined property interests. If there is an insufficient check on the legitimacy of the interest defined as a property interest, the constitutional standard will rely too heavily on the market and not enough on the constant and stable principles that are the hallmark of constitutional adjudication.

40. The Court currently struggles to find doctrines that will provide guidance to owners, planners, and state agents. It acknowledges the need for greater predictability while at the same time admitting the difficulty it has had in establishing predictability consistent with the dictates of the Constitution. First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 321 (1986).

41. If it should ever become too difficult to differentiate productively between a non-compensable regulation and a compensable regulation, it is possible that judges will either overcompensate or undercompensate. In either case, the lack of standards, which necessarily imply a value judgment about what is worth protecting and what is not, will undermine the protection of the Fifth Amendment by reducing important issues of liberty, security, labor, investment, and occupancy to a calculus of the economic gains and losses of proposed behavior. Obviously, the takings clause is about much more than fair market value. A dispute over property interests that involves only the question of exchange value has taken many important democratic ideals from the equation.

42. As discussed later, the industrialized model is about maximum efficiency, reduction of production to its most basic component parts, and creation of new commodities and the resources that produce them. Property may be imperiled in an environment

After discussing the tension between the police power and the Fifth Amendment in Part I, Part II outlines the history of the Takings Clause and the police power. Part III briefly posits the proper role of the regulatory state in using the police power to order citizen and economic relations. Part IV explores the working of markets in their conventional sphere: the economy. Part V demonstrates what happens when the state improperly relies on market logic to make decisions about ordering relations. Part VI shows how the Supreme Court is constitutionalizing market logic in the resolution of police power and Fifth Amendment takings disputes and the problems in allowing markets to define constitutional protections. Part VII proposes a modified framework.

The solution is not simple. The Supreme Court should recognize that its decisional framework has changed and that its new framework is both unexamined and incomplete. The proper framework should include a responsible understanding of the nature of "property" and recognition of the police power's role in both limiting and supporting individual rights. To the extent that a regulation checks and supports such rights, it should receive a strong presumption of constitutionality.

I. The Fifth Amendment and the State's Police Power

The Fifth Amendment and the police power are in tension in most land-use planning decisions because, while the police power distributes benefits and detriments to large groups of people in order to maximize general welfare, the Fifth Amendment requires payment to individuals deprived of the use of property even if the deprivation increases general welfare.

The Fifth Amendment protects the rights of property owners by requiring compensation for certain burdens upon property, thereby promoting fairness and protecting autonomy and private incentive. The Fifth Amendment has protected individuals from having to bear the burden of the public good by requiring compensation for takings when it would be more fair to spread the burden to the public at large.[43] Thus, when the government forced a hardware

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like this. Property relies on wholeness and stability for its continued vitality. Market logic undermines this wholeness and stability if left unmonitored.

43. *See, e.g.*, Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 123 (1978)

store owner to dedicate a bike path across her property because heavier traffic might result from the expansion of the store, the state's interest in decongesting traffic was insufficiently strong to overcome her private property right.[44] Similarly, when a property owner lost the right to build a home on the beach after legislation was redrawn to include his parcels of land in the coastal protection area, the Supreme Court refused to recognize this as a valid exercise of the police power without the state's showing either that the right to build the homes would be proscribed by the state's nuisance law or that the right to build the homes had never inhered in the title.[45] Without such a showing, the land owner would have been required to contribute too heavily to the preservation of the beach; virtually all nearby owners had been permitted to build on their lots.[46]

Furthermore, by requiring payment for the imposition of certain burdens on private property, the Fifth Amendment protects autonomy.[47] Autonomy denotes the authority to make and carry out choices based on criteria generated by the deciding individual.[48] The Just Compensation Clause of the Fifth Amendment protects autonomy by providing a buffer—the requirement of payment—between the owner and the government entity. This buffer causes

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("[T]his Court has recognized that the 'Fifth Amendment's guarantee . . . [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 . . . .'") (quoting Armstrong v. United States, 364 U.S. 40, 49 (1960)).

44. Dolan v. City of Tigard, 114 S. Ct. 2309, 2322 (1994).

45. Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1029–30 (1988).

46. *Id.* at 1029–31.

47. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922), was decided partly on the ground that the private owners of the homes—which were threatened by mine subsidence and protected from further threat by the disputed statute—had exercised their freedom of contract in purchasing the house without the right to subsurface support. This autonomy would be lost if the statute took away that for which they had bargained. *Id.* at 413–14. Justice Holmes seemed to take the view that the freedom to make bad decisions was part of being a citizen in a constitutional democracy. *Id.* at 416. Similarly, a developer was found to have bargained for the right to sell the exclusivity right in the private marina dug by it, thus defeating the claim for public access by the Army Corps of Engineers. Kaiser Aetna v. United States, 444 U.S. 164 (1979). Without the ability to market the homes on Kuapa Pond as completely exclusive, the developer would have lost an important, and arguably the most profitable, element in the venture: the autonomy to sell access. *See id.* at 179–80.

48. *See* ROBERT N. BELLAH, ET AL., HABITS OF THE HEART: INDIVIDUALISM AND COMMITMENT IN AMERICAN LIFE 23 (1985) (exploring relationship between freedom and autonomy).

sufficient pause in state action to allow the majority of decisions by the owner to stand unchallenged.[49]

By requiring that the state engage in an exchange with individuals when it wishes to advance the public interest, the Constitution has profoundly changed the power relationships between the state and the individual.[50] This shift of power from the state to the individual acts as a self-imposed limitation on legitimate state coercion; this limitation is central to the modern conception of private property.[51]

Finally, the Fifth Amendment also protects private incentive. Incentive derives from the knowledge that an owner will be able to produce more than she can consume with her property, sell this surplus, and profit by the endeavor.[52] This requires security of possession so that an owner perceives a reduced risk in investing capital over time. Incentive is not, however, only a product of profit-making. Incentives toward nonprofit enterprises, such as private home ownership, are similarly facilitated by the Fifth Amendment. Persons are encouraged to purchase, maintain, and improve their residences, knowing that the state may intervene in only the rarest of circumstances.[53]

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49. Many cases (not just in the takings context) indicate that the actual decision made is not to be second guessed, but rather scrutinized only for its compliance with statutory and constitutional principles. *See, e.g.*, First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304 (1987); City of Phoenix v. Beall, 524 P.2d 1314 (Ariz. Ct. App. 1974); Landgrave v. Watson 593 S.W.2d 875 (Ky. Ct. App. 1979); Kropf v. City of Sterling Heights, 215 N.W.2d 179 (Mich. 1974). In *First English*, the California Court of Appeal on remand denied permission for a church to rebuild in what was declared a flood plain. Compensation was not awarded on the grounds that the denial was made for public safety reasons. First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 258 Cal. Rptr. 893 (1989), *cert. denied* 493 U.S. 1056 (1990).

50. This is complicated by an expanded definition of "individual" that includes corporations. *See* Metropolitan Life Ins. Co. v. W.G. Ward, Jr., 470 U.S. 869, 881 n.9 (1985).

51. The older, Blackstonian view of property saw the sovereign as the ultimate fee owner, even if the beneficial owner never thought about the sovereign during his life. This is precisely the view that Locke challenged in his work. Locke saw the person who worked the land and made it productive as the only person who had any moral or legal claim against deprivation. The sovereign's only role was to protect that claim. *See* JOHN LOCKE, SECOND TREATISE ON GOVERNMENT § 27 (C.B. Macpherson, ed., 1980) (1690); Alan Ryan, *Locke, Labour and the Purposes of God, in* PROPERTY AND POLITICAL THEORY 17 (1984).

52. *See* POSNER, *supra* note 31, at 32 & n.1 (stating private property is necessary to create incentive and protect profit).

53. The security interest is paramount in writings contemporary to the adoption of the Constitution and Bill of Rights. *See, e.g.*, THE FEDERALIST No. 3 (John Jay), No. 7 (Alexander Hamilton). Equality of power to purchase property almost certainly was not favored. *See* JENNIFER NEDELSKY, PRIVATE PROPERTY AND THE LIMITS OF AMERICAN

Thus, basic values like fairness, autonomy, incentive, and security inform the jurisprudential framework that supports individual rights in the area of property ownership.

In contrast, the police power facilitates planning, encourages public citizenship, and protects social institutions. Facilitation of planning[54] is evident in the seminal case of Village of Euclid v. Ambler Realty Co.,[55] where the Supreme Court found that a zoning plan did not effect a taking even though the aggrieved party would not be permitted to use its property for industrial purposes, its most profitable use. The Supreme Court suggested that the zoning plan benefited everyone in the long run, increasing the value of respective uses of property by juxtaposing them compatibly.[56] Where the police power properly facilitates planning, it results in orderly legal relationships among property owners.[57] This is an appropriate and primary role of the state in a complex constitutional democracy.[58]

The police power also encourages public citizenship.[59] Valid exercise of the power provides the framework for private action, whether to establish the roof pitch necessary to carry the local snow load[60] or to determine the limits of private restaurant capacity.[61] To the

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CONSTITUTIONALISM: THE MADISONIAN FRAMEWORK AND ITS LEGACY 75–79 (1990). Once acquired, however, "the most humble citizen in the land is entitled to identically the same protection accorded to the master of the most gorgeous palace." Bove v. Donner-Hanna Coke Corp., 258 N.Y.S. 229, 235 (N.Y. App. Div. 1932).

54. *See* ERNST FREUND, THE POLICE POWER: PUBLIC POLICY AND CONSTITUTIONAL RIGHTS 6 (W.S. Hein 1981) (1904) (stating that "[t]he state places its corporate and proprietary resources at the disposal of the public by the establishment of improvements and services of different kinds . . . .").

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

56. *See id. Accord* William K. Jones, *Confiscation: A Rationale of the Law of Takings*, 24 HOFSTRA L. REV. 1, 40 (1995).

57. *See, e.g., Euclid*, 272 U.S. at 394.

58. SKOWRONEK, *supra* note 14, at 27–29.

59. *See, e.g.*, PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 81 (1980), in which the Supreme Court refused to find a Fifth Amendment taking when the California Supreme Court determined that the California Constitution required a shopping center owner to provide access to its premises to a group wishing to exercise its right of free expression. To the extent that the Court balanced property and First Amendment rights, the outcome clearly indicates that the owner's passive, if reluctant, participation in the political activity of the group was a tolerable side effect of the Fifth Amendment dispute. *See also* Mugler v. Kansas, 123 U.S. 623 (1887) (requiring brewery owner to suffer uncompensated loss of livelihood in light of evil of alcohol production and consumption). Even Blackstone recognized the state's role in protecting private property via nuisance law. 3 WILLIAM BLACKSTONE, COMMENTARIES *217.

60. *See* Wright v. State Bd. of Eng'g Examiners, 250 N.W. 2d 412 (Iowa 1977) (finding failure to follow building code requirement that roofs be designed for snow load not less than 30 pounds per square foot sufficient to revoke engineers' registration).

61. *See* Burke v. Denison, 630 N.Y.S. 2d 421 (N.Y. App. Div. 1995) (affirming

extent that the police power defines the public implications of a private act, it helps to define the role of the citizen in the republic.[62]

The police power's role in protecting social institutions is less commonly recognized. It is the layer between order and chaos.[63] The police power has protected food supplies,[64] historic buildings,[65] the structural integrity of the earth,[66] wetlands,[67] pension contributions,[68] and even endangered species.[69]

The tension between the benefits and burdens of the police power and the benefits and burdens of the Takings Clause has been extremely contentious for only about half of the United States' history. It would be well to explore the historical context within which the Clause arose in order to understand the constraints of its workings today.

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distinction between "sit down" and "take out/carry out" restaurants for determining parking spaces needed to accommodate anticipated seating demand); Off Shore Restaurant Corp. v. Linden, 322 N.Y.S. 2d 608 (N.Y. App. Div. 1971) (affirming denial of variance to increase seating capacity of restaurant is violative of zoning ordinance's goal to provide adequate parking for commercial establishments).

62. Citizenship is here broadly defined. *See generally* BELLAH, *supra* note 48, at 200–01 (positing three different, and sometimes contradictory, American conceptions of citizenship: implementing moral consensus of community; pursuing differing interests; and transcending individual interests in national affairs).

63. *See* Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 391 (1926) ("suppression and prevention of disorder"); Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 420 (1922) ("If the public safety is imperiled, surely neither grant, nor contract, can prevail against the exercise of the police power.") (Brandeis, J., dissenting); Hadacheck v. Sebastian, 239 U.S. 394 (1915). These cases discuss the need to prevent incompatible uses such as children playing near industrial sites, people residing near factories omitting offensive fumes, or coal mining beneath structures that might collapse.

64. Miller v. Schoene, 276 U.S. 272 (1928) (apple trees).

65. Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104 (1978) (Grand Central Station).

66. Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1987) (subsurface subsidence); Goldblatt v. Hempstead, 369 U.S. 590 (1962) (sand and gravel excavation below water table).

67. United States v. Riverside Bayview Homes, Inc., 474 U.S. 121 (1985) (fill permit).

68. Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust for Southern California, 508 U.S. 602 (1993) (pension contributions); Connolly v. Pension Guar. Corp., 475 U.S. 211 (1986) (pension contributions).

69. Babbitt v. Sweet Home Chapter of Communities for a Great Oregon, 115 S. Ct 2407 (1995) (construing Endangered Species Act of 1973, 16 U.S.C. §§ 1532(19), 1538(a)(1)(B) (1994)).

II. History of Tension Between the Fifth Amendment and the Police Power

A. Historical Context of Takings

1. The Traditional Framework: The Early Cases

The Takings Clause of the Fifth Amendment arose in an historical context where governmental seizure of land was disfavored.[70] Colonial views of ownership were a reaction to the feudal tenure system of property rights, which provided no ultimate ownership to those who lived on and worked the land.[71] Colonial America protected certain basic freedoms rarely enjoyed in Europe,[72] especially freedom from the physical seizure of property by the sovereign.[73] While regulation and dedication of property for the greater good were unoffensive to colonial citizens, the idea that a person could make a commitment to the land, work it, reside on it, raise a family there, and otherwise treat it as his own—but be unable to exercise ultimate legal authority over it—was an affront to the colonial notion of ordered liberty.[74] It was a view more consistent with the newer Lockean theory of ownership based on labor and investment,[75] and the Hegelian derivation of property rights from the philosophy of personhood.[76] In the colonial view, protection of

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70. *See generally* Fred P. Bosselman et al., The Taking Issue 53–104 (1973) (exploring English roots of permissible property regulation and their relationship to Colonial rules); William M. Treanor, Note, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 Yale L.J. 694, 700 (1985) (noting that although interferences were more invasive than would be tolerated today, interferences were inoffensive because of perception interference was for public good rather than for royal good).

71. *See* Nedelsky, *supra* note 53, at 280 n.7; Joseph W. Singer, Property Law: Rules, Policies, and Practices 503–14 (1993).

72. *See* Marvin E. Frankel, *Faith and Freedom—Religious Liberty in America*, 5 B.U. Pub. Int. L.J. 127, 127 (1995) (book review) (religion); Kira A. Larson, Recent Case, 37 Drake L. Rev. 753, 760 (1987) (religion); Arthur K. Steinberg, *A.G. Roeber, Palatines, Liberty, and Property: German Lutherans in Colonial British America*, 39 Am. J. Legal Hist. 239 (1995) (book review) (referring generally to experience of greater freedom than that experienced in Europe); Lee E. Teitelbaum, *The Legal History of the Family*, 85 Mich. L. Rev. 1052, 1054 (1987) (reviewing Michael Grossberg, Governing the Hearth: Law and the Family in Nineteenth-Century America (1985)) (economic and social freedoms for women).

73. *See* Bosselman et al., *supra* note 70, at 76.

74. *See* Nedelsky, *supra* note 53, at 186.

75. *E.g.*, Locke, *supra* note 51, at §§ 27–28; Ryan, *supra* note 51, at 17.

76. *See* Margaret J. Radin, *Property and Personhood*, 34 Stan. L. Rev. 957, 971–78 (1982) [hereinafter Radin, *Property and Personhood*].

property rights could be both more deferential to incidental regulation and use of property by the government, and less tolerant of the loss of liberty interests associated with the tenurial property system of England. It may be difficult to comprehend the self-imposed limits on private property from the vantage point of modern society, however, because conceptions of property and property rights have expanded far beyond those originally contemplated.[77]

The Fifth Amendment protections clearly seem to have been intended for overt government expropriation of improved real property.[78] While there is some disagreement over whether the Clause was intended to protect real property or realty and personalty,[79] there is little evidence that the eighteenth-century view of property extended beyond physical conceptions of property.[80] This limit is the power of eminent domain: an individual may not prevent the seizure of her property by the government—so long as it is for a public purpose[81]—but the loss to the individual must be compensated justly.[82]

Regulations and the exercise of the power of eminent domain were less common occurrences in the late eighteenth and early nineteenth centuries because the state apparatus was much smaller and weaker than it became in the mid-twentieth century.[83] Further-

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77. *See* William M. Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 Colum. L. Rev. 782, 824 (1995) (arguing that vastly fewer interests were protected as property at and after the adoption of the Fifth Amendment); Treanor, Note, *supra* note 70, at 695. Thus, it was common for land to be taken without compensation in order to build roads, for example, but the individual colonial charters or legislative acts provided for procedural protections if the state took private, improved property. *Id.* at 695 n.6; *see also* BOSSELMAN ET AL., *supra* note 70, at 85.

78. Treanor, *Original Understanding*, *supra* note 77, at 791–96.

79. Roger Clegg, *Reclaiming the Text of the Takings Clause*, 46 S.C. L. REV. 531 (1995) (arguing that there is no defensible distinction between protection of real property interests and personal property interests).

80. *Id.* at 540 n.32 and accompanying text; PROPERTY: MAINSTREAM AND CRITICAL POSITIONS 6–9 (C.B. Macpherson, ed., 1978) (pointing out property came to include both things and land with advent of market economy in late 17th century).

Although contemporaneous debate over the amendment is scarce, *see* Clegg, *supra* note 79, at 540; Treanor, *Original Understanding*, *supra* note 77, at 791, early cases recognize this limit, *see* Treanor, *Original Understanding*, *supra* note 77, at 792.

81. *See* NEDELSKY, *supra* note 53, at 232 (discussing broad interpretation of public use); *contra* Clegg, *supra* note 79, at 542–43 (arguing that text of amendment does not support interpretation that private property is available for public purpose, but rather use only).

82. *See, e.g.*, NEDELSKY, *supra* note 53, at 233–34.

83. "In this historical circumstance [of the American Revolution against concentrated state power], there were no acceptable models for the construction of an effective state power." SKOWRONEK, *supra* note 14, at 20.

more, the eighteenth-century view of protectable property interests was more unified because it depended more upon a physical conception of property than is true today.[84] For example, original state charters failed to provide for compensation in the event of a taking of unimproved, unenclosed property;[85] compensation clauses in modern state constitutions reflect the federal Constitution, but the Compensation Clause of the federal Constitution was considered an innovation in its time.[86]

Today, though most agree that the Takings Clause was a Madisonian idea, commentators are divided on exactly what the Fifth Amendment Just Compensation Clause was meant to protect.[87] The papers of the Constitutional Convention provide little illumination,[88] and history simply does not support an argument that the Framers had reached a consensus on constitutional protection of private property ownership among the colonies.[89] Of those colonies that provided protection, they provided for procedural due process, but not compensation. Others provided no protection at all.[90] One commentator has suggested that the ambiguity of the Just Compensation Clause was born of a contest between the values of republicanism, which emphasized the collective good, and the values of liberalism, which focused upon the value of the individual.[91] Perhaps another way of conceiving of the tension is to focus on

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84. *See* BOSSELMAN ET AL., *supra* note 70, at 106.

85. Massachusetts was the exception; it compensated private property owners even if the land taken for a state road was unimproved. *See* BOSSELMAN ET AL., *supra* note 70, at 95–97; Treanor, *Original Understanding*, *supra* note 77, at 786. *See also* Clegg, *supra* note 79, at 538–40.

86. *See* BOSSELMAN ET AL., *supra* note 70, at 94–97 (noting only one state constitution had compensation clause—Massachusetts—and that Vermont's legislature enacted clause but it was never ratified by citizens).

87. *See* NEDELSKY, *supra* note 53, at 28–30, 232 (arguing Fifth Amendment was meant to prevent unlanded masses from wresting holdings from wealthy landowners); Treanor, *Original Understanding*, *supra* note 77, at 818 (reflecting change from republicanism to perception of need to protect liberal values); Clegg, *supra* note 79, at 539 (arguing Clause was incorporated to secure the liberty of politically weak).

88. *See* BOSSELMAN ET AL., *supra* note 70, at 99–100.

89. *See* Clegg, *supra* note 79, at 538; Treanor, *Original Understanding*, *supra* note 77, at 791.

90. Maryland, New York, North Carolina, South Carolina, New Hampshire, and Pennsylvania required only that the legislature consent to the seizure of private property. Delaware, Georgia, New Hampshire, New Jersey, and South Carolina (in their first constitutions) made no reference to the issue at all. BOSSELMAN ET AL., *supra* note 70, at 97. *See also id.*, at 94–98 & nn.48–54.

91. *See* Treanor, Note, *supra* note 70, at 708; Treanor, *Original Understanding*, *supra* note 77, at 819.

the uncertainty over the role of the state in private affairs. In order to give effect to the rights of private property the state had to actively protect such rights (as a "night-watchman state").[92] Yet by taking positive action the state was invading a province where it did not belong. As conceptions of property and legitimate governmental activity have developed through the nineteenth and twentieth centuries, the distinction between appropriate and inappropriate state action has become more difficult to discern.[93]

While the rights of private property owners in the eighteenth century and the early nineteenth century found full vindication only upon physical confiscation of land,[94] the mid-nineteenth century saw the exercise of eminent domain gradually expand from actual seizure to a seizure effected by making the property useless. This is distinguishable as "constructive" eminent domain: physical invasion without expropriation.[95] This scheme created a small *class* of additional forms of state action from which private property owners would receive the protection of compensation.[96] This new conception of eminent domain was a narrow expansion of the rights of property owners. It required both a physical invasion and a direct effect on the land to justify compensation. For example, the government's building a dam and permanently flooding the complaining landowner's pasture, thereby rendering it absolutely useless to the landowner, constituted constructive eminent domain.[97]

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92. *See* ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 26–27 (1974).

93. The takings issue has been described as "intractible," "irresolvable," and even as the equivalent of the physicist's hunt for the quark. Lynda J. Oswald, *Cornering the Quark: Investment-Backed Expectations and Economically Viable Uses in Taking Analysis*, 70 WASH. L. REV. 91, 92 & n.2 (1995) (quoting CHARLES HAAR, LAND-USE PLANNING 766 (3d ed. 1976)).

94. *See* BOSSELMAN ET AL., *supra* note 70, at 106. *See, e.g.*, Coates v. New York, 7 Cow. 585, 605 (N.Y. Sup. Ct. 1827) (upholding validity of state statute authorizing City of New York to prohibit interment of dead bodies on certain lands within city, despite rights held under grants or titles to land held in trust for sole purpose of interment, some of which land had been used for that purpose for over 100 years; stating, "No property has, in this instance, been entered upon or taken.").

95. Pumpelly v. Green Bay Co., 80 U.S. (13 Wall.) 166 (1871).

96. Until the Fifth Amendment Just Compensation Clause was incorporated to apply to the States, the concept of state action extended only so far as the federal government. *E.g.*, Withers v. Buckley, 61 U.S. (20 How.) 84 (1857); Barron v. City of Baltimore, 32 U.S. (7 Pet.) 243 (1833). Incorporation occurred in Chicago, B. & Q.R.R. v. City of Chicago, 166 U.S. 226 (1897).

97.

> It would be a very curious and unsatisfactory result if, in construing a provision of constitutional law, . . . it shall be held that if the government

This framework found its doctrinal legitimacy in nuisance law and was compatible with the practice of compensating someone for an action that interfered with the common law right of quiet enjoyment. This practice continued to treat the takings issue as one of kind, and not, as in later cases, one of degree, for even under the constructive eminent domain analysis there was a *class* of governmental activity that constituted the exercise of eminent domain and thus required compensation; no other action qualified for such treatment.[98] The general trend, though incremental, was to view discrete interests as interests requiring protection under the Constitution.[99] This was primarily because the proliferation of property uses in an industrial market economy also encouraged increased recognition of discrete property interests.[100]

An early Supreme Court case, *Mugler v. Kansas*,[101] recognizes this "new classification" of abstracted property interests, noting the possibility of a protected interest severed from the realty itself. *Mugler* held that regulation of land use that forbids an activity because it causes injury to the community is not a compensable taking of private property for public use.[102] Mugler was unable to manufacture beer in Kansas after the state passed a statute prohibiting the manufacture and sale of liquor. Mugler's plant was virtually useless for any other purpose, yet the Supreme Court denied compensation because the exercise of the police power was valid.[103] This was so because the statute neither affected his title to the

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> refrains from the absolute conversion of real property to the uses of the public it can destroy its value entirely, can inflict irreparable permanent injury to any extent, can in effect, subject it to total destruction without making any compensation, because, in the narrowest sense of the word, it is not *taken* for the public use.

Pumpelly v. Green Bay Co., 80 U.S. (13 Wall.) 166, 177–78 (1871) (emphasis in original)

98. It is always true that the *degree* of noxiousness is the criterion for placement in the class. *See, e.g.*, Reinman v. Little Rock, 237 U.S. 17 (1915) (livery stable); Hadacheck v. Sebastian, 239 U.S. 394 (1915) (brickyard).

99. Pumpelly v. Green Bay Co., 80 U.S. (13 Wall.) 166 (1871); The Legal Tender Cases, 79 U.S. (12 Wall.) 457 (1871) (entertaining but rejecting takings claim for loss of value of money).

100. *See generally* HORWITZ I, *supra* note 16 (arguing evolution of property law followed general economic trend, favoring more technologically advanced uses over more agrarian or less intensive ones).

101. 123 U.S. 623 (1887).

102. *Id.* at 668–69.

103. *Id.* at 664 (rejecting as irrelevant Mugler's allegation that his establishment would have no value because Kansas might lawfully prohibit manufacture and sale of intoxicating liquors as legitimate exercise of police power).

property, nor any lawful use of the property,[104] and did not result in the government's use of the property.[105] This suggests that the Supreme Court had become cognizant of a view of property abstracted from its physical nature.[106] "Injurious use," or a regulation of use that does not affect title, is conceptually more abstract than the idea of a physical parcel of land.[107] Later cases consistently follow *Mugler*, requiring compensation only for appropriations of property for the taker's own use.[108] This is consistent with the evolving classification scheme of abstracted property interests discussed above.

2. *Creative Strains: The Late Nineteenth- and Early Twentieth-Century Analysis*

Perhaps because of the increased individual rights granted through the broad, sweeping language of the Fourteenth Amendment[109] or perhaps because of the expansion of federal and state governments,[110] the late nineteenth and early twentieth centuries experienced a growing tension between private property ownership and governmental regulation. The seminal case of *Pennsylvania Coal Co. v. Mahon*[111] launched a new era of governmental regulation of land use and redefined the parameters delimiting governmental action. *Mahon* established a new threshold for a regulatory

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104. Mugler retained both the rights of exclusion and alienation. *See id.* at 669.

105. *See id.* at 668–69. *See also* BOSSELMAN ET AL., *supra* note 70, at 120.

106. Mugler v. Kansas, 123 U.S. 623, 669 (1887) (discussing possible distinctions between exercise of police power that destroys a public nuisance, prohibition of use of property that diminishes its value, or "taking away" property from "innocent" owner without due process).

107. *See* HORWITZ II, *supra* note 21, at 11–16.

108. *See, e.g.*, New Orleans Gas Light Co. v. Drainage Comm'n, 197 U.S. 453 (1905) (disallowing takings challenge for expense incurred by railroad in being forced to destroy and rebuild bridge in order to accommodate new public drainage plan); Chicago, B. & Q.R.R. Co. v. City of Chicago, 166 U.S. 226 (1897) (disallowing takings challenge by railroad required to keep its facilities at standard that would maintain public health and safety).

109. *See, e.g.*, Chicago, B. & Q.R.R. Co. v. City of Chicago, 166 U.S. 226, 233–35 (1897) (applying Fifth Amendment protections to states through Fourteenth Amendment).

110. It was at this point that the Industrial Revolution, with its acceleration of productivity and fragmentation of labor, created a perceived need for mediation among increasingly complex corporate and individual interests. *See* SKOWRONEK, *supra* note 14, at 11–12.

111. 260 U.S. 393 (1922).

taking by recognizing takings that consist of confiscation of less than the entire parcel of property.[112]

The *Mahon* case transformed the takings question into an issue of degree, not kind, as had earlier been the case.[113] The decision also left the lower courts with little guidance as to the standards necessary to engage in informed decision-making;[114] the situation has not changed significantly to this day.[115] The dissenting opinion counseled against any attempt to place a value on lost profit outside the context of the value of the entire property.[116] However, the majority opinion looked at the complete loss of particular coal as a property right in and of itself.[117]

Mahon involved a dispute over the validity of a statute, the Kohler Act,[118] which prohibited coal companies from excavating certain coal, the removal of which would compromise the stability of the earth beneath erected structures. At issue in *Mahon* was a coal company's property right to the unfettered use of the mineral and support estates it owned beneath a family home. The home-

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112. *Id.* at 414–15.

113. *See supra* text accompanying notes 94–108. *See also* HORWITZ II, *supra* note 21, at 17–19.

114. After *Mahon*, the Supreme Court decided Village of Euclid v. Amber Reality Co., 272 U.S. 365 (1926); Miller v. Schoene, 276 U.S. 272 (1928); and Nectow v. Cambridge, 277 U.S. 183 (1928). Then it virtually stopped deciding land use cases until the early 1970s. *But see* Goldblatt v. Hempstead, 369 U.S. 590 (1962). None of these cases gives a great deal of substantive guidance.

115.

> It is no answer to say that "[a]fter all, if a policeman must know the Constitution, then why not a planner?". To begin with, the Court has repeatedly recognized that it itself cannot establish any objective rules to assess when a regulation becomes a taking. How then can it demand that land planners do any better? However confusing some of our criminal procedure cases may be, I do not believe they have been as open-ended and standardless as our regulatory takings cases are.

First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 340 n.17 (1987) (Stevens, J., dissenting) (citations omitted) (quoting San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621, 661, n.26 (1981)) (Brennan, J. dissenting).

116. This approach presaged, among other cases, Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1987), in which a very similar statute was found not to be a taking at all.

117. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 414–15 (1922). One area of debate in takings jurisprudence is how to define the property that is being regulated. *See* NEDELSKY, *supra* note 53, at 236; Margaret J. Radin, *The Liberal Conception of Property: Cross-Currents in the Jurisprudence of Takings*, 88 COLUM. L. REV. 1667 (1988) [hereinafter Radin, *Liberal Conception of Property*].

118. Act of May 27, 1921 (P.L. 1198) (current amended version at 52 PA. CONS. STAT. § 661 (1996)).

owners, whose title included only the surface estate, argued that the coal company's mining of these subsurface estates would destabilize the earth below their home and thus violate the Kohler Act. The Supreme Court found the Kohler Act to be an impermissible infringement on the coal company's property right in the mineral and support estate.[119] The dissent disagreed, defining the mining as a prohibited noxious use and arguing that public safety was paramount over the private rights to property and contract.[120]

The case was essentially an economic analysis of the interaction between governmental authority and private individuals; the core assumption being the primacy of private rights and freedom of contract over public benefit. The state could, without payment, control private land use without actually dispossessing the landowner. However, if such control went "too far," it would constitute a taking and require payment of compensation or invalidation of the law.[121] The opinion also institutionalized the "diminution in value" test[122] and the case-by-case analysis of the takings issue.[123]

Mahon ties "economic viability," both historically and logically, into the state's changing perception of private property. This Article has argued that the Takings Clause is being redefined by market logic, which more frequently forces the state into an exchange with private property owners to protect ever narrower property interests. This constitutionally mandated exchange, though not absolutely preventing takings, effectively protects private property owners from state control, by forcing the state to step into the economy where it is motivated to rationally maximize its utility.[124]

Thus, the state has economic incentives to exercise restraint in promulgating regulations that impact property interests, as the market definition of narrow property interests will require compensation in most cases. This protection accorded to private property has facilitated the growth of the American economic system into its present form. However, the state may also act in an economically rational manner by justifying the regulation as a valid exercise of

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119. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 414 (1922).
120. *Id.* at 417–18 (Brandeis, J., dissenting).
121. *Id.* at 415.
122. *Id.* at 413. *See* discussion *infra* part VI.A.3 regarding the diminution in value test.
123. *Id.*
124. To the extent that the state is acting like an economic entity.

the police power, the "implied limitation"[125] to which private property rights are subject, such that compensation is not required. Thus, both the state's reduction in promulgating regulations that would require compensating property owners, and the state's justification for regulating the use of private property may be in service to itself as a rational economic actor.

B. Historical Context of the Police Power

Time and tradition institutionalized the weakness of the nineteenth-century state.[126] The need for a stronger administrative state developed as a result of industrialization and urbanization. However, as decisions in the 1920s and 1930s ultimately conceded, the best workable model was the regulatory state; this new, stronger government required the courts to give deference to the legislatures in struggling to manage ever more complex relations among competing actors. A stronger administrative state was not forthcoming in the early twentieth century, due in part to the Supreme Court's active restriction of the social and economic legislation that is the domain and evidence of a strong state.[127] The Supreme Court restricted such legislation for traditional reasons, as was evidenced by the *Pennsylvania Coal v. Mahon* decision of that period. The majority opinion in *Mahon* reflects the desire to maintain a minimalist state and unstructured relations among individuals and between individuals and government,[128] while the dissent advocates more structured social and economic relations to meet the needs of an increasingly complex society that can only be achieved by a

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

126. Stephen D. Krasner, *Approaches to the State: Alternative Conceptions and Historical Dynamics*, 16 COMP. POL. 223, 235 (1984).

127.

> With substantive due process, the Court asserted that the judiciary itself was the only reliable bastion of rational policy making in this volatile democracy. With constitutional laissez-faire, the Court sought to sharpen the boundaries between the public and private spheres, to provide clear and predictable standards for gauging the scope of acceptable state action, and to affirm with the certainty of fundamental law the prerogatives of property owners in the marketplace.

SKOWRONEK, *supra* note 14, at 41. *Accord* HORWITZ II, *supra* note 21, at 222.

128. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415–16 (1992).

larger, more active state apparatus.[129] This historical context has had a tremendous impact on Fifth Amendment cases from *Mahon* to the present.

The case of *Village of Euclid v. Ambler Realty Co.* [130]exercised the police power more broadly than it had previously been exercised in the regulatory context.[131] In *Euclid*, the Court upheld the state's ability to regulate the use of private property through its police power. *Euclid* involved a dispute over the constitutionality of a comprehensive zoning plan that downzoned a significant portion of Ambler Realty's parcel from industrial to medium- and high-density residential, and institutional.[132] The Supreme Court upheld the facial validity of the plan. Justice Sutherland, writing for the majority, reasoned that regulating uses under a comprehensive zoning plan was analogous to regulating nuisances. Zoning would prevent "a right thing in the wrong place,—like a pig in the parlor instead of the barnyard."[133]

In sum, the constitutionality of the police power is undisputed. Yet some constitutional limitations on the police power in land use regulation are also undisputed. The scope of that power or, alternatively, the limitations on it, has been the source of extensive litigation, numerous "tests," and unmitigated confusion, as courts and commentators struggle with the cryptic legacy of *Pennsylvania Coal v. Mahon*.

III. The Role of the State in the Protection of Private Property

Clearly the state has a role to play in private affairs, although there is no consensus regarding how large a role it *should* play.[134]

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129. *Id.* at 422 ("[T]he advantage of living and doing business in a civilized community") (Brandeis, J., dissenting).

130. 272 U.S. 365 (1926).

131. *Id.*

132. *Id.*

133. *Id.* at 388.

134. There are far too many political and legal ideologies and philosophies to discuss even superficially in this Article; such a task is far beyond its scope. Between libertarianism and state communism are myriad gradations of the nature and extent of appropriate state intervention in private affairs. For the libertarian view, see Nozick, *supra* note 92 (basing his argument of historical entitlement on the ground that no rights in property accrue except by actions or transactions); for the socialist view, compare Ludwig Von Mises, Socialism (2d ed. 1951) (arguing centrally controlled allocation of scarce

Legal commentary tends to focus on the state's role in providing security and orderliness of relationships among parties.[135] Welfare economists view the role of the state in the private economy as one of allocation, distribution, and stabilization.[136] To the extent that these roles are legitimate, it is necessary to explain each of these roles before discussing how market logic is transforming them.

A. Security

The state provides security for private property interests in several ways. For example, it promotes national security[137] and commercial relations with foreign governments,[138] which helps to secure private rights.[139] This protects life, liberty, and property from hostile foreign governments.

Domestically, protection of the life, liberty, and property of citizens is seen as a proper role for the state to play even by the most libertarian of ideologies.[140] From the authority of Congress to maintain a military force[141] and establish and maintain treaties with foreign nations,[142] to the right to bear arms,[143] one role of the state has always been to provide active protection to its citizens and to allow citizens to protect themselves from others, including the state.

Through substantive criminal law, the state secures person and property from unwanted invasions of property.[144] Statutes prohibit-

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resources would lead to inefficient or even catastrophic results) with Oskar Lange, *On the Economic Theory of Socialism, in* ECONOMIC FOUNDATIONS OF PROPERTY LAW 57 (Benjamin E. Lippincot ed., 1938) (arguing that central control of property can achieve efficient allocation of resources).

135. FREUND, *supra* note 54, at 6.

136. RHOADS, *supra* note 12, at 61.

137. *See* U.S. CONST. art I, § 10.

138. "The Congress shall have Power to . . . regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. CONST. art. I, § 8, cl. 1, 3.

139. Case law shows that the dispute about whether individual state governments have a role to play is resolved in favor of unified national security, *see, e.g.*, United States v. Maine, 420 U.S. 515, 522 (1975), and unified regulations of foreign commerce, *see, e.g.*, Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434, 448 (1979), Michelin Tire Corp. v. Wages, Tax Comm'r, 423 U.S. 276, 286 (1979).

140. *See* NOZICK, *supra* note 92, at 26–27 (arguing state's role is in self-defense of attacks on life, liberty, and property, though protection may have to be remunerated).

141. *See* U.S. CONST. art. I, § 8, cl. 12, 13.

142. *See* U.S. CONST. art. II, § 2, cl. 1.

143. *See* U.S. CONST. amend. II.

144. *E.g.*, ARIZ. REV. STAT. ANN. § 13-1504 (1995) (criminal trespass); ILL. ANN.

ing criminal trespass, breaking and entering, vandalism, and burglary are examples of criminal law protections for private property. These safeguards for private property interests are codified by legislatures,[145] executed by police forces,[146] and vindicated by courts.[147] Procedural protections such as the right against unlawful searches and seizures are another protection afforded to, among other interests, private property. At the same time, and even in the context of the same crimes, individuals have the right to call upon the state to honor procedural protections to property, namely, the right to be free of unlawful searches and seizures.[148] The right to be free of such unlawful searches and seizures of property are similarly imposed on all three branches of government.[149] The legitimacy of the state gives life to this protection and ultimately provides security of possession to the owner.

In civil matters, individual state governments are the first and last arbiters of the nature and extent of private property rights.[150] John Locke saw a primary role for the state to play in protecting private property from others and from the state itself.[151] Even Blackstone viewed the state as the last forum for vindication of private

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STAT. ch. 720, para. 5/21-1.2 (Smith-Hurd 1995) (institutional vandalism); TENN. CODE ANN. § 39-14-403 (1995) (aggravated burglary).

145. *See supra* note 144.

146. The domain of the police in controlling criminal conduct is so extensive that there are even statutes regulating the degree of self-help or vigilantism permitted outside the executive branch. *E.g.*, KY. REV. STAT. ANN. § 355.9-503 (Baldwin 1996) (requiring judicial permission to ask police officer to sanction or assist in the execution of self-help repossession). *See, e.g.*, People v. Boyd, 474 N.Y.S.2d 661 (N.Y. Sup. Ct. 1984), *aff'd* 511 N.Y.S.2d 455 (N.Y. App. Div. 1987), *appeal denied*, 507 N.E.2d 1094 (N.Y. 1987) (treating private individuals who engage in self-help in assisting police as police agents).

147. In addition to the fact-finding and sentencing functions of courts in hearing and punishing crimes against property, courts have also been called on to interpret the scope of the executive branch. Some have encouraged state action and discouraged private action. *See, e.g.*, First and Farmers Bank of Somerset, Inc. v. Henderson, 763 S.W.2d 137, 141 (1988) (finding creditor must seek judicial intervention if using police officer to assist in repossession).

148. This right is found in the Fourth Amendment to the United States Constitution and in similarly worded provisions of State constitutions. *See* U.S. CONST. amend. IV.

149. In the context of search warrant requirements, *see, e.g.*, FLA. STAT. ANN. § 933.19 (West 1995); MICH. COMP. LAWS ANN. § 300-125 (West 1995); S.C. CODE ANN. § 17-13-140 (Law. Co-op 1995); Connecticut v. Trine, 657 A.2d 675 (Conn. App. Ct. 1995) (suppressing contraband evidence seized after completion of protective patdown search); Illinois v. Mitchell, 614 N.E.2d 1213 (Ill. 1993) (admitting such evidence); North Carolina v. Powell, 181 S.E.2d 754 (N.C. Ct. App. 1971).

150. As Justice Scalia pointed out in Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1031 (1992): "South Carolina must identify background principles of nuisance and property law that prohibit the uses [Lucas] now intends . . . ."

151. *See* Ryan, *supra* note 51, at 15 (citing John Locke, TWO TREATISES ON

rights,[152] as well as the forum for legitimating the rights between private and state actors.[153] One of the most traditional rights in private property, the right to exclude others, is protected by all three arms of the American state: it is codified in state trespass laws and enforced by state law enforcement agents;[154] and vindicated in the courts.[155] It is ultimately the legitimacy of this police power that gives meaning and life to this right to exclude—the security interest that is vital to the integrity of private property.

Legitimacy is the final recourse for the modern state. Max Weber has pointed out that the state can operate as it does—with a large discrepancy between the number of police and citizens—precisely because the majority of the population consents to the limits that these arms of the state represent.[156] If the state loses legitimacy by exercising power arbitrarily or unjustly, its police force can be outnumbered by the population and can no longer control it. The rules fail when those who have been charged with enforcing them can no longer impose the laws on a population that ignores law in numbers too large to be punished. Thus, the legitimacy of the police power is the final arbiter of the right to exclude.

B. Orderliness of Relationships

Apart from enforcing basic security rights, the state protects private property by ordering relationships between private actors. Either before or after private relationships break down, the state must step in to establish the limits of private action.[157] The maxim *sic utere tuo ut alienum non laedas*[158] governs the resolution of land

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GOVERNMENT II, § 123); Donald A. Krueckeberg, *The Difficult Character of Property* 61 J. AM. PLAN. ASS'N 301, 303–04 (1995).

152. 3 BLACKSTONE, *supra* note 59, at *217–*218 (authorizing chancery to protect the use and quiet enjoyment rights of owners as against persons committing nuisances).

153. *See* 2 BLACKSTONE, *supra* note 59, at *3.

154. *E.g.*, KY. REV. STAT. ANN. § 259.200 (Michie/Bobbs-Merrill 1994) (trespass on park, camp grounds); S.C. CODE ANN. § 54-13-30 (Law. Co-op. 1992) (trespass on privately owned docks).

155. *E.g.*, Chase v. Chase, 15 Nev. 259 (1880); New Jersey v. Wouters, 177 A.2d 299 (N.J. Super. Ct. App. Div. 1962).

156. 1 MAX WEBER, ECONOMY AND SOCIETY: AN OUTLINE OF INTERPRETIVE SOCIOLOGY 212–15 (Guenther Roth & Claus Wittich eds., 1978) [hereinafter WEBER, ECONOMY AND SOCIETY].

157. FREUND, *supra* note 54, at 6.

158. *See, e.g.*, Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 492 (1987) ("[U]se your own property in such manner as not to injure that of another").

use conflicts, whether in planning future relationships or in settling fractured ones.[159]

The law of nuisance was one of the earliest adjudicatory frameworks for settling land use disputes unrelated to trespass.[160] Even a lawful use of property could be enjoined if it was injurious to another's land.[161] Nuisance law provided a retroactive mechanism through which the state could reorder the legal relationships between disgruntled landowners.[162] Nuisance law also provided an early analytical framework for the exercise of the state police power to order the legal relations among landowners.[163]

The criminal law is similarly full of prohibitions on private action that impermissibly infringe on the property rights of others. Laws against criminal trespass, vandalism, loitering, and burglary are some examples of legislative value judgments of the importance of property rights. They order legal relationships by defining the limits of private conduct in relation to property owners. Whatever conduct a property owner may be required to expect, she is not required to countenance unauthorized entry, destruction of property, and unwanted persons on her premises.[164] These expectations, created by the criminal law, establish a sense of order in the ownership of private property.

Thus, the law of nuisance and the criminal law are other legal arenas in which the values of private property receive indirect recognition and protection. Criminal statutes and nuisance law protect private property by establishing or resolving the legal relationships among owners.

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159. *See* 2 BLACKSTONE, *supra* note 59, at *3.

160. *See id.* at *2.

161. *See id.*

162. *See* DANIEL R. MANDELKER, LAND USE LAW 100–02 (3d ed. 1993).

163. *See* 3 BLACKSTONE supra note 59, at *217–*218; Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 387–88 (1926): "[T]he law of nuisances . . . may be consulted . . . for the helpful aid of its analogies in the process of ascertaining the scope of the [police] power." *See, e.g.*, Daniel A. Ippolito, Comment, *An Originalist's Evaluation of Modern Takings Jurisprudence*, 26 SETON HALL L. REV. 317, 331 (1995) (asserting that compensation requirement of Fifth Amendment is constitutionalization of Blackstonian views on nuisance law); Douglas W. Kmiec, *The Original Understanding of the Takings Clause Is Neither Weak Nor Obtuse*, 88 COLUM. L. REV. 1630, 1635–38 (arguing for Fifth Amendment jurisprudence informed primarily by law of nuisance). *See also* Bove v. Donner-Hanke Corp., 258 N.Y.S. 229, 232 (N.Y. App. Div. 1932) (finding woman who bought home in area that subsequently became heavily industrialized and later zoned industrial had no cause of action in nuisance against neighboring owner that operated coke factory).

164. *See supra* text accompanying notes 144–149.

C. Allocation, Distribution, and Stabilization

If the state performs any function beyond providing defense and preserving order, it is to decide who receives resources, how much, and whether that decision will preserve the economic structure. This role is critical in maintaining a complex economy with wage and salary earners, international markets, multi-billion dollar economic actors, and stock and bond markets. The state's role in the economy is the subject of considerable disagreement, but to the extent that it does have such a role, welfare economists ask: (1) whether tax revenues and expenditures improve the mix of goods and services produced in the economy (the allocation question);[165] (2) how this change benefits and harms particular groups (the distribution question);[166] and (3) what effect this has on the stability of the economy, including employment, interest rates, inflation, and productivity (the stabilization question).[167] From an economic perspective, current takings jurisprudence asks only the allocation and distribution questions.[168] Takings jurisprudence does not examine the effect on stability in the economy of socializing a regulation through the imposition of a compensation requirement.

In addition to its role in the overall economy, the American state is unique in that its coercive power is limited in such a way as to force it into an exchange with the private property owner when its coercion goes too far.[169] So, while the state is actively involved in deciding how to allocate and distribute resources, and stabilize the effects of economic activity, the state is also one of the very actors vying for resources and engaging in economic activity. The takings clause limits the kind of economic activity in which the state may participate.

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165. *See* RHOADS, *supra* note 12, at 61.

166. *See id.*

167. *See id.*

168. Courts would ask the allocation question if they analyzed whether socializing a regulation would improve the mix of goods and services. Instead, courts ask a slightly different question: whether socializing the regulation by requiring compensation spreads public burdens that, in all fairness and justice, should not be borne by individuals. *See* Armstrong v. United States, 364 U.S. 40 (1960).

169. That is, when the mix of property rights created by regulation creates more harm to the individual than benefit to everyone else. *See* Monongehela Navigation Co. v. United States, 148 U.S. 312 (1893). This, from the welfare economist's point of view, would be a question of distribution.

IV. How Markets Work: Market Logic

A market is simply an organizational framework that espouses rationalization of production,[170] alienability,[171] and exchange.[172] Markets rely on the existence of commodities that can be exchanged for value,[173] and commodities exist only to the extent that they can be produced comparatively inexpensively from raw materials.[174]

Something is a commodity by virtue of its alienability.[175] Thus, if something cannot be alienated, then it cannot be in the market or enter the stream of commerce.[176] Under this model, land is valuable by virtue of its capacity to produce alienable commodities for exchange.[177]

It is not a large conceptual step to make from viewing land as something that produces commodities[178] to viewing land as a commodity itself.[179] If land itself is alienable then it can enter the stream of commerce and become part of the market.

Consumption of commodities, including land, is necessary for markets to survive, flourish, and proliferate. Commodity consump-

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170. *See* Karl Marx, Grundrisse: Foundations of the Critique of Political Economy (1857-58) *in* The Marx-Engels Reader 221, 278–83 (Robert C. Tucker, ed., 2d ed. 1978); 1 Smith, Wealth of Nations, *supra* note 25, at 4–8.

171. *See* Karl Marx & Friedrich Engels, The Holy Family: A Critique of Critical Criticism (1845), *reprinted in part in* The Marx-Engels Reader 133 (Robert C. Tucker, ed., 2d ed. 1978); 1 Smith, Wealth of Nations, *supra* note 25, at 41–56.

172. *See* Karl Marx, Grundrisse: Foundations of the Critique of Political Economy (1857-58), *in* The Marx-Engels Reader 221, 234–35 (Robert C. Tucker, ed., 2d ed. 1978); 1 Smith, Wealth of Nations, *supra* note 25, at 19–25.

173. *See* Karl Marx, Grundrisse: Foundations of the Critique of Political Economy (1857-58), *in* The Marx-Engels Reader 221, 235–36 (Robert C. Tucker, ed., 2d ed. 1978) (stating "[F]inally, the needs of consumption determine production"); 1 Smith, Wealth of Nations, *supra* note 25, at 12–15. *But see* Rhoads, *supra* note 12, at 148–58 (describing producer-generated demand).

174. *Cf.* Rhoads, *supra* note 12, at 65–66 (describing downward pressure on price of commodities due to competition in markets).

175.

> [A]rticles of utility become commodities, only because they are products of labour of private individuals or groups of individuals who carry on their work independently of each other . . . . [T]he labour of the individual asserts itself as a part of the labour of society, only by means of the relations which the act of exchange establishes.

1 Karl Marx, Das Kapital (1867), *reprinted in* The Marx-Engels Reader 294, 321 (Robert C. Tucker, ed., 2d ed. 1978)

176. *See id.*

177. *See id.*; Horwitz I, *supra* note 16, at 32–34.

178. *See infra* note 188.

179. *See* Horwitz II, *supra* note 21, at 33–37.

tion is determined by each commodity's utility, which is ultimately defined by consumer preference or willingness to pay.[180] "Good" commodities are those for which continued demand matches supply and for which there is sufficient threshold demand to spur investment in mass production, whether the commodities in question are antibiotics or toxic chemicals. "Bad" commodities are those for which there is insufficient demand to justify production, whether the commodity in question is a poor movie or an orphan drug.[181] On its own, the market cannot distinguish between a "good" commodity and a "bad" commodity beyond these definitions; only informal norms and formal laws determine whether "good" commodities are produced or "bad" commodities are outlawed.[182]

The utilitarian calculus embodied in the market is only as principled or corrupt as those who transact in it.[183] Within the constitutional framework, this distinguishing role can be played by the state: in the legislature as the conduit for values codified through the republican democratic process; in the courts as arbiters of the meaning of those codified values and as protectors of minority values and views; and in the executive branch in implementing and executing those codified and interpreted values.

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180. One of the fundamental critiques of utility is that there is no external control on what is produced except demand. The concept of utility in a pure market system has no right or wrong about it. "Fulfilling people's environmental, aesthetic, educational, or charitable desires is an economic benefit just as much as is a new car." RHOADS, *supra* note 12, at 62. John Kenneth Galbraith described the role of economics in measuring utility as follows: "The consumer wants more. [The economist's] not to reason why, theirs but to satisfy." John K. Galbraith, *Economics as a System of Belief, in* ECONOMICS, PEACE AND LAUGHTER 82 (1971).

181. This involves another concept: marginalism. Total utility assesses which commodities we would rather do without altogether. Marginal utility evaluates the desire for one additional unit of a given commodity. Take the example of water and diamonds. Comparing *total* utility tells us that, if presented with an absolute choice between water and diamonds, we would rather do without diamonds altogether. The total utility of water is much higher than that of diamonds. However, if we already have enough water to satisfy our survival needs, then having another diamond will be much more satisfying then having another bucket of water. That is, the marginal utility of diamonds is higher than the marginal utility of water. *See* RHOADS, *supra* note 12, at 25–26 (drawing on Adam Smith, THE WEALTH OF NATIONS (ed. 1910 rpt. 1964)

182. *See* Frank J. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of Just Compensation Law*, 80 HARV. L. REV. 1165, 1176 (1967) [hereinafter Michelman, *Property, Utility and Fairness*]. Professor Michelman uses the term "ethical rightness" to distinguish the efficiency calculus from the limitations imposed by informal norms or formal laws.

183. *See id.*

V. What Happens When the State Uses Market Logic

When the state permits market logic to drive its interpretation of the proper definition of property, this eventually results in both a lack of protection of private property and an undercutting of the market system itself. It is important to understand the market in its natural environment before critiquing its use in property law. This section presents a view of market logic in the economy; it then turns to a discussion of the application of those same principles to legal relationships, particularly private property. This will set the stage to discuss how market principles, applied to the law of takings, fundamentally alter the role of the state in regulating private property.

A. The Problems Inherent in the Rationalization of Property Rights

Takings jurisprudence requires the state to become an economic actor by buying property that is subject to unduly heavy regulation. This mandate resolves the problem of state invasion into the realm of private property. However, the use of market logic to determine the nature and extent of the property interest being regulated is problematic: how does the state judge which regulations are appropriate? Markets are driven by a creative rationalization that constantly seeks greater efficiency and new commodities.[184] However, at some point creative rationalization becomes incompatible with responsible state action. The creative rationalization of the market becomes the "random splintering" of state action, and is driven too much by the market in defining and recognizing property rights.[185]

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184. Creative rationalization is the positive impetus provided by markets for innovation in commodities and production. Creative rationalization permits new idea development and new, more efficient ways of producing commodities for the marketplace. Creative rationalization provides the fundamental spark for invention and production, but it is also responsive to marketplace demand.

185. Random splintering is creative rationalization operating outside the market and in spheres where it should not be the primary force. Random splintering is "a right thing in the wrong place" as Justice Sutherland pointed out in a different context in Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 388 (1926); namely, the market's natural urge to commodify, reduce to economically efficient units, and satisfy self-interest.

Land has traditionally been viewed as "property"[186] (although not all "property" is land).[187] Land was at one time a producer of commodities (feudal rents) and then, upon rejection of the feudal tenure system (in which the fee belonged absolutely to the sovereign), became a commodity itself. Thus, it is not a conceptual stretch to view the rights that inhere in the land as capable of rationalization (i.e., amenable to being reduced to economically more efficient units). For example, land is commonly thought to be comprised of three (or four) estates: surface, subsurface, air rights, and (where recognized) support. Future interests such as life estates and fee tails are another traditional way of splintering land interests. This rationalization of land already appears to be taking place, particularly wherever American cultural, social, and economic institutions all presume some quantum of exchange as part of their fabric.[188]

In an increasing number of institutions outside the economy, the market and the logic of economically efficient reduction already inform decision-making. If something can be exchanged for value, it is part of the market;[189] those who have organized their thinking to integrate this exchangeability calculus into their decisions have appealed to market logic.[190] From this perspective, a pre-nuptial agreement is a "rationalization" of the marital relationship: the actors take one slice of that relationship, the financial relationship of the parties based on their pre-marital positions, and separate it from the whole relationship. They rationalize this part of the relationship and place an exchange value on it. Quite apart from its fairness[191] or rightness,[192] the practice is a marketization

186. *See* HORWITZ II, *supra* note 21, at 145–48.

187. Intellectual "property" is a common example of non-landed property. *See, e.g.*, Ruckelshaus v. Monsanto Co., 467 U.S. 986 (1984) (recognizing trade secret as property).

188. A recent example of rationalization is property interests being found in secrecy. *See id.* at 1103–04 (holding that "to the extent Monsanto has an interest in its health, safety and environmental data cognizable as a trade secret property right under Missouri law, that property right was protected by the taking clause of the fifth amendment [sic]").

189. *See* RHOADS, *supra* note 12, at 64–66.

190. *See* CHARLES E. LINDBLOM, POLITICS AND MARKETS: THE WORLD'S POLITICAL ECONOMIC SYSTEMS (1977).

191. *See* Laura P. Graham, *The Uniform Premarital Agreement Act and Modern Social Policy*, 28 WAKE FOREST L. REV. 1037 (1993) (advocating greater latitude in contracting rights and responsibilities in pre-marital agreements); *but see* Gail F. Brod, *Premarital Agreements and Gender Justice*, 6 YALE J.L. & FEMINISM 229 (1994) (arguing pre-marital agreements legalize gender discrimination and disguise it as freedom of contract).

192. *See* Graham, *supra* note 191.

and rationalization of the marital relationship. Market logic constantly presses for further rationalization so that commodification may take place.[193]

This "rationalization" is appropriate in the economic context. Indeed, the rationalization of resources and their conversion into commodities produces incentives for creativity in the market.[194] However, such rationalization of resources becomes problematic when it is misapplied and extended into a sphere of human endeavor where it does not belong. This creative rationalization in the definition of constitutionally protectable property interests causes "random splintering."

Random splintering is the by-product of market logic applied to social institutions. However, market logic does not have universal applicability in takings jurisprudence because it is not the only theory through which "property" can be analyzed. Because alternative property theories do exist, market logic alone cannot completely define a non-compensable regulation.[195]

Where the state's interest and the owner's loss are both relevant, the decision as to whether a regulation has gone "too far" has become a battle over the definition of the property interest that is

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193. Examples of this type of fragmentation are plentiful. The Mobile Cotton Bowl is a marketization of the sporting tradition: by redefining the tradition as something that has exchange value as a commodity, the logic of markets has co-opted the tradition. *See* Richard Sandomir, *Advertising: Companies Pursue Electronic Ways to Insure That Sports Advertisers Get the Best Sites in the House*, N.Y. TIMES, Sept. 14, 1995, at D7 (observing that even corner of television picture can be sold to market actor for single game, for single region); *see* Stuart Elliott, *Advertising: Why Promote Cereal With Ice Cream Giveaways and Why Do Coke Ads Ape Pepsi's 'Congo' Commercials?*, N.Y. TIMES, Sept. 5, 1995, at D5 ("Now that Cadbury Schweppes has become the first corporate sponsor of an individual college football game, by signing an agreement to promote the next three Texas-Oklahoma matchups on behalf of Dr [sic] Pepper, how long will it take for other schools to sell off rights to games quarter by quarter?").

194. *See* 1 SMITH, WEALTH OF NATIONS, *supra* note 25, at 11.

195. This is the case even allowing for categorical takings, a reference to an identifiable group of cases in which a taking may be found regardless of the state interest involved. The two categories currently recognized are "physical invasions," Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1981), and "loss of all economic viability", Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992). The "physical invasion" test is easier to apply because the fact-finder can see whether the state has physically invaded the property. *But see* Frank I. Michelman, *Takings, 1987*, 88 COLUM. L. REV. 1600 (1987) [hereinafter Michelman, *Takings*] (arguing that *Nollan v. California Coastal Commission* was analytically consistent with physical invasion test because owner was made to suffer invasion by public upon granting lateral access easement as condition to building larger house on beach). The loss of all economic viability is much more problematic because its proof requires that the aggrieved owner and the courts engage in exactly the kind of economic splintering that is the subject of this Article.

the subject of the regulation: should the court adopt the state's or the owner's definition of the property interest? This battle encourages the state actor to define the property interest as broadly as possible so that the "denominator"[196] will be large enough to withstand the reduction caused by the regulation without going "too far." Owners, on the other hand, will be encouraged to present their property interests as being perfectly coterminous with the nature and extent of the restriction imposed.

In other words, if the owner can convince the adjudicating body that the *nature* of the specific loss occasioned by the disputed restriction is a separate, recognizable property interest, then the court could find that the restriction causes a compensable taking because the *extent* of loss of that "property interest" will always be close to 100%.[197] Rationalization allows a court to view a restricted aspect of property as a separate property interest.

These definitions of property interests come from the logic of markets, which encourages creative splintering of resources aided by the technology of rational production. However, in the context of regulatory takings, the "technology" is only as expansive as the thought required to splinter the interest. Here, the creativity is as innovative (and, therefore, as random) as the owner's conception of the loss occasioned by the restriction. If an owner can convince the adjudicating body that the interest should be recognized (and therefore protected), the regulation will amount to a taking and the state will be required to pay compensation or invalidate the law.

When the state, whose primary roles are in providing security of property and orderly relationships among citizens,[198] engages in the creative rationalization of the market, its priorities and the state itself are no longer integral to the definition of "security" of property.[199] Protectable property interests then come to find their legitimacy not in the state but in the market. The state's encounter with

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196. The "denominator" is the size of the property interest affected. *See* D. Benjamin Barros, *Defining "Property" in the Just Compensation Clause*, 63 FORDHAM L. REV. 1853 (1995) (discussing denominator problem in determining measure against which regulation should be tested); *Oswald, supra* note 93, at 102 (same).

197. This will be the case unless nuisance law or background principles of State law counsel otherwise. *See* Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1029–32 & n.18 (1992).

198. *See supra* part III.A–B.

199. Professor Lowi warns that "society must become capable of controlling, suppressing and absorbing market forces or the market becomes menace rather than good provider." LOWI, END OF LIBERALISM, *supra* note 38, at 7. *See also* Theodore J. Lowi,

conflicts over property rights that it did not create and its arbitration of disputes in which it has a smaller stake may cause it to lose legitimacy as an actor.

For example, in *Kaiser Aetna*, a property owner wanted to dredge a non-navigable pond, create an access channel to the Hawaiian Bay, and sell homes along the pond with the promise that the pond and the channel would be open only to owners of homes on the pond.[200] A 3000 square-foot home on a frontage lot 80 feet wide sold for $250,000; without the public access exclusion, the same home sold for $50,000, an 80% reduction in the value of the whole parcel.[201] Unless the Supreme Court either announced a clear proportion rule (e.g., a 75% loss) that precisely defined a compensable taking or overruled the case that refused to recognize a 75% reduction in value,[202] the proposed 80% loss should not have resulted in a taking.

Yet the Court held the regulation did result in a taking.[203] Kaiser Aetna convinced the Court that the property interest involved was the interest in excluding the public from access to the pond and ocean channel.[204] The right to exclude ("universally held to be a fundamental element of the property right"),[205] was worth

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Deconstructing American Law, 63 TEX. L. REV. 1591 (1985) (reviewing BRUCE A. ACKERMAN, RECONSTRUCTING AMERICAN LAW (1984)).

200. Kaiser Aetna v. United States, 444 U.S. 164 (1979).

201. This would be almost exactly the same reduction suffered by Mr. Mugler, see Mugler v. Kansas, 123 U.S. 623 (1887) (brewers), and less than the loss suffered by Mr. Goldblatt, see Goldblatt v. Hempstead, 369 U.S. 590 (1962) (gravel excavation).

202. *See Mugler*, 123 U.S. at 675.

203. *See Kaiser Aetna*, 444 U.S. at 179–80.

204. The corporate interest in exclusion is not of the same nature as the private interest in exclusion, the Court's implied conclusion to the contrary. Particularly in this case, the interest in exclusion was clearly the interest in *exclusivity* (rather than in security and autonomy, the more traditional values protected by the exclusive right):

> To view the issue [of individual property ownership] simply as one of public/private entanglement is to overlook a mistaken assumption: attributing to business corporations the qualities, rights and protections acknowledged for private individuals. Such a naively unquestioned transfer ignores the undeniable community function of corporations and fails to hold them accountable as community institutions. The mistake is for our conventional thinking and language to award to such large and powerful institutions, integral to community life, the same rights to privacy and unaccountability as protect the lone person. Policies that wilfully ignore the inherent distinctions between corporations and individual persons are egregiously mistaken, because the property distribution, and hence the power balance, between the two are egregiously unequal.

Krueckeberg, *supra* note 151, at 306.

205. Kaiser Aetna v. United States, 444 U.S. 164, 179–80 (1979).

$200,000—precisely the loss in value that would have been caused by making the private pond public. Kaiser Aetna's definition of the property interest was clearly generated by its understanding of how much it stood to lose financially if the navigational servitude were imposed. Kaiser Aetna separated the constraint (the navigational servitude) and the loss occasioned by the constraint (the loss in property value) and redefined it as a property interest requiring constitutional protection. The ultimate source of its definition was the market: as a developer what it stood to gain or lose in the sale of a commodity (country-club-like exclusivity).

The state's expertise is in protecting security and ordering relationships among citizens. Because the market economy is at its best when it creates commodities for exchange in pursuit of self-interest, when the state acts like the market, it sacrifices its authority and power to protect security and order societal relationships. Thus the state relinquishes control over definitions of property that would enable it to protect the general welfare. Whereas the market is a sphere of the self, the state is a sphere of the collective. While these spheres are not mutually exclusive, state action that is primarily self-interested contradicts its collective character. The state's participation in the market—creating commodities for exchange in the pursuit of self-interest—removes it from the realm of collective action and immerses it in, rather than distances it from, the market. Without enough distance from the market, the state cannot accurately judge whether privately created property "rights" are collectively tenable.

The state must protect the interests found to be property regardless of whether or not it defines the debate over what constitutes property. If it must protect those interests only as recognized by market definitions of property, then private property cannot survive except by the market definition. As a result, the state has no real role in evaluating whether an interest should be recognized as protectable property.

If the state may not control the definition of protectable property, because it has deferred to a property defined in the first instance by market logic and values, then its stake in protecting those rights is necessarily reduced by the quantum of deference accorded the market. If self-interest becomes the arbiter of what is a protectable property right, without reference to the collective or

public interest, the state has no qualitative way to differentiate among competing self-interests.

When the state loses the ability to differentiate among competing self-interests (one of which may be its own), it faces difficulty in fashioning remedies that will protect the market and self-interested action at the same time. Why, for example, would the state punish the action of a private property owner who taps into a state-owned sewer or water line, or (even more amorphously) into a cable television line? On the one hand, the private property owner is exercising a liberty interest in digging into her own ground and connecting and benefiting from these commodities. The owner is maximizing benefit, minimizing cost and creatively rationalizing the water, sewer, and cable television commodities. On the other hand, the state entity has a liberty interest in using its property as a profit-producing service for the provision of water or the removal of sewage; it may secure financial benefit from protecting the monopoly of the cable company that provides television services. The state wants to maximize benefit of profits from water sales and sewage removal; the cable company wants to maximize profit from the sale of access to television programming.

Without a non-market judgment of the relative property rights of the actors, there is no way to differentiate qualitatively between their desires. To the extent that there is sentiment that the state and cable company should receive a remedy for the acts of the property owner, some other understanding of the quality of their property interests is at play. The market logic, which recognizes creative rationalization in the pursuit of maximization of utility, is an insufficient measure of the interests at stake. If creative rationalization of the landowners' property rights requires protection of her right to dig into her own ground and tap into public services, market logic alone would undermine the desirable effects of having water, sewer, and cable television services by reducing incentives to undertake the financial risk of such enterprises. Indeed, it is the other, non-market logic—a logic of interdependence, stability, and security that derives from the basic structure of property—that

ultimately protects private property[206] and the market economy that relies on it.[207]

B. Market-Based Creative Rationalization Distinguished from Conceptual Severance

The concern over the apparent trend in takings law to redefine the interests at stake is by no means new. Professor Margaret Jane Radin has developed a framework for analyzing takings problems that is concerned with, among other things, "conceptual severance":

> It consists of delineating a property interest consisting of just what the government action has removed from the owner, and then asserting that that particular whole thing has been permanently taken.[208]
> Every curtailment of any of the liberal indicia of property, every regulation of any portion of an owner's "bundle of sticks," is a taking of the whole of that particular portion considered separately.[209]
> Thus, this strategy hypothetically or conceptually "severs" from the whole bundle of rights just those strands that are interfered with by the regulation, and then hypothetically or conceptually construes those strands in the aggregate as a separate whole thing.[210]

Market logic applied to property results in severing *something* from the bundle of rights. It is certainly compatible with the framework of conceptual severance. However, the critique of market logic is not a counterpoint to a political philosophy, as is conceptual severance, which provides a clear critique of classic liberal

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206. It has been suggested that modern democracy would not be possible without a market economy. If that is true, then private property rightly understood is crucial to the survival of democratic institutions. Ironically, the undermining of private property by market logic may jeopardize the market, as well as democratic institutions.

207. *See* 1 WEBER, ECONOMY AND SOCIETY, *supra* note 156. "[T]he modern economic order under modern conditions could not continue if its control of resources were not upheld by the legal compulsion of the state; that is, if its formally 'legal' rights were not upheld by the threat of force." *Id.* at 65.

208. Radin, *Liberal Conception of Property*, *supra* note 117, at 1676.

209. *Id.* at 1678.

210. *Id.* at 1676.

conceptions of property.[211] Market logic derives from the economy: from maximization of self-interest, commodification, consumption, and rationalization of production. While conceptual severance exposes the limits of a philosophical tradition whose *raison d'être* is to explain political behavior, market logic creates a different framework altogether, one devoid of accommodation for political acts.

Professor Radin further implies that the severed strands that liberal thought would compensate are, in fact, property interests.[212] Market logic, however, is not so principled. Market logic is driven by commodification, consumption, rationalization, and maximization of self-interest. Conceptual severance defines the interest at stake in *Kaiser Aetna* as public access to Kuapa Pond,[213] or the loss of the right to exclude, or even the sufferance of a physical invasion: "boats of strangers physically entered the Kaiser Aetna Corporation's water."[214] These fit neatly into the traditional categories of property interests: exclusion or physical invasion.

Market logic invents a new kind of property interest, a strand that had not been an independent strand in the bundle: the creation of a right to reap profit from exclusion. Market logic is the force by which property interests come to be protectable when the state imposes regulations that interfere with owners' desires. Its effect is more insidious and disruptive than conceptual severance allows. Conceptual severance certainly occurs when market logic defines and creates property interests; but the severing concept is not the classical liberal ideology of Radin's framework. The severing concept is commodification, reduction to economically efficient units, and satisfaction of self-interest.

The conceptual severance model also needs the liberal conception of property to critique the model's reliance on rigid, self-evident rules: the overapplication of the "Rule of Law."[215] Market logic departs from this critique because there are no rigid, self-evident underlying rules by which the market defines property inter-

211. *See id.* at 1676–78.

212. Professor Radin characterizes the interest taken in *Loretto*, for example, as "an easement to run a cable," *id.* at 1678, and in *Kaiser Aetna*, as an "easement or servitude," *id.* at 1678.

213. "[T]he interest taken by the government's action in *Kaiser Aetna* is likewise most readily characterizable as an easement or servitude." Radin, *Liberal Conception of Property*, *supra* note 117, at 1678.

214. *Id.* at 1678.

215. *See id.* at 1684.

ests. By definition, market logic thrives on change; thus, the liberal conception of property that is the object of critique in Radin's discussion of conceptualism is, if anything, too stable for market logic. Market logic applied to property is more problematic precisely because the object of critique is like a moving target. While the model of conceptualism is powerful, it cannot explain the emergence of "property" interests like the one in *Kaiser Aetna.*

VI. The Supreme Court's Role in Constitutionalizing Market Logic

The Supreme Court, however, appears to believe that there is nothing wrong with accepting the definitions of private property generated by a market that creates property out of losses occasioned by regulation. Over the years, the Court has developed a series of tests to determine whether or not a taking has occurred. As shown below, these tests reflect an inappropriate deference to market logic and thus are ineffective mechanisms for defining the sort of concrete property rights necessary to an efficient protection of both property rights and state police power.

A. An Overview of the Tests Used in Takings Doctrine

Takings jurisprudence, though unclear, has afforded some touchstones over the course of its historical development from which courts have worked to implement core constitutional values. These touchstones are usually theories that focus on either the government's or the property owner's interest, and then balance one against the other.

1. Nuisance

The original source of action and relief for an aggrieved property owner, once courts decided that state action could deprive an owner of rights without formally condemning the property,[216] has its roots in the tort doctrine of nuisance.[217] Even if the regulation

216. *See* Pumpelly v. Green Bay Co., 80 U.S. 166, 172 (1871).
217. *See* Mugler v. Kansas, 123 U.S. (13 Wall.) 623 (1887).

deprived the owner of some or all of the benefit of the property, he was not entitled to relief if the regulated use was noxious.[218] The weakness of this doctrine as a theoretical framework for constitutional decisions inheres in its narrowness. Although the doctrine later took account of "innocent" competing uses by property owners that deprived neighboring owners of the beneficial use of their property,[219] it never incorporated more attenuated state destruction of private property.[220] The Supreme Court has rejected nuisance doctrine as defining the scope of the takings issue.[221]

2. *Physical Invasion*

The "physical invasion" test developed concurrently with the nuisance theory of takings.[222] It expands the protection of private property by requiring compensation when there is an actual physical invasion of property that deprives the owner of some beneficial use.[223] In *Loretto v. Teleprompter Manhattan CATV Corp.*,[224] the Supreme Court reaffirmed the physical invasion test and identified the test's two unexamined assumptions. First, the test is rooted in the most traditional conception of property, for it is definitionally limited to physical personalty and realty.[225] Second, the doctrine can be so formalistically applied as to make it almost absurd; for example, *Loretto* involved the physical invasion of only one and one-half cubic feet of an unused rooftop of an apartment build-

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218. *See id.* at 668–69.

219. *See* Miller v. Schoene, 276 U.S. 272 (1928); Hadacheck v. Sebastian, 239 U.S. 394 (1915).

220. *See* Mugler v. Kansas, 123 U.S. 623 (1887).

221. *See* Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104 (1978); Note, *Developments in the Law: Zoning*, 91 HARV. L. REV. 1427, 1466–67 (1978). *See also* Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1024 (1992). *But see* Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1987) (reviewing public nuisance doctrine and holding that no taking occurred based on doctrine of investment-backed expectations).

222. *See* Pumpelly v. Green Bay Co., 80 U.S. (13 Wall.) 166, 180–81 (1871) (finding taking where plaintiff's land was "actually invaded by superinduced additions of water, earth, sand, or other material" resulting from construction of public dam; noting contrary authority that there is no redress for consequential injuries to property arising from improvements to public infrastructure).

223. *See* Nollan v. California Coastal Comm'n, 483 U.S. 825, 832 (1987) (finding easement dedication requirement constituted physical invasion).

224. 458 U.S. 419 (1982) (finding taking where petitioner was forced to allow respondent to place 4" x 4" x 4" cable box on roof of his apartment building).

225. "[W]hat troubles me most about today's decision is that it represents an archaic judicial response to a modern social problem." *Id.* at 455 (Blackmun, J., dissenting).

ing.[226] The physical invasion test, like regulation of noxious uses, tends to focus on the government entity involved, and to be justifiable in only the most obvious cases of governmental invasion of property. The physical invasion doctrine is useful only in a very small range of disputes, because it seems to lose its principled force as the magnitude of the invasion decreases.[227] Further, as a categorical takings doctrine, physical invasion sheds little light on the most difficult cases.[228]

3. Diminution in Value

"Diminution in value" was historically the most important source of analysis for takings jurisprudence. While the noxious use and physical invasion tests focus on the nature of government action, the primary focus of the diminution in value test is the economic injury to the individual.[229] This test seeks to protect a private property owner's economic interest from threat by state regulation.

Pennsylvania Coal Co. v. Mahon[230] provides the standard for this test, balancing the decrease in the value of the property and

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226. *Id.* at 422. *See also id.* at 450 (Blackmun, J., dissenting) ("Literally read, the Court's test opens the door to endless metaphysical struggles over whether or not an individual's property has been 'physically' touched."); William K. Jones, *Confiscation: A Rationale of the Law of Takings*, 24 HOFSTRA L. REV. 1, 18 (1995) (characterizing loss as "trivial").

227. The physical invasion doctrine may be limited because the standard was developed at a time when a taking was found based on the *kind* of activity involved in the dispute, rather than the extent, or *degree*, of governmental interference with private property ownership. Once the analysis changed from the former to the latter, physical invasions had to be measured by the degree of their invasiveness. Yet the standard is a per se standard: if physical invasion, then taking. The reason *Loretto* seems to be a trivial decision in some respects stems less from its principled nature (small even for a constitutional deprivation), than from a mode of analysis that has not weathered well the journey from the 19th to the 20th century.

228. There has been some confluence of thought lately on the physical invasion test. Several commentators have argued that recent Supreme Court cases are explicable if subsumed under this test. *E.g.*, Michelman, *Takings*, *supra* note 195, at 1611–12. For example, the Nollans were really just being subjected to an "invasion" when their easement dedication was found to be a compensable taking. *Id.* at 1608–09. Commentators are no less inclined to be won over by a doctrinal framework that seems easy to apply.

229. This implicates the controversy over the presumption of validity in modern takings cases: the state or the individual. *See* Dolan v. City of Tigard, 114 S. Ct. 2309 (1994) (holding conditions City placed upon building permit effected taking; finding City bore burden not to show "essential nexus" between legitimate state interest and permit conditions, and also to show that permit conditions were "roughly proportional" to impact of proposed development).

230. 260 U.S. 393 (1922). *See supra* text accompanying notes 111–125.

the importance of the regulation. The majority and dissenting opinions in *Mahon* focus on different values to be taken into consideration, such as the loss of value to the property owner in comparison to the entire value of the enterprise, as opposed to the value of the loss in and of itself. But when the majority states that a government regulation that goes "too far" will constitute a taking, it establishes the private economic interest as the measure of the regulation and relegates the nature of the governmental interest to a position of secondary importance.[231] This balancing test has affected all subsequent takings court decisions, for the ad hoc nature of the balance to be struck fails to provide enduring standards upon which courts may rely and ultimately leaves most of the decision-making power in the Supreme Court.[232] Its explicit use is on the wane,[233] although it turns up from time to time as a supportive doctrine.[234]

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

232. This is evidenced by the lack of agreement on what diminution represents. Whether diminution refers to an owner's entire wealth, or the operation in question, or even some sub-operation to which the regulation applies, is not clear. The "bundle of rights" that make up private property ownership does not always provide guidance as to which rights in the bundle are of sufficient importance so as to constitute a taking should their exercise be abridged. If the state deprives an owner of his right to exclude others, it may not be a taking according to PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 82–83 (1980), or it may effectively destroy a substantial investment, Kaiser Aetna v. United States, 444 U.S. 164, 176–77 (1979). Reminiscent of the "estates" of *Mahon*, 260 U.S. at 414, the right to build in superjacent airspace may be worthless by virtue of the codification in zoning of a convention favoring two-story homes in a residential area, and yet may be the focus of intense litigation in a densely populated downtown urban area, as in Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 105 (1978).

233. The balancing test articulated in *Mahon* has generated other balancing tests, perhaps the most well-known of which is Professor Michelman's test of utility and fairness, first articulated in an article by the same name. *See* Michelman, *Property, Utility, and Fairness*, *supra* note 182. Professor Michelman would balance overall social utility (comprised of demoralization costs, or the price required to restore the morale of the owner being regulated), and settlement costs (closing costs, insurance, relocation, etc.) against basic fairness concerns. *Id.* at 1193–96. Basic fairness concerns come into play when the social utility equation does not work, as when the long-term effects of the regulation cause a greater loss than the present demoralization costs can reflect. Although the test offers an attractive rationale, the rationale itself is suspect. Social utility can be extremely difficult to quantify, as can fairness, and both then become subject to manipulation by legislatures, litigants, and courts. Just as the tax law has become part of the economic calculus for individual and corporate income production, so too could such a test of utility and fairness become a part of the calculus in land-use decisions, thereby nullifying some of its positive effect.

234. *E.g.*, Concrete Pipe and Products of California v. Construction Laborers Pension Trust for Southern California, 508 U.S. 602 (1993); Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1066 (1992) (Stevens, J., dissenting); First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 330–35 (1987) (Stevens, J., dissenting); Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 496 (1987).

4. Reasonable Investment-Backed Expectations

The reasonable investment-backed expectation is another test of what constitutes a taking, and is most clearly discussed in *Ruckelshaus v. Monsanto*,[235] *Kaiser Aetna v. United States*,[236] and *PruneYard Shopping Center v. Robins*.[237] *Monsanto* involved two statutes, one passed in 1969, the other in 1978, which required developers of pesticides to submit their formulae to the EPA.[238] The statute authorized the EPA to disclose some of the information publicly, although doing so might constitute publicizing a trade secret.[239] The 1969 law was amended in 1972 to allow developers like Monsanto to designate their formulae as trade secrets and receive protection for them.[240] The 1978 statute returned the process to pre-1972 status, with changes not relevant here. The Supreme Court held that for the periods 1969–1972 and after 1978, the statutes notified Monsanto that its formulae were subject to disclosure, thus preventing Monsanto from developing a reasonable investment-backed expectation.[241] However, the law from 1972 to 1978 notified Monsanto of the protection of its trade secrets, and the Court found a taking for frustration of Monsanto's reasonable investment-backed expectation.[242]

Kaiser Aetna involved a takings challenge that arose when the Army Corps of Engineers attempted to subject Kuapa Pond, a shallow pond then affected by oceanic tides but formerly separated from the bay by a barrier reef, to the federal government's navigational servitude. A private builder had bought the pond and surrounding area to build a residential development. He dredged the pond and dug out the barrier reef, which provided boat owners access to the bay. The builder had attempted to procure a permit to dredge the pond, but the Corps of Engineers told him none was necessary.[243] The Supreme Court held that, given Kaiser Aetna's reliance on that assurance, it had no notice that its marina might

235. 467 U.S. 986 (1984).
236. 444 U.S. 164 (1979).
237. 447 U.S. 74 (1980).
238. *Monsanto*, 467 U.S. at 991.
239. *Id.* at 992–93.
240. *Id.*
241. *Id.* at 1006, 1009.
242. *Id.* at 1010–16.
243. Kaiser Aetna v. United States, 444 U.S. 164, 167 (1979).

be subject to the navigational servitude. Therefore, the marina could not be taken without just compensation because the imposition of a servitude interfered with Kaiser Aetna's reasonable investment-backed expectation.[244]

Finally, *PruneYard*[245] involved a takings challenge by a shopping mall owner following the California Supreme Court's holding that the State's constitutional provision of free speech and assembly did not interfere with the mall owner's property rights.[246] In this case, some high school students were soliciting signatures for a petition opposing a United Nations resolution. After mall security asked them to leave, they sued to enjoin the shopping center from infringing on their free speech rights under the California Constitution.[247] The United States Supreme Court held that the shopping center's right to exclude others was not so essential that reasonable restrictions of that right in furtherance of the State's interest in protecting free speech would constitute a taking for public use.[248]

In each of the three preceding cases there was a dispute over one of the "sticks" in the "bundle" of rights that comprises private property: the trade secret in *Monsanto*;[249] the exclusivity of the dredged marina in *Kaiser Aetna*;[250] and the right to exclude political activists in *PruneYard*.[251] The owners spent considerable sums of money in developing their property. A taking occurred when the governmental action disrupted the status quo regarding the expectation that the developer had relied upon making the original investment decision.[252]

There appears to be a further showing necessary, namely that the property owner be deprived of notice of the governmental inter-

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244. *See id.* at 179 ("While the consent of individual officials representing the United States cannot 'estop' the United States, it can lead to the fruition of a number of expectancies embodied in the concept of 'property'—expectancies that, if sufficiently important, the Government must condemn and pay for . . . .") (citations omitted).

245. PruneYard Shopping Ctr. v. Robins, 447 U.S. 74 (1980).

246. Robins v. PruneYard Shopping Ctr., 592 P.2d 341 (Cal. 1979), *aff'd*, 447 U.S. 74 (1980).

247. *PruneYard*, 447 U.S. at 77.

248. *Id.* at 83–84.

249. Ruckelshaus v. Monsanto, 467 U.S. 986, 1011 (1984).

250. Kaiser Aetna v. United States, 444 U.S. 164, 180 (1979).

251. *PruneYard*, 447 U.S. at 84.

252. *See* Ruckelshaus v. Monsanto, 467 U.S. 986 (1984); PruneYard Shopping Ctr. v. Robins, 447 U.S. 74 (1980); Kaiser Aetna v. United States, 444 U.S. 164 (1979). All the owners hoped to receive a fair return as a result of the disputed property right maintaining its prior status: undisclosed, consumption-oriented, and private, respectively.

est.[253] The owner in *Kaiser Aetna* was not on notice, and the Court found there to be a taking. Kaiser Aetna relied on the Army Corps of Engineers' assurances that it needed no permit to dredge the pond, a permit it would have needed had the access channel been subject to a navigational servitude. This reliance was enhanced by an eleven-year period during which the Corps acquiesced to Kaiser Aetna's activity. Certainly, this behavior created the impression that the government would not require Kaiser Aetna to relinquish that reliance interest, thus failing to put Kaiser Aetna on notice of any interest the government might have had in the property.[254] Hence, Kaiser Aetna could justifiably argue that the right to exclude non-member boat owners from its marina was one of the property rights it had intended to buy when it decided to build a residential area and dredge the marina, and that the government had provided no indication to the contrary.[255]

In contrast, the owners in *Monsanto* and *PruneYard* were on notice, and the Court did not find a taking. The Court found that Monsanto had notice of the governmental interest in the content of the pesticide formulae being developed. Although Monsanto had an investment-backed expectation of maintaining its trade secrets, that expectation was not reasonable, at least in part because it was on notice of the disclosure requirement.[256] Similarly, one could argue that the owner of the PruneYard Shopping Center should reasonably have been on notice that the area would attract more than commercial activity.[257] The very nature of the shopping mall implies that it is more public than a single retail store, although not as public as a street corner. Therefore, PruneYard should have been on notice that the right to exclude others was more limited in a privately owned public place than it would be on other private land.

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253. *See Monsanto*, 467 U.S. at 1006.
254. *Kaiser Aetna*, 444 U.S. at 179.
255. *Id.* at 179–80.
256. *Monsanto*, 467 U.S. at 1006.
257. *See* PruneYard Shopping Ctr. v. Robbins, 447 U.S. 74, 89–90 (1980) (Marshall, J., concurring). In affirming the California Supreme Court's decision, which rejected the takings claim on the basis of a more expansive expressive right protected by the California Constitution, the Court refused to extend the holding of Lloyd v. Tanner Corp., 407 U.S. 551 (1972) (permitting exclusion of expressive activity on private property). *See PruneYard*, 447 U.S. at 81.

Thus, the reasonable investment-backed expectation is a private property interest that carries legitimacy because it is an economic interest, supported by consideration, which maintains an existence over time. The limitation of such a standard in takings cases should be clear, for property that contains no investment cannot be protected by this definition. The reliance interest, although a possible factor in takings analysis, is not an appropriate requirement for all takings cases, and is subject to circularity like other takings tests.[258] The *Monsanto* case also raises the possibility that notice creates an end-run in the investment-backed expectation because the Court both *finds* a taking where there was no notice as to some of Monsanto's trade secrets, and finds *no* taking where there was notice as to others.[259] In other words, this analysis suggests that there might come a time when government action could never result in a taking because as property becomes more highly regulated, the standard for what is a *reasonable* investment-backed expectation would become further out of reach. Although it indicates the values to be protected by the Just Compensation Clause more clearly than other tests, reasonable investment-backed expectation is an incomplete doctrine that has had to be stretched or supplemented by other legal doctrines in order to cover the areas of private property in need of protection from unreasonable regulation.

5. Economic Viability

The standard of "economic viability"[260] owes its derivation to a seemingly innocuous footnote in the case of *Penn Central Transportation Co. v. City of New York*.[261] The meaning of this standard has never been fully explained by the Court.[262] Yet subsequent cases

258. Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1034 (1992) (Kennedy, J., concurring) ("There is an inherent tendency towards circularity in this synthesis, of course; for if the owner's reasonable expectations are shaped by what courts allow as a proper exercise of governmental authority, property tends to become what courts say it is.").

259. Perhaps if regulatory takings were purely a matter of due process, this case would not be an aberration, since notice would be required as a matter of law.

260. The concept of "economic viability" is now widely utilized.

261. 438 U.S. 104, 138 n.36 (1978).

262. Professor Oswald has recently provided an excellent analysis of the possible meaning and, in the context of decisions using the framework, its misuse. Oswald, *supra* note 93 (analyzing various cases decided by Supreme Court that use "economic viability"

that use the phrase are the core structure around which takings analysis is formed. Economic viability is the primary symptom of the narrow market logic that the Court uses to analyze the takings question to the detriment of fundamental constitutional values, including private property.[263] This test will result in an unpredictable jurisprudence at best.[264]

The development of economic viability is inconsistent; a few major cases and themes emerge.

a. Penn Central*: An Innocuous Beginning*

The modern era of takings jurisprudence starts with the 1978 *Penn Central* case.[265] Given the outcome of *Penn Central*, it is

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or "economically beneficial use" and ultimately concluding that framework is flawed and dictates inconsistent results). Economic viability next appears in a context that makes its citation not only curious, but out of character, because of the summary fashion in which it is used. Justice Powell, writing for a unanimous Court in Agins v. City of Tiburon, 447 U.S. 255 (1980), *abrogated by* First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304 (1986), in a brief statement of a balance sought in takings analysis, articulated the private interest as "economically viable." *Id.* at 260. The Court cites *Penn Central* as though the phrase were so well-understood that it required no further exegesis, and the Court goes on to provide none. "The application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests, *see* Nectow v. Cambridge, 277 U.S. 183, 188 (1928), or denies an owner economically viable use of his land, *see* Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 138 n.36 (1978)." *Agins*, 447 U.S. at 260. *Agins* involved landowners in the city of Tiburon, California, who wished to construct a high-density residential area on five prime acres overlooking San Francisco Bay. After they had acquired the land, but before submitting any kind of design proposal to the city, California passed a law requiring Tiburon to prepare a general plan for land use and open-space development. The city modified the density requirements for the land in dispute, reducing the permissible density to one to five single-family residences for the entire parcel. Thus, the Court cited the relevant language of *Penn Central* as though it had been a holding and stated the proposition as though its meaning was plain. Subsequent cases have indicated, however, that *Penn Central*'s language does not so clearly support this proposition. For example, in United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 126 (1985), Justice White, writing for a unanimous Court, increased the importance of economic viability by describing it as "our general approach." However, he offers no explanation of the phrase "economically viable" in this case either. Such was the introduction of "economic viability" into Supreme Court case law in the area of takings.

263. *See* Oswald, *supra* note 93, at 131. The very fact of the prominence of these tests is symptomatic of the pervasiveness of this new market jurisprudence. The reason that these tests are doctrinally weak and lead to inconsistent results is not that they focus too heavily on the property owner at the expense of the public good, but rather because they rely on a jurisprudential framework whose defining characteristic is change, namely the logic of markets.

264. *See* discussion *infra* part VI.C.2.

265. Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104 (1978). In it the Supreme Court upheld against a takings challenge a landmark preservation law that allowed the city to deny a proposal to construct a 50-story office tower above Grand

difficult to discern how much light the facts of the case shed upon the concept of economic viability.[266] Indeed, the Court provides no direct illumination of the phrase in the case itself: in footnote 36 of *Penn Central*, Justice Brennan remarked that if Penn Central could "demonstrate at some point in the future that circumstances have so changed that the Terminal ceases to be 'economically viable' [Penn Central] may obtain relief."[267]

Penn Central indicates that the loss of the economic viability of the air rights above the terminal is not the measure of the taking:

> "Taking" jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. * * * [T]his Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole—here, the city tax block designated as the "landmark site."[268]

Neither does diminution in value alone constitute a taking;[269] therefore, "economic viability" cannot be equated simply with the loss of property value.[270]

Profitability, though not the only factor important to the determination of a taking, is a factor that matters,[271] and economic viability demands a showing of the extent of monetary loss caused

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Central Terminal in New York. Finding that the owners of the terminal *could* still plan on a reasonable return to their investment *and* that the air rights into which the building was to have been erected could be moved to other places, and noting the importance of preserving the unique architecture, the Court found no taking. *Id.* at 136–38.

266. *See supra* note 265.

267. *Penn Central*, 438 U.S. at 138 n.36.

268. *Id.* at 130–31.

269. *See id.* at 131.

270. Economic viability may include in its calculus the burdens imposed by the regulation. But *Penn Central* indicates that, at least in the area of historical landmark preservation, the legislative judgment of who receives the benefits of the regulation is presumed to be accurate. *See id.* at 134–35. If the complaining property owner is found legislatively to be benefitted by the regulation as well as burdened by it, then the burden in fact borne does not enter the judicial calculus of whether the property is still economically viable. *Nollan* hints that the standard will be made a more rigorous one, *see* Nollan v. California Coastal Comm'n, 483 U.S. 825, 837 (1987), and *Dolan* still permits a factual showing that the end is legitimate and the means roughly proportional to achieving that purpose to prove a regulation non-compensable, *see* Dolan v. City of Tigard, 114 S. Ct. 2309, 2320–21 (1994).

271. *Penn Central* also failed to show that the Commission reviewing the building petitions would deny permission to construct *any* building over the terminal. *See* Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 138 n.36 (1978).

by varying degrees of regulation.[272] Since the air rights above the terminal were transferable they had not been taken or diminished in any way; they had only been moved. Property may therefore be economically viable even though not all the property rights are actually in the physical parcel being regulated, so long as they are somewhere, and capable of being exploited.[273]

b. Agins*: Setting the Stage*

Agins[274] has clarified what economic viability is *not* rather than shedding any light on a precise definition. The Supreme Court, more certain of the correct outcome than the California Supreme Court,[275] unanimously held that when property was still developable for the intended purpose, it was still economically viable, and thus not confiscated. The case may be most useful as a solidification of the economic viability of private property as a measure of the validity of the regulation in question. If the Supreme Court articulated the standard of economic viability with no need to apply it in this case—since the economic impact of "mere enactment"[276] of zoning laws was not significant enough in the minds of fifteen Justices in the combined Supreme Courts to find a taking—then the significance of the case may be its institutionalization of the standard.

c. Hodel v. Virginia Surface Mining*: Stalling for Time*

The case of *Hodel v. Virginia Surface Mining and Reclamation Association*[277] also provides little guidance. Since takings analysis

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272. *Cf.* Oswald, *supra* note 93, at 105.

273. *Cf. Penn Central*, 438 U.S. at 137 (reasoning that air rights secured through New York City's transferrable development-rights program mitigated limitations imposed by landmark designation on plaintiff's exploitation of air rights over his property).

274. Agins v. City of Tiburon, 447 U.S. 255 (1980), *abrogated by* First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304 (1986). For the facts of the *Agins* case, see *supra* note 262.

275. The Supreme Court of California split 6-1 on the validity of the police power exercised by Tiburon. Agins v. City of Tiburon, 598 P.2d. 25 (1979). The Supreme Court voted 9-0 to affirm, Agins v. City of Tiburon, 447 U.S. 255 (1980). Thus, the zoning ordinance passed in response to California state law requiring such municipal planning survived the facial attack. CAL. GOV'T CODE § 65302(a),(e) (West Supp. 1979); *see* CAL. GOV'T CODE § 65563 (West Supp. 1979) (requiring all cities and counties to prepare plans for preservation of open space); *see also* Tiburon, Cal., Ordinance No. 123 N.S., 124 N.S. (June 28, 1973).

276. *Agins*, 447 U.S. at 259–60.

277. 452 U.S. 264 (1981). *Hodel*, also a facial attack, involved the 1977 Surface

depends upon specific fact situations, a facial challenge to a statute with no facts does not clarify the parameters of the economic viability of a regulated activity.[278] The Fifth Amendment challenge was a facial one, so the inquiry for the Court was whether "'mere enactment' of the Surface Mining Act [had] deprived appellees of economically viable use of their property."[279]

d. Keystone*: The Voices of Splintering Get Louder*

Similarly, the Pennsylvania Legislature's judgment that pillars of coal had to be left in place to prevent subsurface subsidence was found not to be a regulatory taking of the use right.[280] Although the Supreme Court decided the *Keystone* case largely on the theory of the physical non-severability of the affected parcels,[281] the Court found the property *as a whole* to be economically viable. Therefore, the regulation was found to be a proper exercise of the police power. As in *Penn Central*, the Court looked at the entire bundle of rights in the parcel (indeed, in *Penn Central*, the Court factored in the economic impact of the regulation when viewed with the other parcels to which the air rights might be transferred) and not at the individual sections of the parcel affected by the regulation.

Mining Act, which mandated regulation of surface mining of coal. *See id.* at 268–75 (summarizing 1977 Surface Mining Act whose provisions included prohibition of surface mining operations where they will adversely affect publicly owned parks or places that are included in National Register of Historic Sites.) The statute looks very much like the Kohler Act, which was at issue in Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 412–13 (1922), and the similar statute at issue in Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1987).

278. The Court hinted in a footnote, anticipating Williamson County Regional Plan. Comm'n v. Hamilton Bank, 473 U.S. 172 (1985), that the allegedly useless variances available for reclamation of certain kinds of coalfields—useless because both the letter requirements of the Act and the variances mine owners were allowed to apply for were so costly that they would neutralize the profit gained from mining in the first place—might constitute a taking if there were evidence that a mine operator had not applied for a variance because to use it would be too costly. *Hodel*, 452 U.S. at 297 n.39. This is reminiscent of Justice Holmes' point in *Mahon* that the bundle of rights in a coalfield is peculiarly thin, since the right to coal exists essentially in the right to mine it. *Mahon*, 260 U.S. at 414.

279. *Hodel*, 452 U.S. at 297.

280. Economic viability usually involves the "use" strand of one's bundle of property rights, although there is no principle requiring this. A possible reason for this is that the Industrial Revolution has expanded the variety and types of "use" that make land economically viable.

281. The parcels became economically non-viable by virtue of the fact that the coal that was there had to be left in place. Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 496–97 (1987).

In the context of *Penn Central* and *Keystone*, the economic viability issue seems to have turned on the recognition of a *profitable status quo*. When balanced against the city's interest in preserving the station's historical architecture, and in the context of an enterprise that was, without exploitation of the contested air rights, profitable, the Court declined to find a loss of all economic viability.

e. PruneYard*: Commercial Use Meets Free Speech*

In *PruneYard Shopping Center v. Robins*,[282] the Court focused on economic viability in the context of the entire shopping center operation.[283] The Court worked with a concept of economic viability that looks at the damage and attempts to sever it and recognize it as a separate property right. However, even a loss of the right to exclude, always considered one of the most essential sticks in the bundle of expectations called property, did not constitute a taking because it was *not* essential to the economic value of the property. Here the Court is exhibiting a tendency to conflate the traditional property doctrine with its market counterpart. The right to decide which non-owners may enter one's property is a fundamental right given to the true owner of a piece of property. Yet the market principle of property was not seriously offended since there was no assault on rationalization, alienation, or exchangeability and overall the interest was profitable, requiring access—or denying exclusivity—was not offensive to the Constitution.

f. Kaiser Aetna*: A Strand Worth Severing*

Contrast *PruneYard* with *Kaiser Aetna v. United States*,[284] which found a taking where the United States demanded that a privately dredged marina and access canal to the Hawaiian Bay be opened to the public under a federal navigational servitude.[285] Here again the Court cites the right to exclude others as the fundamental property right being violated,[286] but the crucial difference is that

282. 447 U.S. 74 (1980).
283. *Id.* at 83 n.6.
284. 444 U.S. 164 (1979).
285. *Id.*
286. *See id.* at 179–80.

the exclusivity strand in this bundle of rights *is* the market commodity being threatened by diminution in value. It was the source of the marina's economic viability. Clearly, a marina with exclusive access to a bay connected to the Pacific ocean is an extraordinarily valuable asset.[287] Unlike *PruneYard*, the Court did not even discuss time, place, and manner regulations to minimize economic effect because any reduction in the exclusive right would have compromised the income potential of the marina. The bundle of rights concept often overlaps with the physicalist view of property, as in *Dolan v. City of Tigard*, where the owner lost the exclusive use of land near a neighboring creek by giving it to the city for flood control.[288]

g. Doctrinal Conclusions

Hodel makes it clear that fact-specificity is still a necessary part of takings analysis, whether or not economic viability is the standard.[289] *Agins* reiterates that the challenged regulation must be expressly applicable to the facts in dispute.[290] A loss of profit has been a necessary, but not sufficient, condition of each takings challenge since *Mahon*; the cases that use economic viability are no different in that respect. Of course, the governmental interest must be valid, and the appropriation must occur for some public purpose. Economic viability changes none of these factors, which have informed Supreme Court decision-making since *Mahon* in 1922.

Thus, economic viability appears to require three distinct considerations:

1. Profitability of retaining the economic status quo;

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287. *See id.* at 169.

288. There, the Court seems to conflate the easement dedication with a physical severance, pointing out that the City was requiring her to deed a portion of her property to it. Dolan v. City of Tigard, 114 S. Ct. 2309, 2316 (1994). This is a view that has found some acceptance, *see* Michelman, *Takings*, *supra* note 195, at 1610, but one that the author considers ultimately unproductive.

289. *See* Hodel v. Virginia Surface Min. and Reclamation Ass'n, 452 U.S. 264, 265, 294–95 (1981) (finding no facial challenge possible in takings cases because only specific factual situations constitute injury for Fifth Amendment purposes).

290. Agins v. City of Tiburon, 447 U.S. 255, 262–63 (1980), *abrogated by* First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304 (1986) (finding in *Agins* no showing of injury possible where appellants have not yet submitted development plan to zoning authority).

2. Amenability to definitional splintering of the economic portion of the interest affected; and
3. The private property owner's idea of the economic impact.

If the current use is reasonably profitable then no taking is found.[291] However, if the injury can be identified and attached to an ownership right (provided the owner can show how her preferred use is no longer possible) then there may be a taking.[292]

The concept of economic viability, like the market itself, is neither self-defining nor stable. The historically consistent view of takings case law would attach the concept to the "degree" analysis of *Mahon*.[293] Economic viability, under this analysis, could mean two things: profitability as an objective standard or expectation of monetary return as a subjective standard. A degree analysis of profitability would find that a taking has occurred at some point above the break-even level, since it would be economically unsound to undertake a for-profit project that would merely break even.[294] The Supreme Court is unwilling to accept such a mathematical, calculated approach to takings;[295] as noted above, public benefit and social utility are very difficult to quantify.[296] However, it may be the best working definition available for economic viability.[297] The expectation of monetary return is very much like profitability, except that the property owner is presumed to have some bottom line in mind at which point the project is no longer worth the time and expense.[298]

In the end, the doctrine of economic viability may substantially undermine takings law by tying it to the market, for while

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291. *See* Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 136 (1978).

292. *See* Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1030 (1992); Williamson County Regional Plan. Comm'n v. Hamilton Bank, 473 U.S. 172, 199 (1985)

293. "[T]his is a question of degree—and therefore cannot be disposed of by general propositions." Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 416 (1922).

294. The rhetorical questions of *when* and *what* constitutes a profit, are beyond the ken of this author; there may, perhaps, be guidance from tax and business, but that is not the purpose of the Article.

295. *See, e.g.*, Andrus v. Allard, 444 U.S. 51, 65 (1979).

296. *See* Michelman, *Property, Utility and Fairness*, *supra* note 182, at 1173, 1183.

297. *See* Oswald, *supra* note 93, at 121–24 (positing purchase price, purchase price relative to fair market value, and effect on status quo as being unsatisfactory measures of taking because of difficulty in achieving consistent results).

298. Economic viability, however, does not mean the most beneficial use of the property. *Id.* at 124. *See* Goldblatt v. Town of Hempstead, 369 U.S. 590, 592–93 (1962). Denial of any permits in *Penn Central* may then have been sufficient to deprive Penn Central of all "economically viable" use of the property, and find a taking of the property. *Lucas* calls this position into some doubt.

the market embraces change at a rate fast enough to insure its own survival, the law of regulatory takings may be shattered by attempting to keep that same pace.

B. Views of Property Using Market Logic: Rationalization of Property Interests

Theories of regulatory takings should and do derive from the legally recognized views of property. However, the Court's willingness to infuse market-based conceptions into property law has proven problematic. The implications of the Court's increased dependence upon quantifiable economic injuries are varied. The courts, wary of subjective interpretation, are comfortable with quantifiable events. However, non-economic injuries should not be per se non-compensable. Will individuals who fail to maximize the utility of their property before a regulation is promulgated be denied compensation? The standard of economic viability may force property owners to monetarize non-economic values. That constitutional rights should not be subject to the whims of the majoritarian rule seems fairly well-accepted. Why then are those same constitutional rights subject to any societally imposed economic system, indeed defined and delimited by their economic rationality?

1. Four Approaches to Property Doctrine

In the area of regulatory takings, property is being rationalized, or splintered, into smaller units. Most regulatory takings litigation may be characterized by one of the following four views of property: the bundle of rights perspective, the legal/doctrinal perspective, the temporal perspective, and the physicalist perspective. These approaches represent a rationalization, or splintering, of property to increase its alienability and hence its marketization. Although these categories overlap to some extent, they represent a paradigmatic shift in that they are separately recognized at all. This provides some evidence that market logic has been adopted in our views of property.

Analysis of major takings cases in terms of these views of property will elucidate the concept of economic viability, the core structure around which takings analysis has formed.

a. "Bundle of Rights" Perspective

Private property is often described as a "bundle of rights."[299] This view of property breaks property down into its component strands: the exclusive right,[300] the use right,[301] air rights,[302] support rights,[303] quiet enjoyment rights,[304] waste rights, and so on.[305] All of these claims of right are enforceable at law.

Although the bundle of rights idea of property can contain many strands, the courts generally focus on the following three: use, exclusion, and alienation.[306]

The overall trend in takings law presents the "bundle of rights" questions in market terms, and *Lucas v. South Carolina Coastal Council* took another step toward institutionalizing this trend. If an injury can be defined as a strand, and that "strand" can be removed from the bundle, then it is easier to conceptualize a taking of that strand.[307]

In *Lucas*, the Supreme Court found a compensable taking for the period during which Lucas could not build luxury beach homes

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299. Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979); *see* PROPERTY: MAINSTREAM AND CRITICAL POSITIONS 2 (C.B. Macpherson ed., 1978) ("In current common usage, property is *things*; in law . . . property is not things but *rights*, rights in or to things"); Margaret J. Radin, *The Consequences of Conceptualism*, 41 U. MIAMI L. REV. 239, 242 (1986).

300. *See, e.g.*, *Kaiser Aetna*, 444 U.S. 164 (finding loss of right to exclude non-fee-paying members from marina of sufficient magnitude to require compensation).

301. *See, e.g.*, Mugler v. Kansas, 123 U.S. 623 (1987) (finding no taking when only possible use—as brewery—found to be illegal under Kansas constitution).

302. *See, e.g.*, Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104 (1978) (recognizing air rights as property interest in holding no taking to prevent owner whose terminal was declared landmark from building multi-story addition over terminal).

303. *See, e.g.*, Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922) (finding loss of right to mine to surface to be taking of support estate).

304. *See, e.g.*, Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987) (finding requirement of lateral beach access easement compensable intrusion into right of quiet enjoyment).

305. The *Penn Central* case is a good illustration of this metaphor. The "air rights" were at issue because the New York Landmark Law made it difficult to secure a permit to build over the Grand Central Terminal. The bundle of rights is the most often litigated. *Keystone Bituminous Coal* was, in part, about the support estate. *Kaiser Aetna* and *PruneYard Shopping* were about the exclusive right.

306. *See, e.g.*, JOHN CHRISTMAN, THE MYTH OF PRIVATE PROPERTY: TOWARD AN EGALITARIAN THEORY OF OWNERSHIP 19 (1994). Christman expands on the use right to include the sub-rights of consumption, modification, destruction, and management. *Id.* at 29.

307. See Justice Brennan's observations in *Penn Central* that it is inappropriate to sever a use from the bundle in determining whether a restriction effects a taking. Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 130–31 (1977).

under the newly enacted Beachfront Management Act,[308] even though other significant sticks in Lucas' bundle of property rights[309] were unaffected by the regulation.[310]

Lucas still possessed the right to exclusive physical access to his property:[311] to exclude others and to otherwise use it when and how he saw fit.[312] The kind of privacy and serenity that this property still retained was precisely the quality whose deprivation in California constituted a taking in *Nollan v. California Coastal Commission.*[313] In *Nollan*, a permit condition compromising this right was held an unconstitutional taking. Lucas retained the right to alienate his property.[314] Although the amendment lowered the resale value of Lucas' land, no precedent supports the proposition that such devaluation disposes of the owner's right to alienate.[315] The amendment's use limitation, prohibiting construction of permanent structures, was not a universal proscription on the property's use.[316] He retained the right to use the property for recrea-

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308. Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1003 (1992).

309. In the Supreme Court, the South Carolina Coastal Council pointed out that the property retained many uses and Lucas retained a substantial number of rights in the parcel. After the amendment, see Respondents' Brief at *47, Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992), *available in* WESTLAW, 1992 WL 672613. Lucas retained the right to exclude others ("[o]ne of the most essential sticks in the bundle" reiterated by Chief Justice Rehnquist in Kaiser Aetna v. United States, 444 U.S. 164, 176 (1976)). Both at common law and in the Constitution, the right to exclude is a fundamental interest in private property.

310. The case involved an amendment to the Coastal Zone Management Act, South Carolina Beachfront Management Act, S.C. CODE ANN. § 48-39-290(A) (Law Co-op Supp. 1995), that had the effect of making two building lots unbuildable by prohibiting permanent structures seaward of the newly designated line. *Id.* at § 48-39-290(A). Real estate developer David Lucas' lots were in the new no-build zone. *See* Respondents' Brief at *8, Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992), *available in* WESTLAW, 1992 WL 672613. The trial court found that the enactment of the legislation had rendered the property "valueless." *Id.* at *46–*47.

311. *See* Respondents' Brief at *47, Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992), *available in* WESTLAW, 1992 WL 672613.

312. *See id.* (implying that many uses were still available, including recreational, at any time he wanted to so use property).

313. 483 U.S. 825 (1987).

314. *See* Respondents' Brief at *47, Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992), *available in* WESTLAW, 1992 WL 672613.

315. *See Lucas*, 505 U.S. 1003 (1992). Clearly, however, recovery of investment and the right of alienation are distinct legal concepts. For example, the adjacent landowners might have found it an attractive possibility to expand their holdings by purchasing these parcels, thereby insuring that, even with the vagaries of the legislative will, these parcels would remain unbuilt. He was under no proscription. Thus, not only did he have the right to alienate the property, he may even have had lucrative possibilities.

316. *See* Respondents' Brief at *48 n.41, Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992), *available in* WESTLAW, 1992 WL 672613.

tional purposes—like the church camp in *First English*.[317] He might erect non-permanent structures, like a trailer or tent. An abridgement of a use right, even if severe, previously had not on its own been sufficient to defeat "all economic viability."[318]

Thus, Lucas retained the right of exclusion, the right of access, the right to alienate, and a reduced right of use. What rights did he lose? The amendment prohibited Lucas' most preferred use of the property[319] and the most economically intensive use of the property.[320] The court's disposition of the case shed little light on which weighed more heavily on its decision because Lucas' preferred use was also the most economically intensive one.

Given the outcome in *Lucas*[321] and its subsequent disposition on remand to the South Carolina Supreme Court,[322] it is fair to infer the following: taken together, the right to exclude, the right of unrestricted access, the right to make passive and recreational use of the parcels, and the right to sell the property, constitute "no economic viability" because the court labeled the property "valueless." Thus, economic viability must have an extra-property meaning; this is evidence of the constitutional splintering of property

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317. *See Lucas*, 505 U.S. at 1044 (Blackmun, J., dissenting); First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 304 (proscribing only construction of buildings and permanent structure, but not day use), *on remand*, First English Evangelical Lutheran Church v. County of Los Angeles, 258 Cal. Rptr. 893, 902 (Ct. App. 1989) (specifically recognizing recreational uses as having sufficient value to defeat argument that church had been deprived of all economically viable use).

318. *See, e.g.*, Goldblatt v. Hempstead, 369 U.S. 590 (1962) (gravel excavation); Hadacheck v. Sebastian, 239 U.S. 394 (1915) (brickyard); Mugler v. Kansas, 123 U.S. 623 (1887) (brewery).

319. *See Lucas*, 505 U.S. at 1006–10; Respondents' Brief at *47 n.40, Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992), *available in* WESTLAW, 1992 WL 672613 (noting takings rule cannot "turn on the subjective vagaries and objectives of the particular owner . . . ."). *Accord* Oswald, *supra* note 93 at 121.

320. *See Lucas*, 505 U.S. at 1006–10; Respondents' Brief at *46 n.38, Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992), *available in* WESTLAW, 1992 WL 672613.

321. The statute was found suspect for the remarkable reason that the trial court, correctly or otherwise, determined that the Act had rendered the owner's land "valueless" and, regardless of the State's interest in the regulation, required compensation. The Supreme Court for the first time since articulating the standard assumed that the trial court's determination met the standard of "no economic viability," and, since it is now possible to receive damages for a temporary taking, First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 318 (1987), Lucas could sue for damages if the use was not a nuisance under South Carolina law. If not, the use inhered in the original title.

322. The South Carolina Supreme Court found no cognizable right in State property law to restrict the development of property for the reasons articulated in the statute. *See* Lucas v. South Carolina Coastal Council, 424 S.E.2d 484 (1992) (on remand).

interests. When a landowner is denied the most intensive economic use of his property or his most preferred use (i.e., luxury residential development), the Constitution may require payment, regardless of the state's interest in regulating use.[323]

Furthermore, Lucas was, ultimately, the arbiter of the meaning of "economic viability."[324] The market defined the property interest Lucas sought to protect since the market was the source of his profit and loss. The Supreme Court acknowledged his market definition of the right.[325] Therefore, the Supreme Court recognized the market logic of randomly splintering property rights in the framework of takings jurisprudence.

b. Physicalist View of Property

Lucas concededly lost his most profitable interest in his property. To the extent that the right to build a luxury house on the beach sufficiently deprived him of a "strand" in his bundle to constitute a compensable taking may say much about the malleability of these abstract strands: sometimes they are present but thin;[326] sometimes they are irrelevant to economic development, but so "thick" that their loss is a taking;[327] or sometimes just comparatively thick enough to afford compensation to an aggrieved owner.[328]

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323. It has been said that the holding in *Lucas* is one that will never be seen or used again. *See* Lazarus, *supra* note 9, at 1427 (noting that in area of environmental litigation "the categorical presumption will rarely apply"). Professor Lazarus describes the *Lucas* case itself as "a hypothetical fact pattern." *Id.* at 1421. It is, however, a clear sign of the Court's unwillingness to countenance certain restrictions on the use of private property, one that land use planners, owners, and other interested parties would be foolish to ignore.

324. The Supreme Court's willingness to address the takings question on the merits is due, at least in part, to Lucas' recalcitrance in allowing the governmental purpose issue to be litigated at all. *See* Respondents' Brief at *37, Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992), *available in* WESTLAW, 1992 WL 672613 (contending "the petitioner never made a serious effort to rebut the fact that this area was an unsafe area to build upon.") As Justice Blackmun pointed out in dissent, the Council's failure to be heard on this question surely did not preclude the Supreme Court from hearing it. *Lucas*, 505 U.S. at 1045 (Blackmun, J., dissenting).

325. *See Lucas*, 505 U.S. at 1016 & n.7 (describing his pleaded injury clearly erroneously as "a fee simple interest"); *id.* at 1018 (stating that regulations requiring land to be left "substantially in its natural state" leaves owner "without beneficial or productive options for its use.").

326. *See, e.g.*, PruneYard Shopping Ctr. v. Robins, 447 U.S. 74 (1980) (finding deprivation of right to exclude protesters insufficiently strong to violate California constitutional protection of right of expression on shopping center property).

327. *See, e.g.*, Dolan v. City of Tigard, 114 S. Ct. 2309, 2322 (1994) (finding easement dedication illegitimate use of police power not remediable by just compensation).

328. *See, e.g.*, Kaiser Aetna v. United States, 444 U.S. 164, 179–80 (1979) (finding

The physicalist view is much more straightforward. The physicalist view of property regards each three-dimensional inch as a separately protectable right.[329] This perspective comprises the dispute between the majority and the dissenting opinions in *Keystone Bituminous Coal Association v. DeBenedictis*.[330] In this case, the Association claimed that the Pennsylvania Subsidence Act[331] was an unconditional taking of private property.[332] The Association was specifically concerned with the loss of the coal pillars and the loss of the support estate.[333]

The majority opinion characterized the regulation as one that prohibited the mining of 2% of the total coal available.[334] The dissenting Justices viewed the regulation as one that "took" all of the coal under protected areas, which amounted to 27 million tons.[335]

Justice Rehnquist's dissent in *Keystone* is also in direct contradiction to the majority in *Penn Central*, which refused to view the air rights as a separate physical piece of the property.[336] This can be contrasted with *Nollan*, in which the Court took a decidedly broader view of a physical parcel than had theretofore been the

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that in this case right to exclude—to be "exclusive"—was so important to petitioner's expectations that it had to be compensated if compromised).

329. The physicalist view was very much in evidence in the dissent to the *Keystone* case. Justice Rehnquist in dissent pointed out that all of the coal that had to be left in pillars to prevent subsidence, had "no economically viable use." Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 514 (1987). The majority found that the separation of those physical parcels and the support estate would be doctrinally insupportable. *Id.* at 500. The Court in *Dolan v. City of Tigard*, the most recent takings case, found just the opposite, holding that the physical portion that was to be left undeveloped for flood control could be severed from the whole and evaluated for the takings claim. *See* Dolan v. City of Tigard, 114 S. Ct. 2309, 2316 (1994).

330. 480 U.S. 470 (1987).

331. PA. STAT. ANN tit. 52 § 1406.1–.21 (1995) (requiring pillars of coal to be left in place to prevent subsurface subsidence).

332. *See Keystone*, 480 U.S. at 478–79.

333. The latter of which had been described in *Mahon* as "a very valuable estate" in land. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 414 (1922).

334. *Keystone*, 480 U.S. at 498 ("The 27 million tons of coal do not constitute a separate segment of property for takings law purposes.").

335.

> In this case, enforcement of the Subsidence Act and its regulations will require petitioners to leave approximately 27 million tons of coal in place. There is no question that this coal is an identifiable and separable property interest . . . . The regulation . . . does not merely inhibit one strand in the bundle, . . . but instead destroys completely any interest in a segment of property.

See id. at 517–18 (Rehnquist, J., dissenting) (citation omitted).

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

case.[337] There, the Court determined that a demand for a deeded easement was tantamount to a requirement that a physical portion of the property be yielded to the public.[338] It furthermore evaluated the extent of the loss against the "parcel" demanded—which came to one hundred percent—rather than against the entire parcel.[339]

The attraction of the physical view of property should be clear: an interest recognized as a physical parcel will receive greater scrutiny. Thus, the category creates the incentive to redefine interests as physical parcels for compensation purposes.

In the area of regulatory takings, the Supreme Court has increasingly recognized this splintering and analyzed the newly defined and separated right as "property." Conceptually severing a portion of property affected by a regulation (for example, a six- foot strip) makes it easier for the Court to demand compensation. Such a regulation might eliminate all economic viability in that portion of the property.[340]

c. Temporal View of Property

The temporal view of property involves rights that accrue because of the passage of time.[341] If property can be divided temporally, then an interruption in ownership is more easily viewed as a total deprivation.[342]

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337. Nollan v. California Coastal Comm'n, 483 U.S. 825, 831 (1987).

338. *See id.* at 832.

339. Though no precise figure is given in the case, the affected parcel was clearly much smaller than the whole.

340. *See* Dolan v. City of Tigard, 114 S. Ct. 2309, 2316 (1994).

341. Thus, for example, the interruption of a property right is itself the confiscation of a property right and therefore compensable. *See* First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304 (1987). *See also* Richard Epstein, *Past and Future: The Temporal Dimension in the Law of Property (Symposium: Time, Property Rights, and the Common Law)*, 64 WASH. U. L.Q. 667 (1986) (arguing temporal interest is obviously cognizable); John E. Fee, *Unearthing the Denominator in Regulatory Takings Claims*, 61 U. CHI. L. REV. 1535, 1542–43 (1994) (asserting temporal aspect is easily identifiable denominator); Margaret J. Radin, *Time, Possession and Alienation*, 64 WASH. U. L.Q. 739 (1986) (arguing temporal aspect of property ownership should be compensable only if time has resulted in development of owner's personhood in property).

342. *See, e.g.*, *First English*, 482 U.S. 304 (finding temporary deprivation can be severe enough to warrant compensation, not just nullification of offending regulation); San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621, 656–57 (1981) (Brennan, J., dissenting) (advocating adoption of temporal severance as tool for deciding takings cases).

Temporal severance is clear in *First English Evangelical Lutheran Church v. County of Los Angeles*,[343] and its predecessor *San Diego Gas & Electric v. City of San Diego*.[344] In both cases, land use rights were commodified as temporal units: This type of quantification lends itself to market logic analysis because it is one way to judge the loss of economic viability.

To answer the economic viability question, one must first answer the question "Which part?" Certainly, any property subject to regulation can be divided into those units that will support the finding of a taking. If one asks, "What part?" it is not hard to answer, "The part injured by the regulation." Thus, market logic finds its own resolution by classifying property into its most exchangeable units.

d. Legal/doctrinal View of Property

Legal severance involves redefining traditional legal bases for justifying the police power. The legal/doctrinal view of property sees property as it is defined by statutory and common-law doctrine.[345] Particularly, *Nollan*, *Lucas*, and *Tigard* narrow the traditional rationale of the police power by trivializing it and denigrating its constitutional force. These cases disintegrate the conventional conception of abating a nuisance by both blurring the line between avoiding harms and promoting benefits, and specifically limiting such police power to the narrowest, most traditional nuisance law.[346]

Under this scheme, it is obvious that the South Carolina Coastal Commission would have had a hard time showing that beach erosion is a common-law nuisance. Indeed, the South Carolina Supreme Court did not recognize it as such, finding that a temporary regulatory taking had occurred.[347] Furthermore, since under *Lucas*

343. 482 U.S. 304 (1987) (recognizing claim for temporary taking).

344. *See* 450 U.S. 621 (1981) (Brennan, J., dissenting) (encouraging Court to recognize the lengthy delay attendant to certain regulations as compensable takings during the period of delay).

345. The law of trespass, for example, as well as of prescriptive easements, provides some long established legal property doctrines, the violation of which would be an abridgment of a property right. This is the "property" favored by the Supreme Court in Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1029 (1992).

346. *See id.* at 1029.

347. Lucas v. South Carolina Coastal Council, 404 S.E.2d 895 (1991), *rev'd*, 505 U.S. 1003 (1992).

it is unnecessary to defeat the assertion of valid police power if the land is rendered valueless, the owner who can convince the trial court of this fact will have a taking for which compensation must be made.

It is certainly consistent with recent takings decisions to blur the line between harms and benefits—since they are irrelevant to the question of whether there has been a taking—but the Court has acted unnecessarily and imprudently in jettisoning this part of its takings framework. It has done so under the pressure of the market, which sees neither harms nor benefits as the state would properly define them (and the Court therefore does not see them either). Rather, the Court recognizes only the splintered interest of the two lost opportunities for luxury housing. As so defined, the total loss of this property interest can only result in a taking for which compensation must be made.

The heart of the issue of what constitutes a taking lies increasingly in the definition of private property. Private property rights derive from the state, thus the fundamental definition comes from state law as delimited by the Constitution. The source of that definition lies in the conception of the nature and function of the American state.[348]

The Court struggles in these cases with the question of whether to sever the "damaged" part of the property from the whole parcel (*Keystone*);[349] or whether to evaluate differently the claim that an essential stick in the bundle has been removed (*Kaiser Aetna*);[350] whether there is a principled difference between preventing noxious uses (*Hadacheck*)[351] and promoting beneficial ones (*Lucas*)[352] (*Penn Central*);[353] or preventing certain uses (*San Diego Gas*)[354] or

348. A comprehensive discussion of these issues is far beyond the scope of this Article.

349. Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 497–99 (1987).

350. *See, e.g.*, Kaiser Aetna v. United States, 444 U.S. 164, 179 (1979) (stating right to exclude others is so fundamental to property that its removal constitutes taking).

351. *See, e.g.*, Hadacheck v. Sebastian, 239 U.S. 394 (1915) (holding ordinance banning brick manufacturing facility within residential district was valid exercise of police power).

352. *See, e.g.*, Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1023 (1992) (stating principle that regulation that substantially advances state interests does not constitute taking).

353. *See, e.g.*, Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 108 (1978) (noting that New York City believed its landmarks preservation law would foster civic pride and promote tourism).

354. *See, e.g.*, San Diego Gas and Elec. Co. v. City of San Diego, 450 U.S. 621,

positively requiring them (*Penn Central*);[355] whether an essential stick has been removed (*Hodel v. Irving*),[356] or one that is less so (*PruneYard*);[357] or even whether a regulation is efficient[358] because it properly involves the owner, spreads risk, and promotes the right level of investment (*Tigard*)[359] or not (*Lucas*),[360] a fundamental failure of the courts is their failure to see market logic at work in this framework. Clearly the courts do see the economics of these cases. They do miss first, what the substance of the law should contain; and second, a fundamental and insidious assumption about how the market controls regulation *and the benefit it derives from so doing.*

C. The Problem of Allowing Markets to Define Constitutional Protections

Although the existence of administrative regulation is by no means universally celebrated, the complexity and size of the twentieth-century market economy requires some greater means of control than was appropriate in eighteenth- and nineteenth-century agrarian America. Takings analysis has become an exercise in redistribution since the convergence of the cost-benefit analysis of *Mahon* and the marketization of the United States. But courts do not ask whether it is necessary or proper to transform social questions into economic issues as they struggle to decide takings disputes. This is because the logic of markets, as applied to social

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621 (1981) (rejecting plaintiff's claim as unripe, but declining to rule that city rezoning plan would not constitute taking if plaintiff denied entire beneficial use of property).

355. *See, e.g., Penn Central*, 438 U.S. at 108.

356. *See, e.g.*, 481 U.S. 704, 716–18 (1987) (ruling complete abolition of both descent and devise might be taking even when intended to ameliorate the extreme fractioning of Indian lands, noting fundamental nature of abrogated rights).

357. *See, e.g.*, PruneYard Shopping Ctr. v. Robins, 447 U.S. 74 (1980) (holding that right to exclude is not absolute and may be outweighed by free speech rights).

358. *See* Susan Rose-Ackerman, *Against Ad Hocery: A Comment on Michelman*, 88 COLUM. L. REV. 1697, 1704 (1988).

359. *See, e.g.*, Dolan v. City of Tigard, 114 S. Ct. 2309 (1994) (holding City's action taking where building permit was made conditional upon dedication of land to bicycle path, because City failed to demonstrate that its demands were related in nature and extent to development in question).

360. *See, e.g.*, Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1019 (1992) ("[W]hen 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").

institutions like private property, prevents the courts from seeing the damaging consequences of their application of the logic.

Market logic prevents us from seeing that: (1) it is undermining state legitimacy; (2) it is causing a continuing increase in unpredictability in planning decisions; (3) splintering an interest in order to protect it may not be good for private property in the long run; and (4) some property interests really should be protected even though they do not fit within a market framework.

The Supreme Court risks serious jurisprudential problems in endorsing this splintering of property interests, declaring the separate splinters "property" and requiring compensation under the Fifth Amendment. Among these jurisprudential problems, the risks of unpredictability and judicial illegitimacy have received the most attention. Two others, no less serious but far more insidious, are the problems of undermining the police power and the eventual collapse of the principled distinction between protectable property and non-protectable property.

1. Legitimacy

When the state (one of whose arms is the court) uses its powers inappropriately, it risks losing its legitimacy, arguably the last institutional layer between order and chaos. Certainly, the Supreme Court has been under attack since *Penn Central* for unabashed agenda-seeking.[361] However, just as the Court cannot allow itself to be driven by popularity, neither can it appear to promote a political agenda, or serve as a trier of fact, lest it forfeit its legitimacy. For example, the Court risked its legitimacy in the 1970s when it became a trial court for obscenity offenses, when its doctrine for First Amendment violations was: "I know it when I see it."[362]

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361. *See* William A. Falik & Anna C. Shimko, *The "Takings" Nexus—The Supreme Court Chooses a New Direction in Land-Use Planning: A View From California*, 39 HASTINGS L.J. 359, 371–76, 389–96 (1988); Lazarus, *supra* note 9, at 1414; William W. Justice, *The New Awakening: Judicial Activism in a Conservative Age*, 43 S.W. L.J. 657, 658, 672 (1989); Mark V. Tushnet, *A Republican Chief Justice*, 88 MICH. L. REV. 1326, 1330–31 (1990) (reviewing SUE DAVIS, JUSTICE REHNQUIST AND THE CONSTITUTION (1989)).

362. Justice Potter Stewart is "credited" with coining this phrase in the context of obscenity and First Amendment violations. Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring). The Court in the 1970s had to view the allegedly obscene material—including watching movies—before it could render its decisions. Beyond the

2. *Unpredictability*

The Supreme Court's inability to reach consensus on a doctrinal framework for takings analysis leads to unpredictability in the lower courts, in planning bodies, and among owners and developers. Lower courts have struggled with the takings issue, trying to harmonize apparently inconsistent results and incompatible doctrines. They have tried to interpret economic viability with almost no guidance from the Supreme Court and, absent a clear indication of the limits of this standard, they have given it inconsistent effect indeed.[363] Some have denied compensation for a 95% reduction in property value,[364] while others have awarded compensation for far less.[365] This unpredictability is due in part to the Court's poor

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arguably laughable picture of their reviewing evidence of this type, the Court had such a difficult time articulating the legal standards for First Amendment protection of pornographic material that it effectively sat as a trier of fact in every case for which it granted certiorari. The power that is retained by the Court when the law is this unclear makes for a perception that decisions may be unpredictable (and therefore arbitrary) and for a perception of instability—that decisions can never be final until they have been adjudicated in the Supreme Court. The Court faces a similar problem today as it struggles with the takings issue, an issue that is proving as recalcitrant of predictable application and final adjudication as the obscenity cases of the 1970s.

363. *See, e.g.*, Haas v. San Francisco, 605 F.2d 1117, 1120 (9th Cir. 1979), *cert. denied*, 445 U.S. 928 (1980) (holding conceded 95% reduction in value—$2,000,000 to $100,000—not taking because owner was nevertheless allowed to develop property, which retained some value). *But see* Hernandez v. Lafayette, 643 F.2d 1188, 1198 n.17, 1200 (5th Cir. 1981) (finding single-family residential classification to render property economically non-viable because property was bounded by floodplain and sewage treatment plant, and was subject to easements).

364. *See, e.g.*, Kawaoka v. Arroyo Grande, 796 F. Supp. 1320 (C.D. Cal. 1992) (rejecting takings claim despite loss of $6,000,000 in anticipated land sale profits); 900 G. Street Assocs. v. Dep't of Housing & Community Dev., 430 A.2d 1387, 1391–92 (D.C. 1981) (holding there had been no taking when City prevented plaintiff from demolishing building registered as historic landmark after plaintiff's purchase; finding existence of reasonable alternative economic use for building dispositive, regardless of plaintiff's expectation of higher profit, or of purchase price of building); Haas v. San Francisco, 605 F.2d 1117 (9th Cir. 1979) (stating developer's disappointed expectations cannot be turned into taking); *accord* Kalorama Heights Ltd. Partnership v. District of Columbia Dep't of Consumer and Regulatory Affairs, 655 A.2d 865, 871 (D.C. 1995).

365. For example, the property owner in *Dolan* lost at most only 15% of her property to the ordinance requiring the floodplain greenway and recreation easement. There was never even an assertion that she would lose all economically viable use of the entire property, yet a taking was found. *See generally* Dolan v. City of Tigard, 114 S. Ct. 2309, 2314, 2316 n.12 (1994). Similarly in *Lucas*, Justice Stevens makes the same charge, citing the hypothetical situation of a home destroyed on the same beach to illustrate inconsistent outcomes of the rule. Lucas would be able to recover (for a lost opportunity), while his neighbor (who has lost both the opportunity to rebuild *and* her home) would not. *See* Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1064–65 (1992) (Stevens, J., dissenting).

choice of cases,[366] but more significantly to the Court's use of market logic to identify the range of property interests deserving Constitutional protection. If the courts, as an arm of the state, have abdicated authority to define the object of its protection, then the object of its protection will be as changeable as the litigants that come before the courts.

3. Loss of Police Power Protection

Since *Mahon* there has been a presumption by the Court that the police power serves the public good to the detriment of private property. This is the assumption behind the oft-quoted phrase that "if regulation goes too far it will be recognized as a taking."[367] Even *Mahon*'s "implied limitation"[368] bespeaks a reluctance to yield private rights. The Court fails to appreciate the role of the police power in protecting private rights, including the right to private property.

The case of *Hodel v. Irving*[369] demonstrates this phenomenon. Under the General Allotment Act of 1887, individual Indians and tribes were granted tracts of land ("allotments"). As Justice O'Connor pointed out, those property holders held their land subject to the trust of the federal government, which held the underlying fee. Because the Indians could not alienate the property without special permission from the government, much of it stayed in the same family, fractioning by devise or intestacy for a century before the Consolidation Act was passed.[370]

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366. As Justice Souter points out in *Dolan*, "The right case for the enunciation of takings doctrine seems hard to spot." Dolan v. City of Tigard, 114 S. Ct. 2309, 2331 (1994) (Souter, J., dissenting). There was a period in the 1980s when most cases were dismissed as unripe. *See, e.g.*, Williamson County Regional Plan. Comm'n v. Hamilton Bank, 473 U.S. 172 (1985) (dismissing takings claim where respondent had failed to obtain final decision regarding application of contested regulations to affected property); San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621 (1981) (dismissing takings claim as unripe where lower courts had refused appellant monetary damages, but had yet to decide whether other remedies were available).

367. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 414 (1922).

368. *Id.* at 413; *see supra* text accompanying note 125.

369. 481 U.S. 704 (1987).

370. The rights were originally splintered due to an inability by the native populations to resist the market forces that induced them to dispose of their properties under the federal trust doctrine. *Id.* at 707. The policy of allotment of Indian land transformed the Indians into petty landlords. Rather than farming the land, the Indians leased their allotted shares to white ranchers and farmers and lived off the meager rentals.

The Supreme Court found the statute abrogating those limited alienation rights to be unconstitutional by a unanimous vote. The extreme splintering of interests caused by the unusual operation of the federal trust doctrine[371] and the limited right of alienation of those trust lands[372] to white settlers was not the relevant issue to the Court.[373] Rather the Court viewed its decision as protecting a principle: the oft-heralded basic right to pass property to one's heirs.[374] The Court inadvertently protected not a property principle, but rather the status of the native populations as victims of the market. Thus, the property that was being protected found its primary definition in the splintering logic of the market. The Court's inability to see that it was simply accepting as a protectable property interest something whose ultimate provenance was the market, not law, is testament to the pervasiveness and invisibility of this force. Ultimately, a market economy, the development and maintenance of which is a source of never-ending difficulty on the reservations, was undermined by a randomly splintered view of a protectable property interest.

Thus, this method of defining compensable property interests may work to the detriment of private property in the long run. The end result might be to undermine the state's police power, imperiling the security of private property itself.[375] By redefining every interest affected by regulation as a separately cognizable property right, the Court has taken the first step along this path. The next step is to find that regulations can effect takings as soon as they are promulgated.[376] At the extreme, every regulation might require

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371. *Id.* at 715. The federal trust doctrine views the relationship between the Indian tribes and the Federal government as one of protection. While the oldest cases view the relationship as one of guardian to ward or teacher to student, more recent invocations of the doctrine, like *Irving*, resemble more of a fiduciary responsibility.

372. *Id.* at 707.

373. *Id.* at 718.

374. Hodel v. Irving, 481 U.S. 704, 716 (1987).

375. *See* discussion *supra* part III.A.

376. This is part of Justice Stevens' critique in his dissent in *First English*:

> [T]he fact that a regulation would constitute a taking if allowed to remain in effect permanently is by no means dispositive of the question whether the effect that the regulation has already had on the property is so severe that a taking occurred during the period before the regulation was invalidated.

First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 328–29 (1987) (Stevens, J., dissenting).

compensation. As Justice Holmes exhorted in *Mahon*: "[G]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law."[377] By eviscerating the police power, private property might successfully be secured against government intrusion; but without the police power, nothing could secure such interests against *private* intrusion. Thus, for the Fifth Amendment to have efficacy, the police power must have legitimacy.

4. Non-Cognizable Property Interests

Finally, market logic cannot be the first resort for definitions of constitutionally protectable property interests. This Article has developed this assertion extensively, but the primary reason is that for the market to flourish it must not be permitted to invade spheres of life unsuited to its logic. Property relations is one of those spheres. Some property rights may not be cognizable under this model because they were never economically viable or the source of investment-backed expectation, or of a value that the courts have ruled could be diminished. Further, other rights may have to be redefined inappropriately in order to be protected.

This problem resonates in *Lyng v. Northwest Indian Cemetery Protective Association*,[378] where the Court refused First Amendment protection to a worship ground on federal land threatened with destruction by the construction of a road. It would not have qualified for Fifth Amendment protection either, unless the tribe could have established the parcel's "economic viability." Such a redefinition of the property right would have been highly inappropriate, offending many of the traditional values attaching to property: a culture's sense and expectation of rootedness, the sacredness of place, and the responsibility of private property owners to the local and national community.[379] It should not be necessary to frame these values in economic terms in order to protect them.

377. Pennsylvania Coal v. Mahon, 260 U.S. 393, 413 (1922).
378. 485 U.S. 439 (1988).
379. *See id.* at 469 (Brennan, J., dissenting).

VII. A Modified Framework

Seemingly without reflection, the Court has adopted a market framework that promotes the splintering of property interests. The Court should now stop to examine the effects of its approach, for it threatens to undermine the very interests the Court purports to protect.

The following proposal is offered to allow for appropriate use of economic criteria to help assess the compensability of state regulation of private property.

A. The Court Must Reassume Its Duty to Decide Whether a Dispute Involves Property

The primary definition of property derives from state law.[380] If the courts are to use such fragmented paradigms as temporal property interests, physical property interests, bundles of rights, and traditional legal property interests, they must fit expressly within the property framework recognized by State law. The Court must adopt a coherent analytical framework through which to identify protectable property interests.[381] With such a framework in place, private interests would find it more difficult to manipulate the laws of property to their own advantage. This Article has proposed but one set of categories. It matters less which framework the Court adopts than that the chosen standards are clearly articulated and consistently applied.

For example, the Court in *Monsanto* posited several characteristics of "property": it is assignable; it can form the *res* of a trust; it passes to a trustee in bankruptcy; and it is the product of one's "labour and invention."[382] Similarly, in *Dolan*, the majority opinion refers to state law principles in analyzing whether Ms.

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380. *See* Board of Regents of State Colleges v. Roth, 408 U.S. 564, 577 (1972); *see also* Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1016 n.7 (1992).

381. There is some inkling of this when Justice Stevens suggested in Dolan v. City of Tigard, 114 S. Ct. 2309 (1994), that the regulation in question was better analyzed as a business regulation, not a regulation of property use. *See id.* at 2325 (Stevens, J., dissenting). Some members of the Court are clearly uneasy with the sweeping reclassification of so many injuries as the deprivation of a property right and are trying to propose principled doctrinal distinctions. *See, e.g*, Kaiser Aetna v. United States, 444 U.S. 164, 183–87 (Blackmun, J., dissenting).

382. Ruckelshaus v. Monsanto, 467 U.S. 986, 1002–03 (1984).

Dolan's injury was to a protected property interest.[383] Although that case concerned itself with the nexus question, the Court easily could have begun its inquiry by analyzing whether the state's definition of a property interest encompassed the injury in question. Just as the Court has refused to accept blindly the proposition that a regulation serves the public interest,[384] so, too, should it be skeptical of the owner's assertion that the injury is to a "property" right worthy of constitutional protection. The Court has rigorously examined claims involving injuries to an "interest" that was not conventionally "property" because it was not land.[385] There is no logical reason for the Court to treat differently "interests" that appear to be tied to land or land use.

The temptation with this step of the test is for the Court to slip into what it is doing now: severing the restriction and calling it a property right. This should be balanced somewhat by first determining what property is. But the Court must be careful to make its determination based on principles of property law, and not market logic, lest the entire framework collapse, leaving private property owners, regulators, legislators, and courts no better off than before.

B. Five-Element Test of the Effect of the Regulation on the Property

If the property interest in question is found to be protectable, the court must still determine whether the disputed action constitutes a taking. First, the courts should determine whether the state action serves a legitimate purpose. If so, the court should then perform a comprehensive cost-benefit analysis to determine whether the action is economically justified. Finally, the court should identify

383. *Dolan*, 114 S. Ct. at 2318–19.

384. *See* Nollan v. California Coastal Comm'n, 483 U.S. 825, 838 (1987) (finding demand for lateral beach access easement to be unrelated to public interest of preserving view of beach from road).

385. *See, e.g.*, Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust, 508 U.S. 602 (1993) (dealing with employer's withdrawal liability to multi-employer pension plan under Multi-employer Pension Plan Amendments Act of 1980); Connolly v. Pension Guaranty Corp., 475 U.S. 211 (1986) (challenging constitutionality of withdrawal liability provisions of Multi-employer Pension Plan Amendments Act of 1980).

and evaluate the non-economic impacts of the regulation, before making its decision.

1. The Public Good Achieved by the Regulation

The state must articulate a legitimate purpose for its action. This step is similar to the traditional element articulated in so many takings cases: What is the nature of the governmental regulation? How compelling is it? It does not matter whether that purpose is an attempt to abate a public nuisance, or to effect a public good. It only matters whether the state gives voice to a purpose that is within its purview to seek. This element generally will not be difficult to satisfy.

2. The "Cost" to the Regulated Owner

This step is similar to the tests of diminution in value,[386] investment-backed expectation,[387] and economic viability.[388] The difference is that under the aforementioned steps A and B the property interest at issue has already been established, thereby providing the "denominator" in the cost equation. The value of those two previous steps here becomes apparent: if the interest is already recognized as a category of property interest, then it is much easier to calculate the true effect of the regulation.

Suppose, for example, a property interest including the traditional estates (mineral, surface, support, and air), and a proposed regulation partially constraining the mineral right. Having identified the interest at stake (the mineral right) the courts will be in a much better position to analyze the cost of the regulation. The courts would not be tempted to reclassify the interest as a physical right, the regulation of which causes the loss of 2% or 5% of the physical parcel. The analytical framework will be clear, consistent both internally and with state law, and legitimate.

386. *See generally* Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413, 415 (1922) (stating right to coal consists in right to mine it, and hence rule that makes it commercially impracticable to mine coal has same effect for Constitutional purposes as appropriating or destroying it).

387. *See* Kaiser Aetna v. United States, 444 U.S. 164, 175 (1979); Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978).

388. *See* Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1015 (1992); *Penn Central*, 438 U.S. at 138 n.36.

3. Economic Protection Afforded by Police Power

In calculating the benefits of the regulation the courts must employ a broad notion of economic "standing," accounting for the ultimate consequences of the action, and not just its direct effects. In having committed themselves to cost-benefit analysis, the courts should be required to do it right. Thus, the courts should consider the benefits not only to the private property owner, but also to the economy at large.

For example, the imposition of navigational servitude on Kuapa Pond[389] may have reduced the property values of those parcels abutting the pond and eliminated the owner's ability to collect the homeowner's fee due to increased public use of the marina and channel. However, the restriction would have had positive economic effects as well. The increase in use due to public access would benefit the local economy. Likewise, David Lucas[390] could write off the regulatory loss, an unexamined benefit. Home prices probably experienced some upward pressure when the potential supply decreased by two, benefitting both individual homeowners seeking home equity loans or selling their homes, and the local tax base (or at least partially offsetting the loss of income from these two properties). The Nollans[391] were being permitted to build a much larger and more luxurious home on the beach where they had not theretofore lived. In addition to this direct benefit was the benefit to all homeowners of an improved housing stock. Monsanto[392] received financial benefits from having its pesticides registered with the federal government. Finally, First English Church[393] was being saved the risk of a lawsuit, which would have provided some benefit in the form of reduced insurance rates.

Thus, regulatory costs often have hidden benefits, and the courts should be made to account for them if they are going to use this line of analysis to determine whether a regulation has taken private property. Once the courts are finished with this comprehen-

389. *See Kaiser Aetna*, 444 U.S. at 180.
390. *See Lucas*, 505 U.S. 1003.
391. *See* Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987).
392. *See* Ruckelshaus v. Monsanto, 467 U.S. 986 (1984).
393. *See* First English Evangelical Church v. County of Los Angeles, 482 U.S. 304 (1987).

sive assessment, they should analyze the next element: the economic costs imposed by the regulation.

4. Economic Costs Imposed by Exercise of Police Power

In addition to the direct costs of regulation are indirect costs, another economic standing question. After the court has assessed the direct costs outlined in Section 2 of this Part, and has assessed the indirect economic benefits afforded as outlined in Section 3 of this Part, it should examine the indirect costs. These are the detriments to the larger economy. For example, factors such as depressed investment resulting from regulations and "demoralization costs"[394] should be part of this calculus. The local economy near the Nollans[395] may have suffered as a result of tourists' or locals' inability to see the ocean from the road with the new house in place. First English Church[396] may have lost congregation members as a result of being unable to run its camp, interfering with its ability to minister to the community. The Lucas family[397]—if indeed they were to have lived in one of the homes—would not be able to live in the community, depriving the local economy of their contribution. Once these indirect costs and benefits are assessed, the courts can make the final calculation: non-economic benefits and harms.

5. Analysis of Non-Economic Benefits and Injuries

Finally, the courts must articulate and separate the economic from the non-economic injuries: the importance of eagle feathers in Native American religious rituals,[398] the importance of the right to exclude,[399] the security provided by improved flood control,[400]

394. *See* Michelman, *Property, Utility and Fairness*, *supra* note 182, at 1214.

395. *See Nollan*, 483 U.S. 825.

396. *See First English*, 482 U.S. 304.

397. *See* Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992).

398. *See* Andrus v. Allard, 444 U.S. 51, 65 (1979) (holding that denial of traditional property right—right of Indians to use eagle feathers for religious rituals—does not always amount to taking).

399. *See, e.g.*, Dolan v. City of Tigard, 114 S. Ct. 2309, 2316 (1994); Nollan v. California Coastal Comm'n, 483 U.S. 825, 831 (1987); Kaiser Aetna v. United States, 444 U.S. 164, 179–80 (1979).

400. *See Dolan*, 114 S. Ct. at 2316 (finding no taking where permit conditioned upon redevelopment, contrasting this condition with requirement that owner give public

the connection to the past afforded by historical preservation,[401] the loss of autonomy caused by regulation,[402] and the loss of liberty.[403] These intangibles are often overlooked, producing inconsistent results. If they, like direct and indirect economic costs and benefits, are expressly considered within the takings analysis, the framework will reflect more accurately the complexity and precision the problem demands.

D. Calculating the Outcome

Once the courts have expressly analyzed all of the criteria demanded by the problem, they are in a position to announce reliable, consistent, non-reversible decisions. The Supreme Court has expressed its preference for economic data. This proposed modified framework merely incorporates the unarticulated assumption that market logic should inform the analysis of constitutionally protected property interests by separating the work of law from the work of markets. This framework simply returns control over that debate to the appropriate forum: the legislature and the courts. Application of the proposed framework would facilitate consistent outcomes, providing a rational guide to public and private actors negotiating the extraordinarily difficult process of improving the lot of both individuals and the polity.

VIII. CONCLUSION

This Article has argued that the doctrine of regulatory takings has been beset by a decisional framework that is ill-suited to stable

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access to his land, noting that owner here retained right to exclude others, and hence was not deprived of "one of the most essential sticks in the bundle of rights commonly characterized as property").

401. *See* Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 107–10, 132–35 (1978) (holding that actions pursuant to New York City's comprehensive plan to preserve structures of historic and aesthetic interest were not takings).

402. *See generally* Nollan v. California Coastal Comm'n, 483 U.S. 825, 836 (1987) (stating that commission could legally require Nollans to provide spot on their property for passersby to view ocean).

403. *See Penn Central*, 438 U.S. at 136 (holding that city law is not rendered invalid by its failure to provide "just compensation" whenever a land owner is restricted in exploitation of property interests, such as air rights, to greater extent than provided for by applicable zoning laws).

constitutional jurisprudence: the random splintering of market logic. While the historical ties to industrialization and the development of a market economy and administrative state are clear, they are not inevitable. Market logic applied to takings disputes has caused a proliferation of doctrines and elements. It has, most importantly, shifted the authority to define property from the state to the individual. This shift has destabilized property and takings law. The Supreme Court must recognize that it has gone beyond classical liberalism in embracing market logic as its framework for deciding these cases. It must now choose a framework that is compatible with stable constitutional jurisprudence. This Article has proposed one such doctrinal approach.

Whether Justices Holmes and Brandeis were describing the conditions of the early twentieth century, predicting the future, or attempting to direct the development of social, economic, and legal relations, it is clear that over seventy years of litigation and commentary have further confused the debate started in *Pennsylvania Coal Co. v. Mahon*. There must be some agreement over the role of the administrative state in society, and some sense of the difference between legal, social, economic, and political questions. If the market wins, the market may lose.