The Hidden Structure of Takings Law

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ARTICLES

THE HIDDEN STRUCTURE OF TAKINGS LAW

JEREMY PAUL

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THE HIDDEN STRUCTURE OF "TAKINGS LAW"

JEREMY PAUL

The American legal community remains perplexed and fascinated by the question of which exercises of governmental power should fall prey to the constitutional ban on uncompensated takings of property. Intense interest stems partly from the Supreme Court's professed inability to provide a general solution to the takings problem and partly from


2. Justice Brennan first characterized the Court's takings cases as a set of "ad hoc factual inquiries," Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978), and the Court has repeatedly emphasized its adherence to his formulation. Pennell v. City of San Jose, 485 U.S. 1, 10 (1988); Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 494-95 (1987); MacDonald, Sommer & Frates v. Yolo County, 477 U.S. 340, 349 (1986); Hodel v. Virginia Surface Mining and
the undeniable appeal of contrasting points of view.3 Students of the takings controversy, however, are perhaps most intrigued by the extent to which it raises fundamental questions of political life. Which resources should be treated as crucial to personal well-being and thus either exempt from any collective redistribution or at least shielded against uncompensated loss? Will a strict compensation requirement encourage shy or self-reliant people to trust communal bonds, or will it prevent the collective control necessary to sound resource management? Are satisfactory general formulations available to decisionmakers responsible for identifying those items of value which the government may purchase but not destroy?

Two features of takings jurisprudence highlight the Supreme Court's reactions to the takings issue and these more general questions it poses. First, throughout its history the Court has been reluctant to invalidate legislative or executive action for failing to provide for compensation.4 Instead, a longstanding, but perhaps wavering, judicial consensus


3. Professor Michelman evokes the roots of the controversy with his eloquent contrast between Hobhouse's conviction that it is unjust for one citizen to suffer so that many will benefit and Holmes's pragmatic observation that this "injustice" is inevitable. Michelman, Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law, 80 Harv. L. Rev. 1165, 1165-66 (1967). Contemporary scholars have alternatively condemned or recharacterized this inevitability. Compare R. Epstein, Takings: Private Property and the Power of Eminent Domain 263-82 (1985) and E. Paul, Property Rights and Eminent Domain 261-66 (1987) (urging courts to invalidate legislative action more frequently) with F. Boselman, D. Callies & J. Banta, The Taking Issue (1973) (suggesting that land use regulations should be immune to takings clause challenges) and Sax, Takings, Private Property and Public Rights, 81 Yale L.J. 149 (1971) (defending broad governmental authority to restrict property without compensation in order to protect public rights).

Professor Ackerman has perhaps been the most struck by the attractiveness of competing views of the takings clause. He argues that we cannot resolve the takings dilemma without making a choice between "two fundamentally different ways of thinking about law, each of which has roots in our present legal culture." B. Ackerman, Private Property and the Constitution 4 (1977).


The Court has recently solidified its reluctance to award compensation by insisting that claimants prove both that they have no monetary alternative to a constitutional action and that application of the challenged restriction will certainly result in a taking. See Pennell v. City of San Jose, 485
has supported broad governmental authority to adjust the benefits and burdens of economic life within narrow constraints of fairness and justice. Second, the Court has more recently paired the principle of judicial deference with a commitment to ad hoc factual inquiry as the preferred method for resolving takings disputes. Accordingly, the Court has devoted its energy to articulating a series of considerations or factors whose application has led to the denial of the vast majority of takings claims.

Contemporary takings decisions reaffirm both aspects of the Court's traditional approach and bring the intellectual relationship between them closer to the surface. Justice Stevens' opinion in *Keystone Bituminous Coal Association v. DeBenedictis*, which upheld Pennsylvania mining regulations against constitutional challenge, embraced ad hoc inquiry and extended the Court's longstanding favorable treatment of legislatively imposed restrictions. In contrast, Justice Scalia's opinion in *Nollan v. California Coastal Commission*, which thwarted the Commission's


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6. *See cases cited supra* note 2. The Court's view that takings controversies hinge on particular circumstances is not entirely new. See United States v. Central Eureka Mining Co., 357 U.S. 155, 168 (1958); *Pennsylvania Coal Co.*, 260 U.S. at 413. *See also Michelman, Possession vs. Distribution in the Constitutional Idea of Property, 72 IOWA L. REV. 1319, 1338-40 (1987)* (suggesting that the Court's modern takings jurisprudence began with the Court's embrace of ad hoc inquiry and that such inquiry served to permit deference to the legislature because particularistic calculations appeared inconsistent with a property notion strong enough to transcend popular will).


8. 480 U.S. 470 (1987); *see cases cited supra* note 4.

efforts to trade a building permit for public access to the beach, reveals the extent to which ad hoc inquiry as currently practiced provides an insufficient defense of the Court's deferential attitude towards regulation of property. *Nollan* may therefore indicate a changed court inching towards a broader attack on previously settled takings jurisprudence.10 This Article begins as a defense of the Court's more flexible approach against any such attack.11

The trend toward more frequent judicial invalidation of legislative restrictions may be challenged most directly with a critical analysis of the specific arguments put forward in cases like *Nollan*. This Article takes up that project and suggests that Justice Scalia's reasoning gains a false allure from clever appeals to neutrality that cannot withstand serious analysis. Two central points may be summarized here. First, Justice Scalia argued that, although a government is constitutionally empowered to restrict what landowners may build on their land, it may place on the owners' right to build only those conditions that serve the precise governmental purpose justifying the initial regulatory authority.12 He did not,
however, propose a meaningful way to determine the correct level of generality at which to express governmental purpose: Scalia assumed in *Nollan* that new buildings might cause certain harms that the Commission is empowered to prevent, but he saw no connection between these harms and the Commission’s desire to grant access to the beach.13 If the California Coastal Commission were permitted broadly to describe its goal as promoting the best use of state beaches and adjacent land, however, the Commission could easily argue that restricting the building of private beachfront homes and demanding that members of the public be permitted to walk across the beach served the same purpose.14

Justice Scalia also contended that government may not diminish a landowner’s right to build by simply telling the owner, prior to purchase, that new restrictions will apply.15 Scalia contrasted this rule with the Court’s earlier holding in *Ruckelshaus v. Monsanto Co.* that allowed the government to reveal secret pesticide data without compensation, in part because the owner knew disclosure would occur when the data was included in an application for a permit to sell poisonous chemicals.16 Compensation for the pesticide secrets was unnecessary, Scalia argued in *Nollan*, because the owner exchanged the data for a governmental benefit.17 However, Scalia relied solely on our intuitions to explain why citizens have a right to build but may sell pesticides only with government permission. This Article hopes to demonstrate that Scalia took unfair advantage of our legitimate fear of hazardous chemicals to beg *Nollan*’s question of whether it is fair to tell all owners of oceanfront property that they must grant public access if they wish to construct a beachfront home.

At root, however, this Article is an effort to extend analysis of the takings question beyond criticism of any particular case or even of a particular perspective. Its principal goal is to examine the intellectual structure of the takings problem critically in order to question the current framework of scholarly debate. Recent writings on the takings clause have presented two contrasting styles of constitutional adjudication.

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14. For further discussion, see infra Part II(A)(1)(f), text accompanying notes 175–82. For an alternative and astute attack on Scalia’s argument that highlights tensions between his views in *Nollan* and his dissent in *Pennell v. City of San Jose*, 485 U.S. 1, 15 (1988), see Michelman, *supra* note 11, at 140–53.
15. *Nollan*, 483 U.S. at 833 n.2.
According to one view, the Court should seek to develop a unified theory that would enable it to distinguish rather predictably between takings requiring compensation and mere regulations under the police power. Proponents of this more formalistic approach argue that clear standards will better enable investors to make intelligent choices when committing resources to capital projects. Moreover, they suggest that the uncompromising constitutional language banning uncompensated takings of property requires the Court to apply a unified set of principles to determine when a taking has occurred. Above all, the search for a single theory to resolve the takings controversy appeals to our collective fear that the Court’s current ad hoc balancing risks straying so far from “the text and history of the Constitution [as to become] the antithesis of the rule of law.”

In contrast, the second style of constitutional adjudication is supposedly typified by the Court’s embrace of particularistic judgments as the preferred method in takings cases. Here takings law is presented as a “pragmatic ethical issue [that] defies reduction to formal rules,” and the Court is to be applauded for resisting conceptual straightjackets that might hinder regulation that comports with current social conditions. The hope is that once we can free ourselves from the search for the holy grail of a unified takings theory, courts will be freer to consider the many

18. For scholars seeking a general solution to the takings problem, see, for example, R. Epstein, supra note 3 (challenging the entire New Deal as built on unconstitutional takings); Costonis, Presumptive and Per Se Takings: A Decisional Model for the Taking Issue, 58 N.Y.U. L. REV. 465, 512-23 (1983) (suggesting a four-part inquiry to determine when compensation is required); Humbach, A Unifying Theory for the Just-Compensation Cases: Takings, Regulation & Public Use, 34 RUTGERS L. REV. 243, 254-61 (1982) (proposing a unified theory distinguishing protected property rights from unprotected economic freedoms); Peterson, Part I and Part II, supra note 1 (suggesting that government must compensate whenever it intentionally deprives citizens of economic value unless lawmakers are punishing wrongful conduct or unless government created the economic value and reserved right to alter it); Sax, Takings and the Police Power, 74 YALE L.J. 36, 67 (1964) (suggesting that government should pay for injuries caused when government acts in its enterprise but not its sovereign capacity). But cf. Sax, supra note 3, at 150-51 (retracting the view that the desirability of compensation could be determined solely by using the enterprise/sovereign distinction).

19. Rose-Ackerman, Against Ad Hocery: A Comment on Michelman, 88 COLUM. L. REV. 1697 (1988). For a convincing explanation of why it is just plain wrong to leap from the claim that clear standards will promote investor efficiency to the argument that the government should pay compensation more often than it does now, see Kaplow, Economic Analysis of Legal Transitions, 99 HARV. L. REV. 509, 529-30, 551-52, 602-07 (1986).

20. Peterson, Part I, supra note 1, at 1342-44.


22. Radin, supra note 11, at 1684.
conflicting values at stake in takings cases. No apology need be made for appealing to "balancing—or better, the judicial practice of situated judgment or practical reason"—since these techniques are "not law's antithesis but a part of law's essence."  

Careful analysis of takings doctrine, however, reveals that the contrast between styles of takings adjudication may be overdrawn. Those seeking a unified answer to the takings problem are not doomed to failure because unified theories are insufficiently nuanced to account for particular situations; rather, the problem is that there are simply too many compelling and conflicting theories for any to account accurately for American attitudes toward the takings dilemma. This Article will explain how and why this is so through an analysis of conflicting theories of property at the root of takings law.

At the same time, the Court's professed allegiance to so-called "ad hoc inquiries" is far more formalistic than it appears. Indeed, as this Article will demonstrate in some detail, the Court's actual application of

23. Professor Ross has been particularly eloquent in arguing that clashing philosophical perspectives and divergent personal characteristics among Supreme Court Justices will unravel any attempt to devise a single, value-neutral framework for resolving takings disputes. Ross, Modeling and Formalism in Takings Jurisprudence, 61 NOTRE DAME L. REV. 372, 399-414 (1986). Similarly, Professor Michelman has hypothesized that "decisional rules simply cannot be formulated which will yield other than a partial, imperfect, unsatisfactory solution [to the takings problem] and still be consonant with judicial action." Michelman, supra note 3, at 1171.


25. The effort to explain the takings debate by resorting (some might say retreating) to general principles has a distinguished history. Professor Michelman's appropriately revered treatment attempts to clarify the compensation issue by considering various theories of property as inspiration for a rationalized compensation practice. Michelman, supra note 3, at 1202-1213. Professor Ackerman's illuminating discussion presents the takings debate as part of a deeper division within American legal theory. He contrasts those who solve legal problems by attempting to articulate a "Comprehensive View" of our legal and ethical practice ("Scientific Policymakers") with those who view themselves as "law-takers" seeking only to reach decisions most consistent with established social expectations ("Ordinary Observers"). B. ACKERMAN, supra note 3.

Although Professor Ackerman is primarily concerned with pushing the legal profession toward philosophical inquiry, id. at 175-89, he also sees alternative approaches to the notion of property as central to the takings problem. In particular, Professor Ackerman contrasts social property—ownership claims that can be easily defended as consistent with social practice—with legal property—ownership claims whose validity frequently must be established by lawyers who must often rely on documentary proof. Id. at 116-18, 156-67.

I share Professor Ackerman's view that both these fundamentally irreconcilable notions of property are part of American legal practice. See Paul, Searching for the Status Quo, 7 CARDOZO L. REV. 743, 757-65 (1986). This Article attempts to take this insight in directions different from those pursued by Professor Ackerman. The concern here is with the conceptual underpinnings of property that produce its contradictory visions, the ways in which these competing visions are reflected in contemporary doctrine, and the implications for future takings jurisprudence. It is appropriate to acknowledge, however, the extent to which this Article builds on Professor Ackerman's significant contribution.
the multi-factor balancing test reveals a commitment to precisely the same formal models of property that wreak havoc with attempts to develop a single unified theory. Thus, the problem with current takings doctrine is not that the Court is engaged in multi-factor balancing. Rather, the difficulty is that the Court is often willing to apply its many factors without explicitly linking them to the Court's underlying vision of the values private property serves in a democratic society. This Article is intended to push the Court toward more candid discussion of its vision of property.

Part I describes the hidden structure of the takings controversy. It begins by portraying the difficulty of determining when compensation is constitutionally required as only one instance of the more general problem in American legal theory of separating the sovereign's coercive authority from its purportedly neutral role in establishing societal ground rules. The claim here is that property's twin roles—as protector of individual rights against other citizens, and as safeguard against excessive government interference—are more difficult to reconcile than is

26. Contemporary attention to this problem has focused on the inadequacy of the so-called public/private distinction. See The Public/Private Distinction, 130 U. PA. L. REV. 1289 (1982). That distinction assumes the government must exercise coercion to restrict individual prerogatives but may do so only concerning matters sufficiently "public" to warrant state intervention. In contrast, "private" affairs must be permitted to proceed largely unchecked, albeit within limited ground rules such as property and contract rights that are necessary to protect the public interest. Progressive legal scholars have repeatedly demonstrated the impossibility of drawing an objective or even a coherent line between public and private when they are defined this way. Frug, Property and Power: Hartog on the Legal History of New York City (Book Review), 1984 A.B. FOUND. RESEARCH J. 673, 678-87; Mensch & Freeman, Liberalism's Public/Private Split, TIKUN, Mar.-Apr. 1988, at 24. Accordingly, courts remain free to manipulate these terms to obtain particular results. See Klare, The Public/Private Distinction in Labor Law, 130 U. PA. L. REV. 1358, 1386-1415 (1982) (exploring the shifting meanings of "public" and "private" and arguing that public/private rhetoric helps legitimate the status quo).

Ultimately, however, the appellations "public" and "private" might be viewed simply as after-the-fact names given to lines we struggle to draw between our desire for collective action and our longing for individual freedom. This conflict is neither unique to a particular legal system nor one that is soon likely to disappear. We may come to a greater understanding of how group dynamics shape individual personalities. See Kerr, Chronic Anxiety and Defining a Self, THE ATLANTIC, Sept. 1988, at 35. At given moments in time, however, particular decisions made at the point of a sovereign gun will still feel different from those governed only by more subtle group forces. This Article, therefore, devotes little attention to the general failings of the public/private distinction. It focuses instead on illuminating the role that a concept of property must play for a liberal, democratic state meaningfully to patrol the borders between collective control and individual responsibility. See infra Part I, text accompanying notes 39-81. Current takings decisions, the article concludes, fail to account for the Court's role in defining property from this more general perspective. See infra Part III, text accompanying notes 336-413.
generally acknowledged. More specifically, Part I describes how private law's purported function of allocating resource claims and public law's professed role of protecting already allocated resources threaten to become indistinguishable, thereby imperiling coherent judicial enforcement of the just compensation clause. This problem can be seen most clearly in cases where the losing party in a traditional private law dispute charges that the court has violated constitutional property protections by altering previously settled law.

27. Professor Singer's recent work suggests that describing property as a shield against others is an oversimplification. Property law, he correctly points out, also enables people to participate in relationships by crystallizing mutual expectations and by altering expectations to satisfy reliance interests. Singer, The Reliance Interest in Property, 40 STAN. L. REV. 611, 663-701 (1988).

For purposes of this Article, however, it is sufficient to focus on the extent to which property law is responsible for drawing lines between one citizen's rights and another's. The goal here is to describe the relationship between defining property rights and protecting citizens against government. Recognizing that reliance interests often serve as the basis for protecting vulnerable parties within relationships rightly adds another factor to property's well-recognized goals of rewarding labor, stabilizing possession, and creating well-defined interests to promote human exchange. But 'expanding the number of appropriate grounds for property protection simply increases the likelihood of conflict among different property rationales and thereby only deepens the dilemma of finding a sufficiently formal approach to private law disputes that will form a core concept of property useful for constitutional analysis.

28. Professor Sax's writings have been strongly influenced by the analogy between traditional private law disputes and takings controversies. He argues that environmental regulations, such as those prohibiting strip mining, should not obligate governments to compensate mine owners, even if the regulations deprive the mine owner of substantially all use of the land. Legislative prohibitions, he contends, are no different from judicial decisions enjoining the mining at the behest of a nearby landowner who alleges that subsidence damage to that person's land renders the strip mine a nuisance. Sax, supra note 3, at 152-54.

Professor Sax is right that both situations raise takings issues, but he is less persuasive in explaining why no compensation is required. If the strip miner had a clear right to proceed prior to the nuisance action and the court decided to amend nuisance doctrine to reflect new environmental sensitivities, see, e.g., Prah v. Maretti, 108 Wis. 2d 223, 321 N.W.2d 182 (1982) (extending nuisance doctrine to protect sunlight's new-found economic value as energy), why does the prospective strip miner not also have a valid takings claim?

Professor Sax suggests that takings claims are invalid whenever the newly prohibited use has spillover effects on neighbors or the general public, but he is forced to define spillover effects as those where the prohibited use interferes with the neighbor's use of her physical space or the public's use of a common. Sax, supra note 3, at 161-64. On this view, the government, without paying compensation, could outlaw a competing business because it interfered with the neighbor's effort to attract customers or could order the destruction of a home because it blocked a neighbor's view. The state would still have to compensate, however, for minuscule physical takings such as the invalidated regulation ordering landlords to accept installation of cable television equipment. Loretto v. Telepromp'ter Manhattan CATV Corp., 458 U.S. 419 (1982). For discussion of how Sax's view flows from a desire to cling to what is called here the physicalist model, see infra Part III(A), text accompanying notes 356-71.

29. Because courts that are willing to describe their holdings as changing settled law frequently make their decisions prospective only, see, e.g., Friendswood Dev. Co. v. Smith-Southwest Indus., 576 S.W.2d 21 (Tex. 1978), the relationship between private law disputes and constitutional definitions of property is discussed most often in cases where courts or legislatures alter available remedies
Part I's analysis of the conflict within property theory proves that the just compensation problem is even more intractable than courts and commentators have long recognized. The traditional approach emphasizes the difficult question of when government should be permitted to alter already established values without reimbursing those harmed by the change. But because government is largely responsible for establishing the rules governing economic life, it can be said to have created those values in the first instance. Each governmental action therefore raises not only the question of whether values may be altered but also of which values should be treated as already established.

To help enhance our understanding of various solutions alternately embraced and ridiculed by scholars and jurists, Part I continues by describing two approaches to the takings problem. Although each approach is unsatisfactory and in conflict with the other, both are nevertheless directly responsive to the dilemmas in property theory previously identified. The first approach, here called the physicalist model, stems from earlier notions of property as consisting of land or physical objects. In today's constitutional context, the physicalist model most closely resembles "the permanent physical invasion test," which the Court embraced in \textit{Loretto v. Teleprompter Manhattan CATV Corp.}\textsuperscript{31} The and the losing party claims that the new, usually monetary, remedy constitutes a taking for private use. See, e.g., Blakeley v. Gorin, 365 Mass. 590, 313 N.E.2d 903 (1974); Boomer v. Atlantic Cement Co., Inc., 26 N.Y. 2d 219, 309 N.Y.S.2d 312 (1970). It is a simple extension, however, for a defendant losing a nuisance case to claim that a change in prior law entitles him or her to compensation for the loss of the use now prohibited by a common law court. See \textit{generally}, Thompson, \textit{Judicial Takings}, 76 VA. L. REV. 1449 (1990) (offering the first sophisticated treatment of the idea that court decisions may violate the takings clause and arguing for application of takings protections to the judiciary).

\textsuperscript{30} Professor Peterson has also recently argued that "the Court's takings doctrine is in far worse shape than has generally been recognized." Peterson, \textit{Part I, supra} note 1, at 1303-04. She too notes the importance not only of defining when a taking has occurred but also of crafting a constitutional definition of property. \textit{Id.} Her view, however, is that although the Court's doctrine is confused, the results of takings cases are predictable and reflect an underlying judicial sense of fairness. In contrast, this Article demonstrates that the judiciary's ideas of fairness in this context are built on contradictory notions of property such that the only predictable outcome is continued judicial vacillation. Indeed, one wonders how anyone could infer predictable outcomes from recent cases decided by 5-4 votes. See \textit{id.} at 1342 (using \textit{Nollan} and \textit{Keystone} as bases for arguing that one can frequently predict the outcome of takings cases).

\textsuperscript{31} 458 U.S. 419 (1982). The Court's holding that "a permanent physical occupation authorized by government is a [compensable] taking without regard to the public interests that it may serve," \textit{id.} at 426, resembles what is called here the "physicalist model" because it draws important conclusions from the presence or absence of physical changes occurring in the material world. Today's "physical invasion test," however, is a hollow shell, if not precisely the opposite, of a truly physicalist conception of property. The contemporary Court considers the presence of a permanent physical invasion a per se taking, but the absence of a permanent physical invasion does not establish that no taking has occurred. See Michelman, \textit{supra} note 3, at 1226-29 (exploring possible reasons...
physicalist model is appealing because it holds out hope for simultaneously resolving private law controversies and constitutional disputes. In short, if courts could take their cues concerning the essence of ownership from a designated set of physically owned things, these things could form the core of the individualized property right protected against both citizen intrusion and government interference. By contrast, the second approach, called here the market model, attempts to settle difficult issues of property law in sequential order. Its guiding concept is that government can establish a set of background rules that the just compensation clause protects against sudden or radical alteration. The importance of the market model necessitates some discussion of its early development.

Part II applies the intellectual framework developed in the first part to the doctrines and rationales the Court has employed in takings cases. In particular, the Court's current three-factor test for evaluating takings claims is criticized for its reliance on general solutions to the underlying problems of property law that have failed to provide a coherent framework for takings jurisprudence. One doctrinal theme stands out. Since 1878, the Supreme Court has sharply distinguished the question of when an exercise of governmental power requires compensation from that of how much compensation is constitutionally required. As Professor Michelman has observed, however, these two questions are different versions of the same inquiry. A purely physicalist notion of property produces the false impression that valuing a taken object is a separate inquiry from determining whether compensation must be paid for the taking. Once it is understood; however, that ownership of an object consists of a set of legal rules that permit the owner to exercise various sorts of control over the physical thing, it becomes impossible to separate the question of how much the item was worth from the question of which set of legal rules the constitution immunizes against uncompensated change.

underlying the Court's view). The Court, for example, has recently held that the right to bequeath fractional interests in land is constitutionally protected. Hodel v. Irving, 481 U.S. 704 (1987). Once property rights are seen as including a set of legal rules that protect individual decision-making authority over resources, however, the difficult value judgments inherent in establishing those rules cannot be escaped by pointing to the set of physical things owned by private parties. See infra Part I (B)(1), text accompanying notes 55-72; see also Paul, supra note 25, at 757-65.

32. See Boom Co. v. Patterson, 98 U.S. 403 (1878) (awarding the claimant the value of the land for highest and best use and ignoring the possible argument for the government that since that use could be validly taken through denial of a government charter, it should not be a constitutionally recognized item for just compensation).

33. Michelman, supra note 3, at 1167 (describing the question of "how many dollars compose the just 'compensation' which must be paid when 'property' is, admittedly, being 'taken' " as another formulation of the question of when compensation must be paid).
For example, can the question of whether the government would be constitutionally permitted to strip an owner of the right to sell a privately owned object, without paying compensation, be separated from the question of whether the government that takes the object must pay the owner the amount the object would bring on the open market? Part II's discussion of the inadequacies of the physical invasion test and the origins of the market model concludes that because these two questions are inseparable, the Court should abandon its slavish adherence to the notion that takings claimants have a constitutional right to market value compensation.34

Part III attempts to demonstrate how Part I's framework also illuminates the confusion in scholarly approaches to the takings problem. Part III emphasizes the extent to which general solutions have failed to resolve the dilemmas posed by the fifth amendment's just compensation clause. The point, however, is not merely to dwell on the inadequacy of existing judicial and academic theories, for we would not expect constitutional jurisprudence to have fared much better than contemporary philosophy at drawing the line between individual rights and collective needs.35 Instead, this Article endeavors to show that, despite a professed commitment to ad hoc solutions, courts and many commentators have continued to seek general solutions that prevent us from thinking seriously enough about the question the framers implicitly asked us to address: When do individual contributions to collective welfare cease to be a proper price of communal citizenship and become an unfair sacrifice of the few to the many? Part III's concluding section offers some general

34. Professor Costonis has already persuasively argued that certain governmental regulations should be accompanied by fair or reasonable compensation rather than the traditional market value compensation associated with eminent domain. Costonis, "Fair" Compensation and the Accommodation Power: Antidotes for the Taking Impasse in Land Use Controversies, 75 COLUM. L. REV. 1021, 1021-23 (1975). His arguments, however, have fallen on deaf judicial and legislative ears.

Costonis believed that the courts' unwillingness to consider alternative measures of compensation reflected the judiciary's blind allegiance to the police power and the power of eminent domain as occupying the field of government regulatory authority. Thus, he suggested a third power, "the accommodation power," as a way out of this box. In contrast, this Article argues that rigid compensation practices derive from unreflective judicial allegiance to models of property law aimed at avoiding the courts' role as expositors of human values. See infra Part II(A)(2)(d), text accompanying notes 223-54. Perhaps our combined efforts will prove more successful.

35. For a familiar but dramatic controversy within contemporary philosophy, compare J. Rawls, A THEORY OF JUSTICE 60-83, 150-61 (1971) (arguing that justice requires a background structure of society that will tolerate only those inequalities of wealth and opportunity that benefit the relatively disadvantaged) with R. Nozick, ANARCHY STATE AND UTOPIA 149-231 (1974) (focusing on actual historical events and transactions to demonstrate the unjustness of governmental efforts to secure specific distributions of wealth). But cf. Stick, Turning Rawls into Nozick and Back Again, 81 NW. U.L. REV. 365 (1987) (suggesting that differences between Rawls and Nozick stem more from competing political commitments than from conflicting philosophical methodologies).
thoughts intended to spur continued dialogue about this extraordinarily difficult question.

Finally, a brief comment on the Article's method is in order. Today's progressive legal scholars run the risk of placing too much weight on the general failure of neutral principles to justify particular judicial outcomes. Proponents of concrete positions such as the one adopted by Justice Scalia in Nollan will naturally challenge their critics to identify an alternative substantive view and to justify that view according to some criteria not victim to the same charges of false neutrality. At this point, progressive scholars hazard a fatal error. Because so much is at stake in our decisions concerning the nature of property rights in late twentieth century America, there is an overwhelming temptation...
to break trust with intellectual conservatives and devote more energy to winning the argument over the proper judicial role than to developing a shared sense of the complexity of the problem. This Article can avoid that mistake only with a leap of faith. The implicit assumption here is that the most effective challenge to defenders of traditional property rights is a comprehensive description of the dilemmas property theory

UNGER, PASSION 5-15 (1984) (attempts to sketch a view of modernism that will escape the predicament posed by the uneasy feeling that although a meaningful life demands relatively fixed contexts, any context can be transcended through sufficient exercise of individual will). The political dilemma is equally great. Critical legal scholars are deeply committed to democratic decision making. See, e.g., Frug, The Ideology of Bureaucracy in American Law, 97 HARV. L. REV. 1276 (1984) (suggesting that human freedom might best be pursued through meaningful participatory democracy and sharply criticizing justifications of contemporary bureaucracy); Stone, The Post-War Paradigm in American Labor Law, 90 YALE L.J. 1509 (1981) (arguing that contemporary labor law relies on an inaccurate model of industrial pluralism and suggesting that the privatization of labor law issues wrongly removes class conflict from democratic politics). Contemporary political and economic conditions, however, may have helped create a citizenry that would vote to reproduce large portions of the hierarchical political structure that critical legal scholars are equally committed to changing. But see T. FERGUSON & J. ROGERS, RIGHT TURN: THE DECLINE OF THE DEMOCRATS AND THE FUTURE OF AMERICAN POLITICS (1986) (effectively demonstrating that the supposed commitment to the economic status quo characteristic of the Reagan era can be found more readily among campaign contributors than among the American public)

One response would be to suggest that contemporary voting is simply not democratic since it does not occur under ideal conditions. See J. HABERMAS, COMMUNICATION AND THE EVOLUTION OF SOCIETY 186-87 (T. McCarthy trans. 1979) (suggesting meaningful democracy would require background institutions that could be agreed upon by free, equal people engaged in discursive will formation). Indeed, some similar idea might be necessary to determine whether accession to a national referendum rejecting democratic workplace control would be a victory for democracy. Once ideal democratic conditions become a prerequisite for honoring democratically reached outcomes, however, real-world political life presents the seemingly never-ending dilemma of whether particular disputes should be resolved autocratically, in favor of further approaching ideal conditions, or democratically, despite current inequalities that may skew the vote. (For the growing importance within property theory of ethical approaches that respond to nonideal conditions, see Radin, Market Inalienability, 100 HARV. L. REV. 1849, 1915-21 (1987); Radin, Residential Rent Control, 15 PHIL. & PUB. AFF. 350, 352 (1986).)

This Article rejects the possibility that tactical judgments concerning when progressives should depart from straightforward democratic outcomes can be made in advance of concrete political settings. For that reason, it assumes critical legal scholars—no less than liberal scholars—will be forced to balance competing considerations and rely on conventional forms of justification such as weighing costs and benefits and placing subjective value on important aspects of human life. The tactical judgment made here is that only widespread agreement on a meaningful concept of property could produce a real-world political practice different from that of the current Court. This is particularly true because this Article's topic is a constitutionally based principle that must be sufficiently democratically enshrined to limit further democratic activity. Accordingly, the Article's goal is to expand the argument over the contemporary meaning of property, not to win it. For recent contributions to this ongoing debate, see Baker, Property and Its Relation to Constitutionally Protected Liberty, 134 U. PA. L. REV. 741 (1986); Cribbett, Concepts in Transition: The Search for a New Definition of Property, 1986 U. ILL. L. REV. 1; Michelman, supra note 6; Radin, Market Inalienability, supra; Singer, supra note 27.
poses for contemporary judges. The reader is left to determine whether understanding can be successfully linked to progress.

I. PROPERTY AND THE POSITIVISM PROBLEM

The concept of property holds two special places at the heart of American law. As the basis of our economic system, private property law can be viewed as the set of rules we use to resolve conflicts among individuals concerning control over tangible and intangible resources. These rules establish, for example, my right to live quietly in my house, although they might also deny me a chance to build a restaurant on my lot. More generally, they help define the interests I can ask courts to protect and the entitlements with which I may enter the world of commercial exchange.

Property law, however, performs a second, equally vital role. Not only can one citizen invoke property claims to enlist the state in a struggle against another, but each citizen can call upon property law to protect herself against actions of the government itself. The fifth amendment specifically prohibits takings of property for public use without just compensation. Therefore a concept of property is necessary to render the Constitution an effective safeguard against excessive governmental interference with individual life.  

But see Comment, Unemployment as a Taking Without Just Compensation, 43 S. Cal. L. Rev. 488 (1970) (arguing that courts should).

One strategy within property theory seeks to disrupt this familiar pattern by focusing on the extent to which government interferes, whether it acts or fails to act. Because government is charged with regulating the relations between people, every failure to protect one person provides implicit protection for another. If, for example, the government allows a factory owner to close a plant, it refuses to interfere with "property" rights only to the extent that it permits the owner to interfere with the jobs of workers that might just as easily receive "property" protection. On this view, the rhetoric of governmental interference risks a political slant because it hides the extent to which government must always act to protect one side of a dispute, for example, capital, against another, for example, labor. Cohen, Property and Sovereignty, 13 Cornell L.Q. 8, 11-14 (1927); Singer, supra note 27; see also Olsen, The Myth of State Intervention in the Family, 18 U. Mich. J. L. Rev. 835 (1985) (suggesting that the terms "intervention" and "nonintervention" are largely meaningless when applied to the relationship between government and family).

This Article accepts the political critique of governmental interference rhetoric, but asks a different question. Given the apparent difficulties with the idea of property as a protector against governmental interference, what intellectual attributes within property theory account for the persistence of that idea? It seems fair to say that governmental interference rhetoric still lies at the core of
At first glance, property’s twin roles seem entirely complementary. Each citizen can be described as having a set of property rights that grant control over certain resources and protect the citizen from both neighborly and governmental intrusion. The image of the individual home owner whose land is secure against all forms of trespass best conveys this notion of property.

The constitutional component of property law, however, confronts an obvious dilemma, whose relationship to private law property issues too often remains obscure. This dilemma can best be illustrated with an example that will be developed as the discussion proceeds. Suppose a dangerously powerful government wishes to occupy a piece of land for a public theater displaying patriotic tributes to its leaders. If the law

- the Court’s takings jurisprudence. See cases cited supra note 1. Nor would it be unfair to find it at the root of the takings clause itself. Note, The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment, 94 YALE L.J. 694 (1985) (authored by William Michael Treanor).

40. At this point, the example is inevitably misleading. The problem with seizing the theatre for tributes appears to be that personal encomiums are an insufficiently public purpose to justify using the power of eminent domain. This example, therefore, takes advantage of the readers’ hostility to the governmental purpose to highlight the difficulties of determining when compensation is required. But this is no coincidence.

The takings problem would be trivialized, however, if it were viewed simply as a matter of policing governmental motivations. This perspective would completely collapse the traditional public use question with the question of whether compensation must be paid. Private property would never be exempted from collective control unless the processes of collective action were malfunctioning. The difficulties of describing and justifying such an independent concept of property have indeed led courts and commentators to increase the importance of governmental purpose in analyzing when compensation is required. See id.; Sax, supra note 18, at 61-67. This Article will illustrate the difficulties with focusing on governmental purpose. See infra Part II(A)(1), text accompanying
gives government absolute power to define property rights, what prevents the state from telling the so-called owner of this land that the right to use or to sell the land is not "property," and that the owner therefore has no right to compensation when the government claims the land for the theater? In more general terms, how can government simultaneously be responsible for establishing the property rights of the citizenry and also be entrusted not to render its constituents helpless when conditions dictate defining property rights so as to benefit public officialdom? In property theory, this might be called the problem of positivism.41

A. STRUCTURAL APPROACHES

For several reasons, the average American reader will likely be untroubled by the positivism problem as described. Two structural features of our government help blunt and thereby mask its severity, and two common, if contradictory, conceptions of property appear to dissolve the problem altogether. This part explains why none of the conventional responses provides a fully satisfactory solution to the positivism riddle. The implication developed in Part III is that more energy should be devoted to working out a shared and possibly constitutional conception of the resources ("property") each individual needs to enter communal life on a sound footing.

1. Federalism

One clear oversimplification in the public theater example involves the ambiguous use of the term "government." It may be that some public officials have the authority to decide whether the purported landowner really has a legally recognized property interest. Entirely different officials, however, might desire the land for the theater and still others might be expected to rule on the owner's claim for compensation. Accordingly, both federalism and separation of powers provide safeguards against government overreaching.

notes 96-181. Accordingly, the public tributes example is meant simply to identify a clear case where we would expect compensation. The challenge is to describe why.

The federalism argument may be the easiest to see. State governments are primarily responsible for defining property rights. Federal judges, however, have the power to review alleged violations of the Constitution's property protections. In theory, therefore, federal courts are free to evaluate state property definitions and reject those that appear to be illicit means of avoiding the fifth amendment compensation requirement. If a state supreme court ruled that its state law of trespass included a public necessity exception that authorized the state to permit traffic permanently to travel across an individual's land, for example, the U.S. Supreme Court might require compensation to the landowner despite the state's argument that no property right existed to be "taken." Accordingly, federal review of state action should provide citizens some measure of protection against state overreaching.

In addition to the Court's general reluctance to scrutinize state property definitions, however, two factors prevent federalism from fully ameliorating citizen concerns over state power to take property by redefining property rights. The first is the perhaps trivial observation that federal review simply transfers the ultimate power of definition to another governmental body that may also be hostile to citizen complaints. The second and crucial point is the simultaneous need for and absence of clear standards to guide federal review. In concrete terms, federal scrutiny is meaningless unless the federal courts have some way of recognizing when a state's definition of property—like the one transforming backyard into highway—contravenes constitutional requirements.

Because the Constitution does not delineate which rights constitute protected "property," federal courts must choose among three divergent sources for property's meaning. The easiest approach would be to defer

42. "Nor as a general proposition is the United States, as opposed to the several States, possessed of residual authority that enables it to define 'property' in the first instance." PruneYard Shopping Center v. Robins, 447 U.S. 74, 84 (1980). "Property interests, of course, are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law...." Board of Regents v. Roth, 408 U.S. 564, 577 (1972).

43. In Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155 (1980), for example, the Court invalidated a Florida statute upheld by Florida's Supreme Court that gave Florida the right to charge a fee for depositing interpleader funds into a court registry and also permitted the state to retain the interest earned on those funds. The Court unanimously rejected the argument that the interpleader fund should be recharacterized as public money so that the interest earned on the fund was not private property under state law. Id. at 164.

44. See generally L. Tribe, supra note 41, at 599-604 (discussing Supreme Court reaction to state-permitted trespass); Thompson, supra note 29 (surveying the extent to which court decisions are subject to takings protections).
entirely to the states, but the Supreme Court, at least rhetorically, repudiates such abject deference for the obvious reason that it returns the positivism problem to full force. Alternatively, federal courts might attempt to successively develop concrete, substantive rights, such as a right to shelter, that deserve constitutional protection. Part III advances arguments in favor of this approach, but the contemporary Supreme Court has at least implicitly rejected it, perhaps in the mistaken belief that a concrete constitutional theory of property would be more antidemocratic than the Court's current approach. A successful theory of concrete, substantive property rights might render federalism an adequate answer to the positivism problem, but it would be the property theory and not federalism that effectively responded to the positivist concerns. The final avenue available to provide federal review with enough content to place meaningful limits on the states is the one the Court has adopted. This strategy relies on more generalized ideas about property—such as the sanctity of physical possession, the right to a reasonable return, and the importance of individual expectations—to judge not only purported state redefinitions of property but all constitutional claims for just compensation. Part II explores the problems with this generalized approach, but the point worth repeating here is that federal review cannot solve the positivism problem without some additional property theory.

2. Separation of Powers

America's traditional separation of powers adds another important layer of protection for property holders. One major advantage of judicial review of state legislative action is that courts are less likely to initiate self-interested steps that deprive owners of control over their resources. It is easy to picture a municipality overreaching its bounds by requiring landowners not to build so the city will be spared acquisition costs for

45. The Court's classic formulation is that "a State, by ipse dixit, may not transform private property into public property without compensation . . . This is the very kind of thing that the Taking Clause of the Fifth Amendment was meant to prevent." Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 164 (1980). See also Ruckelshaus v. Monsanto, 467 U.S. 986, 1012 (1984) (expanding the Court's hostility to positivist property definitions to include scrutiny over Congressional action).

46. Lindsey v. Normet, 405 U.S. 56, 74 (1972) (rejecting a tenant's challenge to Oregon's forcible detainer statute in part because the Constitution does not provide a "guarantee of access to dwellings of a particular quality").

public parks.\textsuperscript{48} It is much harder to imagine a fiscally minded state court granting an injunction to a group of nearby homeowners seeking to stop construction on the theory that any house on a particular parcel of land would be a public nuisance. Similarly, a federal court might scrutinize a state statute redefining trespass to permit public access to private land more closely than a state supreme court decision interpreting the state trespass law to allow access.\textsuperscript{49} Legislatures may be under greater pressure to grant uncompensated access than the courts, and state judges would in most cases find it difficult to manipulate such a decision for personal gain. These examples support the general view that state legislatures are scrupulously watched by their own courts, who in turn are checked by the federal judiciary.

It would be a mistake to conclude from the seeming salutary effect of judicial review, however, that the positivism problem is solved because legislatures define property rights and courts merely monitor their protection. In fact, many of the previous examples reveal the extent to which state courts fashion state property law while settling everyday disputes. When a group of homeowners sues to stop a neighbor from proceeding with a construction project, the court hearing their claim must decide whether the builder’s property rights include the right to proceed or whether the neighbors’ rights support their request for an injunction. Suppose the court is persuaded to deny the injunction because the proposed construction will be good for the community. The separation of powers does not offer the defeated neighbors access to another branch of government to hear their argument that the constitution requires compensation for the taking of their “property” right to quiet enjoyment.\textsuperscript{50}


\textsuperscript{49} The United States Supreme Court did afford plenary review to the California Supreme Court’s conclusion that its state constitutional protection of free speech required a shopping center owner to grant access to persons wishing to solicit petition signatures. PruneYard Shopping Center v. Robins, 447 U.S. 74 (1980) (The Court rejected the owner’s takings claim.). Of course, when state courts use state constitutions rather than statutory interpretation to command access, federal review provides the injured party with her only recourse. Perhaps this accounts for the Court’s willingness to treat state constitutional provisions like “statutes” for purposes of appellate jurisdiction. \textit{Id.} at 79. Consider, in contrast, the unlikelihood of obtaining federal review of the New Jersey Supreme Court’s decision that state trespass law did not authorize a farm owner to bar health and legal services workers from crossing his land to contact migrant workers. \textit{See State v. Shack}, 58 N.J. 297, 277 A.2d 369 (1971). \textit{See generally Thompson, supra note 29, at 1463-72, 1482-92 (exploring judicial reluctance to entertain or validate such claims and generally questioning the traditional view that property owners have less reason to fear courts than legislatures or executive agencies).}

\textsuperscript{50} For similar examples, see Large, \textit{The Supreme Court and the Takings Clause: The Search for a Better Rule}, 18 ENVTL. L. 3, 53 n.152 (1987) (noting the “odd dichotomy” that permits state courts to grant access to beaches using the doctrine of custom or to enjoin flooding as a nuisance but
The judiciary's role in establishing property rights thus brings into focus the underlying tensions between the twin roles of property law noted at the outset. The question might be phrased as follows: Why does the loser in every private law contest over control of resources not have a constitutional claim to compensation for loss of property rights? For example, why is a landowner who is enjoined pursuant to nuisance law from burning a particular type of coal not compensated for his or her losses? The answer may be that because the landowner had no "property" right to burn the coal, no compensation is required. But the problem is obvious. From the owner's point of view there is nothing to separate the court's status as arbiter of the private law dispute from its feared role as illicit intruder into individual prerogative. This danger increases to the extent that courts are willing to incorporate direct appeals to public policy in rendering private law decisions. In other words, since the court is simultaneously defining the owner's rights and denying her claim to compensation, the danger of a branch of government judging in its own case—the positivism problem—has returned in full strength.

The separation of powers alone, therefore, cannot sufficiently protect the citizen against an all-powerful government. A substantive theory of property is needed to point the way toward meaningful limits on sovereign power and thereby give strength to the practice of judicial review. To reconcile American law's double-edged reliance on property concepts, this theory must successfully distinguish between the courts' role as definers and defenders of property rights. Although the problem is raised only occasionally by judges who transcend the customary differentiation between private lawsuits and constitutional challenges to government action, the claim pursued here is that the positivism problem lies at the heart of American thinking about property and has shaped the

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51. Modern sensibilities might suggest that the loser has no claim because the adjudication determined her lack of a property right. But cf. Abbott, The Police Power and the Right to Compensation, 3 HARV. L. REV. 189, 200 (1889) (suggesting that the owner of a spite fence deserved compensation after the Massachusetts court in Rideout v. Knox, 148 Mass. 368, 19 N.E. 390 (1889), found the fence to be an illegal nuisance to his neighbor). For a discussion of how courts should attempt to distinguish private law decisions not implicating the taking clause from private law changes that do, see Thompson, supra note 29, at 1522-41. For a contemporary debate on the plausibility of using private law as a constitutional baseline, compare R. Epstein, supra note 3, at 112-21 (arguing that private nuisance law can safely be treated as establishing constitutional property rights because clear-cut principles will resolve most disputes) with Paul, supra note 25, at 757-65 (criticizing Epstein's views).

52. See, e.g., McCarty v. Natural Carbonic Gas Co., 189 N.Y. 40, 81 N.E. 549 (1907).

53. See supra note 29.
longstanding debate over the meaning of the constitutional just compensation requirement.

B. PROPERTY MODELS

American law has responded forcefully to the need for property concepts to supplement the structures that protect against an oppressive state. Two opposing sets of ideas have occupied center stage in the development of a substantive theory of property that would prevent government's power to define from becoming the power to destroy. Each hides the conflict between property's twin roles and each at first glance renders unconvincing the examples of the positivism problem already provided. Neither approach, however, provides an ultimately satisfying solution to the positivism problem because each needs the other in order to address fully a variety of interpretive dilemmas posed by the consequences of change.  

This section describes these two approaches and develops a preliminary critique. A discussion of these ideas as they occur in case law appears in Part II. It is worth noting here, however, the somewhat stylized nature of the property models. No claim is made that any lawyer, judge, or scholar actually embraces a particular model. Instead, the goal is to group certain recognizable beliefs about property into bundles that form plausible answers to the positivism problem already described. To the extent each model appears incomplete, elements of the competing model should provide the missing pieces.

1. Physicalism

The first approach, referred to here as the external solution, is perhaps the more difficult for the modern lawyer to apply. At its core is the idea that certain aspects of social practice, such as physical possession of previously unowned resources, demand legal recognition. Its genius lies in the understanding that if property rights could generally be derived from social life rather than created by the legal system, courts would then be freed from the dilemma of having simultaneously to define property rights and protect them against excessive government intervention. A court faced with a private law dispute over competing land uses, for

54. See infra Part I(B)(3), notes 77-81 and accompanying text.
55. For a similar but more detailed effort to describe part of American law in terms of cognitive models that respond to a core dilemma, see Frug, supra note 38 (describing and criticizing formalist, expertise, judicial review, and market-pluralist models as responses to the problem of unbridled bureaucracy).
example, would look to the initially nonlegal source of rights to determine who should prevail. The losing party, such as a homeowner denied an injunction prohibiting nearby coal burning, would then have no plausible constitutional claim because the court denying the injunction would have applied a commonly accepted process of recognition posing no risks of government arbitrariness on its own behalf. Ordinary constitutional challenges would be similarly unproblematic. Property rights allocated according to the initially nonlegal scheme would be respected by courts, thus preventing judicial excesses, and protected by courts, thereby forestalling legislative overreaching.

Presented in this extreme fashion, the idea that there is a system of property rights existing outside the legal system and waiting to be recognized may appear farfetched. Absent divine guidance or a convincing theory of natural rights, it is unclear where these property rules would originate, and the sheer presence of numerous disputes over tangible and intangible resources suggests that many citizens have vastly different ideas concerning who is entitled to what.\(^{56}\) Consider, however, the extent to which versions of the external solution guide common sense notions of property law and the ways in which these notions make some of the earlier examples seem easy. Recall the purported landowner whose parcel is commandeered by the despotic government for the public theater. The officials' position was that the rights taken for construction of the theater simply did not constitute "property"; thus the landowner did not have a constitutional claim. Of course, one response would be that the rules must have previously permitted the owner to use the land, so that the government is now claiming to be defining the rules, when what it really wants is to change them. This reflects faith in the more modern market approach to property that follows.\(^{57}\) Perhaps a deeper reaction, however, would be to take offense at the government's attempt to arrogate the absolute power of definition. The government cannot plausibly claim that a citizen "owns" a piece of land unless the "owner" holds a legally protected interest in preventing the land from becoming a public theater.

This idea of nonlegal or inherent limits on "ownership" can take many general forms, each sharing certain characteristics. The guiding concept of this approach is that there are some features of the external

\(^{56}\) For a more detailed critique of one effort to ground answers to the takings problem in an appeal to natural rights, see Paul, supra note 25, at 748-74.

\(^{57}\) See infra Part I(B)(2), text accompanying notes 71-76.
world (so-called facts) that demand certain legal conclusions. One example is the familiar assertion that a man's home is his castle, and woe to the government that tries to interfere. This strategy provides a powerful antidote to government overreaching by permitting the community to react with legally sanctioned horror when government definitions of property do not comport with a particular version of the external solution.

One crucial problem, however, plagues the external solution and pushes strongly toward a particular version here called the physicalist model. Any effort to derive property rules from existing social practice runs the risk of appearing arbitrary to those not following the purported customs, and most legal disputes will reflect disagreement over supposedly settled norms. Courts seeking to avoid the appearance of favoring one group over another will have trouble pointing to a custom that the losing party is willing to acknowledge. Moreover, only the most highly structured society is likely to have a well-developed set of customs concerning entitlements to resources that itself is not dependent on the rules laid down by the courts. If the courts are to rely on their own rules, however, the positivism problem will return, albeit in a more indirect fashion. Courts could use their authority to set social practices to which they could then seemingly defer as the noncontroversial source of property rights. To escape this circle, courts need a feature of social life that appears largely independent of judicial manipulation. Reliance on physical control over resources and rewarding first possession (i.e. "the physicalist model") appears to be the perfect alternative.

The physicalist model forms the basis for one apparent solution to the positivism problem. It stems from the idea that the legal system should give formal recognition to what has occurred, usually without violence, in the social world. A woman who has farmed and encircled land deserves to keep it; a man who captures a fox deserves his bounty. Moreover, the model draws strength from common-sense categories used to determine which things are actually possessed by individual claimants. People own land, homes, and animals but not necessarily stocks or radio

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58 See, e.g., Wolf v. Baldwin, 19 Cal. 306 (1861) (An enclosure without a residence or cultivated area is insufficient to establish actual possession.); Pierson v. Post, 3 Cai. R/ 175 (N.Y. Sup. Ct. 1805) (Ownership was awarded to the party who captured and killed a wild fox).
The beauty of this approach is that it appears to find property rights in factual questions (who got there first?) and principles (protect the existing occupant) so general and uncontroversial that the courts' role as definers of property rights seems to disappear.\(^{60}\)

The model also suggests methods for enforcing property rights. Once physical things are awarded, they become synonymous with "property" and are protected against theft and trespass. In the most simplified vision, everyone possesses a group of things, particularly land, that constitute their property. When one neighbor takes or physically interferes with another's use of these things, the second neighbor's rights have been violated and courts can intervene. Similarly, if the government takes one of these things for public use, the judiciary will require compensation.

Every lawyer undoubtedly recognizes that this simplistic model is an abysmally poor description of contemporary property law. In reality, neighbors are permitted some types of physical interference, and physical invasions do not perfectly correspond to government accountability.\(^{61}\)

What is ignored is the extent to which the physicalist model remains a foundation upon which much of contemporary law is built.

Most important for purposes of this Article is the rationalizing effect that physical units of property have on contemporary fifth amendment law. Contrast the typically permitted land use regulation with the paradigm case of a governmental taking of property requiring compensation. Suppose a local government enacts a zoning ordinance permitting no more than one home per half acre of land, and a particular owner affected by this regulation demonstrates that the inability to place two homes on one half acre reduces the value of the land by twenty percent.

\(^{59}\) See generally Singer, supra note 27, at 637-41 (explaining the illusory quality of property concepts that attempt to match individual "owners" with the items they own).


\(^{61}\) Easements by necessity, for example, may be awarded to landlocked owners permitting them to cross their neighbors land. See R. CUNNINGHAM, W. STOEBUCK & D. WHITMAN, THE LAW OF PROPERTY § 8.5 (1984). Moreover, the landowner's general right to exclude is sometimes limited by a countervailing right of access. See State v. Shack, 58 N.J. 297, 277 A.2d 369 (1971) (State trespass law does not bar legal and health professionals from entering farm owner's land to consult migrant workers, even if farm owner objects.).

The whole idea of a "regulatory taking" as applied to zoning and typical forms of economic regulation depends upon the possibility that nonphysical intrusions may violate the just compensation clause.
Unless the owner can demonstrate some unusual reason why the ordinance is generally irrational or arbitrarily applied to that parcel, a constitutional claim for compensation will be summarily rejected.62 Suppose instead the same owner has five acres of land with an identical home on each. If the government wants one of the parcels as a site for a post office, compensation for the taking would clearly be required.63

The obvious anomaly is that in each case the owner has suffered a twenty percent loss of value, but only in one is compensation available. The question is why courts feel comfortable pointing to the remaining eighty percent of value in the zoning case but are unwilling to say to the second owner that the four houses remaining prove that that owner suffered no compensable loss. Perhaps the answer is simply that current doctrine establishes these differences and owners have relied upon existing law.

The doctrine's initial plausibility, however, is clear testimony to the strength of the physicalist model. Each of the five homes represents a fact in the external world which physicalist courts are eager to recognize. Were the court to rely on the existence of the other four homes as reason to deny compensation for loss of one, it would be difficult to refute charges that the court was permitting an uncompensated taking of property. The physical universe appears already to have carved the homes into separate units, and the court's decision would seemingly "fly in the face of the facts." Of course, that appearance is deceptive. The law, not nature, tells us to treat each parcel separately; consequently, the Supreme Court has broadly characterized a claimant's holdings when it wishes to reject a claim for compensation.64 The physicalist model, however, relies


63. 2 NICHOLS, THE LAW OF EMINENT DOMAIN § 6.05 (J. Sackman ed. 3d ed. 1990).

64. In Penn Cent. Transportation Co. v. City of New York, 438 U.S. 104 (1978), for example, the Court upheld landmarks legislation that prevented the claimant from building atop its already existing structure. The Court rejected the argument that the claimant had been deprived of 100% of its air rights, stating that "'[t]aking' jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated." Id. at 130. But why not? And why in the example discussed in the text would the Court feel uncomfortable saying that takings jurisprudence does not divide a claimant's holdings into discrete parcels and attempt to determine whether rights to a particular parcel have been abrogated? Penn Central demonstrates how the physicalist model supports linking the air rights to the underlying ground parcel because a parcel of land represents the paradigm case of fee simple ownership. The case also illustrates, however, how physicalism serves to hide the judicially constructed nature of property units used to measure takings claims. For further discussion, see infra Part II(B)(1)(a), text accompanying notes 265-72.
on a strong correlation between widely accepted ideas of discrete physical units and legal recognition of the same. To win the case, the owner losing one of five parcels would not need to distinguish the zoning case or to argue that it would be undesirable to have compensation depend on the owner's other holdings.

In contrast, the owner in the zoning case who is seeking to build must find the source of the claimed property right in a set of already existing rules. The claim that the ordinance unconstitutionally changes the rules makes sense only if there are rules already in place. But where could these rules come from? Because the physicalist model does not apply, the courts are tempted to view the zoning ordinance not as changing the rules but merely defining them in the first instance. Custom is an unlikely source of a viable challenge to this interpretation. Although there is a background assumption that one is free to use one's land as one sees fit, that assumption is countered by the equally widespread notion that one must not use one's land so as to harm another.65 In absence of the physical fact of a taken home, courts can choose between these background principles more easily. Despite protestations by the affected owner that the extra home will not harm anyone, today's settled rule is that area zoning is constitutionally permissible.66 Although judicial decisions are often couched in rhetoric that describes zoning as a deprivation of use and not a taking, the effect is the same as if courts ruled that the unconditional right to build is not constitutionally protected property.

This contrast between courts' treatment of zoning cases and more paradigmatic takings cases also highlights a crucial ambiguity within the physicalist model—the problematic link between tangibility and existing practice.67 The very idea of a lawsuit based on property rights depends upon a theory that the defendant, whether government or neighbor, has disrupted some prior pattern that the plaintiff seeks to restore. The physicalist model asks courts to derive that pattern from a state of affairs already existing in the external world. The clearest case is the taken

65. See generally Singer, The Legal Rights Debate in Analytical Jurisprudence From Bentham to Hohfeld, 1982 Wis. L. Rev. 975 (exploring the problem that injury without legal redress poses for a system committed to the idea that one may not use one's property so as to harm another).
67. Another ambiguity within physicalism occurs because a physicalist focus may range from the impact of challenged law on the physical things owned by the claimant, to those aspects of the claimant's activities that cross physical boundaries, to the more general question of whether the claimant is altering the existing state of affairs. To help avoid confusion later sections will employ the term "simple physicalism" to describe approaches that emphasize confiscated items and boundary crossings. The term "enlightened physicalism" will describe approaches that stress changes in the existing state of affairs. See infra Part II(A)(1)(b)(i), text accompanying notes 117-21.
object. Its colloquial formulation, “Before I had it, now I don’t,” fits the paradigm example of land taken for a post office, where the claimant points both to loss of the existing use of land and to loss of possession of the land itself. In contrast, the customary challenge to zoning ordinances involves a plaintiff who has neither lost physical possession nor been deprived of an existing land use. The standard comparison therefore creates the false impression that the loss of an intangible right, like the right to build, is less serious because the holder is losing something that was never really possessed.

In many cases, however, the existing state of affairs cannot be described by reference to a person owning a physical object. These cases reveal the fallacy in equating tangibility with existing practice and place defenders of the physicalist model in an intractable dilemma. Consider a plaintiff who has been using her neighbor's driveway for many years and who seeks compensation when the government condemns the neighbor's land for a schoolyard. Denying compensation to the driveway user would contradict one of the two basic tenets of the physicalist model. If courts are successfully to prevent oppressive government, they must demand recompense for citizens whose daily control over resources is disrupted by an unwieldy state. Accordingly, contemporary doctrine would certainly call for compensation if the claimant has used the land long enough to have earned a prescriptive easement.

This result, however, presents a challenge to the other basic tenet of the physicalist model. The right to continue to use the driveway looks dangerously like a legal rule rather than one derived from social practice. If, for example, the use had been for too short a period, then the user would have no property right and would receive no compensation. Few requirements are more obviously superimposed by the legal system than the time period for a statute of limitations. To safeguard the easement, therefore, the physicalist model must partially rely on preexisting rules as

68. For a description of how this dilemma helped produce a shift from physicalist to value-based notions of property, see Vandevelde, The New Property of the Nineteenth Century: The Development of the Modern Concept of Property, 29 BUFFALO L. REV. 325, 333-40 (1980) (exploring changes spurred by legal recognition of goodwill and by developments in the law of accession).

69. For an astute description of Eaton v. B.C. & M.R.R., 51 N.H. 504 (1872), see Costonis, supra note 18, at 532, which explains how Justice Jeremiah Johnson expanded protection for property by exploiting the puzzle that intangible rights, like easements, posed for nineteenth century physicalist notions of property.


71. For an insightful discussion of how constitutional challenges to changes in the law of statute of limitations helped undermine nineteenth century physicalist notions of property, see Kainen, Nineteenth Century Interpretations of the Federal Contract Clause: The Transformation from Vested
part of the status quo that courts are protecting. These rules, however, may be subject to legislative and judicial manipulation and thus pose the threat of reintroducing the positivism problem, which the physicalist model was designed to overcome. The inability of the physicalist model to resolve cases where the claimant wishes to continue an existing practice not clearly linked to a physical object will later provide a window into the general failure of the model. It also spurs the need for an alternative set of principles to separate the tasks of defining property rights and enforcing them.

2. The Market Model

Return now to the original example of private land taken for a public theater. A final, simple answer to the positivism problem, here called the market model, may explain the need for compensation to the landowner. This approach highlights the clear set of legal rules permitting uses of the land that will no longer be possible when the theater is complete. On this view, preexisting laws of ownership, whether set forth in judicial or legislative pronouncements, would contradict the government's claim that the owner had no property right to use the land. Accordingly, the court cannot now define the rules so as to permit uncompensated taking of the theater because this definition will conflict with earlier ones.

The key here is sequence. Possibilities for government overreaching created by the government's power to define property rights are drastically reduced if property rights are defined before the compensation issue arises. The fact that courts are theoretically asked to define and enforce property rights simultaneously is unimportant because this will almost never occur in fact. Instead, courts will first set the rules by which the conduct of private actors is governed and then require the government to pay compensation when public needs demand that the rules be changed. This vision of property as formally stabilizing entitlements so as to permit investment and exchange closely parallels the guiding spirit of neoclassical economics, hence the name the market model.72

72. Indeed, the idea of sequence plays a crucial part in defining some versions of the law and economics movement. According to one writer, a basic tenet of that approach is a separation of decisions concerning the allocation of resources from the decisions concerning distribution of wealth. A. POLINSKY, AN INTRODUCTION TO LAW AND ECONOMICS 105-13 (1983). In other words, the legal regime should first set the ground rules against which economic transactions take place and then consider whether those transactions should be taxed to accomplish a desired distribution. The intuitive appeal of such sequentialism is what gives strength to the idea that certain government
The market model draws its greatest strength from the ease with which it distinguishes the paradigm case requiring compensation from the commonplace private law dispute in which constitutional issues seem out of place. The tyrannical government seeking to avoid paying for land for the theater appears laughable because each citizen knows a neighbor could not legally place an unwanted building on the owner's land. In contrast, private law disputes are typically framed in terms of defining rights in the first instance; losers cannot successfully raise constitutional claims because the market model demands a demonstrated change in the rules, not simply a bad rule choice. A hotel owner denied an injunction against adjacent construction blocking its sun, for example, has no constitutional claim because the court can plausibly assert that the owner simply lacked any property right to unobstructed light. Thus, the positivism problem is seemingly rendered harmless. Litigants settle contested legal issues in private law cases, and courts protect settled property rights from public confiscation.

Again, however, the contrasting paradigm cases obscure a crucial feature of the model—markets depend heavily on the hazy differentiation between settled and unresolved legal issues. Consider the problems for the market model posed by a constitutional challenge to a land use regulation alleged to be overly burdensome. One explication of the market model suggests that, because the land was not formally restricted prior to the challenged ordinance, the rules have changed and compensation is required. This approach searches for settled law consistent with the underlying notion that everything is permitted unless explicitly forbidden. It has the market model's advantage of preventing the government from using its power of definition to its own benefit. But it is untenable in practice. This version of the market model would require compensation whenever the government restricted land use or any other previously

programs are redistributional because they disrupt the existing pattern. For a judicial defense of taxation as the most democratic method for affecting distributional decisions and the method most consistent with the takings clause, see Pennell v. City of San Jose, 485 U.S. 1, 13-14 (1988) (Scalia, J., dissenting). For a brief critique of Scalia's view see infra notes 102-03.

73. Although property owners are customarily referred to as "his" or "her," the vast resources now owned by corporations and other organizations make "it," the neutral third person pronoun, perhaps more appropriate.


75. Professor Large simultaneously recognizes and mocks market model rhetoric when he notes that courts using the doctrine of custom to permit citizens to walk along the beach need not fear compensation claims from affected landowners because the court declares that the citizen's access rights have "always" existed. Large, supra note 50, at 53 n.152 (emphasis added).
unregulated activity. Accordingly, it has been repeatedly rejected in the nation's courts.\footnote{76 For cases permitting the uncompensated introduction or alteration of regulatory schemes, see, for example, Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1987); Connolly v. Pension Benefit Guar. Corp., 475 U.S. 211 (1986); Agins v. City of Tiburon, 447 U.S. 255 (1980); Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104 (1978); Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).}

Alternatively, courts could attempt to determine the extent to which the restriction truly departs from a more complete notion of settled law. Presumably, nearby landowners already have the power to prevent some types of construction on the newly burdened land by bringing a private lawsuit charging nuisance. Only the construction additionally prohibited by the new regulation can be fairly described as changing the rules to the owner's detriment; from this perspective, compensation should be available only for loss of the newly prohibited option. This approach, however, threatens to extinguish the market model. The court hearing the compensation claim will have to determine the degree to which the regulation goes beyond private law. Accordingly, the court will have to decide the unsettled private law issues in precisely the same case as the constitutional compensation issue. The landowner fears that the court will choose to expand the theory of nuisance so as to minimize the drain on the local fisc. The sequential theory of the market model will provide the owner little help.

Finally, courts might choose to treat the challenged land use ordinance as part of the existing private law. Under one view, the landowner had no rights beyond those she was actually exercising prior to the law's enactment. Accordingly, the new ordinance only impinges on constitutional rights if the owner acted contrary to it before it was passed. The fact that this theory builds on notions of existing practice drawn from the physicalist model is obvious. The important point here, however, is that this approach gives courts the alternative of characterizing some newly-enacted rules as fundamentally new and others as rules that immediately become part of the background legal regime. Whether courts use individual expectations (as they have) or some other theory to determine which rules are new, the market model has been fundamentally altered. Its premise was that once the rules are settled all changes warrant compensation. This altered approach gives courts discretion to pick and choose. The positivism problem appears inescapable.
3. The Two Models Combined

As one would expect, the stylized models described here refer largely to resolutions of the positivism problem that courts have never systematically employed. Sustained application of either model would readily reveal its underlying weakness. Were courts to stick solely to the physicalist model, they might mask the power of the judiciary in private law suits by pretending that physical boundaries could solve disputes among neighbors. However, government's regulatory authority would be wholly untamed in a world where courts protected only against physical invasions. Alternatively, rigid adherence to the market model would do more than paralyze legislative action by calling for compensation after every change in the existing rules. Courts applying the pure market model would feel enormous pressure to present each decision as if it were inherent in preexisting law. At some point, the implausibility of discovering rather than making law would become apparent.

The one-sided nature of the two models, however, should not obscure the extent to which courts appeal to the underlying spirit of each in the course of actual litigation. Indeed, much truth resides in both the physical and sequential notions of property. Property would be a different concept if people could not point to physical things that individuals own. Nor could we make sense of the idea of property apart from some notion of fixed ground rules. Part II's effort to demonstrate that both models play a crucial role in takings jurisprudence should therefore not be surprising. Before proceeding to that discussion, however, it is worth pausing briefly to consider some aspects of the interrelationship between the two models. Each model supports the other but renders its competitor unsatisfactory.

The physicalist model cannot survive without some criteria for determining which physical facts indicate ownership. If possession of land gives rise to ownership, what is to constitute possession? If general property law permits free use of land within one's boundaries so long as one's neighbors are not harmed, how will courts decide what kinds of harm are prohibited? These questions would render the physicalist

77. Conflicts over underground water, for example, require choices between different versions of first possession theory. If one focuses on first possession of land, then all landowners might be said to deserve all the water beneath their land without consequence to their neighbors. In contrast, if one focuses on first possession of the water, then the first possessor of water might be able to enjoin neighbors from digging under their land in a way that would disrupt the water flow.

78. Upon what principle, for example, will a court rely to permit me to open a restaurant on my land even if that puts my neighbor's coffee shop out of business? If the point is that my restaurant will not physically invade my neighbor's space, then the rule preventing me from harming my
model unworkable unless additional principles permitted courts to decide who is entitled to what without invoking judicial discretion that raised the specter of positivism. Social practice can help. We would not expect a court to hesitate long before enjoining a firing range constructed in a residential neighborhood, even if no bullet had yet to find its way to a neighbor's lawn. Again, however, the sheer volume of litigation suggests that social practices often differ significantly, and highlights the role of courts in determining which practices are to be preferred over others.

The physicalist model retains vitality, however, precisely because difficult interpretive questions become steadily less controversial the more often they are decided. The first person who enclosed an unowned tract and began to farm it may have wondered if this was sufficient to constitute possession. Once courts have ruled repeatedly in favor of farmers who have done the same, however, citizens may gain confidence that courts are likely to rule the same way again. Accordingly, what could once have been a politically charged decision favoring farming interests over those seeking smaller divisions of land, will eventually appear to be a routine application of existing rules. Similarly, a judicial refusal to enjoin a landowner's nearby competitor, even though the landowner is harmed by the competition, may have once been problematic but is now taken for granted. Notice, however, that judicial reliance on past decisions to resolve interpretive difficulties is little more than one version of the market model.

Moreover, the more courts turn to precedent to settle disputes over the legal consequences of physical circumstances, the more they must confront what was true all along—the physicalist model is based on general principles such as first possession that are themselves controversial and resemble nothing so much as legal rules whose persuasive power stems in large part from a long period of acceptance. Accordingly, for the physicalist model to make sense, it must rely on sequence ideas not only to provide stability for judicial interpretation of basic principles but also to provide grounding for the ideas that form physicalism's core. No wonder market concepts seem to be steadily gaining ground.

The market model, however, has its own interpretive dilemmas. Cases of first impression are obviously problematic. If the market model is the only available solution to the positivism problem, then all cases of

neighbor is redundant; I may simply not cross her boundaries. A narrow physicalist approach based purely on boundaries, however, would permit me to dig so as to cause my neighbor's soil to collapse, despite uniform common law rules protecting lateral and subjacent support: See, e.g., Gilmore v. Driscoll, 122 Mass. 199 (1877).
first impression may create opportunities for dangerous judicial legisla-
tion. More important is the basic legitimacy problem of explaining
why a controversial decision once made should continue to be followed. Unless the court can point to some reason why the initial decision was
correct, citizens adversely affected will feel aggrieved and will continue to
challenge the so-called rule. Here again, however, time is on the courts’
side. The longer a rule is in effect the more people will rely upon it, and
the more external circumstances will change so as to make alteration of
the rule increasingly costly.

To defend the existing rule structure by pointing to the external cir-
cumstances it has produced, however, is in part to concede the moral
inadequacy of the market approach. The beauty of the market model is
that it appears to permit allocation of background entitlements that citi-
zens can claim against their neighbors and against the government. Only
disputes that arise within, and do not challenge, the background scheme
will call for judicial resolution. If in every dispute over conflicting
resources, however, the courts must justify the background rules by look­
ing to existing practice, then existing practice will also become a valid
source of legal rights.

The doctrine of adverse possession, for example, reveals how courts
will sometimes defer to the existing state of affairs and award legal title to
a party in possession whose claim would otherwise fail under prevailing

79. This problem with the market model for property law is a subset of the more-general
difficulty that Ronald Dworkin identifies with H.L.A. Hart’s jurisprudence. See R. DWORKIN, TAK­
(1961)). Dworkin attacks Hart for describing the judicial process as one where judges enforce previ­
ously existing rules until the rules run out and then the judges simply decide the case as they see fit.
R. DWORKIN, supra at 31-39. Dworkin recoils at this sort of judicial discretion and suggests that
even in hard cases judges must still interpret the already existing law. In property law this means
courts must seek general principles that support existing resource entitlements, and then extend
these principles to fit new conflicts over resource use. The problem, of course, is that there may be
many such principles and they may conflict in a variety of ways in any given case. Furthermore,
each time a new principle is introduced or succeeds in combat with other principles, more room is
created for challenging the seemingly fixed set of entitlements upon which the market model
depends. Judges will then seem less and less the enforcers of an already existing property scheme
and more and more the creators of a system of resource allocation. Perhaps this suggests one reason
why Dworkin has been driven to devote a great portion of his career to defending the judicial role.

80. Courts will also constantly face efforts by lawyers to present fact situations as not governed
by existing rules. Accordingly, courts need some devices to prevent each new dispute from forcing
them to confront the initial controversy all over again. A court that has ruled that enclosure consti­
tutes possession, for example, may discover that new methods of fence construction enable fences to
be built very cheaply. A claimant who suggests that a fence costing less than a certain amount
should not fall under the earlier rule may therefore be seen as seeking an exception or as asking the
court to rethink the original rule.
rules governing recorded ownership. Of course, adverse possession itself is now part of our background rules. Its present enforcement is therefore entirely consistent with the market model. Adverse possession, however, creates doctrinal puzzles surrounding the interpretation of the requirements that the possession be open, hostile, and notorious precisely because courts will be torn between adhering to verbal formulations of existing doctrine and protecting claimants who appear to have invested tangible resources on disputed land. Professor Singer has argued that this phenomenon challenges the market model because courts seek not only to enforce existing rules but also to protect the reliance interests of more vulnerable parties. The more devastating critique, however, is that the market model itself would relinquish legitimacy unless there were some reason to adhere to the rules it lays down. If property rules are treated as authoritative simply to avoid the positivism problem, then they can fairly be called autocratic as well. If, however, courts sometimes decide not to reconsider the rules in a given case in order to protect reliance interests, then reliance becomes part of the market model; consequently, courts must evaluate competing reliance claims, many of which will spring from physicalist roots (I got there first!). Resolving these conflicts may prove easy or difficult, but courts cannot confront them without squarely facing their role as repeated definers of property rights. In short, neither physicalism nor market approaches to property can shield the courts from responsibility for difficult value choices unless the citizenry overlooks judges' natural tendency to alternate between one model and the other without confronting the relationship between the two. Part II describes such unconscious judicial fluctuation in the context of takings law.

II. THE POSITIVISM PROBLEM AND TAKINGS CLAUSE JURISPRUDENCE

The Supreme Court seldom explicitly identifies the positivism problem or the physicalist and market solutions described in Part I. Perhaps driven by an implicit understanding of tensions within the property concept, however, the Court has expressly rejected the unified approach to the takings dilemma that both the physicalist and market models

81. Singer, supra note 27, at 665-70.

82. The Court has repeatedly recognized, however, that the unchecked power to define and redefine property rights threatens the constitutional scheme. Preseault v. ICC, 110 S. Ct. 914, 927 (1990) (O'Connor, J., concurring); Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1012 (1984); Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 164 (1980).
embrace. Proponents of the physicalist and market models seek a generalized approach to property law that will provide guidance in determining the nature of private property rights and the permissible scope of government interference. The Court, by contrast, has abandoned the search for general solutions in favor of ad hoc inquiries, and has attempted to identify factors that will render those inquiries consistent with the judicial role.

The ad hoc approach serves several functions for the contemporary Court. First, it enables the Court to grant much greater leeway to governmental activity than would be afforded by a strict version of the market model. In *Penn Central Transportation Co. v. City of New York*, for example, where the Court specifically endorsed the ad hoc approach, the Court upheld a landmarks regulation that prevented the landowner from constructing a skyscraper atop its historic railroad station. Under the market model, the Court would have been forced to award compensation unless it could persuasively describe the existing legal regime as including an inherent limit on the right to build atop historic sites. Instead, the Court found the regime was being altered but held that only those changes with "an unduly harsh impact" required compensation pursuant to the takings clause. Second, the ad hoc approach permits the Court

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83. The Court's clearest repudiation of the physicalist philosophy appears, not surprisingly, in a case ostensibly involving property valuation:

The critical terms are "property," "taken" and "just compensation." It is conceivable that the first was used in its vulgar and untechnical sense of the physical thing with respect to which the citizen exercises rights recognized by law. On the other hand, it may have been employed in a more accurate sense to denote the group of rights inhering in the citizen's relation to the physical thing, as the right to possess, use and dispose of it. In point of fact, the construction given the phrase has been the latter.


Justice Brennan's opinion in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978) demonstrates the Court's understanding of the impossibility of adhering to a strict market model:

"This Court has accordingly recognized, in a wide variety of contexts, that government may execute laws or programs that adversely affect recognized economic values.... More importantly for the present case, in instances in which a state tribunal reasonably concluded that "the health, safety, morals, or general welfare" would be promoted by prohibiting particular contemplated uses of land, this Court has upheld land-use regulations that destroyed or adversely affected recognized real property interests."

*Id.* at 124-25.

84. See *Michelman*, supra note 6, at 1338-40.


86. *Id.* at 127. The Court also suggested that restrictions "not reasonably necessary to the effectuation of a substantial public purpose" may constitute a "taking." *Id.* Under one view, such regulations would presumably be unconstitutional even were compensation afforded to injured property owners. Scalia's opinion in *Nollan*, however, may indicate the Court's willingness to more closely scrutinize the public purpose to determine when compensation must be paid. *Nollan*, 483 U.S. at 834-42. But if so, Scalia is hot clear precisely which cases are *takings* cases deserving of
to pay lip service to relatively traditional definitions of property while simultaneously upholding a wide array of regulations. For example, instead of challenging the centrality of the right to exclude in property theory, the court prefers to find that the right is not implicated or that its loss is outweighed. Third, the ad hoc approach indefinitely postpones the need for the Supreme Court to articulate its own theory of property in the context of takings cases. Finally, the ad hoc approach permits the Court to adapt to new situations without radically altering existing doctrine.

Part II begins with a somewhat sympathetic analysis of the Court's ad hoc approach. After all, if the previous section correctly prefigured the inadequacy of general solutions to the positivism problem and its takings counterpart, then the switch to particularistic judgments appears not only desirable but necessary. Two aspects of the Court's current multifactor jurisprudence, however, remain particularly troubling. First, our culture finds ad hoc solutions cognitively vulnerable. Accordingly, heightened scrutiny. See Michelman, supra note 10, at 1612-14 (suggesting Scalia wishes heightened scrutiny only in cases of physical invasion).


The Court's desire to uphold legislative regulations without questioning the property concept at the core of judicial review resembles the phenomenon progressive scholars have recently described whereby liberals too enthusiastically adopt traditional rhetoric simply to obtain particular political results. See, e.g., Fischl, Self, Others and Section 7: Mutualism and Protected Protest Activities Under the National Labor Relations Act, 89 Colum. L. Rev. 789 (1989) (describing how judges sympathetic to labor used the broad concept of self-interested behavior to expand labor act's definition of concerted activity rather than considering a more progressive notion of mutuality); Simon, Rights and Redistribution in the Welfare State, 38 Stan. L. Rev. 1431 (1986) (Liberals' willingness to defend welfare programs using property and contract analogies doomed a more progressive needs-based jurisprudence.); Winter, The Metaphor of Standing and the Problem of Self-Governance, 40 Stan. L. Rev. 1371 (1988) (Liberal jurists mistakenly embraced a constrained, individualistic model of adjudication to help limit attacks on New Deal reforms.).

88. See, e.g., FCC v. Florida Power Corp., 480 U.S. 245 (1987) (A power company's right to exclude is not lost when FCC limits rates chargeable to cable television providers for use of utility poles because power company chose to permit use of poles in first instance.); PruneYard Shopping Center v. Robins, 447 U.S. 74, 82-85 (1980) (The right to exclude is an essential stick in the bundle of property rights but its loss does not amount to a taking where the claimant cannot demonstrate that state-projected protesters will unreasonably impair the value or use of claimant's property as a shopping center.).

89. Consider, for example, Professor Gilligan's finding that the powerful strain of moral reasoning she identifies with males tends to confront moral dilemmas with a repeated desire to develop
those seeking to curtail collective resource control will continually invent more general theories to support their constitutional vision. Justice Scalia’s opinion in Nollan is the most recent example. Second and more important, ad hoc inquiries can be successful only to the extent that they respond directly to the underlying controversy to which they are addressed. Thus, the ad hoc inquiry in the takings context should focus on the core interests the takings clause was designed to protect and the primary abuses the clause was designed to prevent. Instead, as Part II demonstrates, the Court’s current ad hoc approach too often vacillates between the generally inadequate physicalist and market models.

The Court has articulated three factors for determining when the fifth amendment demands compensation. These factors form the organizational structure for Part II. In resolving taking cases, the Court examines the challenged conduct to discover (1) the character of the governmental action; (2) the severity of the economic impact on the claimant; and (3) the extent to which the government has disrupted reasonable, investment-backed expectations. These three factors will be considered in turn. Because all aspects of the Court’s three-factor test have received extensive analysis and criticism elsewhere, Part II’s review of each factor’s origin and current application will focus on two distinctive themes. First, Part II argues that each factor reveals more fully the strengths and weaknesses of the physicalist and market models. Of special note is the way that application of the three factors illustrates the simultaneous opposition and mutual dependence of the two models. Second, particular attention will be devoted to an aspect of takings doctrine customarily considered secondary: the manner in which courts

90. See, e.g., R. Epstein, supra note 3 (arguing that uncompensated governmental activities should be limited to narrowly defined exercises of police power and those where implicit in-kind compensation is provided). But cf. Paul, supra note 25 (detailing the indeterminacy and manipulability of Epstein’s theory).

91. See cases cited supra note 7. The obvious tension between the purportedly objective inquiry into the reasonableness of the claimant’s beliefs and the more subjective analysis of what the claimant actually believed is perhaps one reason why the Court sometimes employs the adjective “distinct” to modify the phrase “investment-backed expectations.” Connolly v. Pension Benefit Guar. Corp., 475 U.S. 211, 225 (1986) (quoting Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978)). For further discussion see infra Part II(C), text accompanying notes 282-336.

92. Separate expository focus on each factor, however, must not obscure the Court’s current method of employing an ad hoc balancing of all three factors to determine whether the Constitution requires compensation.

93. See sources cited supra notes 1 & 3.
should determine the amount of compensation for worthy claimants. The three-factor test obscures the fact that the question of how much compensation a person should receive following adverse government action is essentially the same question as whether compensation should be awarded at all.

A. CHARACTER OF GOVERNMENT ACTION

Recent cases indicate that the Supreme Court analyzes the character of government action in two distinct ways. In some cases, the Court asks whether the challenged government conduct constitutes a physical invasion of the claimant’s property. In others, the Court examines the precise nature of the government’s purpose in undertaking the questioned activity. Although they are purportedly aspects of the Court’s ad hoc decision making, these inquiries share the search for qualitative triggers that will answer the compensation question yes or no. Both inquiries divert the Court from asking why the claimant’s interest should be constitutionally rather than legislatively or judicially defined.

1. Governmental Purpose and the Harm/Benefit Distinction

In evaluating taking claims, the contemporary Court scrutinizes the government’s purpose or motive, but this inquiry differs substantially from standard analysis of legislative intent. The Court seldom considers, for example, the actual goals of particular legislators when enacting a challenged statute, nor does the Court more than perfunctorily ask why an entire legislature might have been motivated to enact a questioned law.

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94. See Connolly v. Pension Benefit Guar. Corp., 475 U.S. 211, 225 (1986) (“[W]ith respect to the nature of the governmental action, we have already noted that, under the Act, the Government does not physically invade or permanently appropriate any of the [claimant’s] assets for its own use.”).

95. See Keystone Bituminous Coal Ass’n v. DeBenedictis, 480 U.S. 470, 485 (1987) (“[T]he character of the governmental action involved here leans heavily against finding a taking; the Commonwealth of Pennsylvania has acted to arrest what it perceives to be a significant threat to the common welfare.”).

96. “Judicially defined” here refers to courts’ power to establish property rights in ordinary common law disputes. Courts are also responsible for defining property in constitutional cases, but the pretense that they are merely announcing preexisting law may be even more important when interpreting the Constitution than it is in the common law context.

97. In Keystone, for example, the Court reached the broad conclusion that “the Commonwealth is acting to protect the public interest in health, the environment, and the fiscal integrity of the area.” 480 U.S. at 488. This conclusion was based largely on evidence establishing the rather trivial point that the challenged mining regulation was not motivated by a desire to benefit private landowners. Keystone, 480 U.S. at 486-88; see also Hughes v. Washington, 389 U.S. 290, 298 (1967)
Beyond the obvious problems with discerning legislative intent, severe difficulties beset any simple motive inquiry in the context of takings clause adjudication.\textsuperscript{98} An invalid or nonpublic purpose would theoretically render a challenged statute unconstitutional, even where the statute provided for compensation.\textsuperscript{99} In cases where the compensation requirement was at issue, therefore, courts inquiring into legislative motive would need to identify some concededly public purposes that would nonetheless point toward compensation. Distributive motives might cause suspicion, since prevailing judicial interpretation sees the takings clause as primarily designed to prevent unfair forms of redistribution.\textsuperscript{100} Nevertheless, statutes, such as progressive taxes, that are most explicitly aimed at what Professor Michelman calls "equalizing" redistribution,\textsuperscript{101} are perhaps most likely to survive a takings challenge.\textsuperscript{102} To evaluate compensation claims using legislative motive, therefore, a court ("[The Constitution measures a taking of property not by what a State says, or by what it intends, but by what it does.").

To look at governmental purpose more closely, of course, would demand that the Court develop a hierarchy of acceptable governmental motivations, a task the Court has largely avoided when addressing whether compensation must be paid. See, e.g., Connolly v. Pension Benefit Guar. Corp., 475 U.S. 211, 224 (1986) (finding plenary authority to regulate employer pension liability included in congressional duty to adjust the benefits and burdens of economic life); Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 129 (1978) (Claimants conceded that New York’s goal of preserving historical structures and areas is an entirely permissible governmental objective.). See generally Lawrence, Means, Motives, and Takings: The Nexus Test of Nollan v. California Coastal Commission, 12 HARV. ENV. L. REV. 231, 242-64 (1988) (exploring Court’s future direction when reviewing legislative motive in takings cases).

\textsuperscript{98} For a typically eloquent description of some basic problems with identifying a single, predetermined legislative intent, see R. DWORKIN, LAW'S EMPIRE 317-37 (1986); see also Gudridge, Legislation in Legal Imagination: Introductory Exercises, 37 U. MIAMI L. REV. 493 (1983) (presenting a preliminary effort to surmount problems with discerning legislative intent that suggests encoded conflicts among legislators should guide statutory interpretation).

\textsuperscript{99} Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229, 245 (1984); cf. Coniston Corp. v. Village of Hoffman Estates, 844 F.2d 461, 463-66 (7th Cir. 1988) (containing Judge Posner’s intriguing speculation on whether the takings clause prevents takings for private use or whether such takings instead violate the fourteenth amendment’s due process clause).

\textsuperscript{100} "It is axiomatic that the Fifth Amendment’s just compensation provision 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.’ ” Pennell v. City of San Jose, 485 U.S. 1, 9 (1988) (quoting First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 318-19 (1987) (quoting Armstrong v. United States, 364 U.S. 40, 49 (1960))).

The term "unfair redistribution" is successful shorthand for the Court’s words only under the assumptions of the sequentialist market model. The idea is that some legal system initially establishes rules that produce an existing set of entitlements and then later governmental decisions must be scrutinized to determine the extent to which the initial system is altered and why. See Paul, supra note 25, at 755 n.50.

\textsuperscript{101} Professor Michelman’s astute point is that equalizing redistributions, designed to redistribute from the better off to the worse off, are constitutionally acceptable but other purposeful redistributions are not. Accordingly, he suggests that the takings clause may be properly viewed as
might search for expressed motives that serve as pretexts for unfair redistribution.103 But since legislative motive alone will not indicate which redistributions are unfair, the Court must further consider whether the legislature is seeking to prevent the claimant from acting unjustly or whether the claimant is being asked to serve his community in a fashion above and beyond the call of duty.

supervising governmental activities that result in redistributions that would be unacceptable if carried out intentionally but that may be acceptable if they are the unintended byproduct of government programs with nonredistributional motives. Michelman, supra note 3, at 1182-83.

102. "Not every individual gets a full dollar return in benefits for the taxes he or she pays; yet, no one suggests that an individual has a right to compensation for the difference between taxes paid and the dollar value of benefits received." Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 491 n.21 (1987). See generally R. Epstein, supra note 3, at 283-305 (describing and criticizing the Court's general reluctance to invalidate taxation schemes as unconstitutional takings).

Justice Scalia, in his clever dissent in Pennell v. City of San Jose, 485 U.S. 1, 15 (1988), attempted to manipulate this paradox by suggesting that taxes are the only form of constitutionally permissible redistribution because they take money from the "public as a whole." Id. at 22 (Scalia, J., dissenting). Justice Scalia is right that redistribution through the tax system creates a different political dynamic (and one more favorable to conservatives) than redistribution through regulations such as the rent control ordinance challenged in Pennell. Id. at 21-24 (Scalia, J., dissenting).

But it is nonsense to find talismanic significance in the idea of taking money from the public as a whole. See Michelman, supra note 11, at 146-49 (arguing that within the liberal tradition Scalia's concession that general redistribution is permissible commits him to principles that justify affirmative welfare rights). Progressive taxes take money from some, high income earners, and transfer it through public assistance to others, low or no income earners. Indeed, the very definition of redistribution is to take from some to give to others. Taxes may be a good mechanism for redistribution because legislators may encounter difficulty in singling out one group for adverse, perhaps unfair, treatment. Justice Scalia is unconvincing, however, in his effort to demonstrate that the entire class of landlords is less likely to be unfairly singled out than, for example, the class of high income earners. See Note, Taking a Step Back: A Reconsideration of the Takings Test of Nollan v. California Coastal Commission, 102 Harv. L. Rev. 448, 464 (1988) (challenging the claim that tax policy is more democratic than regulatory policy). In short, once redistribution becomes a permissible goal of government, the standard for unfair redistribution cannot be derived from mere allegations that the purpose of a statute is redistributional. See generally Rose, Mahon Reconstructed: Why the Takings Issue is Still a Muddle, 57 S. Cal. L. Rev. 561 (1984) (characterizing the ambivalence of takings clause jurisprudence toward redistribution as the inevitable result of the tension within the American tradition between property as wealth and property as virtue).

103. Justice Scalia's Pennell dissent may also be viewed as arguing that the City of San Jose was seeking to redistribute wealth from landlords to tenants through the guise of an ordinance that purported to regulate overcharges for which landlords might be held justly responsible. Since landlords are not to blame for tenant hardship, Scalia argued, using hardship as a factor when setting rents demonstrates that the City's motives include an impermissible redistributional component. Pennell v. City of San Jose, 485 U.S. 1, 21-22 (1988) (Scalia, J., dissenting). But again, Justice Scalia could not show that the redistributional motive was hidden in a way that transforms what would be acceptable explicit redistribution into unfair covert redistribution. Indeed, San Jose voters were quite likely aware of what even Chief Justice Rehnquist was willing to concede: "[A] primary purpose of rent control is the protection of tenants." Pennell, 485 U.S. at 13; see also Michelman, supra note 11, at 152-53 (exploring republican rationales for Scalia's suspicion of San Jose's motives).
The latter inquiry into the relationship between the government's goals and the claimant's activities is what the Court now implicitly performs when looking to governmental purpose. In *Keystone*, for example, Justice Stevens emphasized that the Court is generally reluctant to require compensation when a citizen is prevented from making harmful use of property because the notion of "reciprocity of advantage" suggests that each citizen will benefit from similar restrictions on others. As discussed more fully below, the Court should make that connection more explicit by specifically addressing why certain individual sacrifices should be expected as part of communal life and others should be treated as needlessly confiscatory. The Justices should openly acknowledge that current inquiries into governmental purpose tacitly rely on the models of property already described.

a. The harm/benefit distinction: prelude: At first glance, it appears paradoxical to begin a discussion exploring theoretical models of property with a description of the Court's inquiry into governmental motive. After all, one obvious strength of focusing on governmental purpose is the apparent escape from the problems with the physicalist and market approaches to property already described. If the government may inflict uncompensated economic harm for some purposes but not others, then the search for a uniform theory of property can be abandoned. The general belief that some activities of government are less threatening than others formed part of the early doctrine safeguarding governmental exercises of the police power from the compensation requirement.


105. It is not clear precisely which governmental activities nineteenth century jurists viewed as police power measures immune from the compensation requirement. Chief Justice Rehnquist and Professor Sax have each argued that perhaps the key component of the police power was the state's right to prohibit noxious uses. Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 144-45 (1978) (Rehnquist, J., dissenting); Sax, supra note 18, at 38-46. Each relies on Justice Harlan's opinion in *Mugler v. Kansas*, 123 U.S. 623 (1887) (upholding uncompensated destruction of liquor made illegal by challenged laws).

The Court's own reliance on *Mugler* to reject a takings challenge to Pennsylvania anti-oleomargarine statutes, however, calls the noxious-use theory partly into question. See *Powell v. Pennsylvania*, 127 U.S. 678 (1888). In *Powell*, the Court upheld the trial court's refusal to admit evidence that the oleomargarine the claimant was on trial for selling was purely wholesome. Id. at 684-85. Justice Harlan argued that it was for the legislature to decide whether a blanket ban on oleaginous substances was needed to protect the public health. Id. Although the opinion may be fairly read as establishing broad latitude for the legislature to decide what the public health requires, the Court's decision to deny compensation to the owner of an allegedly healthful product suggests the Court viewed the police power as extending beyond the mere authority to prohibit noxious uses. In any event, it is clear the Court once saw some governmental actions as within the police power and therefore outside the compensation requirement. *Hadascheck v. Los Angeles*, 239 U.S. 394 (1915); *Powell v. Pennsylvania*, 127 U.S. 678 (1888); *Mugler v. Kansas*, 123 U.S. 623 (1887). See generally Stoebuck, *Police Power, Takings, and Due Process*, 37 WASH. & LEE L. REV. 1057 (1980) (finding
the pitfalls of uniform property theories also explain why much of the contemporary scholarship concerning the takings clause has investigated the reasons underlying governmental decisions to harm property interests.\textsuperscript{106}

Surprisingly, however, the initial focus on public purpose illustrates the pervasive importance of the physicalist and market models within takings clause jurisprudence. If the physicalist and market models demonstrably influence judicial attempts to solve the takings question in cases where the judiciary avoids resorting to conceptions of property, it will be much easier to demonstrate the relationship between those models and other aspects of the Court's ad hoc inquiry. Moreover, the Court's recent cases indicate the importance of governmental purpose within the takings framework.\textsuperscript{107} Most dramatically, the Court's decision in \textit{Keystone} upheld a Pennsylvania mining regulation in large part because the

\begin{itemize}
\item \textsuperscript{106} Professor Sax, for example, once hoped that courts could determine when compensation was constitutionally required by distinguishing between government's sovereign actions benefiting the public and its enterprise activities resembling private conduct. Sax, \textit{supra} note 18, at 61-67.
\item Professor Michelman offers perhaps the strongest argument that clarifying governmental purpose is central to takings doctrine. As he puts it, "if the only purpose which seems able, in the general understanding, to justify governmental 'intervention' in the first place is a purpose which would obviously be disserved by payment of compensation (or by nonpayment) little more need be said." Michelman, \textit{supra} note 3, at 1172. Accordingly, Michelman begins his classic treatment of takings law with an attempt to describe the general goals of governmental activity from the more limited perspective of when compensation might be in order. \textit{Id.} at 1172-83.
\item Professor Costonis also emphasizes the goals of a challenged measure, suggesting that compensation is required unless there is a "linkage" between the government's aim and the use of the taken property. Costonis, \textit{supra} note 18, at 487. Like Justice Scalia's opinion in \textit{Nollan} that virtually adopts Professor Costonis's views, however, Professor Costonis is only vaguely describes the nature of the required linkage.
\item Finally, Professor Peterson's entire theory is based on the idea that the government may take property without compensation, if the government's purpose is to prevent wrongdoing. For discussion, see \textit{infra} Part III(A), text accompanying notes 342-55.
\item The Court's decision in \textit{Penn Central} wrongly signaled that the harmful nature of the claimant's intended conduct would become less important in assessing the validity of property regulations and that therefore judicial focus might shift away from governmental purpose. Although the Court devoted significant discussion to earlier cases that had authorized harm-preventing legislation, the statute upheld in \textit{Penn Central} prohibited the owners of Grand Central Station from building atop the historic structure to safeguard the landmark, not to prevent harm to nearby citizens. Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 125-27 (1978). Of course, the legislature might assert that defacing the landmark is itself "harmful," but if the legislature is given free reign to deem any prohibited conduct as harm-creating, then every statute would pass constitutional muster. See Costonis, \textit{supra} note 18, at 480 n.65 (noting the difficulty in characterizing \textit{Penn Central}'s building plan as harmful since similar uses were permitted to non-landmark-owning neighbors). The Court's \textit{Keystone} opinion, reemphasizing government's broad authority to prohibit uses of property that will interfere with public health or welfare, comfortably overlooks the problems with setting the scope of legislative authority to define so-called safety measures because of the obvious advantages of
\end{itemize}
The public purpose behind the safety measure was significantly clearer than that of a similar statute invalidated in the landmark case of Pennsylvania Coal Co. v. Mahon.¹⁰⁸

The *Keystone* opinion resuscitated Professor Freund's oft-articulated rationale for the early distinction between uncompensated exercises of the police power and compensable uses of the power of eminent domain. Freund argued that the government should be required to pay compensation when it required one citizen to sacrifice for the benefit of the community but should not be required to pay compensation when the government prevents a citizen from harming neighbors or the community.¹⁰⁹ On this view, the mining regulation challenged in *Keystone* survives constitutional challenge because Pennsylvania was simply restraining coal miners from causing subsidence that would damage the public welfare.

As Professor Michelman has tellingly noted, however, this so-called harm/benefit distinction depends in large measure on the establishment of a "neutral baseline" from which harms and benefits can be measured.¹¹⁰ Michelman asks, for example, whether a government regulation banning billboards is best described as preventing the would-be advertiser from inflicting scenic blight upon passing motorists or as preventing mine subsidence. *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 485-93 (1987).

¹⁰⁸. *Keystone*, 480 U.S. at 485-93 (distinguishing Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922)). See Michelman, suprano note 10, at 1600 n.2, 1602-03 (noting *Keystone's* reliance on the traditional nuisance rationale but questioning its efforts to distinguish *Pennsylvania Coal*). The Court's recent emphasis on governmental purpose is also reflected in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), where Justice Scalia found that compensation was required because the challenged permit condition and the Commission's limits on development failed to serve "the same governmental purpose." *Id.* at 837.


¹¹⁰. As Professor Michelman puts it, the harm-benefit distinction "will not work unless we can establish a benchmark of 'neutral' conduct which enables us to say where a citizen's refusal to confer benefits (not reversible without compensation) slips over into readiness to inflict harms ( reversible without compensation)." Michelman, supra note 3, at 1197. See also Large, supra note 50, at 15, 29-34 (1987) (describing how the characterization of actions as harm-preventing or benefit-confering depends largely on the analyst's point of view). For a general discussion of the difficulty of establishing neutral baselines to help determine whether an unconstitutional taking has occurred, see Paul, supra note 25, at 755-74; see also Sunstein, Lochner's Legacy, 87 COLUM. L. REV. 873 (1987) (using the idea of baselines as an analytical tool to evaluate the significance of *Lochner v. New York*, 198 U.S. 45 (1905), for contemporary constitutional law); Beermann & Singer, *Baseline
increasing the value of the public highways. More generally, he demonstrates that when government engages in activities designed to increase the public welfare by favoring one resource use over another there is no readily discernible way to determine whether a harm has been prevented or a benefit created.

.b. The harm/benefit distinction and the property models:

i. Searching for a baseline: Professor Michelman's analysis may be extended, however, by recognizing that both the market and physicalist models, including the variant earlier called the external solution, serve as illusory versions of the so-called neutral baseline. Despite Michelman's persuasive arguments against the harm/benefit distinction, the distinction continues to play a confusing role in cases like *Keystone*, in which the Court elides the issue of whether the government may act


111. Michelman, supra note 3, at 1197; cf. Naegle Outdooor Advertising, Inc. v. City of Durham, 844 F.2d 172, 176-78 (4th Cir. 1988) (straightforwardly accepting the city's legitimate interest in aesthetics as a justification for an antibillboard ordinance and directing the district court's attention to the measure's economic impact on the claimant).

112. Michelman astutely distinguishes laws that require thieves to return stolen property. Clearly thieves have no claim to compensation for their loss, and antitheft measures might be characterized as preventing the harm of thievery. Michelman, supra note 3, at 1236. And, as long as government activity is clearly designed to enforce an already existing, well-publicized property regime, difficult compensation issues are unlikely to arise.

The problem, however, is that in some cases courts will be forced simultaneously to define and enforce the property scheme. Consider, for example, a Texas court considering whether to assign liability to an owner whose withdrawal of underground water causes his neighbor's land to subside. See Friendswood Dev. Co. v. Smith-Southwest Indus., Inc., 576 S.W.2d 21 (Tex. 1978) (holding that the defendant had the right to withdraw water, but that in future subsidence cases, defendants will be liable if they withdraw water in a negligent manner.). The court may view the plaintiff as seeking enforcement of the previous rule protecting land against subsidence. In that case, the defendant would have no plausible claim to reimbursement from the government. On the other hand, the court may see the plaintiff's claim as a request to alter the preexisting rule permitting unrestricted withdrawal of underground water. In that case, if the court decides to grant relief to the plaintiff, it must then face the defendant's argument that its property was taken without just compensation. It is hard to see how the court will determine which is the appropriate characterization of the plaintiff's argument. Certainly, however, a court ruling for the plaintiff would unnecessarily confuse the issue by asking itself whether its decision was meant to prevent the defendant from acting unjustly or intended to promote collective efficiency. The court would seek to accomplish both. Cf. Michelman, supra note 3, at 1237 (acknowledging the lack of a sharp distinction between antitheft-like measures and those protecting collective welfare).
with the question of whether compensation is required. More important, the persistence of an unreflective view of the harm/benefit distinction provides false comfort for judges who take a harsh stand regarding economic regulations. Justice Scalia’s opinion in *Nollan*, for example, is based on the following syllogism: Government regulations that prohibit construction without a building permit derive constitutional legitimacy from the government’s police power to prevent harm. Requiring a landowner to comply with certain conditions to obtain a building permit can be justified only as an extension of this general police power to regulate construction. Accordingly, any condition the government places on the right to build must be aimed at the same harm that the government was authorized to prevent in the first instance. Evaluating this syllogism requires careful consideration of the possible meanings of the term “harm.”

Consider first what would be necessary to render the harm/benefit distinction a successful or even helpful method for determining when compensation is constitutionally required.

113. Compare Michelman, *supra* note 3, at 1235-45 (clearly explaining that governmental measures justified by the simple desire to prevent one citizen from interfering with the already established rights of another require no compensation, but that when government acts to promote collective economic welfare, the question of compensation cannot be addressed by looking to whether the claimant is causing harm) with *Keystone Bituminous Coal Ass’n v. DeBenedictis*, 480 U.S. 470, 485-93 (1987) (finding that the challenged mining regulation served a valid public purpose and using this finding as powerful evidence that no compensation was required). For other criticisms of the harm/benefit distinction and its noxious use counterpart, see Stoebuck, *supra* note 105, at 1061-62; Sax, *supra* note 18, at 48-50.

114. *Nollan v. California Coastal Comm’n*, 483 U.S. 825, 834-37 (1987). Justice Scalia’s reasoning in *Nollan* requires the permit condition to serve the same governmental purpose as the general police power regulation. *Id.* at 837. Whenever governmental purpose is evaluated, however, some standards must be applied that will prevent the government from simply stating that its purpose is to serve the public good and accordingly both the permit condition and the building restriction serve that goal. Scalia’s obvious answer is to differentiate governmental purposes into actions aimed at preventing specific harms. This tactic produces the phrasing of his syllogism used in the text. It also explains his general approach to takings law, under which government would be required to show how a citizen asked to bear a particular economic burden has caused the harm that the regulation is designed to remedy. *See Pennell v. City of San Jose*, 485 U.S. 1, 21-22 (1988) (Scalia, J., dissenting) (A rent control ordinance that permits consideration of tenant hardship in setting rents violates takings clause because affected landlords have not caused the tenant’s hardship); *cf. Adkins v. Childrens Hospital*, 261 U.S. 525, 557-58 (1923) (holding that a minimum wage statute violated the due process clause because employers did not cause the workers’ indigence). *See also Note, supra* note 102, at 455-65 (1988) (criticizing Scalia’s “cause/effect” test as inefficient and unfair).

115. The text’s exclusive expository focus on the harm/benefit distinction may wrongly suggest the Court now uses the distinction as a single-minded tool for determining whether compensation is required. In fact, the distinction is employed as only part of the multi-factor analysis that constitutes the Court’s contemporary inquiry. *See Keystone Bituminous Coal Ass’n v. DeBenedictis*, 480 U.S. 470, 492-93 (1987). The dissipated impact of confusion within a particular component of a multi-faceted analysis, however, should not obscure the possibly combined effect of problems with many
will always be able to characterize specific restrictions as harm-preventing. Even a legislative requirement that land be kept entirely vacant may be described as part of a plan to thwart congestion or, more plausibly, as part of a flood control scheme.\footnote{116} If courts are to scrutinize such regulations effectively, the governmental aim must be measured against a reference point that is not provided by the regulators themselves. Similarly, however, the judicial claim to legitimacy depends upon a method for evaluating regulatory goals that is more than merely the courts' own judgment concerning the wisdom of the regulation. Otherwise, courts might manipulate the reference point to uphold favored legislation and invalidate regulations deemed undesirable.

Three plausible approaches to the search for a reference point correspond to elements of this Article's already established framework. First, courts might label legislation that prohibits one party from crossing a neighbor's boundaries as harm-preventing and thus not requiring compensation. For example, no one would expect an automobile owner to be compensated when laws prohibit driving across neighbors' lawns. This approach might be called simple physicalism.\footnote{117} Second, courts might investigate whether the government seeks to stop citizens from altering a beneficial factual status quo. In \textit{Keystone}, for example, the Court upheld mining restrictions designed to prevent coal owners from causing physical subsidence.\footnote{118} Here it is easy to see how the land in place serves as

parts of the purportedly ad hoc test. Nor can the harm/benefit distinction or any approach to a constitutional problem be defended because it is merely one of several suggested approaches.

\footnote{116. See, e.g., \textit{First English Evangelical Lutheran Church v. County of Los Angeles}, 482 U.S. 304 (1987) (treating seriously although not ruling upon the claimant's charge that a flood control ordinance violated the just compensation clause, thereby implicitly rejecting the idea that all such ordinances by definition pass constitutional muster). \textit{But cf. Adolph v. Federal Emergency Management Agency}, 854 F.2d 732, 736-40 (5th Cir. 1988) (thoroughly reviewing flood control case law and upholding the National Flood Insurance Program against takings challenge that relied on \textit{First English}).}

\footnote{117. Ironically, simple physicalism here draws intellectual strength from sequence or market ideas. Because the conceptual origins of property treat land as the paradigm case, the idea of landowners with fixed boundaries forms the backdrop against which all constitutional claims are evaluated. Accordingly, laws that reinforce this physicalist scheme are easily viewed as conceptually prior to laws that concern conflicts arising from competing but nontrespassory land uses. To complain about an inability to cross onto your neighbor's land, therefore, is to complain about something that has seemingly \textit{always} been outside your rights.}

\footnote{118. \textit{Keystone Bituminous Coal Ass'n v. DeBenedictis}, 480 U.S. 470 (1987). \textit{Nollan} also reveals the importance of the party that wants to change the external state of affairs. In \textit{Nollan}, the claimants sought permission to build a new home thus changing the factual status quo. The Coastal Commission also wanted to change the physical circumstances by permitting the public to walk across the claimants' beach. Justice Scalia's opinion siding with the claimant might be described as insisting that government must reasons for prohibiting one change with its reasons for wanting the other. \textit{Nollan}, 483 U.S. at 831-42 (1987).}
the reference point from which the threatened subsidence looks like a harm the government wishes to forestall. Emphasis on changes in the external state of affairs might be labeled a more enlightened physicalism. Finally, courts may choose to focus on the extent to which the challenged regulation reinforces or alters the existing property rules. According to this, the market model view, government may act to prevent the spread of new harmful agents, such as pesticides\(^{119}\) or cedar rust\(^{120}\) precisely because property law has always stood in the way of such harmful uses.\(^{121}\)

Each of these approaches serves a crucial role in maintaining the continued viability of the harm/benefit distinction, but none is successful in providing a neutral reference point that the distinction requires. In fact, the persuasive power of each approach helps explain why the others are deficient. As a result, current takings clause jurisprudence unconsciously fluctuates between physicalist and market approaches without pausing to appreciate the perennial character of the debate. Of course, recognizing the structure of the problem will not make it go away. The trick is to observe the ways in which our commitments to the competing approaches encourage us to believe the harm/benefit distinction can function as an answer to the problem for which it is really only a

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\(^{119}\) Ruckelshaus v. Monsanto Co., 467 U.S. 986 (1984) (The government's disclosure of information about the effect of a pesticide may constitute a taking depending on when the defendant submitted data to EPA).

\(^{120}\) Miller v. Schoene, 276 U.S. 272 (1928) (rejecting a constitutional claim for compensation brought by cedar tree owners who were forced to destroy their trees to prevent infectious cedar rust, which is harmless to the cedars, from spreading to and destroying nearby apple orchards). The Court's refusal to "weigh with nicety the question whether the infected cedars constitute a nuisance according to the common law," id. at 280, accounts in part for some of the stinging criticism of the case. See R. Epstein, supra note 3, at 112-15; E. Paul, supra note 3, at 185-87. After all, if the cedar tree owners had been subject to an injunction all along, what property right could they claim had been taken? See also Michelman, supra note 3, at 1198-99 (criticizing Miller for pretending that harmful nature of cedars could justify a decision not to compensate if the challenged ordinance was designed to promote collective efficiency).

\(^{121}\) Of course, cases like Ruckelshaus and Miller can also be explained by pointing to the ways in which the claimant's conduct threatened to degrade a healthy environment.

It is worth noting that Professor Michelman's example highlighting the dangers of the harm/benefit distinction involves a brick factory which began legal operations on previously vacant land before the construction of nearby residences. Michelman, supra note 3, at 1198. Accordingly, he insightfully draws our attention to a situation where a decision ordering the factory to shut down could rely neither on the brickmakers' disruption of the factual status quo nor on a preexisting legal regime outlawing brickmaking. Cf. Hadacheck v. Los Angeles, 239 U.S. 394, 408 (1915) (where Professor Michelman's circumstances existed but where the government did rely partly on a physicalist model by alleging that the brick factory would emit fumes, gases, smoke, soot, steam, and dust that would cause sickness in the vicinity).
The problem is to determine when a governmental decision denying citizens the opportunity to perpetuate some status quo results in a taking of their fair share of societal resources such that they deserve compensation.

ii. Two "easy" cases: The impact of physicalist and market ideas upon application of the harm/benefit distinction may be illustrated by contrasting opposing paradigm cases. Consider first an individual who owns a vacant parcel of land that is zoned for residential uses. The individual learns of a new manufacturing process that permits furniture construction to take place more quietly than ever before. Unfortunately, the new technique also creates an unpleasant odor that has sickened residents living near the factories where it has been employed. Nevertheless, the landowner applies for a zoning variance to permit a furniture factory to be built on the land. The owner relies on the fact that the new process will be as quiet as residential use. Unsurprisingly, the request is denied. The result would be even easier to predict were the owner to continue this folly by taking the claim to federal court and arguing that by denying the variance, the government unconstitutionally took property, without just compensation.

A court rejecting this bizarre claim might articulate its decision in many ways, but one compelling alternative would be to phrase its decision in terms of the state's power to prevent one citizen from harming neighbors and the community. Analyzed from a simple physicalist

122. This danger persists even where the harm/benefit problem is analyzed along a continuum rather than as a qualitative trigger for determining when compensation is due. Thus, Richard Wilkins suggests the Court should begin to evaluate takings cases against a spectrum whereby compensation would be more likely the less powerful the police power justification for the government's action is. See Wilkins, supra note 41, at 27. The police power justification is strong, Wilkins suggests, where the government seeks to prevent a misuse or illegal use of property. Id. at 28. Of course, if government acts to prevent an already illegal use, the claimant hardly has a strong claim, since even a strict market model approach would lead to a denial of compensation. Alternatively, Wilkins's examples of misuse, and those uses he calls "noxious," primarily include cases where the government prevents various sorts of physical transgressions onto neighboring land. Id. at 27. In short, Wilkins's efforts to divine the strength of the police power justification still depend on the Court's ability to separate harm-preventing from benefit-conferring conduct. This is precisely the problem rendered so difficult by our allegiance to competing conceptions of property.

123. Our landowner might be told that one has no property right to a variance or that no reasonable investment-backed expectation of receiving one exists in this instance. See Ruckelshaus v. Monsanto Co. 467 U.S. 986, 1005 (1984) (holding that a failure to demonstrate reasonable expectations can doom takings claim). A court might also inform the landowner, that the land still has many other valuable uses, and therefore the disapproval of this use will not cause a sufficiently severe economic loss to raise a constitutional challenge. See Agins v. City of Tiburon, 447 U.S. 255, 260 (1980) (suggesting that a land-use regulation that substantially advances a legitimate state interest will only be a taking if it deprives claimant of all economically viable use of the land).
angle, the claimant wants to inject foul-smelling odors into the air and across nearby boundaries onto the land of others. Even if the court ignored the boundary question, it might point to the way in which the claimant seeks to worsen the community’s situation by changing the character of the neighborhood through construction of the new factory. Finally, the claimant can be described as asking the government to change the existing rule structure by granting a variance. Accordingly, from a market perspective, the court can stress that the background zoning rule, like the background common law of nuisance, exists precisely to contain land use disputes that might erupt into broader conflict. Because it is the claimant who wants to breach the legal peace, the claimant must meet a heavy burden to justify the request for an exception.

Contrast the would-be factory builder with an individual who has for a long time been making bookshelves for personal use. A frightened Congress determines that individuals who do not purchase prefabricated shelves in the market pose a threat to the economic survival of the furniture industry. Accordingly, Congress enacts a statute banning the making of bookshelves in any building also used as a residence and requiring owners to destroy any such homemade shelves now in their possession.

124. See Just v. Marinette County, 56 Wis. 2d 7, 201 N.W.2d 761 (1972) (upholding wetlands regulations in part because they merely prevent claimants from causing harm by changing the natural character of the property); see also Paul, supra note 25, at 757-65 (discussing the importance of existing state of affairs in takings cases).

125. The claimant could alternatively argue that because the zoning rules also include the procedure permitting application for a variance, no rule exists concerning whether the variance should be granted. The government might respond that if the claimant wishes to rely on the variance procedure he must also rely on provisions establishing the zoning board as the final arbiter of the problem. But cf. Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 538-41 (1985) (rejecting the argument that citizens who rely on statutory schemes for substantive entitlements have procedural due process rights only to the procedures established by the statute). Again, the claimant might suggest that it is implicit in the constitutional structure that egregious errors by the board must be subject to judicial review. My goal is not to resolve this debate but to observe the extent to which the struggle to characterize the other side as seeking a change in the rules testifies to the power of the market model within the context of just compensation claims.

126. The requirement that existing shelves be destroyed might suggest that this hypothetical statute demands a physical invasion that would be ruled a taking without triggering further judicial inquiry into the character of the governmental action. See Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982) (A permanent physical invasion demands compensation without regard to other factors in Court’s takings analysis). Miller v. Schoene demonstrates, however, that the Court will sometimes sanction a legislative decision to order the destruction of tangible resources without providing compensation. Miller v. Schoene, 276 U.S. 272 (1928) (finding that compensation is not constitutionally required despite the fact that the state ordered the destruction of existing cedar trees). In contrast, the Loretto approach insists that, in the case of a physical invasion, inquiry cease and compensation be awarded only when government or a governmentally authorized stranger takes a permanent foothold on the claimant’s land. Loretto, 458 U.S. 419. The resemblance between
The Supreme Court might not uphold an award of compensation to individuals affected by this law, but it is easy to see the power of the takings challenge. These carpenters have not harmed their neighbors by thrusting damaging products into the stream of commerce. Rather, they have been quietly engaged in furniture making for a long time, and the government now seeks to change the existing state of affairs. Furthermore, the general rules governing uses of property cannot be easily described as preventing home manufacture of personal products. Accordingly, no so-called neutral baseline readily appears against which the carpenter's activities can be characterized as harmful. Indeed Congress's precipitous action looks more like an effort to benefit furniture manufacturers and possibly the general economy at the expense of a few unsuspecting citizens.

The interplay between Congressional motive and the harm/benefit distinction does create some additional complexity for our home carpenter. The confluence of both physicalist and market factors militating against characterizing the carpenter's activity as harmful is so strong as

127. Possible first amendment challenges to this statute are beyond the scope of this Article. See City of Lakewood v. Plain Dealer Pub. Co., 486 U.S. 750 (1988) (invalidating local ordinance giving mayor total control over the placement of newsracks on public property).
128. But cf. Wickard v. Filburn, 317 U.S. 111 (1942) (rejecting due process and commerce clause challenges to federal wheat quotas despite the claimant's argument that he would use excess wheat for his own consumption).
129. The perceived difference between the statute's ban on future manufacture and its requirement that shelves be destroyed further illuminates the power of the physicalist model. To the extent we view the home carpenter's activities as a single set of ongoing practices, and thus "thingify" the behavior, the ban and the destruction requirement are virtually identical.

Each new act of manufacture that produced a novel set of shelves, however, could be described as altering the existing state of affairs. Thus, with respect to the ban, the government could argue that it was acting to prevent the harm the new shelves would create rather than conferring a benefit as it might by ordering the destruction of shelves already produced. Perhaps this explains why it would be easier to win a takings claim for loss of the value of existing shelves than for loss of the right to build new ones. See id. at 132-33 (disavowing a constitutional right to grow wheat above quotas and stressing that the challenged regulatory regime was in place before claimant threshed and harvested excess wheat). Consider further the difficulty of describing the right to build shelves as a "property" right. Both the existing shelves and the ongoing practice of making the shelves can be viewed in terms of their physicality. Our tendency, however, to treat the shelves as things and the process of shelf making as an object of social construction simply highlights the ambiguities within physicalism itself. Cf. R. Nozick, supra note 35, at 174 (mockingly asking whether a labor theory of property would afford the owner of a can of tomato juice title to the sea once the juice was poured into the sea and it dissipated throughout).
to create suspicion that the contemplated statute might violate constitutional principles, even if compensation were afforded. But, of course, legislative desire to promote national industry is a valid public purpose that would likely be immune to challenge in light of **Hawaii Housing**.\(^\text{130}\) Accordingly, the claimant who seeks judicial relief would have to rely on the government’s failure to provide compensation.

Despite the difficulty of describing the carpenter’s activities as harmful, a claim for compensation still might not succeed. The harm/benefit distinction is only one of the factors in the Court’s ad hoc inquiry; the carpenter might lose because he or she has not suffered a sufficiently grave economic loss. More important, the antibookshelf statute does not single out a particular person or socially recognizable group for burdensome treatment.\(^\text{131}\) Instead, the statute applies generally to all past and future home carpenters. Since no one is singled out, the antibookshelf ordinance may be simply another example of Congress’s plenary authority to adjust the benefits and burdens of economic life.

There is an ambiguity, however, in the idea of “singling out.” If the Court is to defer to Congress whenever the legislative branch is not guilty of punitive or discriminatory motives, then the compensation requirement again becomes superfluous. After all, if the purpose of the statute was to make life difficult for home carpenters because they tended to vote against the party in power, the antibookshelf ordinance would fail even were compensation provided. Alternatively, the Court must consider whether standards exist to determine when a challenged legislative action constitutes an unfair and thus compensable redistribution. But this is exactly why the harm/benefit distinction was devised in the first place. If all that can be said to the home carpenter is that the legislature has now decided his or her past and future efforts are harmful to the economy and the court must defer to legislative judgment, then the harm/benefit distinction is meaningless.

The gap between application of the harm/benefit distinction and the underlying question of when a citizen is being asked to make too great a sacrifice remains hidden because actual cases seldom resemble those of our would-be factory owner or our home carpenter. Instead, the typical just compensation claim arises when the simple physicalist, enlightened physicalist, and the market models would lead to conflicting results. The


\(^{131}\) See, e.g., Levinore, **Just Compensation and Just Politics**, 22 U. CONN. L. REV. 285 (1990) (arguing that the takings clause is best read as preventing arbitrary governmental action that harms politically powerless entities).
perennial nature of this conflict makes it easy to see why commentators have persuasively argued that the harm/benefit distinction can produce few answers in real or even imagined takings controversies. The crux of the debate in takings jurisprudence is often over which of the three approaches provides the appropriate baseline for determining whether a harm is being prevented or a benefit conferred. The harm/benefit distinction in and of itself, however, offers no guidance on which model to select.

c. The harm/benefit distinction and simple physicalism: The factual situation in Penn Central Transportation Co. v. City of New York offers perhaps the most salient example of how the property models often point in opposite directions. The challenged New York landmarks law prohibiting office construction atop Grand Central Station prevented Penn Central from using its land in a manner that would otherwise be permitted. The law was enacted not to prevent Penn Central from physically intruding upon its neighbors, but instead to maintain landmarks for the city's overall benefit. Accordingly, simple physicalism supports Penn Central's position. Moreover, an already well-structured system of land use regulations limited the ways in which Penn Central could build on its land. Like most constitutional claimants, therefore, Penn Central could employ the market model in support of its challenge to a change in the existing rules. What Penn Central could not claim, however, was that the new landmarks regulation forced the railroad company to make significant changes in the way it was using Grand Central Station. Instead, New York City could argue that Penn Central's contemplated changes would make the City worse off by burdening an existing landmark with unnecessary construction. Penn Central thus presents the classic takings dispute in which choosing between physicalist and market models to determine the appropriate baseline will determine

132. See, e.g., Michelman, supra note 3, at 1196-1201; Sax, supra note 18, at 48-50.
133. The challenged New York City law did not, of course, directly single out Grand Central Station. Rather, the landmarks law authorized the Landmarks Preservation Commission to identify districts and buildings of historical significance and to designate a building as a landmark only after providing an opportunity for all interested parties to be heard. The law's restrictions then applied to designated landmarks. Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 109-111 (1978). Penn Central opposed the Commission's designation of Grand Central Station but did not question that designation in court.
134. The existing zoning regulations enabled New York City to sweeten the pill administered to landmark designees by affording them increased opportunity to employ transferable development rights that normally accompanied ownership of land not fully developed because of land use restrictions. Id. at 113-15.
whether the newly prohibited activity is harm-preventing or benefit-conferring.\footnote{135}

Nor is Penn Central unique. Many takings cases are controversial precisely because physicalist and market ideas have pushed in opposite directions or because divergent approaches to physicalism have suggested different results. Perhaps most vexing to commentators are those situations in which both enlightened physicalism and the market model seemed to demand compensation, but the Court refused to award it. Both Hadacheck v. Sebastian\footnote{136} and Miller v. Schoene\footnote{137} fit this pattern, and both can be used as evidence of the surprising strength of straightforward physicalist ideas.\footnote{138}

In Hadacheck an existing brickyard was outlawed after the surrounding neighborhood became a desirable site for residential growth. Accordingly, the claimant’s takings challenge rested on the argument that the law had changed to prohibit once legal activities and that the claimant was \textit{already engaged in} these activities in which he had invested substantial sums.\footnote{139} The government alleged that the claimant’s brick manufacture created “fumes, gases, smoke, soot, steam and dust,” causing sickness to those living in the vicinity. This image of the brickyard

\footnote{135. Justice Brennan’s majority opinion upholding the landmarks law explicitly emphasizes Penn Central’s continuing ability to use Grand Central Station as it had been used in the past. \textit{Id.} at 136. Brennan is careful, however, to stress the lack of a state-imposed change in the existing state of affairs within the portion of the opinion concerning the severity of Penn Central’s loss and not during a discussion of why the landmarks law is harm-preventing. \textit{Id.} But Brennan’s subtle craftsmanship cannot conceal the need for clear reasons linking the landmarks law to the long line of police power measures held outside the compensation requirement. Brennan does suggest that the landmarks law differs from reverse or spot zoning because the landmark owners are not singled out. \textit{Id.} at 132. Again, however, if he means that there is no evidence that would imply an insincere legislative motive, then he has simply shown the law to have a valid purpose. To the extent additional strictures against singling out are implicit in the compensation requirement, Brennan’s designation of the law as part of a comprehensive plan simply begs the question. \textit{See id.} at 132. When are regulations that burden some more than others sufficiently comprehensive so that the unevenly allocated burden passes constitutional muster?}

\footnote{136. 239 U.S. 394 (1915).}

\footnote{137. 276 U.S. 272 (1928).}

\footnote{138. Had the Court accepted the claimant’s characterization of the facts, Reinman v. Little Rock, 237 U.S. 171 (1915), would also fit this pattern. Again, the claimant alleged it had for a long time been conducting a livery stable whose impeccable operation was subsequently enjoined by the challenged ordinance. The Court heartily endorsed the regulation of livery stables as within the ambit of the police power, presumambly in part because of the diseases and noxious odors stables might create. \textit{Id.} at 176-77. The Court also, however, accepted Little Rock’s averments that the stable was operated in a careless manner. \textit{Id.} at 178.}

\footnote{139. \textit{Cf.} Kainen, supra note 71, at 386-87 (highlighting the distinction within nineteenth-century contract clause doctrine between powers exercised by corporations pursuant to valid charters that were constitutionally protected and powers granted but as yet “unexecuted” that were deemed constitutionally unprotected in Pearsall v. Great Northern Ry., 161 U.S. 646 (1896)).}
helped the Court reject the takings claim.\textsuperscript{140} Thus, the \textit{Hadacheck} Court used the simple physicalist model to characterize the claimant's conduct as harmful, despite the support the claimant might gain from a more enlightened physicalist approach or from the market model.

From a contemporary perspective, the absence of neighbors living in the vicinity at the time the brickyard was constructed renders the fact of physical invasion irrelevant to the compensation issue. What we tend to ignore, however, is the extent to which the presence of a physical invasion enables the Court to avoid conflating its public and private law roles. The Court need not seriously inquire into the extent of the police power to define unlawful uses of property because the particular use now deemed unlawful resembles transgressions courts often enjoin. Upholding legislative action, therefore, helps foster the impression that no difficult private law choice is made.

In the absence of such a resemblance, however, the Court would be forced either to inquire whether its own antinuisance rules would block the prohibited action or to craft recognizable limits onto the police power. In \textit{Miller} the Court specifically refused to address the nuisance question when it was again faced with a claimant whose existing cedar trees were suddenly illegal because the cedar rust they produced harmed nearby apple orchards.\textsuperscript{141} There too, however, the claimant's trees could be described as creating a physical invasion because the disease could travel across physical boundaries.\textsuperscript{142} Except for vague statements in

\begin{itemize}
\item \textsuperscript{140} \textit{Hadacheck}, 239 U.S. at 408.
\item \textsuperscript{141} \textit{Miller} v. Schoene, 276 U.S. 272, 280 (1928).
\item \textsuperscript{142} Professor Michelman suggests that "[t]o rely on the fortuity that the [harmful] pest spawns in the cedars would be to find comfort in an illusion" since there would be no appreciable difference if the pest lived in the apple trees and could only be exterminated with ash made from the condemned cedars. Michelman, \textit{supra} note 3, at 1198-99. He is correct that the cedar owner's lack of fault would be clear in both cases. It would thus be ironic, if not unfair, to charge the cedar owner with causing a harm. Nor is it easy to construct a powerful argument for distinguishing Michelman's hypothetical from \textit{Miller} itself. But it would not be surprising for courts to treat the cases differently. The migrating pests establish a physical link between the cedar trees and the diseased apple orchards. In \textit{Miller}, therefore, fortuitous events and not the legislature appear responsible for requiring that the cedar owners come to the apple owners' and the economy's rescue.
\end{itemize}

To extend Professor Michelman's example, suppose that the cedar trees needed for the extermination serum were across the state from the contaminated apple orchards. Here too the cedar owners would not be responsible for the disease, but the physical link is still more attenuated. Simple physicalism would predict that at some point the courts would begin to view the legislature's decision to demand sacrifice by the cedar owners as arbitrary to the extent that the cedar owners have "nothing to do with" the apple owners' or the economy's plight. If "nothing to do with" the apple owner's plight means that the owner was not at fault, then all these examples are the same and compensation
Pennsylvania Coal Co. v. Mahon,\textsuperscript{143} the Court has never devised an approach for takings-based limits on the police power.

The extensive scholarly criticism of cases like Hadacheck and Miller stems from deep problems inherent in the simple physicalist model. Accordingly, that critique prefigures the general problems with each of the models described here. There are, of course, the obvious attacks on any descriptive property theory based on physical boundaries. Private property law often privileges crossing onto other people's land. Furthermore, neighbors can be dramatically harmed by and are therefore often legally protected against activities that owners perform solely on their own land. More important is the normative challenge to simple physicalism. If one citizen has been crossing onto another's land for a long time, but circumstances have now changed to give the burdened party reason to object, it seems unfair to permit the burdened party simply to invoke physical boundaries to enjoin the trespass.\textsuperscript{144} More generally, courts deciding private law disputes wish to protect the sanctity of physical boundaries, but they also desire to protect longstanding practice and the factual status quo. Accordingly, courts interpreting the takings clause tend to view as creating harm actions that transgress boundaries and actions that disrupt the existing state of affairs. But, of course, these actions will not always be the same. In other words, enlightened physicalism provides an implicit critique of the simple physicalist model. Similarly, if as in Hadacheck, the legal rules have for a long time permitted discharge of fumes into the air, some limit should be placed on the rulemakers' ability suddenly to ban the discharge. Otherwise, the existing rule structure would lack stability, and unchecked government

\textsuperscript{143} 260 U.S. 393 (1922).

\textsuperscript{144} Of course, if one party has been invading the property openly and long enough, private law will eventually award him a prescriptive easement to continue the transgressions. R. Cunningham, W. Stoebuck & D. Whitman, THE LAW OF PROPERTY § 8.7, at 451-6. For a defense of adverse possession and prescriptive easements based on the reliance interests of the transgressing party that implicitly embraces the normative critique of simple physicalism, see Singer, supra note 27, at 665-70.
power will again raise the positivism problem. In this sense, simple physicalism and the market model are incompatible. The strength of the alternative models therefore gives power to the critique of cases like Hadacheck and Miller.

d. The harm/benefit distinction and enlightened physicalism: Simple physicalism is not the only model to suffer from comparison with its companions. Return now to the Penn Central debate. Among the many reasons Penn Central produced significant controversy was that unlike earlier land use regulations held to be within the police power, the challenged statute was not designed to eliminate physical harm to nearby residents. The landmark regulation instead granted intangible or aesthetic benefits to the entire community rather than physical relief to the nearby residents. Thus, on simple physicalist premises it would be difficult to describe landmark regulations as harm-preventing. Another version of physicalism, however, places the Penn Central claimant in a more unfavorable light. The claimant was the one seeking to change the physical use of the regulated structure. Thus, the Court was able to reject the argument that Penn Central was being singled out for unfair burdens in part because it was then operating the railroad station without an office building above it.

At some point, however, there must be a limit to the idea that a citizen who has engaged in a particular practice for a long time can be forced to continue that practice without compensation for losses incurred in doing so. Suppose New York had passed a statute requiring all buildings with large outdoor clocks to continue to operate these timepieces in order to inform citizens of the correct time. Or suppose a new statute ordered Macy's to continue to sponsor the Thanksgiving Day parade, Rockefeller Center to continue paying for its annual Christmas tree, and

145. No claim is made here that the unstable rule structure will so discourage investment that the market model must be adopted to promote efficiency. Compare Blume & Rubinfeld, Compensation for Takings: An Economic Analysis, 72 CALIF. L. REV. 569 (1984) (suggesting that market failure in the insurance market creates risks for which government compensation is the appropriate remedy) with Kaplow, supra note 19 (challenging the notion of insurance market failures and explaining why economic analysis often suggests that government compensation schemes are inefficient). Instead, the conflict between physicalism and the market model is designed to illustrate the rhetorical significance of sequential reasoning in mollifying our concerns over governmental abuses. A conceptual scheme that describes some rules as sufficiently settled so that power holders cannot change them without providing compensation has obvious legitimacy advantages over a system in which all rules are subject to uncompensated change. See id. at 602 (recognizing that preventing abuse of power may provide reasons for compensation apart from efficiency concerns but suggesting that a compulsory insurance approach might better reconcile legitimacy and efficiency goals).

146. See note supra 135.
Ringling Brothers to continue appearing in Madison Square Garden.\(^{147}\)

Suppose that Penn Central was even ordered to continue operating a railroad because it had done so for so long. These examples illustrate the problem with sole reliance on enlightened physicalism.

Strict adherence to the market model would not so much answer these questions as render them irrelevant. Because it would be virtually impossible to characterize existing law as requiring any of these services to the city, the market model would demand compensation in all these cases. The market model would also require compensation in Penn Central and virtually any case where a formerly permissible practice was subsequently outlawed. Accordingly, the market model's pragmatic approach to placing limits on enlightened physicalism would ask how much the claimant would be harmed by a government requirement to continue an existing practice. This approach has its own obvious uncertainties in defining the appropriate level of loss giving rise to compensation.\(^{148}\) It serves, however, to limit enlightened physicalism's extreme claims that the takings clause never protects a citizen's right to change the existing state of affairs.

Recurring controversy over cases in which claimants are required to keep their land vacant illuminates the weaknesses of enlightened physicalism from a more traditional physicalist viewpoint. Bans on development resulting from open space legislation, flood control schemes, or governmental efforts to protect wetlands are likely to have a substantial impact on the economic value of a claimant's land.\(^{149}\) Accordingly, economic loss partially explains why development bans are often targets for judicial action and scholarly criticism.\(^{150}\) An owner of land subject to a development ban, however, could lose less money on an absolute or percentage basis than another owner who may develop his or her land but only in accordance with stringent regulations.\(^{151}\) Only a link between

\(^{147}\) The imaginative reader will certainly be able to devise at least 16 such New York "landmarks" to improve the comparison between the "singling out" issue here and the 16 actual landmarks designated in Penn Central.

\(^{148}\) See infra Part II(B), text accompanying notes 256-83.

\(^{149}\) See, e.g., Dooley v. Town Plan & Zoning Comm'n, 151 Conn. 304, 197 A.2d 770 (1964) (invalidating flood control legislation because claimant's permitted uses were all impractical and economic loss was severe).


\(^{151}\) Compare, for example, an owner of vacant wetlands parcel whose inability to fill and construct a residence reduces the land value from $50,000 to $10,000 with a brickyard owner such as Hadacheck whose land value declined from $800,000 to $60,000 following an ordinance outlawing brickmaking at that location.
market ideas and simple physicalism can fully account for the special attention paid to development bans.

Consider how development bans pose a threat to our basic physicalist model. If the government may prevent all activity within the boundaries created by a system of ownership that divides land into privately owned parcels, then the notion of "owning" land becomes more difficult to maintain. Physicalism begins with the idea that facts in the external world limit government's ability to abuse the power of defining property rights. But upon what facts may a landowner rely when all development may be forbidden? Government may point to the owner's failure to develop the land, but this argument loses force if the claimant seeks to replace one form of development with another. Simple physicalism, therefore, highlights the need within a land-based system for some amount of freedom to make changes within one's boundaries.\(^\text{152}\)

Put another way, complete rejection of simple physicalism would render physicalism itself an unacceptable tool for applying the harm/benefit distinction. If every change that the legislature deems undesirable may be described as a harm whose prevention may be accomplished without compensation, then the harm/benefit distinction would empower legislatures to freeze the factual status quo. Citizens would be required to forego any project that the community found unacceptable, and collective frustration of individual life plans might never trigger the compensation requirement. Simple physicalism checks this problem by affording constitutional protection to those projects that can be executed within a landowner's physical space. Alone, this is a poor model because it wrongly gauges society's level of interdependence. No matter how physical boundaries are established, one landowner can easily damage neighbors and others without crossing those boundaries. Nevertheless, simple physicalism at least addresses the crucial problem of interdependence that enlightened physicalism largely ignores.

\(^{152}\) The Court's own rhetoric refers to the landowner's claim to both economic value and physical freedom. The Court often asks whether the challenged regulation deprives the claimant of "economically viable use" of the land. Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 485 (1987) (quoting Agins v. Tiburon, 447 U.S. 255, 260 (1980)) (emphasis added); United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 126 (1985) (quoting Agins, 447 U.S. at 260) (emphasis added). Although this phrase may be intended generically to refer to all economically viable options for the land, including, for example, non-use (that is, leaving the land vacant), the Court's choice of language can be better explained as reflecting deep-seated judicial preference for physical exploitation of land as a 'natural resource. See Winter, An Upside/Down View of the Countermajoritarian Difficulty, 69 Tex. L. Rev. 1881, 1905-19 (1991) (contrasting Western tendencies to treat land as a resource to be used with alternative perspective of Native Americans).
Enlightened physicalism proceeds from the idea that individuals have fewer rights to make changes in the external state of affairs than to prevent them. Continuing an existing practice, however, may eventually cause great harm to others while commencing a new activity may have only minimal impact. More important, unless some changes are protected, the harm/benefit distinction becomes a way of defining the nature of the claimant’s conduct solely by reference to the existing state of affairs. The notion of causing harm is replaced with the idea of change, and the status quo becomes the arbiter of constitutional principle. Opponents of development bans recognize that, as simple physicalism suggests, preventing change is a poor surrogate for preventing harm. Perhaps it’s not so simple after all.\footnote{For an interesting example of a rule arguably based on simple physicalist ideas; consider one judicial response to a landlord’s refusal to comply with housing codes. Forcing a landlord to conform to a new code could be described either as a demand for a change in the existing state of affairs (i.e., the court is requiring the landlord to make repairs) or as a perpetuation of the status quo (i.e., the court is simply requiring the landlord to continue to lease apartments that must now conform to the building codes). In the case of a landlord who threatens to take his apartment off the market rather than make repairs, courts have good reason to prefer the latter characterization. Otherwise, tenants availing themselves of the right to withhold rent until repairs are made run the risk of eviction based on the landlord’s allegations that repairs are too costly. At the same time, courts are understandably reluctant to force landlords to assume excessive economic hardship. To address these competing concerns, courts have strictly scrutinized attempts by landlords to remove a single housing unit from the market while granting landlords greater flexibility to close down an entire building. See Robinson v. Diamond Hous. Corp., 463 F.2d 853, 864-67 (D.C. Cir. 1972). While this approach could easily be described as a prophylactic rule designed to police disingenuous claims of landlord poverty, see Radin, Market-Inalienability, supra note 38, at 1909-11 (describing uses of prophylactic rules), another view would characterize the courts as enmeshed in physicalist notions. Thus, once landlords have opened their physical boundaries to tenants, their flexibility becomes more limited than if they wished to erect an artificial wall around their borders. Perhaps this view helps explain why the Robinson court was less clear on the result when a landlord wished to close one building but continued to operate another in the same city. Robinson, 463 F.2d at 867. Presumably, that question would depend only in part on whether tenants in the remaining buildings would be intimidated by the shut down. Id.}

e. The harm/benefit distinction and the market model: Finally, consider the market model’s inability to serve as the sole reference point from which to measure the harm/benefit distinction. Since virtually every takings challenge consists of a claimant’s objection to a new governmental rule, the market model would obviously favor the claimant because this model would require compensation for any change in the existing rule structure. The difficulty lies in determining what accounts for the persistence of the market model in light of its obvious tendency to prevent all uncompensated legislative change. One answer lies in the plausibility of distinguishing between truly new governmental rules and those that simply reinforce already existing principles. The trick is to
describe the governmental rule at the appropriate level of generality so as to argue for or against compensation. Physicalist ideas play a large role in rendering some descriptions more convincing than others.

Another fanciful example may help to illustrate how some rules appear newer than others. Imagine an eccentric inventor who uses common materials purchased in a store to concoct a serum that renders metal invisible to the human eye. Congress learns of the discovery and, fearing the serum could be used to construct invisible weapons such as guns and tanks, bans manufacture or sale of the new serum. The inventor challenges the statute as an unconstitutional taking of property without just compensation.154 A pure market model might support this claim because the rule banning the invisibility serum clearly represents a new restriction that was not present when the inventor devised the formula. But the government may respond that general legal principles prevent one person from using his or her property so as to injure another155 and also grant broad governmental authority to protect national security.

154. Characterizing this interest as property raises more intriguing questions concerning the relationship between physicalist and market ideas. Our inventor has not obtained a patent to the serum and accordingly does not have what might be described as a Hohfeldian right to prevent others from also manufacturing the new liquid. In contrast, the inventor does have a Hohfeldian right to prevent private citizens from coming onto her land and interfering with her serum production. Moreover, the inventor will argue that prior to the challenged statute he or she had a Hohfeldian privilege to engage in serum manufacture and sale. Sole possession of the formula, of course, will render the privilege to manufacture and sell as valuable as a patent, at least until others catch on. Consequently, the inventor wants this privilege constitutionally protected as property. See generally Kainen, supra note 71, at 437-52 (exploring the Hohfeldian scheme and the dilemma that protection of privileges poses for constitutional and especially contract clause jurisprudence).

The government may argue that only rights and not privileges should be so protected. But this would reduce property to meaningless physicality. If land ownership, for example, meant only that citizens could recover for governmentally imposed harms that resembled private interference with Hohfeldian rights, then all land use regulation would be immune from constitutional challenge. Presumably, owners of vacant land have no Hohfeldian rights concerning buildings that are not yet constructed. See Siegel, Understanding the Nineteenth Century Contract Clause: The Role of the Property-Privilege Distinction and “Takings” Clause Jurisprudence, 60 S. CAL. L.REV. 1, 81 n.401 (1986) (describing how regulation reveals the implausibility of distinguishing between protecting possession of physical items and protecting economic value). Accordingly, meaningful constitutional review must include protection for some Hohfeldian privileges and the challenged statute banning the invisibility serum must be defended on grounds other than the claimant’s failure to obtain a patent. Cf. Humbach, supra note 18 (arguing that the takings clause should protect only Hohfeldian rights). But cf. infra Part III(A), text accompanying notes 371-83 (criticizing Humbach). The text explores the rationale that the serum may be banned without compensating the inventor because introducing the serum into society would create harm to the community.

155. At this level of generality, the circularity of the market model as a baseline for the harm/benefit distinction becomes acute. If the general prohibition against causing harm is sufficiently broad to include any legislative prohibition, then no legislative acts will be benefit-conferring and compensation will never be required. In contrast, if some newly prohibited activities do not fit within the general rule against causing injury, then some method is needed to determine when a prohibition bans activity not previously outlawed by the general rule. That method cannot rely on
Under this view, the new statute is merely a concrete application of already existing rules rather than a change to a new legal regime; thus the market model would suggest no compensation is necessary.

Justice Sutherland employed the precise strategy of analogizing new restrictions to already existing principles in his famous opinion in Village of Euclid v. Ambler Realty Co. His decision upholding zoning depended heavily on the similarity between this new type of land use regulation and earlier restrictions limiting the height of buildings and prohibiting nuisances. He also recognized the same problem that the invisibility example highlights. The more actual conditions change, the more government will be forced to alter its regulatory schemes. Thus, he noted that regulations sustained today might have been unconstitutional years ago. “And in this there is no inconsistency, for while the meaning of constitutional guaranties never varies, the scope of their application must expand or contract to meet . . . new and different conditions.”

Sutherland’s emphasis on changing economic and physical conditions reveals the underlying tension between the market and physicalist concepts. The market model suggests that citizens may make any change in the existing state of affairs provided that that change is not already illegal. In contrast, enlightened physicalism implies that citizens have no constitutionally protected interest in future states of affairs they may wish to create. Putting these ideas together is extraordinarily difficult in situations where new circumstances like those in Euclid suggest that government might legitimately wish to prohibit future land uses. The market model points toward demanding compensation for the changed legal regime whereas enlightened physicalism supports the government’s position because no existing land uses were outlawed.

Sutherland recognized this difficulty and noted that the mere fact of changed conditions cannot be permitted to invalidate every new government regulation. He suggested that circumstances and locality will help determine whether a new restriction is a response to new conditions consistent with already existing principles or is instead a truly new restriction that goes beyond the police power. But how will an analysis of the circumstances in the individual case help?

156. 272 U.S. 365 (1926).
157. Id. at 387-89.
158. Id. at 387.
159. Id. at 386-87.
160. Id. at 388.
Only factors outside of the market model will enable courts to determine whether a challenged regulation is correctly described as new. Physicalist ideas suggest at least two considerations. Sometimes enlightened physicalism will bolster the market model. If, for example, a new land use regulation prohibits an activity in which the claimant has long been engaged, the argument that this activity has long been illegal is very weak. In contrast, when a new regulation is easily analogized to earlier prohibitions on trespass, simple physicalism will strengthen the claim that already existing rules have long prohibited the now legislatively forbidden practice. Height restrictions, therefore, might receive judicial approval because an expanded view of interdependence easily explains how blocking a neighbor’s light can be as harmful as an actual transgression onto the neighbor’s land. Ultimately, however, the Court will be pushed to consider also the extent to which the claimant should reasonably have expected the new regulations to be imposed. This factor expands the scope of the Court’s inquiry beyond the question of the harm/benefit distinction and creates still further problems for the market model.

Without physicalist and expectations analysis, the market model is inadequate to the task of separating the prevention of harm from the conferring of benefits. The market model suggests either that compensation is required for every legislative change or that compensation is never required because legislative acts that satisfy the public purpose criterion merely the concretize general ban on harmful activities. Incorporating physicalism into the market model, however, risks heightening the degree of unconscious fluctuation between models. Physicalist considerations cannot be permitted to completely determine when a new regulation prevents a harm or confers a benefit. If physicalism controlled, the rhetorical gains of protecting against uncompensated rule changes would be largely lost. Accordingly, the Court needs substantive criteria for deciding when physicalist notions will prevail and when the simpler market model will justify compensation because there has been a change in

161. Indeed, the constitutionality of height restrictions was apparent even to the claimant in Welch v. Swasey, 214 U.S. 91 (1909), the case providing Supreme Court imprimatur to height limitations. In Welch, the claimant conceded the general validity of height restrictions but attempted to distinguish between police power limitations, presumably those that protected neighbors from harm, and height requirements whose purpose was of an “aesthetic nature.” Id. at 104. The claimant also argued that the particular restriction was arbitrarily severe. Once the general validity of the restrictions was conceded, however, the Court had little trouble unanimously rejecting the more particular challenge.

162. See infra Part II(C), text accompanying notes 282-336.
the rules. These criteria, rather than an effort to escape a multi-factor approach, should be the focus of judicial and scholarly effort.

f. The harm/benefit distinction: aftermath, property and interdependence: Each of the property models tells an important story concerning the possibility of deciding when to compensate citizens for governmentally inflicted damage. Citizens who seek to cross established physical boundaries, change the existing state of affairs, or violate existing prohibitions all appear to be causing harm that the community might prevent without paying compensation. Although conflicts among the models prove they cannot all be applied simultaneously, nothing suggests that the models lack intuitive power. Since actual cases will pit the models against each other, however, and since none of the models alone can provide a sufficient answer to the question of whether a harm has been created, judges must also thoroughly analyze when particular activities deserve constitutional protection.

In deciding, based on the harm/benefit distinction, whether a challenged governmental action calls upon the citizen to make an unfair sacrifice, the court must select an appropriate starting point from which to evaluate the claimant’s contribution. Consider, for example, a change in a longstanding rent control scheme that reduces permissible rent increases from one-half to one-quarter of market rates. Overburdened landlords might argue the new scheme deprives them of a reasonable return. However, this challenge assumes that the appropriate starting point is market rates. If the court treats landlords as starting with a right to fifty percent of market, then the new ordinance takes only fifty percent of what was left. Presumably the same reasoning that justified the original fifty percent limit will also justify the new one. Physicalist or market ideas might help us to decide which of these starting points is appropriate. If, for example, a landlord purchased the building after the controls were put in place, the claim seems weaker because that individual will suffer from only one change in the rules rather than two. But it would be foolish to suggest that these are the only available approaches. Once we fully recognize the extent to which physicalist and market ideas are incomplete, the door is open to engage in a more serious normative

163. Cf. Cromwell Assocs. v. Mayor and Council, 211 N.J.Super. 462, 511 A.2d 1273 (1985) (upholding a landlord’s challenge to a 25% cap on rent increases that included no exception for landlord hardship and granting landlords the right to a statutorily mandated 6% rise over and above any hardship increase).
inquiry concerning the importance of the property right that the claimant is asserting. Two strategies are readily apparent. First, any particular takings claim can be evaluated from a simple physicalist, enlightened physicalist, or market model perspective, and specific arguments can be advanced as to which perspective is appropriate. Second, additional models that are less concerned with a global solution to the normative problem can also be applied. These strategies will be discussed further in Part III, but a brief capsule is worthwhile here.

Return, therefore, to Keystone and Nollan. Justice Stevens's Keystone opinion attempted to persuade us that Pennsylvania's contemporary anti subsidence regulations were more worthy of judicial deference than the Kohler Act invalidated in Pennsylvania Coal because, in his words, "the Commonwealth of Pennsylvania has acted [here] to arrest what it perceives to be a significant threat to the common welfare." But what precisely did he mean by threat? If the point is simply that Pennsylvania is better off after the enactment of mine subsidence legislation, then Stevens's argument works to distinguish neither Pennsylvania Coal nor any situation where the Court concedes the legislation would be valid if compensation were paid. Clearly the Pennsylvania legislature thought the Commonwealth was a better place after passage of the Kohler Act, and any legislation that could not arguably be presented as improving some aspect of life for a state's people would fail the most basic public purpose or due process requirement.


165. Justice Stevens further attempted to distinguish Keystone from Pennsylvania Coal by referring to the passage in the 1922 opinion where Holmes suggests that the Mahons' (homeowners') interest would be insufficient to supply a public purpose for the statute. Id. at 483-84. Stevens argued that the finding of no public purpose is the true holding of the case and characterized the remainder of Holmes' opinion as advisory. Id. This Article's perspective, however, suggests an alternative reading for the passage Stevens quoted.

Pennsylvania Coal marks the first occasion on which the Supreme Court holds that an exercise of the police power might so restrict property rights as to constitute a taking. Holmes appears keenly aware, even if Stevens is not, that one source of support for a broad police power is the analogy between the legislative power to regulate use and the uncontested judicial power to resolve conflicts among competing users. Accordingly, for Holmes's opinion to work he must explain not only why the legislative restriction goes too far, but also how it differs from the typical private law case where "existing rights may be modified" but no compensation is required. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413 (1922) (citing Rideout v. Knox, 148 Mass. 368, 19 N.E. 390 (1889) (upholding a statute outlawing an existing spite fence and providing no compensation to the fence owner)). But cf. Abbott, supra note 51, at 200 (1889) (criticizing Knox because prior to the challenged statute, nuisance law permitted construction of the fence (market model) and the fence had already been constructed (enlightened physicalism)).
Stevens next suggested that Pennsylvania's subsidence regulations were constitutional because they promoted a public purpose broader than the mere balancing of private economic interests. But suppose the prohibited mining would physically harm a large number of private landowners. Did Stevens wish to imply that shielding those landowners would not serve a public purpose? Ultimately, what distinguishes those affected landowners from the more general residents of Pennsylvania whom the challenged regulation actually protects? Indeed, wouldn't the defense of those landowners constitute an "adjust[ment of] the benefits and burdens of economic life to promote the common good" that Justice Stevens reminded us is normally more secure against constitutional challenge?

Perhaps Stevens feared that statutes such as the Kohler Act were enacted to benefit only a few private landowners and thus they raise the specter of special legislation. In contrast, the broad public purposes upheld in Keystone ensure that the coal companies have not been singled out unfairly. This approach, however, raises an intriguing paradox. If the takings clause provides a constitutional guarantee against majority excess, then the courts should pay particular attention when large numbers of landowners benefit from antisubsidence legislation. The many landowners must not be permitted to pressure the legislature into placing unfair burdens on the relatively few coal companies. Moreover, as a practical matter, consider how unlikely a legislative decision to benefit only a few landowners would be in light of the likely political strength of the mining industry. Accordingly, the compensation aspect of the takings clause is most needed not to thwart special legislation but to monitor situations where large numbers of citizens could win unfair gains through the political process. Justice Stevens, therefore, should have provided some explanation for why coal companies are any less deserving of compensation than others who must bear burdens to assist the general public. Otherwise, Keystone becomes indistinguishable from Pennsylvania Coal.

Nor could Stevens take refuge in the simple idea that the antisubsidence legislation was designed "to protect . . . the environment." Presumably, any legislation that prohibits a person from engaging in

167. Id. at 488 n.18.
168. See Levmore, supra note 130 (stressing the role of the takings clause in protecting individuals and groups not well organized within the political process).
some activity is valid only to the extent it improves conditions for some­one else.\footnote{170} Accordingly, virtually any land use regulation can be described as protective of the environment if the regulation is analyzed from the perspective of those whose situation is improved. Certainly, the Mahons’ environment would have been “protected” had the Court sustained the Kohler Act and prevented the Pennsylvania Coal Company from removing the ground beneath their home.

Steven’s reference to environmentalism does, however, shed some light on a more thoughtful approach to the harm/benefit distinction, which supports the result in \textit{Keystone} despite the confusion within Stevens’s opinion.\footnote{171} The strongest argument supporting Pennsylvania’s decision to regulate mine subsidence stems from the obvious \textit{physical} interdependence among the owners of adjoining land. If the mining companies dig carelessly, nearby residents will suffer directly and immediately. Such physical interdependence could provide a rationale for distinguishing when compensation is and is not required.\footnote{172} Moreover, the tangible environmental consequences of physical interdependence highlight the broader interdependence that pervades our society. If I open a fast, efficient dry cleaning establishment downtown, I may injure a suburban mall clothing store owner who sells fewer shirts because downtown workers can have their shirts cleaned more frequently. Accordingly, a law forbidding cleaners in the downtown neighborhood could be described fairly, if not convincingly, as preventing harm to the store owner.

As we grow more conscious of interdependence, we will better appreciate the underlying problem that the harm/benefit distinction was

\footnotetext{170}{Even the debate over so-called victimless crimes often turns not on whether the state should be permitted to prevent someone from harming only themselves but on whether any activities correctly fit the category of wholly self-regarding activity. \textit{Compare} Osborne v. Ohio, 110 S. Ct. 1691 (1990) (upholding restrictions on home viewing of child pornography because such viewing affects others by building an economic market for pornography) \textit{with} Stanley v. Georgia, 394 U.S. 557 (1969) (treating home viewing of obscene material as largely private, and thus protected, conduct). Bans on alcohol consumption, for example, might be criticized because they interfere with self-regarding activity or defended because they increase everyone’s security on the roads or even because they improve my chances of having my loved ones live longer. \textit{See generally} Rubenfeld, \textit{The Right of Privacy}, 102 Harv. L. Rev. 737, 756-61 (1989) (describing and criticizing the theory of self-regarding acts); Singer, \textit{supra} note 65, at 995-1014 (same). Indeed, once one recognizes that people care about each other and that emotional distress causes harm, it becomes extraordinarily difficult to attach normative significance to the category of wholly self-regarding activities.}

\footnotetext{171}{\textit{Cf.} E. PAUL, \textit{supra} note 3, at 7-57 (suggesting that an overemphasis on environmental concerns has led to an unwarranted decline in judicial protection of property).}

\footnotetext{172}{\textit{See} Sax, \textit{supra} note 3, at 161-72 (seeking to define when compensation is required using idea of spillover effects, which is simply another name for physical interdependence).}
formulated to solve. For our failure readily to distinguish newly prohibited activities that would harm others from activities that the government bans to benefit the public in no way diminishes the need to organize collective affairs so that individuals are afforded security to participate freely in the community. The takings clause is a constitutional directive to protect certain individual economic interests, and the harm/benefit distinction focuses on whether the citizen asks to take from the common pool or whether the community demands unjust sacrifice from the citizen. Attempts to apply the harm/benefit distinction that do not account for the underlying property models will ultimately lose sight of this crucial question.

Reemphasizing the question of whether the affected citizen is unfairly singled out suggests three obvious but problematic strategies. First, the Court could explicitly spell out why it favored one of the three property models over another in a particular case. In *Keystone*, for example, Justice Stevens could have tried to explain why enlightened physicalism was the most appropriate framework. He might have suggested that the market model is inappropriate in cases where a common resource like coal is being extracted from the earth for private gain. Defending this proposition would be extraordinarily difficult, but at least it begins to address the problem of defining property as protection against the collective in a world where interdependence makes it impossible to conceive of property apart from the collective. Second, the Court could attempt to define categories of legislative power that would receive broader deference. Regulations that limit participation in the market economy, for example, might receive less stringent scrutiny than restrictions on use of physical objects for personal gain. Under this view, market participation would clearly implicate the interdependence of our society, and citizens could thus expect less freedom to participate according to their desires. Such categories would tend to break down, however. Is my right to sell my hen’s eggs really less important than my right to use the guest cottage at my estate? Disdain for a categorical approach

173. Over time a categorical approach will resemble and thus gain strength from the market model. Citizens engaged in activities clearly identified as subject to broad legislative regulation may have fewer constitutional claims because the possibility of new regulations may be described as part of the already existing law. See, e.g., *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 227 (1986) (upholding limits on withdrawal from multiemployer pension plans in part because pension plans were perennial objects of legislative concern). The 'bridge concept here is the idea that the claimant has no right to expect constitutional protection. This helps explain why the claimant's reasonable investment-backed expectations have become part of the Court's multi-faceted inquiry. *Id.* at 225. The problem of defining the categories and resolving borderline cases, however, will also plague the expectations approach. See *infra* Part II(C), text accompanying notes 282-336.
may, therefore, suggest a final strategy: the Court could articulate the goals of the takings clause and the harm/benefit distinction in highly general terms and could refuse to say more beyond applying these general concepts to concrete cases. For example, the Court could state that the takings clause protects citizens against unfair burdens, but could refuse to define "unfair." This strategy might support the result in *Keystone* if the mining companies are painted as benefiting from the general law in ways that justify their bearing the burden of subsidence regulations. But highly general formulations will continue to provide little guidance on the connection between rule and application. Ultimately, all of these strategies may be combined in recognition of the extraordinarily difficult nature of the takings problem. Particular effort might be made to develop paradigm cases in which government must or need not pay. Justice Stevens's opinion assumed some of this responsibility when he discussed the "reciprocity of advantage" that environmental regulations provide. Moreover, Justice Stevens indicated that he understood the complexity of the takings problem by stressing that factors other than governmental purpose supported his result. The same cannot be said for Justice Scalia.

In *Nollan*, Scalia concluded that the California Coastal Commission acted unconstitutionally when it refused to grant the Nollans a permit to construct a larger home on their beachfront property unless the Nollans granted the public an easement to walk across their beachfront land. In bold terms, the opinion denied the existence of any "rational relationship" between the source of the Commission's power to deny building permits and the Commission's desire to promote access to California's beaches. Scalia's position is persuasive largely because it hides the physicalist nature of harm to which it implicitly appeals. To the extent that harms created by the Nollans' contemplated home are described in physical terms, it becomes difficult to explain how allowing citizens to walk across the beach will remedy any damage the Nollans might cause. This explains why Scalia saw the case as turning on "a play on the word 'access.'" He argued that the proposed house might block visual access to the beach from the adjacent road but this has nothing to do

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175. *Id.* at 492-93 (specifying that claimants failed to show a sufficient diminution in value to warrant compensation).
177. *Id.* at 838.
with granting lateral access to walk along the beach. Indeed, he sug-
gested the case would be different if the Commission had required the
Nollans to grant an easement for “passersby with whose sighting of the
ocean their new house would interfere.” But why should the harms
caused by the Nollans’ house be viewed merely in physicalist terms?

Suppose the Coastal Commission justified its permit condition on
the grounds that the Nollans’ home would enhance the degree to which
the legal system recognized private ownership of the beach. In other
words, consider how the ideas implicit in the desire to protect the
existing state of affairs might include hostility to any additional beach-
front development that reinforced private ownership. The Coastal Com-
mission might then inform the Nollans that the increased private control
over beachfront property could be counterbalanced by increased public
access accomplished through the easement. There may be good rea-
sons for refusing to permit the Commission to rely on such a general
explanation. Perhaps the Court should treat private ownership of
individual parcels of land as so fundamental to the American system that
building a private residence is always a good thing. However, this propo-
sition is at least somewhat controversial, and requires a defense.

One view of property ties the notion of private ownership to the
right to build a home on one’s land absent physical harm to neighbors
and community. On this view, even an interdependent society may not,

178. Id. at 836. Nathaniel Lawrence has astutely suggested, however, that the Coastal Commis-
sion’s action might be upheld even if Scalia’s focus on visual access is accepted. He notes that the
easement for lateral access would make it possible for citizens to walk along the beach without
getting wet at times when high tide would otherwise prevent pleasant beach travel. And, of course,
citizens strolling along the beach would be able to view the ocean that the Nollans’ home would
otherwise block. Lawrence, supra note 97, at 243-44.

179. Justice Brennan’s dissent offered the similar suggestion that the requested easement would
aid public access exactly as the Nollans’ house would diminish it. Nollan, 483 U.S. at 845 (Brennan,
J., dissenting). See also Lawrence, supra note 97, at 243 (explaining how Brennan’s dissent high-
lights the extent to which Scalia resorts to characterization in place of justification).

180. Scalia’s opinion suggests that permitting easy justification of permit conditions would
enable government to shield its true motive. Nollan, 483 U.S. at 836-37. Perhaps, for example, the
Commission had no interest in denying the building permit but used this as an excuse to gain the
easement without having to pay for it. Again, however, this argument is persuasive only to the
extent the Court can identify the governmental motives it finds illegitimate. Clearly, the Coastal
Commission is not singling out the Nollans as political enemies or members of a suspect class. Does
the desire to conserve governmental resources alone doom the condition? Suppose the FCC offered
to permit citizens’ groups to broadcast on an unused frequency but required the broadcasters to
donate their electronic equipment to the government after a three year period. Would this scheme
be unconstitutional if the FCC admitted its chief purpose was to save money on the construction of
radio equipment? This case may seem different because the government is here allocating govern-
mental resources, but if the motive is laudable here why does it become impermissible when govern-
ment exercises police powers?
without compensation, ask a person to leave land vacant or underdeveloped unless construction will cause physical harm. A contrasting position suggests that the bundle of property rights should be drawn more narrowly to include the right to build only when consistent with community desires, or perhaps not even to include the right to build at all. Scalia clearly holds the former view. This may be a defensible view of human affairs, but in claiming that no rational relationship exists between the power to deny the permit and the desire to achieve lateral access he simply adopted his view without defending it. Rationality alone cannot explain where to draw the line between sacrifices implicit in community membership and contributions above and beyond the call of duty. If confronting that reality results in determinations we experience as ad hoc, then so be it.

2. Physical Invasion Test

As Andrea Peterson recently noted, the Supreme Court sometimes suggests that a permanent physical invasion constitutes a per se taking, while at other times the Court hints that a physical invasion merely makes it more likely that “the character of the governmental action” will weigh in favor of compensation. But to the extent the permanent physical invasion cases avoid the ad hoc balancing test, the Court could be viewed as escaping the uncertainty inherent in the multi-factor

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181. Scalia's position embracing the enduring value of residential construction is expressed in a footnote where he argues that advance notice of the permit restriction cannot diminish the Nollans' rights because the right to build, unlike a permit to sell pesticides, is not a governmental benefit. Id. at 833 n.2 (1987) (distinguishing Ruckelshaus v. Monsanto Co. 467 U.S. 986 (1984)). Scalia's argument reveals the reciprocal relationship between consideration of governmental purpose and expectations analysis. This section has demonstrated the extent to which conflicts between physicalist and market models push the Court toward treating existing law as including prohibitions on actions not explicitly-illegal. That strategy becomes more coherent to the extent that new regulations can be described as already within the claimant's expectations. If the claimant expected the new law, then it is almost as if the law was not new and compensation seems unnecessary under the market model.

Expectations analysis itself becomes incoherent, however, if government is permitted free reign to manipulate expectations through changes in the law. To prevent governmental abuse, therefore, the Court, represented here by Justice Scalia, was forced to distinguish between Hohfeldian privileges called property (right to build) and those treated as governmental benefits (right to pesticide permit). Drawing this distinction, however, simply reintroduces the problem of defining baselines that expectations analysis hoped to prevent. A theory is needed to explain why some parts of the existing rule structure may be freely altered (right to sell withdrawn, or AFDC payments reduced) while others may not change (rights to build). Cf. Bowen v. Gilliard, 483 U.S. 587 (1987) (Because AFDC payments are a governmental benefit, payment reductions should be treated exactly as if no payments existed and government was now introducing a payment schedule.). This problem parallels the effort to distinguish harm-preventing from benefit-conferring legislation. See infra Part II(C), text accompanying notes 282-336.

approach and overcoming the conflicts among the three property models. Indeed, at first glance, the presence of the per se rule barring uncompensated permanent physical invasions seems a partial victory for the physicalist model.

A careful analysis of today's judicial hostility to physical invasions, however, reveals the extent to which America's divided allegiance to both physical and market ideas continues to dominate takings jurisprudence. On one hand, the importance of the Court's physicalist rhetoric cannot be overlooked. Many lessons can be drawn from the paradigmatic taking of private land for a public works project. However, despite the vast, insightful commentary detailing the numerous inadequacies of the physical invasion test, the current Court has often chosen to emphasize the physical nature of both the government's action and the landowner's loss. Accordingly, Supreme Court jurisprudence continues to suggest the possibility that constitutionally defined property is based on physicalist roots. Indeed, the Court's clear ban on uncompensated permanent physical invasions formed the first premise of Justice Scalia's opinion in Nollan invalidating a state requirement that landowners grant access to a private beach in exchange for a building permit.

On the other hand, the Court's denunciation of permanent physical invasions cannot hide the limited practical significance of the so-called per se rule. Although the Court has occasionally invalidated state regulations that authorized physical invasions without compensation, the

183. For some of the more incisive criticisms of the physical invasion test, see Costonis, supra note 18, at 501-14; Michelman, supra note 3, at 1184-90, 1226-29; Sax, supra note 18, at 46-48. For the Court's unwillingness to be swayed by these and similar criticisms, see Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982) (citing Michelman's description of the case law but ignoring his argument, overlooking Sax's article, and ruling against the party represented in part by Professor Costonis).

184. The physicalist phenomenon is not confined to the Supreme Court. Consider, for example, one circuit's view that exhaustion of state remedies is necessary to pursue a federal takings claim unless the claimant can allege a physical taking. Compare Austh v. City and County of Honolulu, 840 F.2d 678, 681 (9th Cir. 1988) (holding that a landowner who altered building plans in reliance upon the city's broken promise to buy setback area must pursue state remedies even when no current state law provides for inverse condemnation relief) with Hall v. City of Santa Barbara, 833 F.2d 1270, 1281 n.28 (9th Cir. 1986), cert. denied, 485 U.S. 940 (1988) (finding the exhaustion of remedies requirement set forth in Williamson County Regional Planning Commission v. Hamilton Bank, 473 U.S. 172 (1985), inapplicable to physical invasion cases).


186. The permanent physical invasion rule is enormously important if it stands as the sole clear reason why a homeowner whose land is taken for a highway site receives compensation. Virtually every commentator, however, would award compensation under these circumstances. The question is what lesson is to be drawn from this paradigmatic case. See, e.g., Costonis, supra note 18, at 492 (arguing that government's need for a specific site gives rise to a duty to compensate); Michelman, supra note 3, at 1250 (arguing that compensation is appropriate because physical occupation has
The vast majority of takings challenges do not involve permanent physical occupations by government. Moreover, recent claimants who have alleged a physical disruption have been found to have voluntarily permitted the invasion or have simply been denied compensation without explanation. Perhaps most important, the Court's recent strict application of the physical invasion test failed to clarify the appropriate measure of damages for the government's action, and may therefore have offered purely rhetorical protection.

The physical invasion test is a partial remnant of a failed solution to the positivism problem; this helps to explain the contemporary Court's ambivalence toward a physicalist approach to takings. As this section describes, the physical invasion test began as an outgrowth of physicalist notions of property and might be seen as part of that general solution to the takings dilemma. Once the failures of that approach are clear, however, the contemporary physical invasion test must be justified on some other grounds. Perhaps the physical invasion test could provide a boundary for a modified market model by establishing one case where compensation will always be awarded. However, the Court would need to explain the advantages of this small pocket of relative certainty. Will investors behave differently knowing that a permanent physical...

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187. See FCC v. Florida Power Corp., 480 U.S. 245 (1987) (holding that a power company has no right to just compensation for the cost of allowing cable signals to be carried over electric wires and utility poles because electric company voluntarily accepted cable transmissions); Fresh Pond Shopping Center, Inc. v. Callahan, 464 U.S. 875 (1983) (dismissing for want of a substantial federal question appellant's claim that a condominium and rent control ordinance prohibiting eviction of an unwanted tenant amounted to a physical taking).

188. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982), is the most recent case in which the Supreme Court held that a government responsible for a permanent physical invasion of private property is constitutionally required to pay just compensation for losses caused by the invasion. Accordingly, the Court invalidated a New York state statute that afforded only token compensation to landlords who were required to permit cable television operators to install cable facilities in residential buildings. The Court said nothing, however, concerning the constitutionally required amount of compensation, and the New York courts have delegated this question to the state cable commission. Loretto v. Teleprompter Manhattan CATV Corp., 58 N.Y.2d 143, 446 N.E.2d 428, 459 N.Y.S.2d 743 (1983). Moreover, when called upon to measure the loss suffered by a landlord when cable equipment was installed pursuant to an illegal contract, New York courts found the owner had suffered no actual damages because no harm had come to the building and the property owner could not legally force removal of the cable facilities. UA-Columbia Cablevision v. Fraken Builders, Inc., 114 A.D.2d 448, 494 N.Y.S. 718 (App. Div. 2d Dept. 1985).

189. See Loretto, 458 U.S. at 436-37 (1982) (defending the ban on permanent physical invasions because it eliminates line-drawing problems and problems of proof).
invasion authorized by the government will require compensation? In contrast, if the Court sincerely wishes to to identify, through an ad-hoc process, the fundamental aspects of human life that deserve constitutional protection, it has failed to put forward convincing justifications for the sanctity of physical boundaries.

Put simply, the crucial problem for contemporary physicalism is the collapse of earlier versions of the physical invasion test used to define when a compensable taking has occurred. Today's Court is still attracted to the idea that physical boundaries will ease the burden of value-laden decision making and has held that the presence of a permanent physical invasion demands compensation. Earlier courts, however, spoke as though the absence of a permanent physical occupation rendered compensation unnecessary. The Court's renunciation of the older view calls into question the Court's current use of physicalism. If courts can no longer look to physical boundaries to define property rights and

190. The assumption that uncompensated physical invasions will particularly demoralize economic actors forms a portion of Professor Michelman's explanation of the resilience of the physicalist approach. Michelman, supra note 3, at 1228. But cf. Kaplow, supra note 19, at 528-31 (explaining how full compensation may create the reverse problem of overinvestment).

191. The ban on physical invasions might be defended with biological arguments suggesting that dominion over physical space is an absolutely basic individual drive worthy of extraordinary societal protection. See generally R. Ardrey, The Territorial Imperative (1966) (exploring biological need to carve out territory). From that perspective, courts might examine individual governmental actions to discover their impact on the claimant's control over basic living space. The Court's solicitude in Loretto for the victim of a physical intrusion minimally implicating dominion interests, however, may be compared with a general willingness on behalf of lower courts to uphold regulations that might prevent a condominium owner from living in her own home. See, e.g., Loeterman v. Town of Brookline, 709 F.2d 116 (1st Cir. 1983) (dismissing as moot district court opinion upholding condominium regulations). See generally Judson, Defining Property Rights: The Constitutionality of Protecting Tenants from Condominium Conversion, 18 Harv. C.R.-C.L. L. Rev. 179 (1983) (exploring legislative approaches to housing shortages that may forbid owners from taking possession of housing units, and arguing that tenants' occupancy and reliance interests provide a basis for denying compensation to the owner). These results can be explained only by the judiciary's undying hope that physicalism will provide a value-free rescue from the nigh-imponderable question of which aspects of human existence deserve constitutionally protected status.

192. See supra note 188.

193. The Court in Pumpelly v. Green Bay Co., 80 U.S. 166 (1872), specifically noted that it was unusual to award compensation absent an actual physical appropriation. Id. at 180-81. Late nineteenth and early twentieth century cases inferred that unless a physical invasion had occurred, the claimant had suffered mere noncompensable consequential damages. Bedford v. United States, 192 U.S. 217 (1904); Scranton v. Wheeler, 179 U.S. 141 (1900); Meyer v. Richmond, 172 U.S. 82 (1898); Gibson v. United States, 166 U.S. 269, 274-75 (1897); Transportation Co. v. Chicago, 99 U.S. 635, 642 (1879).

194. Justice Holmes's opinion in Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922), marks the end of the Court's insistence that only physical invasions implicate the takings clause. See generally Sax, supra note 18, at 40-46 (describing the historical significance of Holmes's views).
solve the positivism problem, why should the presence of a physical invasion cause any heightened judicial scrutiny?

This problem is even easier to see when presented in a novel way. What justifies awarding market value compensation following a permanent physical invasion? Why not instead attempt to identify the protected dominion interest and compensate only for this loss, thereby at last beginning the process of defining which property values the Constitution protects? This section addresses these questions by briefly sketching the test's historical development and emphasizing its inability to account for a method of measuring just compensation.

Two claims are made. First, as a conceptual matter the Court's increasing reliance on market concepts flowed in part from the decline of physicalism as a tenable description of the Court's actual fifth amendment practice. Second, and more important, the current vestiges of physicalism conceal precisely the same conflict between physicalist and market concepts that dominates application of the other components of the multi-factor analysis. In this instance, that conflict surfaces in the cases addressing the question of how much compensation successful claimants deserve.

a. Origins of the physical invasion test: Consider first the origins of today's half-hearted, physicalist defense of dominion interests. Prior to the enactment of the fourteenth amendment, most cases involving individual claims for compensation were adjudicated by state courts pursuant to state constitutional provisions similar to the fifth amendment.

195. As observed in note 34, supra, this Article is not the first to highlight the judiciary's anomalous willingness to protect market values in the context of compensation awards while permitting frequent regulatory destruction of those same values. See Costonis, supra note 34, at 1047-48. Professor Costonis attributes the confusing and ironic results to the courts' unreflective wearing of different hats in eminent domain and land use cases. In contrast, this Article explains the same phenomenon as part of a deep-seated ambivalence between physicalist and market approaches to property law.

196. Professor Michelman refers briefly to the problem of measuring compensation near the end of his article's first critique of the physical invasion test. Michelman, supra note 3, at 1189-90. He emphasizes situations where the amount of compensation differs from what a private party would pay for the same resource to demonstrate that compensation practice is directed at redressing redistributional losses and not valuing taken property. He correctly shows therefore that a narrow focus on whether the government has "taken" a property interest will prove an insufficient guide to whether compensation should be paid. The more important point, however, is that a redistributional loss can be defined only after property values are established in the first instance. Physicalism fails precisely because it is an unsatisfactory method for determining which values should be protected against loss. That weakness helps push some towards the market model. See R. Epstein, supra note 3, at 49-50; Blume & Rubinfeld, supra note 145, at 574-75.

197. For a description of the judiciary's steady departure from physicalism within aspects of property law not covered here, see Vandevelde, supra note 68.
Many of these cases took an extraordinarily narrow view of the compensation requirement, often denying compensation for injuries to property which did not involve direct government acquisition. Recognizing the obvious threat to property rights posed by such a strict interpretation, the United States Supreme Court emphatically rejected a title-based approach in *Pumpelly v. Green Bay Co.*, one of the Court’s earliest takings cases. In *Pumpelly*, the Court held that the Wisconsin Constitution guaranteed compensation for a landowner whose lands were damaged by government induced flooding. Using language strikingly resonant for today’s courts, Justice Miller declared,

> It would be a very curious and unsatisfactory result, if... it shall be held that if the government refrains from the absolute conversion of real property to the uses of the public it can destroy its value entirely, can inflict irreparable and permanent injury to any extent, can, in effect, subject it to total destruction without making any compensation, because, in the narrowest sense of that word, it is not taken for public use.

Although Justice Miller’s words could have been interpreted more broadly, the Court soon read *Pumpelly* to stand for the limited proposition that compensation was available because the government flooding physically infringed on the claimant’s land. More important, the many late nineteenth century cases that embraced this reading of *Pumpelly* also reasoned that the absence of a governmentally created physical invasion was sufficient to defeat a fifth amendment claim. These cases typically involved landowners who suffered damage when nearby government construction deprived them of access to roads or highways that the owners had previously enjoyed. Accordingly, they represent a desperate effort to hold onto physicalist definitions of property even when property owners have strong reliance claims based on the existing states of affairs. Contemporary commentators have found this version of the physical invasion test particularly unattractive, and it differs radically from today’s more modest conclusion that the presence of a physical invasion requires

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198. As the Court put it, there were “numerous cases in the State courts in which the doctrine held been successfully invoked that for a consequential injury to the property of the individual arising from the prosecution of improvements of roads, streets, rivers, and other highways, for the public good, there is no redress.” *Pumpelly v. Green Bay Co.*, 80 U.S. (13 Wall.) 166, 180-81 (1871).

199. Id.

200. Id. at 177, 178 (emphasis on “value” added). The Court was confined to interpreting the Wisconsin Constitution because prevailing doctrine held the fifth amendment inapplicable to the states and the duty to compensate for takings had not yet been imposed as part of the fourteenth amendment’s due process requirement.

201. See cases cited supra note 193.
compensation. Ironically, Justice Miller’s language suggests the strongest critique of both views.

b. Physicalism and the valuation problem: In emphasizing destruction of value, Justice Miller identifies the crucial weakness in all efforts to rely solely on physical boundaries when interpreting the just compensation clause. Today’s attorneys see the impact of land use regulations on property values and thus understand that government can significantly harm landowners without a physical invasion. Accordingly, courts and commentators have long recognized that compensation should sometimes be awarded even when no physical invasion takes place. The more interesting point, however, is that a pure physical model is unable to provide a workable answer to the question of how much compensation should be awarded when a clear taking occurs. Market value compensation for physical invasions may sometimes be too great.

The physicalist model treats land taken for a public works project as the clearest case for compensation. But what recompense should the landowner receive? Although early state courts were occasionally confronted with demands that government award the landowner an equivalent piece of land, this approach was overwhelmingly rejected in favor of money damages. To value land in terms of money requires a theory of value that is not based on physicality alone. Any other theory, however, pushes courts away from the physical invasion test, and ultimately supports a market approach to property law that threatens a single-minded reliance on physicalist notions.

i. Physicalism and existing uses: Consider first the straightforward approach of awarding monetary compensation based on an estimate of the property’s worth as it is currently being used. In some cases, this method will present few intellectual difficulties. For example, imagine that the taken land has a home on it. If the land is best suited for and most valuably used as a home, and if the owner had no plans to use it for anything but a home, then the owner should receive the value of the land as a home. Asking what a willing buyer would pay for the home is a simple and viable technique of valuation. Valuing the land based on its existing use coincides with the more general tenets of the physicalist model. Like physical boundaries, existing uses provide courts with tangible, existent criteria that enable them to mitigate the positivism problem by eschewing controversial property definitions.

The seemingly unproblematic connection between the physicalist model and compensation for existing uses, however, is illusory. Governments seeking to diminish their financial outlays will raise the following question: Are the current uses of the land legally protected property interests? In *Monongahela Navigation Co. v. United States*, for example, the government challenged a claim for compensation made when a landowner's lock and dam were taken.\(^\text{203}\) The landowner sought to recover for the value of the state-granted franchise to collect tolls from users of the lock and dam. The federal government argued that the franchise was revocable, and thus the owner had no compensable interest in its continuation.\(^\text{204}\) *Monongahela* thus presented the Court, which had previously adhered to physicalist notions, with the following dilemma. To deny compensation for the value of the franchise, it must reject compensation for an already existing use and rely instead on an alternative valuation technique. In contrast, to award compensation, the Court must decide that a very nonphysical resource, the right to collect tolls, was a compensable property interest. The Court's dependence on purely physical definitions of property would therefore be undone.

Justice Brewer's opinion in *Monongahela* cleverly finessed the physicalist dilemma and helped establish the sharp differentiation between the questions of whether compensation must be awarded and how much compensation is constitutionally required. Since this was a clear case of physical condemnation, Brewer stressed that the only question presented was "how much [the government] must pay as compensation."\(^\text{205}\) This emphasis on valuing taken property, rather than on compensating whenever value is taken, permitted Brewer to award compensation for the franchise without explicitly acknowledging that the intangible franchise right itself deserved constitutional protection. Instead, Brewer simply extended the physicalist Court's technique of assigning value based on

\(^{203}\) 148 U.S. 312 (1893).

\(^{204}\) The Court has often faced the question of whether a claimant has a right to receive monetary compensation for additional value created by favorable legal rules that appear connected to the claimant's land. See United States v. Fuller, 409 U.S. 488 (1973) (denying compensation to claimants for the value added to their fee lands by a revocable permit authorizing them to graze cattle on neighboring lands that the government owned); United States *ex rel.* TVA v. Powelson, 319 U.S. 266 (1943) (denying compensation to claimants for the increased value of their land created by state government's prior grant of eminent domain power) (discussed infra note 209).

\(^{205}\) *Monongahela*, 148 U.S. at 324. Or, as he later stated:

> It should be noticed that here there is unquestionably a taking of the property, and not a mere destruction. It is not a case in which the government requires the removal of an obstruction. What differences would exist between the two cases, if any, it is unnecessary here to inquire. All that we need consider is the measure of compensation when the government, in the exercise of its sovereign power, takes the property.

*Id.* at 337.
the worth of the taken property to include all the uses for which the property was plainly adapted. Market valuation, however, poses an even starker intellectual conflict with a physicalist definition of property, and Justice Brewer's distinction between defining takings and valuing property is ultimately unsuccessful.

ii. Physicalism and market valuation: Justice Brewer was correct that no logical equation exists between compensating only for physical invasions and valuing taken property based on existing uses. A doctrinally coherent legal regime could award damages only when the government physically invades the claimant's land, but pay damages for that land at its reasonable or highest and best use. Indeed, the Court had adopted precisely such a compensation practice in *Boom Co. v. Patterson* one year before it first endorsed the physical invasion test. In *Boom*, the Court ruled that a private company exercising the power of eminent domain must compensate a landowner for the amount the vacant land would be worth if it were used for construction of a boom. In rejecting the company's claim that the land should be valued without regard to its enhanced value for boom purposes, Justice Field announced the rule that applies today: "The inquiry in such cases must be what is the property worth in the market, viewed not merely with reference to the uses to which it is at the time applied, but with reference to the uses to which it is plainly adapted."

Using market value to measure compensation, however, threatens the intellectual underpinnings of the physicalist model. Once monetary compensation is awarded for the loss of a particular use, it becomes more difficult to argue that government action destroying that use is noncompensable under the fifth amendment. If taken land is valued by the market for its use as commercial real estate, for example, then why can't citizens recover whenever government diminishes the market value of land by prohibiting commercial building? More important, market value is a coherent concept only if the actors in the market understand the background rules governing the resources to be valued. Prospective purchasers of Patterson's land would need to know if the land could be used for a boom. If the clear legal rule is that a boom will be permitted, then the market would value the land at a higher price. If the clear rule is to the contrary, then the market would value the land accordingly. Thus

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206. See *Boom Co. v. Patterson*, 98 U.S. 403 (1878).
207. *Id.*
208. *Id.* at 408. In other words, "compensation to the owner is to be estimated by reference to the uses for which the property is suitable, having regard to the existing business or wants of the community, or such as may reasonably be expected in the future." *Id.*
the valuation technique used in Boom depends upon the legal rules as well as the physical facts to determine the appropriate level of compensation.

The government's power to alter the legal rules thereby imperils the claimant's right to recover the market value of his land. Suppose that the claimant in Boom had applied for and been denied legal permission to construct a boom. Such a governmental decision would not create a right to compensation. The Boom ruling, therefore, established that the value of the right to construct a boom was constitutionally protected if taken by the government during a physical condemnation but not constitutionally protected when the government exercised its power to define the scope of property rights.

This double standard disrupts a uniform physical definition of property and shifts the focus to the nature of the government's action. The government, in exercising its charter power, may deprive citizens of value that could not be taken without compensation pursuant to the power of eminent domain. Courts take differing postures towards different powers of government, however, and need some theory to distinguish among various governmental threats to individual freedom. One approach would be to classify certain exercises of governmental power, such as the decision to grant or deny a charter to build a boom, as inherent in the nature of sovereignty and not in conflict with true property rights. Part II(A)(1) of this Article has already detailed the difficulties

209. The Boom Court never considered this issue, perhaps because the Court was less familiar with market model rhetoric. A more recent court might easily have used the market model as a way of reducing Patterson's compensation. In United States ex rel. TVA v. Powelson, 319 U.S. 266 (1943), for example, the Court was divided over whether the claimant was entitled to have his taken lands valued as a site for an elaborate hydroelectric power plant. To build such a plant, the claimant or any private owner of the land would have had to assemble a larger tract through purchases of lands held by third parties. In some circumstances, the Court would clearly have treated the possibility of such an assembly as a "speculative" and hence noncompensable component of the value of the taken land. But in Powelson, North Carolina had explicitly granted the claimant's predecessor the power of eminent domain to purchase the needed land.

The majority found that the state's grant of the eminent domain power could not be considered in valuing the claimant's land. Swayed in part by the physical factor that the land's existing use was not for a power plant, the Court felt comfortable treating the grant of eminent domain as a revocable privilege. This result embarrasses the market model in that it permits the government to simultaneously revoke the privilege and condemn the land, thus permitting the government's desire to save money to influence the decision concerning the extent of the owner's right. In Powelson, the embarrassment was even worse since North Carolina had granted the power of eminent domain to the landowner whereas it was the federal government that took advantage of a presumption of revocability.

210. This strategy was not unfamiliar to late nineteenth century courts. Indeed, prior to Justice Holmes's famous opinion in Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922), the Court often spoke as though government could avoid the compensation requirement whenever it exercised "the
of attempting to classify governmental powers and motives in order to determine when compensation is required. A second response has been to move in the direction of the market model. This approach questions whether physicalism should continue to have any role in the Court’s analysis of takings problems.

c. Market value and the market model: The market model attempts to deflect concern over the government’s ability to abuse its regulatory powers (for example, by unjustly denying a boom-building charter) by viewing the regulatory decision as occurring prior to a decision to take a claimant’s land. In other words, the regulatory decision is seen as establishing property rights whereas the condemnation decision is viewed as disrupting them. Because Justice Brewer’s distinction between defining a taking and valuing property similarly depends upon sequence, it takes a subtle step toward this more contemporary market concept. As a result, it suffers from the same weaknesses.

The intuitive appeal of Justice Brewer’s approach to the valuation of taken property stems from its attempt to prevent government overreaching. The Court’s longstanding embrace of his position reflects the fear that if governments are able simultaneously to define and to appropriate property, they would have virtually unlimited control over society’s resources. Consider, for example, a valuation technique that permitted courts to investigate the extent to which the local authorities might have restricted the taken property without any compensation. If unzoned land were condemned, the state would pay only what the land was worth when zoned as strictly as the Constitution would allow.

By contrast, under current doctrine the claimant is awarded the higher market value of the land as unzoned precisely because it relies on the idea that the zoning rules have been established prior to the “taking.” It seems unfair for the government to change the zoning rules for the purpose of saving money on condemnation awards. Nothing in the physicalist model, however, would prevent this apparent inequity.211 Courts poli ce power.” See, e.g., Mugler v. Kansas, 123 U.S. 623 (1887). See generally Sax, supra note 18, at 38-46 (contrasting Holmes’s view with Justice Harlan’s).

211. The careful reader may observe that certain physicalist notions would hinder government effort to calculate the value of the land based on strict zoning that purportedly passes constitutional muster. If private law property rules were described as permitting each owner any use of land that does not cross a neighbor’s boundaries, then any zoning would impose new public law limits and constitutionally require compensation. This example highlights a crucial ambiguity in reliance on physical notions to solve property problems. See supra notes 67-72, 117-19 and accompanying text (using the same ambiguity to create simple physicalist and enlightened physicalist models). According to one view, courts would require compensation only when government crossed physical boundaries. This view sees government as a private actor that must pay for its own physical disruptions of
that prohibited only uncompensated crossings of physical boundaries would have no reason to disallow restrictive zoning, and, if the land was still vacant, the owners could not claim a disruption of existing practice. Accordingly, courts persuaded to adopt the higher compensation measure have frequently relied on the idea that once physicalist criteria establish that a taking has occurred, compensation will be paid for all reasonably expected uses positively valued by the market at the time of the taking.\(^\text{212}\)

All sequential decisions, however, raise the problem of devising a satisfactory theory to separate one decision from the other. The initial

\(^{212}\) The standard measure of compensation is the fair market value of the land as of the date of the taking. United States v. Miller, 317 U.S. 369, 374 (1943); Kirby Forest Indus., Inc. v. United States, 467 U.S. 1, 10 (1984). Application of this standard, however, has revealed substantial ambiguity. In Almota Farmers Elevator & Warehouse Co. v. United States, 409 U.S. 470 (1973), the Court (by a 5-4 vote), fearful of the government's capacity to combine its powers, took a strict market approach. Thus, the Court awarded compensation to a lessee for substantial improvements the lessee had made to the leased land on the theory that "there was an expectancy that the improvements would be used beyond the lease term." Id. at 478. The Court rejected the government's argument that the tenant had no constitutionally protected interest because the government could legally buy the landlord's fee simple interest and then refuse to renew the lease. Id. at 477. Justice Powell further criticized the government's argument, noting that where a decision to acquire the landlord's fee would have been part of the same project that led to the condemnation of the leaseholder's interest "the Government must pay pre-existing market value for each." Id. at 480 (Powell, J., concurring).

As a result of Justice Stewart's shift, however, the same Court rejected landowners' claims that compensation for their taken land should include the extra value generated by the lands' proximity to lands owned by the United States on which claimants had been grazing their cattle pursuant to a clearly revocable federal permits. United States v. Fuller, 409 U.S. 488 (1973). Implicitly rejecting the chronological sequence approach, Justice Rehnquist permitted the government to act as if it had decided simultaneously to revoke the grazing permits and condemn the land. He described prior cases as having gone far "toward establishing the general principle that the Government as condemnor may not be required to compensate a condemnee for elements of value that the Government, has created, or that it might have destroyed under the exercise of governmental authority other than the power of eminent domain." Id. at 492 (emphasis added).

These cases exemplify the difficulty of determining which preexisting rules should be treated as part of the market against which market value is to be calculated. They also illustrate Robin West's thesis that adherents of contemporary judicial conservatism are more interested in establishing the validity of recognized authority than in protecting market values. See West, \textit{Progressive and Conservative Constitutionalism}, 88 Mich. L. Rev. 641 (1990). After all, in these valuation cases, Brennan, Marshall, and Douglas argued for the higher awards, while Rehnquist and Burger argued for lower compensation.
issue is how to keep the question of whether a taking has occurred separate from the question of valuation. In the zoning example, the lower level of compensation appears unfair only to the extent that the zoning rules are viewed as already fixed rather than newly created. Otherwise, the government may claim that an owner who demands the value of unzoned land is seeking a windfall, since virtually all land is zoned eventually, and the government simply has yet to act. To reject the windfall characterization, courts need a theory that explains which rules are settled and which have yet to be decided. Physical standards for such a determination, however, are not readily available.\textsuperscript{213}

Consider the case of \textit{United States v. Lynah},\textsuperscript{214} decided relatively shortly after the Court instituted its per se rule awarding compensation for all physical invasions. In \textit{Lynah} the claimants' rice paddies bordered the Savannah River. As a result of government dam construction, the claimants' land was flooded and the rice paddies were destroyed. Significantly, however, even if the land had not been flooded, the rice paddies would have been ruined by the loss of drainage caused by the new dam. Nevertheless, the Court found that the flood constituted an unconstitutional taking and awarded the claimants the full value of the land and the rice paddies.\textsuperscript{215} In contesting this conclusion, the dissent highlighted the problems that arise when a physical standard for determining when a taking has occurred is combined with a market standard for measuring compensation. Specifically, the dissent argued that the appropriate compensation would be only the cost of building a fence to keep out the water, a nominal amount, because the loss of the rice paddies could be ascribed to nonphysical (loss of drainage) rather than physical (flooding) damage.\textsuperscript{216} The more general argument is that an award for the market value of taken land always includes some values that deserve constitutional protection against physical intrusion along with other values that would not merit compensation if taken in a different fashion.

\textsuperscript{213} Indeed, renewed reliance on physicalist concepts obscures the difficulty of identifying the settled values for which a claimant may recover compensation. In the zoning example, the decision to take land and the decision to restrict its use appear physically separate. Accordingly, courts can confidently adhere to the idea that once the land is physically taken, the possibility of future restrictions is a mere fiction. Of course, the purported rigid physical distinction between taking and zoning is somewhat of an illusion. Land zoned for open space and land taken for a public wildlife preserve may suffer similar physical effects. More important, differing factual circumstances demonstrate that the decision to treat government actions as physically distinct must stem from an underlying policy judgment concerning the values the court wishes to protect. See \textit{infra} notes 214-24 and accompanying text.

\textsuperscript{214} 188 U.S. 445 (1903).

\textsuperscript{215} \textit{Id.} at 474.

\textsuperscript{216} \textit{Id.} at 484-85 (White, J., dissenting).
The sharp differentiation between finding a taking and valuing the taken property provides a doctrinal response to the *Lynah* dissent: Once the taking has occurred the claimants may recover for all settled values including the value of the rice paddies. However, the doctrine does not provide a method for deciding precisely when the taking took place or for explaining why these values warrant a constitutional safeguard. If the rise in the river and the flood are treated as simultaneous events, then the value of the rice paddies was destroyed by the taking. In contrast, if the Court views the rise in the water as occurring before the flood (which must be the case at least incrementally), then the value of the rice paddies was lost before the flood and no compensation for them is warranted. Perhaps most important, any rationale for protecting the value of the rice paddies against flood but not loss of drainage must look to either the timing or purpose of the governmental action, rather than to a physical definition of property.

Cases like *Lynah* reveal that physicalism alone provides no rationale for separating the issue of when property has been taken from the task of valuing the property. Accordingly, takings jurisprudence is compelled to rely on sequence concepts. The rules in effect at the time the government decides to undertake an action that results in a taking create the settled values, the loss of which is awarded to the claimant after the taking. Thus, before the flood, the *Lynah* claimants were permitted to cultivate rice paddies, and the effect of the flood was the same as if that practice had been outlawed.217

Once preexisting rules are seen to create economic values that are protected when the government disruption is concurrent with physical invasions, these settled rules themselves appear to be the objects of constitutional protection. At the most concrete level, courts need tools to prevent fiscally alert governments from circumventing the compensation requirement by separating decisions, such as the decision to flood the Savannah River, into two stages. First, the government might decide to raise the river and later decide to raise it again. Once again courts might be tempted to employ physicalist fictions. They might ask whether the separately timed decisions to flood the river were actually part of one decision (i.e., was the government’s decision to raise the river within or

217. For contemporary debate over whether the Constitution protects citizen reliance on existing legal rules, compare Humbocf, supra note 18 (arguing that the takings clause protects precisely those economic rights that are embodied in rules creating private rights of action) with Peterson, Part II, supra note 1 (contending that the constitution permits the public to change the rules provided the public now believes previously permitted behavior is morally wrong). For further discussion see infra Part III(A), text accompanying notes 341-83.
without the flooding scheme?).\textsuperscript{218} This question has meaning, however, only if courts inquire into the motives and purposes behind the government's action.\textsuperscript{219}

At a more general level, the tendency to award market value compensation highlights both the attractiveness of the market model and its weaknesses as a solution to problems with earlier physicalist concepts. A regime that forbids the government simultaneously to make the rules and apply them has legitimate advantages. But at the same time, once it becomes clear that market value compensation depends upon the existence of settled rules whose disruption creates valid constitutional claims, nonphysical alterations of those rules, such as land use regulations, pose difficult constitutional issues. For example,\textsuperscript{219} if a landowner whose unzoned land is condemned recovers for the value of land as if it were zoned for intensive use, why can a landowner whose land is downzoned for less intensive use not recover for the difference in value? Is it plausible to say that in the first case the rules were sufficiently fixed so that recovery is available, whereas in the second case the rule change was simply an adjustment of the benefits and burdens of economic life?\textsuperscript{220}

These questions reveal that the initial problem of distinguishing valuation from identification of property rights expands to encompass the problem of determining what constitutes an unconstitutional taking. Taken to its logical extreme, the market model would suggest that any loss in economic value caused by a change in legal rules warrants compensation. Since this approach would freeze government, any real world market model requires techniques for distinguishing those background rules which give rise to "property" rights from other rules which are part of the give and take of economic exchange.\textsuperscript{221} Or as Justice Jackson put

\begin{itemize}
\item \textsuperscript{218} This problem is analogous to situations where government "down zones" property, prohibiting construction prior to condemnation in anticipation of later paying a lower price. \textit{See}, \textit{e.g.}, \textit{Miller v. City of Beaver Falls}, 368 Pa. 189, 82 A.2d 34 (1951) (Where the city plotted property for a park and froze development for three years, the city engaged in an unconstitutional taking.).
\item \textsuperscript{219} A takings doctrine that focuses on the nature of the governmental decision represents a major shift from a takings clause that protects the physical integrity of land ownership. \textit{As described in Part II(A)(1)}, the Court's most recent cases have raised the government's motive to an unprecedented level of importance, perhaps in part because focusing on the nature of the claimant's loss has proved so troubling. \textit{See supra} text accompanying notes 96-181.
\item \textsuperscript{220} \textit{Cf. Usery v. Turner Elkhorn Mining Co.}, 425 U.S. 1, 16 (1976) ("Legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations.").
\item \textsuperscript{221} Professor Peterson refers to this difficulty within the market model when she highlights the Court's effort to distinguish between the sometimes compensable "economically valuable rights created by positive law" and the more often compensable "economically valuable vested rights created by positive law." Peterson, \textit{Part I, supra} note 1, at 1347-51. Her reaction is to criticize the Court for its inconsistency; she attempts to formulate a unified theory of takings. \textit{Id.} at 1341-63. As this Article seeks to demonstrate, however, the structure of current thinking on the takings problem is
\end{itemize}
it, the Court must distinguish between mere economic interests and those economic advantages called property rights "which have the law back of them."222

It is at this point that the contemporary Court's use of physicalism resurfaces as one ironic attempt to resolve the market model's difficulty in identifying settled rules. After all, judicial pronouncements in constitutional cases themselves become part of the settled law. The Loretto court intended to establish that a clear ban on permanent physical invasions will become one of the market rules that courts may then strictly enforce. In this sense, the contemporary physical invasion test relies as much on the market model as it does on its physicalist roots. Justice Blackmun's dissent eloquently illustrates the problems with applying a so-called per se ban on permanent physical invasions.223 More important, however, is the Court's complete inability to ground physicalism within the terms of the market model.

The market model demands that courts have some way to isolate the challenged legal action and measure it as a change from a prevailing legal status quo. Each time the Court decides a takings case, however, it adds to the preexisting body of doctrine and thus helps alleviate the difficulty of identifying settled rules. Thus, if the Court holds that traditional zoning laws pass constitutional muster, it will no longer be possible for landowners to allege that a typical zoning ordinance conflicts with the preexisting rule that allowed them to do what they like with their land. Instead, another preexisting rule makes clear that government may zone land without fear of having to compensate affected landowners. Of course, the original decision permitting zoning cannot be justified using built around competing unified views of property such that the only unity we can expect is that courts will acknowledge the conflicts. See also Rose, supra note 102 (arguing that conflict within takings law is inevitable because our society is divided on deep-seated matters of political philosophy).

223. Justice Blackmun, for example, noted that it is often difficult to tell when a physical invasion is permanent. Indeed, Mrs. Loretto could have rid herself of the offending cable box if she was willing to cease leasing the apartments in her building. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 448 (1982) (Blackmun, J., dissenting). Moreover, Justice Blackmun correctly noted that typical landlord-tenant regulations require the presence of fire-extinguishers, mailboxes, and other physical items. Id. at 449 n.7. The Court attempted to distinguish these regulations on the ground that the statute challenged in Loretto authorized the cable company, rather than the landlord, to own the offending item. More likely, in perhaps another irony, the challenged statute offended the Court because of its more obvious break with the spirit of the market model. Rules governing fire-extinguishers and the like are longstanding restrictions; new regulations of the same type are fully consistent with the burdens inherent in being a landlord. In contrast, cable television was a relatively new development, and rules requiring landlords to accept it are much more easily presented as a change in the status quo.
the market model. As time goes on, however, this embarrassment fades, and the market model begins to justify itself because no one affected by new regulations feels as though he or she is the victim of a radically altered legal regime.

The recognition that the Court's takings decisions are themselves part of the preexisting law against which takings are measured, however, poses a severe and by now familiar threat to the legitimacy of the market model. The Court's method of determining what constitutes property rights cannot depend upon preexisting rules that the Court itself defines. Thus, the Court must invoke a controversial method for defining property, and the combination of the power to define and destroy becomes an inevitable part of takings litigation.

Cases like *Loretto* indicate that the Court is unwilling to enunciate core values directly. The Court in *Loretto* turned to physicalist ideas in the hope that it would appear to be engaged in value-neutral promulgation of an already existing standard. The Court never explained why physicalism should be basic to property law, even though we live in a world where takings can be nonphysical and the Court sometimes looks to its three-part test. On one hand, the majority opinion looked to historical practice for support for its result, relying chiefly on cases that cling to older physicalist notions of property. At the same time, however, the Court wished to modernize the physical invasion test by supporting it with arguments concerning ease of application and predictability. A rule requiring compensation only on Tuesdays, however, would be predictable and easy to apply. The question is why special consideration is given to physical invasions once the premises of the physicalist model have been replaced.

The answer is that physicalist premises have not been and cannot be abandoned because the market model itself is incapable of answering the crucial question of when disturbances in prior law give rise to compensable claims. The history of takings doctrine following *Pennsylvania Coal Co. v. Mahon* has been devoted to devising alternative strategies for identifying those losses of economic value that violate constitutional guarantees. The two principal approaches involve an analysis of the extent of the claimant's loss and an evaluation of the extent to which the loss was unexpected. The next two sections describe the weakness of those strategies and the extent to which their present-day application resorts to physicalist roots.
d. The legacy of physicalism: Before turning to the remainder of the three-factor test, however, it is worth pausing to consider how recognition of our divided allegiance to physicalist and market ideas might help us reshape one aspect of takings doctrine. The current legal regime governing the level of compensation in takings cases is built on the rule/exception model.224 The rule is that the claimant is to receive the market value of the taken property, that is, what a willing buyer would pay a willing seller for what the government has taken.225 Perhaps recognizing that government frequently alters market values without paying any compensation, however, the Court has often departed from market value compensation even after a clear taking.226 Thus, a claimant may not recover the market value of an ongoing business when the site of the business is taken, even if moving the business turns out to be infeasible.227 Similarly, a claimant may not recover the market value of a taken item if that value has been enhanced as a result of government demand.228 Finally, claimants sometimes may not recover the value of taken property that depends on legal rules to which the claimant has no special entitlement.229

224. The rule/exception formulation, of course, always raises the question of how many exceptions the rule can withstand before it no longer makes sense to speak of an underlying rule at all. One way, then, to describe the challenge to market value compensation is to imagine the current rule giving way to an alternative principle drawn from the already numerous exceptions. See generally Unger, The Critical Legal Studies Movement, 96 HARV. L. REV. 561, 602-48 (1983) (describing process of reinventing legal doctrine by focusing on exceptions and anomalies in existing law).

225. This approach demonstrably reflects market ideas in that the imagined buyer is to assess the property as if it may be used according to the legal rules in effect at the time of the taking.

226. The Court has been much less willing to grant exceptions when this would increase the compensation award. In United States v. Fifty Acres of Land; 469 U.S. 24 (1984), for example, the claimant municipality argued for the physicalist idea that when the federal government took its landfill site, the Constitution required compensation in an amount sufficient to construct an equivalent landfill at another location. The Court unanimously rejected this claim, holding that the city was treated constitutionally when it received the lower but clearly ascertainable market value for the landfill site.


228. United States v. Cors, 337 U.S. 325 (1949) (holding that the claimant was not entitled to the enhanced value of a condemned tug boat that resulted from government's wartime demand for tugs); United States v. Miller, 317 U.S. 369 (1943) (holding that in valuing condemned land, the trial court had properly excluded any incremental increase resulting from the possibility that if the land had not been taken it would be near government project).

229. United States v. Fuller, 409 U.S. 488 (1973) (finding that the claimant could not recover for enhanced value of his land that resulted from proximity to government land on which the claimant had been grazing cattle pursuant to a revocable government permit); United States ex rel. TVA v. Powelson, 319 U.S. 266 (1943) (finding that the increased value of a claimant's land resulting from state grant of eminent domain power for land assembly project is not compensable when the land is taken by the federal government).
The exceptions to market value compensation show that the Court has struggled to avoid confronting the underlying conflict between the rules governing the calculation of compensation and those controlling when compensation is due. And again, the Court is both caught within and able to manipulate our unconscious commitments to conflicting models of property. Consider first the rule denying an owner compensation for the market value of his or her business (including business good will) when the business site is taken by the government. This rule can be derived from the physicalist idea that the tangible item taken is the land, not the business. This rationale fits with the idea of property as tangible items, but it offends modern sensibilities that focus on the claimant's economic loss. If the claimant is unable to sell the business following the taking of the site, the argument that only the land was taken is a legal fiction.

The government can respond, however, that even under the market model, the claimant has no right to compensation for loss of the value of the business. The government can argue that the claimant's legal right to sell the business remains intact, and thus there has been no change in the rules concerning that economic value. The dispute then turns on whether the fact that the land and business have in the past been tangibly linked should now allow the claimant to argue that they are legally linked for purposes of determining compensation. The claimant will assert that since private actors might have simultaneously purchased the land and the business, the private market would value the two together.

To overcome this argument, the government must explain why market reliance on rules that would presumably have permitted simultaneous sale is insufficient to support a compensation award for business damages. The government's problem illustrates the general difficulty of limiting the domain of market ideas. After all, when land is taken for an open space preserve, the government could argue that it has taken only the

230. The rule referred to here, like those throughout this Article, is the federal constitutional rule governing eminent domain compensation. Perhaps because it conflicts with one version of market model ideology, this rule is frequently altered by state statute creating additional rights to compensation for business damages. See, e.g., FLA. STAT. ANN. § 73.071(3)(b) (West 1987) (protecting certain business damages when the business has been in existence five years).

231. As Justice Brandeis put it, "If the business was destroyed, the destruction was an unintended incident of the taking of land." United States v. Mitchell, 267 U.S. 341, 345 (1925).

open space rights, and the fact that the market would have valued the land for development does not give the owner the right to recover the development value.\textsuperscript{233} If the owner really wants to sell development rights, the government might say that he or she can go find another vacant site, buy it, and then sell it to a developer.\textsuperscript{234} This argument would, of course, obliterate the general rule of market value compensation. Thus, the question is why the Court does not see the bar to recovery for loss of good will as having the same effect.\textsuperscript{235}

One answer is that the Court is allowing the physicalist model to temper its market orientation. The physicalist fiction that the business and land are separate items is simply more persuasive than the more artificial separation between the land and development rights. Contemporary readers may scoff at this result, but its presence in the law reminds us that we depend upon some technique to prevent a constitutional freeze on government alterations of market value not accompanied by compensation. By now, we should not be surprised that the Court has no readily available approach that would explicitly limit market value by affording compensation based on the moral or utilitarian value the society places on the rights being claimed. Thus, the Court neither defends the bar to good will damages by suggesting that loss of business income is simply a risk of operating a profit-making enterprise nor highlights the possible risks of overinvestment that might be created by a generous compensation policy.\textsuperscript{236} Instead, the Court simply characterizes the loss of good will as obviously noncompensable under the Constitution. This is a strategy the Court often repeats.

The Court's unwillingness to permit recovery for value allegedly created by government demand for the taken item, for example, also conflicts with rigid application of the market model. In \textit{United States v. Cors}, the Court refused to permit the owner of a tug boat to recover the

\textsuperscript{233} See Costonis, supra note 34, at 1049-55, 1061-70 (explaining how landowners might in certain circumstances not be entitled to compensation for their land valued as a development site and showing how the system of transferable development rights implicitly recognizes a power between the police power and eminent domain—"the accommodation power"—that would support less than full market value compensation).

\textsuperscript{234} These situations might be distinguished on the ground that owners of vacant land will already charge a premium to reflect the land's value as a development site. However, the business owner might also be charged a premium by the owner of a possible new site who calculates that the new location is the best place for the business owner to retain old customers. In addition, the Court has suggested that the business owner cannot recover for lost goodwill, even if there are no feasible sites for relocation. \textit{Kimball Laundry Co. v. United States}, 338 U.S. 1, 12 (1949).

\textsuperscript{235} Many commentators, of course, do see it that way. See supra note 232.

\textsuperscript{236} See Kaplow, supra note 19, at 527-32 (explaining how generous compensation practice creates incentives for owners to build socially undesirable projects).
market value of his condemned vessel because that value was enhanced by the government's wartime need for boats. But why is this 5-4 decision plausible? After all, had the government chosen not to condemn the claimant's tug, the private market would indeed have paid a premium for one of the few boats remaining in private hands.

The Court's rationale was the oft-repeated view that claimants have no right to recover premiums for government-created value. But, of course, this principle cannot be carried to its logical extreme. Suppose that when the government condemned land it reduced the compensation award for all the elements of market value that fairly could be attributed to governmental sources. Thus, land taken in a small town might be valued as if the town had no post office, no public roads, and no public water supply. The fact that these public goods all preexisted the government's taking decision could be treated as irrelevant as long as the public facilities were factors in valuing the property. Surely, this approach would lower compensation awards. It would also send courts on an endless quest to separate public from private value, thereby creating difficulties that would dwarf the positivism problem as already described. Indeed, the whole point of the market model's dependence on sequence is to stabilize compensation practice by requiring the government to pay the market value of the property assuming no other change in the rules at the time of the taking.

What accounts for cases like Cors is the seemingly small deviation from the market model that the result entails. Although the legal rules would clearly have allowed the tug owner to benefit from increased demand for the tug had the government not chosen to condemn it, the increased wartime demand for the tugs represented a confined, identifiable change in the circumstances affecting the tug's valuation. The Cors Court implicitly asks us to consider what the tug was worth before wartime demand increased its value. The valuation baseline thus shifts from what the tug would have been worth under the existing legal rules at the time of the taking to what the tug would have been worth given the state


238. In Cors, the Court relied on a federal statute that codified this general principle. The statute provided that "in no case shall the value of the property taken or used be deemed enhanced by the causes necessitating the taking or use." Cors, 337 U.S. at 328 (quoting § 902 of the Merchant Marine Act of 1936). The Court elaborated on this in United States v. Miller, 317 U.S. 369, 375 (1943), stating that "although the market value of the property is to be fixed with due consideration of all its available uses, its special value to the condemnor as distinguished from others who may or may not possess the power to condemn, must be excluded as an element of market value." (footnotes omitted).
of affairs existing prior to the need for the taking. Precisely the same shift takes place in the cases establishing the “scope of the project” rule that prevents owners from recovering the value added to their land by a government project, such as a public park. The courts value the land at what it was worth before the decision was made to build the new facility, rather than the price for which it could be sold to a private buyer who is willing to bet that the land will be near but not within the new facility.

There is every reason, however, to ask courts to go beyond this limited exception to their demand that market value compensation be paid in every case. Just as the separation between the land and the business upon it is a legal fiction, so too there is no magic to the moment prior to some governmental action with respect to the taken property. The moral stance endorsed by cases like Cors is that when the public suddenly needs something more than it did previously, the owner of the desired item should not be able to take advantage of the government’s situation. But why should this principle be limited to cases where the government’s plans have a direct impact on the price of the land?

Suppose it is discovered that the public park in a particular town is contaminated by hazardous pollutants so that the town needs to build a new park. If there is only one suitable site, and that site is privately owned, the town will not bargain with the owner for an above-market price. If the town had to pay an above-market price, the power of eminent domain would have little value. But why should the town have to pay even a market price based on the existing set of land use controls and

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239. For my earlier effort to describe the takings dilemma in terms of the impossibility of constitutionally protecting citizens against rule changes and against changes in the existing state of affairs, see Paul, supra note 25, at 757-65.

240. The “scope of the project” rule was announced in United States v. Miller, 317 U.S. 369 (1943). For a thorough explanation of the rule and its rationale, see United States v. 320.0 Acres of Land, 605 F.2d 762, 781-93 (5th Cir. 1979).

241. Indeed, a similar rationale is often used to define the power of eminent domain. Thus, one rationale often offered for eminent domain is that it prevents the owner of the desired land from “holding out” for an above market price based on the government’s specific need for the property. Merrill, supra note 40, at 75. The very characterization of holding out, however, implies acceptance of a market transaction that prevents the seller from taking into account the government’s need. Since this approach hardly reflects uniform practice in private law (imagine a law of contracts that prohibited the seller from taking advantage of the buyer’s need for the product), a theory is needed to describe why this particular practice of refusing to sell out at market price reflects unreasonable stubbornness against which the government needs the coercive authority of eminent domain. One candidate appears to be a general, but largely undefended, hostility to an owner’s taking advantage of a physical location that another needs much more than he. This approach perhaps accounts for private law doctrines, like easements by necessity, which require owners to let others cross their land to reach otherwise unreachable destinations.
private law rules that perhaps would have allowed the owner to develop the land quite intensively? The public had no reason to expect that there would be a need for a new park.\textsuperscript{242} Thus, on one view, the private owner takes advantage of the public's need if the owner charges a price much higher than the town can easily afford.\textsuperscript{243}

The traditional response to this argument is that the landowner is not at fault for the town's need; thus it would be unfair to ask the owner to bear the cost of the town's desired improvement. However, the owner can be fairly described as bearing the cost of the park only if the owner lost a previously held right to value the land as a site for intensive development. If the Court were to set the constitutional rule so as to award merely cost plus interest compensation, for example, then the risk of not being able to develop the land would be just one of the many risks that property owners customarily assume. The landowner might object that the government's argument threatens to swallow the entire compensation requirement. Although the Court could declare any compensation rule to be part of the background legal regime that owners are forced to accept, the owner would contend that the Court has an obligation to justify its rule by explaining which risks are fairly borne by property owners.

But, of course, it is the Court's vacillation between competing views of the appropriate distinction between compensable and noncompensable risks that got us here in the first place. The Court cannot forthrightly assume the role of setting the background rules against which compensable losses would be measured without abandoning the market model. The model demands that the Court appeal to already established background rules against which compensable losses can be measured. What cases like \textit{Cors} reveal, however, is that the Court is willing to deviate

\textsuperscript{242} Recall that changed circumstances led to the Court's decision not to protect market values in the context of determining whether zoning gave rise to a constitutional duty to compensate affected owners. Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 388 (1926). \textit{See supra} Part II(A)(1)(c), notes 156-63 and accompanying text.

\textsuperscript{243} To most readers, any discussion of how much the town can afford will appear a blatant non-sequitur. One might ask, what basis is there for suggesting that the landowner is in any way responsible for the town's sorry finances? Surely none if the test is whether the owner somehow created the town's problem. But, of course, the tug owner did not create the wartime demand for tugs either. Rather, the question posed here is whether the owner can be fairly forced to help the town out of its new predicament. Answers will depend on one's view of the citizen and the state. At least we can imagine an argument that would allow the town to say to the owner, "We know we planned to let you develop your land, but now we need it, and the best we can do for you is pay you back what you have put into it plus interest." In any event, the text explores the possibility of paying the owner less than what the land is worth as a development site.
from the market model when it can rely upon another seemingly objective model. Thus, the Cors claimant lost precisely because it sought to gain advantage from the radical change in the existing state of affairs.

If, as Cors suggests, the Court can craft its own definition of a fair market so as to prevent private owners from taking advantage of public need, the Court should consider the extent to which any claimant who insists on traditional market value compensation might fit under that description. Indeed, to follow its own paradigm the Court might consider the extent to which market value compensation exceeds the claimant’s reasonable expectations, such as whether the claimant had reason to foresee possible condemnation, and whether the claimant would remain in an “economically viable” position after receiving less than market value compensation. This approach may not bring order to compensation practice, but it would likely be an improvement over existing law.

Moreover, a relaxation of the rule that all takings claimants are entitled to market value compensation might lessen the embarrassment created by a final set of Court cases denying compensation for allegedly extra-market values. These cases reveal that the government influences the supposedly objective market that is used to value taken property. In United States v. Commodities Corp., for example, the Court considered the price the government must pay for pepper taken from the claimant for use during the war. Prior to the actual condemnation, the government had invoked its regulatory authority to set a ceiling on the price of pepper. Thus, the claimant could not have sold the pepper for more than the ceiling price; however, the claimant could have retained the pepper with the hope of profiting when regulations were lifted. The government argued that since the pepper could not have been sold above the ceiling price, that price was the market price and thus was the appropriate price at which to calculate compensation for the condemned pepper. In another 5-4 decision, the Court accepted the government’s view.

Commodities Corp. clearly displays the positivism problem at the root of all takings cases. If the government is empowered both to take property at market prices and to set ceilings on those prices, then private owners have reason to fear that the government is acting as judge in its own case. Again, however, sequence ideas can alleviate our fear of the

244. See infra Parts II(B) & (C), notes 254-336 and accompanying text.
246. Justice Frankfurter, dissenting in part, agreed that the government need not pay the unregulated price of the pepper. 337 U.S. at 342 (Frankfurter, J., concurring in part and dissenting in part). He argued, however, that the claimant was entitled to at least what it had paid for the pepper.
all-powerful sovereign. The government could plausibly argue that its actions in *Commodities Corp.* constituted two separate actions. First, the government set price ceilings and then later decided to condemn the claimant's pepper. The Court had long ago acknowledged that government had the power to regulate rates and prices during wartime. Once these prices were set (and the claimant could not argue the government set them in contemplation of the taking) the Court merely had to value the pepper based on the preexisting and now validated market.²⁴⁷ This is yet another instance in which sequence ideas obviate the positivist dilemma.

The Court's willingness to take advantage of government's regulatory authority to deny market value compensation, though, has not been limited only to cases where the regulatory act precedes the taking. In *United States v. Fuller,*²⁴⁸ the Court denied compensation to owners of land who sought to include in the value of their land the value of revocable permits that authorized their cattle to graze on nearby government land. In *Fuller* the government took the land *prior to* making any decision to revoke the grazing permits. Nevertheless, the Court awarded the claimant the value of the property without the permits on the theory that the government could have revoked the permits and thus should not now have to pay for them. If this precedent were extended, the government could then deny market value compensation to any landowner on the theory that it might always have later decided to restrict the use of the property. The tangible existence of the permits as a separate item for valuation, however, probably persuaded the Court in *Fuller* that it was safe to allow the smaller award.

Yet the Court need not rely on the sequence approach of *Commodities Corp.* and the arbitrary line drawn by tangibility in *Fuller.* Rather, the Court could defend its results by turning to the general rule outside the valuation context that government frequently denies compensation when regulations affect market values. Whatever approach the Court

²⁴⁷. This type of sequencing provides only a tentative response to the dangers of government overreaching. Although the Court may have correctly assumed that the government did not plan to take the pepper when it established ceiling prices, the Court opened the door for such scheming in the future. For one thing, government motives are notoriously difficult to discern. More important, this sequencing rationale permits government to make long range guesses on the kinds of items it is likely to take from citizens and act to reduce future liability. Indeed, it would not be stretching to find a similarity between cases like *Commodities Corp.*, where the Court says nothing at all about why the ceiling price is fair, and cases like Bowen *v. Gilliard,* 483 U.S. 587 (1987), where the Court can then meekly defer to the government's refusal to create a property interest in welfare benefits, a refusal that serves to protect the government against later fifth amendment claims.

applies to determine when an economic regulation is a taking that requires compensation, and this Article argues for a more nuanced, multi-factor approach, the Court could apply similar standards to calculate the required amount of compensation. This would not mean that a homeowner whose land is taken for a highway would receive less than market value; even the current ad hoc approach to takings has not resulted in uncompensated seizures of private homes. However, it might mean that a developer would not receive all the speculative profits expected from development of a vacant lot that is taken instead for a government project.

There are, of course, several risks involved in relativizing compensation awards along the lines of current takings doctrine. First, to the extent we are unhappy with the uncertainty in current takings law, any move to expand the current approach will increase that uncertainty. Second, and more serious, is the risk that relativized compensation awards may enable the government to take advantage of selected individuals more easily. Thus, the traditional view is that government regulations are aimed at such wide groups of people that regulations will spread losses across many affected individuals; as a result, government will be hard-pressed to use regulations to attack particular political opponents. In contrast, if no rule required market value compensation for formal takings, the government might select sites so as to punish political enemies. This contrast is likely overdrawn. Clearly, government already has the power to target political opponents (for example, landlords or tenants) when it enacts general regulations, and site selection for government projects is hardly free from politics. Nonetheless, courts that

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249. Professor Costonis's implicit fear seems to be that if market value compensation were not the rule in eminent domain cases, then there would be no brake protecting claimants in the typical taking of private land. Costonis, supra note 34, at 1049. Thus, he proposes the creation of a new power, the accommodation power, that would fall between eminent domain and the police power and be accompanied by what Costonis calls "fair compensation." But Costonis is unpersuasive in asserting that market value compensation should always accompany the taking of land outright. See id. Here he relies on a type of physicalism that holds out different rules for formal seizure, but he offers nothing to explain why those rules are not just another of the anomalies that he so well describes. Nor is there anything in the constitutional language that requires market value compensation upon formal taking. The Constitution demands "just compensation"; semantically, a strong case can be made that this means something other than "market value."

250. Several commentators are very troubled by the Court's current flexible approach. See, e.g., Kniec, supra note 21; Peterson, Part I, supra note 1; Rose-Ackerman, supra note 19.

251. This problem is serious because even market value compensation does not provide for subjective losses experienced by a community uprooted. For example, see Poletown Neighborhood Council v. City of Detroit, 410 Mich. 616, 304 N.W.2d 455 (1981) (permitting the destruction of an ethnic neighborhood so that General Motors could build a new factory).
accept this Article's suggestion to deviate more frequently from market value compensation must still consider whether the claimant's land was appropriately selected for governmental taking.

In the end, however, a more flexible view of the appropriate compensation in eminent domain cases offers advantages that will outweigh the risks. As Professor Costonis pointed out fifteen years ago, a seemingly ineradicable shrillness haunts the debate between those who would find broad regulatory authority under the police power and those who would demand compensation more often than the Court now awards it.252 Certainly, the possibility of compensation at less than market value represents a classic split-the-difference strategy that might allow both sides to see the merits of opposing positions.253 Moreover, a rethinking of the rule that requires market value compensation in eminent domain cases would have a marked "debundling" effect on the idea of property. In valuation cases, there is never any question that "property" has been taken. Reliance on markets to value that property, however, is built on the false premise that once a "thing" is taken, a set of rules exists to value the taken item. An alternative approach to the valuation problem would emphasize that each physical taking involves the alteration of many legal

252. Costonis; supra note 34, at 1021-49. For a recent display of vitriol, see Berger & Kanner, supra note 150, at 687 (stating that their opponents' writing "is to legal scholarship what a HOJO's breakfast is to haute cuisine").

253. One contemporary example of opposing viewpoints centers on the now-settled question of whether compensation is constitutionally required for the time period between the enactment of an unlawfully restrictive land-use regulation and the time a court invalidates the regulation. See First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304 (1987) (requiring compensation). Those against monetary damages fear that huge awards, measured by lost market value to developers, will chill land-use regulation which is necessary to sound growth. Williams, Smith, Mandelker & Babcock, The White River Junction Manifesto, 9 VT. L. REV. 193 (1984). Moreover, because this fear is justified, courts face renewed pressure to avoid finding that a taking has occurred, thereby mitigating the Supreme Court's unambiguous mandate to award damages in cases where takings are found. At the same time, those arguing in favor of compensation worry that unless money is at stake, local governments will feel free to abuse their regulatory authority. McMurry, Just Compensation or Just Invalidation: The Availability of a Damages Remedy in Challenging Land Use Regulations, 29 UCLA L. REV. 711, 732-34 (1982) (highlighting the danger of an endless string of only slightly less restrictive ordinances). Each side then vigorously adheres to its own reading of the takings clause without regard to the strong policy arguments on behalf of the competing view. A shift in the doctrine that would allow for reduced damage awards might serve to bring the two camps closer together. In the meantime, courts must determine just precisely what constitutes market value compensation for the temporary loss of development rights. See generally Barnes, Just Compensation or Just Damages: The Measure of Damages for Temporary Regulatory Takings in Wheeler v. City of Pleasant Grove, 74 IOWA L. REV. 1243 (1989) (surveying different judicial approaches to the measurement of damages and ultimately criticizing the approach adopted in Wheeler v. Pleasant Grove, 833 F.2d 267 (11th Cir. 1987)); Wilkerson, Just Compensation for Temporary Regulatory Takings: A Discussion of Factors Influencing Damage Awards, 35 EMORY L.J. 729 (1986).
rules and that only some of those rules deserve protection against majoritarian redistribution. Indeed, a rejection of a per se rule that requires market value compensation would force courts to focus more precisely on which economic values the takings clause protects. Even if judicial attempts to identify those values seem at first to generate even greater uncertainty, the courts will at least be attempting to answer the right question.

B. SEVERITY OF ECONOMIC IMPACT: DIMINUTION IN VALUE

Justice Holmes's opinion in Pennsylvania Coal v. Mahon has been described as the foundation of modern takings law. It marked the first time the United States Supreme Court held an economic regulation invalid pursuant to the just compensation clause. It set forth the Court's commitment to evaluate takings claims based on particular circumstances. And, it illuminated the tension between the state's police power and the contract and due process clauses that had been ignored or minimized in earlier cases. Most important for purposes of this section, Justice Holmes placed squarely into focus a central question of takings jurisprudence: How much did the claimant suffer as a result of the challenged governmental action?

At first glance it appears that tying the question of whether a taking has occurred to the extent of the claimant's injury constitutes a complete defeat for all formalistic approaches to the takings problem. After all, evaluating the degree of the claimant's suffering requires a highly open-ended determination, and the obvious criticism of the severity-of-the-impact test is that it creates too much judicial discretion. In simple terms, if a regulation will be found to be a taking only when it goes too

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254. Citizens might, for example, receive full value when their home was taken, not out of blind allegiance to market formula, but because they need a new home to continue their achieved rate of participation in civic affairs. In contrast, a developer whose vacant land was appropriated might recover less than full value if the developer was protected against real economic losses (i.e., at least cost plus interest would be recovered).

255. 260 U.S. 393 (1922).

256. See, e.g., Large, supra note 50, at 10-16 (Pennsylvania Coal was a seminal case marking an abrupt shift in Court's takings jurisprudence); Rose, supra note 102 (focusing on Pennsylvania Coal as the source of modern takings confusion).

257. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413 (1922); see Michelman, supra note 6, at 1338-40.

258. As Justice Holmes stated, "As long recognized some values are enjoyed under an implied limitation and must yield to the police power. But obviously the implied limitation must have its limits, or the contract and due process clauses are gone." Pennsylvania Coal, 260 U.S. at 413. For a preliminary description of the contrast between Justice Holmes's approach and the Court's earlier attitude reflected in the opinions of Justice Harlan, see Sax, supra note 18, at 38-46. For a more sustained effort to analyze the conceptual shift, see Siegel, supra note 154.
far, how are courts to decide how far is too far? Paradoxically, this question revives the physicalist ideas about property that a value-based analysis seems designed to overcome.

Several strategies are available to constrain the apparently limitless judicial freedom that a focus on economic loss could allow. Perhaps the simplest would be to craft specific dollar amounts above which compensation would be paid but below which losses would remain on the affected individuals. The problems with this approach, however, are virtually self-evident. Any specific dollar figure will appear arbitrary both in its selection and its application. If the dollar figure were high—$25,000, for example—upon what basis could a court justify permitting governmentally inflicted injuries below that amount to go uncompensated? If the figure were low—$1,000, for example—how could government afford all the instances, when compensation would be required? Moreover, a constitutional interpretation pegged to dollar amounts would appear to favor the rich over the poor. If an owner's land was worth little before a regulation was enacted, and even less afterwards, the owner might not receive compensation because the reduction in value failed to cross the dollar threshold. In contrast, if a parcel of land was worth a great deal before a land use restriction, the owner might be entitled to compensation even though the land was still worth a great deal following passage of the new controls. In addition, judicial specification of dollar amounts below which government could safely take property from citizens would seemingly invite governmental abuse. Finally, this method would dramatize the legitimacy problems inherent in any such rejection of a literal interpretation of the takings clause. No wonder

259. "The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922) (emphasis added). Professor Michelman argues that the "too far" test might itself be viewed as a categorical approach under which the Court now validates any regulation that does not impose a total deprivation of a unique right. Michelman, supra note 10, at 1622-25. He is correct that Keystone's phraseology, which focuses on denying the owner "economically viable use of the land," Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 487 (1987), connotes a more formalistic approach that the open-ended term "too far." The concern here is to expand the explanation of the conceptual pressures pushing the Court towards interpreting the "too far" test in ways that deny the extraordinary discretion it appears to connote. See Michelman, supra note 10, at 1614-29 (beginning that explanation). For even if Michelman is right that the Court will now only interfere when a total ban is imposed, the process of determining which bans are total will raise the complexities of defining the affected property that are discussed in the text.

260. The first court to set the dollar amounts would exercise broad discretion, but its authority would eventually gain strength from the spirit of the market model. Once established, the monetary limits would become part of the existing law by which the public would govern its behavior.

261. Contemporary takings clause jurisprudence is particularly embarrassing to any approach to constitutional law that hopes to resolve difficult constitutional issues by simply resorting to the text. See generally J. ELY, DEMOCRACY AND DISTRUST 1-41 (1980) (describing the allure and
the Court has never considered identifying dollar thresholds as part of its takings clause jurisprudence.

To escape the burden of specifying arbitrary dollar amounts that would define constitutional injury, the Court has chosen instead to consider the extent of the claimant's loss in more relative terms. The question has never been simply how much the claimant has lost but instead how much the claimant has lost in comparison to some idealized notion of what might have been lost had the state actually taken title to the resources in question. Professor Michelman has aptly described the Court's inquiry as a fraction in which the loss caused by the challenged action forms the numerator and the preexisting value of the affected property constitutes the denominator.262 Presumably, when the percentage represented by this fraction gets too high, the economic impact becomes sufficiently severe so that compensation is suggested if not required.263

Limiting the Court's focus to the impact on the affected parcel avoids the obvious problems with a broader inquiry such as an inquiry into the impact on the claimant's overall wealth. Permitting greater damage to wealthy persons would pose the danger of unfairly burdening the rich in the same way that establishing strict dollar amounts might appear to discriminate against the poor. In the extreme, governments might justify confiscating the land of wealthy persons for post offices or

impossibility of adopting a clause-bound interpretivism that seeks guidance from explicit constitutional phraseology). A literal reading of the clause suggests that any taking of property requires compensation. Accordingly, any focus on the extent of the claimant's loss presents a direct conflict with the idea that all losses generate valid compensation claims. Attempts to draw monetary lines separating compensable from noncompensable injuries simply exaggerate this interpretivist problem.

Even the strongest proponents of an interpretivist approach to the takings clause, however, face a dilemma of their own. Focus on the broad prohibitory language "nor shall private property be taken for public use without just compensation" suggests no exceptions, but focus on the word "taken" appears to exempt regulations and even physical destruction from the compensation requirement. Compare R. Epstein, supra note 3, at 26-28 (defending an interpretivist view but also arguing for compensation when government floods land) with Paul, supra note 25, at 750-751 (challenging the coherence of the interpretivist position).

262. Michelman, supra note 3, at 1192. The Court has embraced Professor Michelman's formulation. Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 497 (1987). See also Michelman, supra note 10, at 1614-21 (contrasting the Court's method of calculating the denominator in Keystone with the Court's reasoning in First English Evangelical Lutheran Church of Glen­dale v. Los Angeles County, 482 U.S. 304 (1987)).

263. Since severity of economic impact is now merely one part of the three-factor test, a regulation might have an extraordinarily severe impact but not create a valid takings claim because one or both of the other factors points against compensation. See, e.g., Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1005 (1984) (The claimant's failure to show damage to reasonable investment-backed expectations obviated the need to examine the severity of economic impact.).
other government buildings and refusing to pay them because they have many other assets. 264

Defining the contours of the property affected by a challenged regulation, however, poses excruciating problems that threaten to divorce the severity-of-the-impact test from the underlying question of whether the claimant has suffered too much. The plan to establish a dollar limit below which governmentally created injuries would remain noncompensable gains some strength from the idea that some injuries are simply too slight to rise to constitutional stature. Similarly, the method comparing governmentally imposed harm against the claimant's, overall wealth appeals to commonly held notions concerning ability to pay. It may seem inappropriate to consider the claimant's wealth when evaluating a takings claim, but it is not arbitrary. For what reason, however, should courts care about the impact of a zoning regulation, for example, as a percentage of loss in value of the affected land? Why, for example, will one owner suffer more when an open space regulation prohibits all economically viable use of a relatively small parcel of land that was once worth $100,000 than another owner will suffer when the value of that owner's twenty acres is slashed from $200,000 to $40,000? The first owner may appear worse off, but what if that owner has nineteen other acres across town whose value at $180,000 is unaffected by any zoning change?

1. Economic Loss and the Property Models

The strongest response, of course, is that focus on the affected property provides an alternative that is fairly easy to administer and is preferable to the vacillation back and forth between the unsatisfactory approaches of strict dollar limits and evaluation of claimant's overall wealth. But the difficulty lies in trying to identify the method by which the Court can specify the precise nature of the affected property. 265 The mutual dependence and underlying conflicts of the property models have

264. The problem here is more complex because the taking of land owned by the rich for public projects could become sufficiently widespread to resemble a redistributive tax that would pass constitutional muster. Accordingly, the deep hostility to the text's purported confiscation stems from suspicion that the government's actions must contain some elements of singling out, rendering the action an unfair burden on the affected party rather than a routine part of an acceptable redistributive scheme.

265. For a terse argument that a focus on economic loss is unsatisfactory in part because of the difficulty of defining the affected property against which to measure a relative change in value, see Sax, supra note 18, at 60. For more recent discussions of this issue and its importance to contemporary takings law, see Michelman, supra note 10, at 1614-21; Radin, supra note 11, at 1674-78 (coining the phrase "conceptual severance" to refer to this difficulty).
caused the Court to fluctuate between approaches whose connection to the underlying problem of the extent of the claimant's hardship has become increasingly obscure. Stated simply, the owner of the small parcel zoned for open space is easily identified as suffering virtually a total loss both because physical circumstances divide the affected parcel from the owner's other holdings and because existing property rules likely specify the affected parcel as a separate tract capable of independent ownership. Since physicalist and market ideas coincide in this paradigm case, courts can minimize the problem of ascertaining the relevant property against which to measure the relative decline in value. When the question of identifying the affected item becomes more difficult, however, as in the case of mining or height restrictions, the tension between physicalist and market ideas becomes apparent. No resolution of this tension can occur until courts understand that defining the relevant item or parcel calls upon them to engage in serious inquiry concerning the nature of property protected by the fifth amendment.

a. Physicalism: Consider first the problems that a purely physicalist approach creates for courts trying to measure the claimant's suffering in terms of a percentage change in the value of affected property. A takings claimant who divides the physical universe into sufficiently small components may always plausibly assert that the challenged regulation confiscates 100% of the affected property. Penn Central made this argument when it attacked New York City's landmarks restriction for taking 100% of the airspace above Grand Central Station. 266 Similarly, the mining companies in Keystone questioned the constitutionality of Pennsylvania's antisubsidence legislation because it deprived the claimants of 100% of the value of the individual veins of coal that the statute required be left underground. 267

Pushed to its extreme, the argument that physical resources can be carved into infinitely small pieces might support attacks on setback ordinances or even gasoline rationing. Affected owners could contend that the portion of land on which building is prohibited has been taken or that the specific gallons of gasoline have been requisitioned. Unsurprisingly, the Court has not been sympathetic to this line of argument. 268

Penn Central contains the Court's clearest repudiation of the idea that takings claimants might divide physical resources into parts small

268. Id. at 498 (explicitly denying that claimants may carve resources into discrete components, and using set-back ordinances to illustrate dangers of this approach).
enough to assert 100% losses. Justice Brennan stated that "'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." Accordingly, he rejected the claim that New York's landmarks legislation takes 100% of the air rights above Grand Central Station. Instead, he concluded that the relevant question was how the landmarks regulation affected the parcel as a whole, which he defined as the city tax block designated as the landmark site. However, Justice Brennan failed to show that the Court's choice to measure the economic impact on a single parcel is not just as arbitrary as the claimant's choice of air rights. The problem is that physicalism alone cannot provide a reference point from which to determine the unit of property whose diminution is to be measured on a percentage basis.

Justice Brennan's *Penn Central* opinion is convincing because of the second way in which the affected landmark site was marked off from the claimant's other holdings. Both the affected city block and the affected air rights could be identified as discrete physical items. Fee simple title to the affected land, however, is much more basic to the background rules governing ownership than mere title to airspace. Although the law might permit a separate market for air rights, the bundle of rights accompanying ownership of the land is simply much more familiar. Accordingly, the government's characterization is strengthened by the idea that physical resources have been divided in accordance with preexisting legal rules. Conversely, the claimant's position seems strained because the


270. Id. at 130-31. Justice Brandeis's dissent in *Pennsylvania Coal* also suggests the Court should measure the impact of the challenged regulation on "the whole property." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 419 (1922) (Brandeis, J., dissenting). He recognized that it would be arbitrary to use physicalism to focus only on the actual coal that the statute requires to remain in place and dangerous to permit the coal company to rely on contract rights to render the affected mining rights a separate property interest. *Id.* Brandeis does not explore why the relevant percentage decline is measured using the affected land rather than the coal company's total holdings.

271. For an interesting example of a court's willingness to consider a greater portion of the claimant's holdings when determining the percentage loss caused by a challenged action, see *Naegle Outdoor Advertising Inc. v. City of Durham*, 844 F.2d 172 (4th Cir. 1988). In *Naegle* the challenged anti-billboard ordinance prohibited the claimant from displaying certain billboards (85 of them) within the city of Durham. In remanding the case for trial, the Fourth Circuit specifically instructed the district court not to treat the loss of these specific billboards in isolation but instead to look at all the company owned billboards and decide which were in the same area so as to create the appropriate unit. *Id.* at 178. Notice that even here the court of appeals uses the physicalist idea of a confined location to draw the line between relevant and irrelevant parts of the claimant's asset portfolio.
rules it relies on are much less clear. In short, the market model supports Justice Brennan’s position and partially resolves the ambiguities that pure physicalism creates.

b. The market model: The claimants in Keystone were acutely aware of how the market model could be used to identify the property affected by a challenged regulation. They noted that Pennsylvania property law had previously separated ownership interests into distinct estates known as the surface estate, the mineral estate, and the support estate. Accordingly, they argued that compensation was required because the disputed antisubsidence regulation deprived them of the entire support estate thereby creating a 100% loss. Ultimately, they sought to persuade the Court that it could escape the difficult task of defining the affected property interest by deferring to state law. Justice Stevens declined this invitation. Like Justice Brennan in Penn Central, however, Justice Stevens also rejected the claimant’s vision without offering one of his own.

Justice Stevens was correct to dismiss the mining companies’ reliance on the market model. In a legal regime with broad rights of alienability and free contract, sole reliance on the market model will create problems for takings law that precisely parallel those engendered by pure physicalism. Citizens permitted to carve precise ownership interests from the broad fee simple bundle could generate endless takings claims by selling “estates” or entering contracts tailored to defeat government regulation. Imagine, for example, the owner of a tract of unzoned land who sells the right to build commercial buildings on the parcel to one developer and the right to build residential homes to another. If the local government then zones the land for residential use only, the commercial developer could argue that it has lost 100% of its “estate.”

Justice Brandeis saw precisely this danger at the root of Justice Holmes’s conclusion that the coal company in Pennsylvania Coal had suffered too great a loss. Pennsylvania Coal’s deed transferring title to the surface estate to the Mahons specifically reserved the right to mine without paying for subsidence damage, and, accordingly, the challenged statute appeared to confiscate 100% of the company’s mining interest. Justice Brandeis understood that virtually unlimited compensation claims would result from recognizing purely legal interests as the relevant property against which to measure the diminution in value. He noted the possible impact on height restrictions if sale of air rights entitled airspace holders to claim total destruction of their property.272

More broadly, he recognized that precise legal rights established by government charter or private contract cannot sanctify existing entitlements against all government alteration. Justice Stevens’s *Keystone* opinion reemphasized this concern when he highlighted the Court’s repudiation of what he called “legalistic distinctions” in its decisions to treat air rights as part of the fee simple parcel in *Penn Central* and the right to sell as part of a larger ownership bundle in *Andrus v. Allard.*

What Stevens needed, however, was a principle other than shared ownership to defend his decision to consider the support estate as linked to some of the claimants’ other holdings. Courts could prevent claimants from using contract and other legal doctrines to divide ownership by evaluating takings claims based on all the claimants’ property, but this would reproduce the problems of evaluating takings claims using the claimants’ total wealth. Instead, Stevens wanted to connect the allegedly taken support estate to the mining estate that the claimants retained. This connection is implausible from a purely legal point of view because the *Keystone* claimants clearly did not rely on their own contracts to establish the support estate as a separate property interest. Rather, they asserted that the support estate was an already established separate interest under state law.

Stevens’s opinion, however, is persuasive because he relied on a more physical or practical connection between the support estate and the mining or surface estate. The support estate appears more clearly linked to the claimants’ mining rights than, for example, to stock they held in unrelated corporations because there is a physical connection between the support estate and claimants’ other interests in the same land. More generally, Justice Stevens relied on a physicalist model to check what

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273. *Id.* at 420-21. More than ten years earlier, Holmes also seemed to recognize the dangers of allowing the extent of constitutional rights to turn on whether the parties had sought to establish a private contract as a limit on the police power. As Holmes stated, “One whose rights, such as they are, are subject to State restriction, cannot remove them from the power of the state by making a contract about them.” *Hudson Water Co. v. McCarter*, 209 U.S. 349, 357 (1908). In *Hudson*, the defendant had contracted to remove water from the state of New Jersey after the state had outlawed the practice. Thus, unlike the Pennsylvania Coal Company, the defendant in *Hudson* could not take full advantage of the market model’s protection against contracts abridged by changes in the legal regime.


275. Clever citizens might further try to create separate corporations that owned nothing but the interest the government was expected to destroy. Courts would then even more desperately need a theory to pierce the corporate veil and link the taken interest to retained rights thereby reducing the percentage diminution.
would otherwise be unacceptable consequences of a market approach. He therefore avoided having to explain how substantive policies related to the purpose of the takings clause justify treating the mining companies as having suffered a relatively small economic loss.

2. Economic Loss Revisited

Viewed together, Justice Brennan's opinion in *Penn Central* and Justice Stevens's opinion in *Keystone* reveal that the Court has broad powers to deflect takings claims. If an aggrieved citizen suffers serious harm to an arguably discrete physical resource, the Court can point to other resources to which the injured item is linked at common law. Alternatively, when a discrete legal interest is destroyed, the Court can emphasize the broader legal holdings to which the taken interest is physically linked. This type of fluctuation threatens to eviscerate consideration of the severity of the claimant's loss.

As was the case concerning the harm/benefit distinction, in order to rescue the analysis of economic loss, the Court must abandon the idea that a fixed baseline can provide the starting point from which to measure the percentage decline. Because physicalist and market ideas offer different baselines, the debate must focus not only on the amount of loss necessary to assert a takings claim, but also on whether the lost resource should be considered in conjunction with the claimant's other resources. Justice Stevens might have argued, for example, that the coal companies should bear the risk of separating the support estate from mining rights because they are in a better position to anticipate the extent of subsidence damage. Justice Brennan might have relied more heavily on New York's transferable development rights scheme to argue that a separate consideration of air rights should preclude *Penn Central* from receiving any value for the connection between air rights and its particular surface parcel. These more specific approaches would force the Court to

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276. *Cf.* Epstein, *Takings: Descent and Resurrection*, 1987 SUP. CT. REV. 1, 6-7 (arguing that surface owners explicitly anticipated subsidence to the same extent as the mining companies).

277. The landmarks scheme challenged in *Penn Central* awarded the railroad company transferable development rights (TDRs) that could be transferred to other property it owned, or sold to an owner of a nearby lot. The TDRs would permit airspace development beyond what the ordinary zoning scheme allowed. *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 113-15 (1978). The award of TDRs was one factor that influenced Justice Brennan's decision that no taking occurred, but Brennan did not consider whether the TDRs would have constituted just compensation had there been a taking. *Id.* at 137. He might have gone further, however, and accused the claimant of playing two sides in the same argument. The claimant's dissatisfaction with the TDRs was presumably that they were worth less than the right to develop the affected parcel. Here, then, the claimant wanted to link the airspace to its underlying land. But in evaluating the percentage
explain why a particular economic loss was relatively minimal and ultimately might encourage debate over the constitutional values at stake.

More generally, both Justices might have addressed a series of difficult questions: Are there approaches that do not rely on market and physicalist ideas to identify which of the claimant’s holdings should serve as a reference point against which to measure a percentage loss of economic value? Are there some circumstances when one model is more likely to be helpful than the other? Perhaps, for example, concerns over dominion interests suggest that a claimant’s other holdings should never be considered when a land use regulation diminishes the value of the lot on which the claimant lives. Would judicial performance improve if the Court developed a core list of property interests that should not be evaluated using the percentage approach because loss of these rights is so drastic that it does not matter that other interests are retained? Does the general fungibility of goods in a market economy obviate the need for defining property interests that are immune from a more general economic calculus? These questions point back to the ultimate constitutional issue. Why are some governmentally created harms part of communal living and others unjustified majoritarian tyranny? How does the severity of the claimant’s loss help us to distinguish between the two? Unfortunately, the Court’s hidden reliance on physicalist and market models permits it to continue dodging these constitutional conundrums. To progress, the Court must carefully consider the relationship between the severity of the claimant’s loss and the likelihood that the claimant has been unfairly singled out for adverse action.

Professor Michelman has evaluated the Court’s focus on the percentage diminution in value in terms of these broader constitutional goals. In what proved a prescient analysis, Michelman suggested that the Court’s decision to consider severity of economic loss in terms relative to a particularly affected property interest can be defended not only on grounds of administrative expediency but also as a response to the demoralizing effect of government interference with “distinctly perceived, sharply crystallized, investment backed expectation[s].”

diminution, the claimant asked the Court to focus on the 100% confiscation of the claimant’s airspace. Perhaps Justice Brennan was right to find the economic loss was insufficiently severe because the claimant should not be able to have it both ways.

278. Michelman, supra note 3, at 1233. Michelman’s insight was prescient because, writing in 1967, he explained why a sustained focus on economic loss would push the Court towards an emphasis on damage to the claimant’s expectations; over the next twenty years expectations analysis became increasingly central to the Court’s takings jurisprudence. See, e.g., Ruckelshaus v. Monsanto Co., 467 U.S. 986 (1984) (holding that the claimants failure to show a reasonable, investment-
Michelman reasoned that one goal of the takings clause might be to prevent government from engaging in behavior with costs that outweigh its benefits. He next focused on the particular costs citizens would experience as insecurity or "demoralization" if they felt their property could be taken without just compensation. Michelman relied on what he conceded is a questionable empirical assumption concerning human behavior to suggest that demoralization costs will be particularly high when a citizen experiences the loss of one entire "thing" rather than part of a larger bundle of rights. On this view, uncompensated confiscation of one car would demoralize citizens more greatly than a gas consumption regulation that forced an owner of several cars to keep some of them in the garage, even if the economic impact were the same.279

Michelman is right that demoralization will be high when citizens' distinct expectations are disturbed; he is also correct that measuring economic loss in terms of relative impact on an affected property interest brings the question of expectations to the fore. The crucial step in his analysis, though, is his identification of two distinct situations where citizens' expectations will be sufficiently crystallized to trigger the extra demoralization upon loss that warrants compensation. First, Michelman contended that citizens are more likely to feel aggrieved when a government action deprives them of an entire legal interest that has been carved out specifically for their enjoyment.280 The coal company in Pennsylvania Coal fits this definition because it had specifically reserved the right to mine coal and not pay for subsidence.281 Second, Michelman noted the tendency to permit citizens to maintain nonconforming land

279. The example is drawn from B. Ackerman, supra note 3, at 123-50.
281. Michelman also noted the case of United States v. Virginia Elec. & Power Co., 365 U.S. 624 (1961), in which the Court required payment of compensation to the owner of a flowage easement that was destroyed when government flooded the servient estate. Michelman pointed out that because the easement owner could not have exercised its rights without using navigable waters, the case is inconsistent with United States v. Twin City Power Co., 350 U.S. 222 (1956), which found no compensable interest in the loss of the right to use navigable waters. Michelman reasoned that the Court in Virginia Electric, like the Court in Pennsylvania Coal, was influenced by the claimant's ability to demonstrate the loss of an entire legal interest that had been created to suit the claimant's functional needs. Michelman, supra note 3, at 1231-33.
uses whose existence predated enactment of a conflicting zoning ordinance. Michelman argued that the already existing use created a sufficient expectation in the mind of the affected citizen so that requiring changes without compensation would raise serious constitutional questions. 282

By now, we recognize how Michelman's two cases of shattered expectations conform to our two property models. In the Pennsylvania Coal example, specific legal rules based on the market model generate the expectations that Michelman seeks to protect. In the zoning hypothetical, the claimant’s expectations spring from already existing uses that constitute enlightened physicalism. Because these models often lead to similar results, Michelman presented a strong descriptive theory that the Court's outcomes often reflect a desire to protect established expectations. Moreover, his analysis reminds us that separate consideration of the various factors within the contemporary Court's three-part test threatens to obscure the interrelationships among the factors. But Michelman's reliance on expectations analysis ultimately cannot overcome the tension between physicalist and market approaches. Just as courts seeking to define the affected property interest from which to measure relative decline were forced to choose between physicalist and market ideas, courts will often face decisions where market and physicalist expectations conflict. The nature and extent of these conflicts is explored in the next section.

C. INVESTMENT-BACKED EXPECTATIONS

As Part I explains, the power of the market model creates significant pressure for courts to adopt the claimant's expectations as a crucial factor in determining when compensation must be paid for governmentally created harm. Since courts cannot award compensation whenever a claimant asserts a change in the existing rule structure, the most obvious alternative is to distinguish abrupt alterations from situations where claimants had reason to believe the rules would change or did not rely on the rules at all. Perhaps this accounts for the increasing importance of expectations analysis in the Court's takings jurisprudence. 283

282. Michelman, supra note 3, at 1233-34.
283. Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 136 (1978), marked the introduction of the claimant's expectations as a crucial factor in takings jurisprudence. Since then the expectations of the claimant have played a major, often definitive, role in a variety of cases. See, e.g., Connolly v. Pension Benefit Guar. Corp., 475 U.S. 211 (1986) (Reasonable expectations are not disrupted by changes in pension regulation because the mere fact that considerable regulations already existed put parties on notice of possible future changes); Ruckelshaus v. Monsanto Co., 467
Expectations analysis, however, suffers from well-known difficulties that raise serious doubts about its viability. The superficial appeal of expectations arguments is that citizens who have made plans based on existing law may claim they are treated unfairly when government alters the legal regime. As Louis Kaplow has concisely explained, however, this argument contains the implicit and unfounded assumption that the law will never change. Once we recognize that laws change all the time, citizens must rely on the particular context to make out a persuasive claim that they expected the rules to continue unaltered. But this very process of looking to context to distinguish between reasonable and unreasonable expectations suggests that some theory other than disrupted expectations is driving the decision whether compensation is constitutionally required.

Moreover, the Court's decisions concerning which expectations are protected threaten to plunge expectations analysis into circularity. The citizenry will over time come to rely on the Court as a prominent expositor of the meaning of private property. Once the Court has ruled that a particular government practice, such as requiring landlords to grant uncompensated access to cable television, violates the Constitution, landowners will feel secure that similar statutes will not interfere with property values in the future. If the courts then point to the public's general expectation that government will not authorize uncompensated permanent physical invasions to justify new decisions extending the physical invasion ban, the circle back to the original decision is obvious. So long as the Court does not simultaneously announce a rule and justify

U.S. 986 (1984) (holding that the expectations factor nullified compensation claims concerning certain pesticide data); Kaiser Aetna v. United States, 444 U.S. 164 (1979) (holding that interference with reasonable investment-backed expectation of the private use of a marina supports the finding that a private owner must be compensated for public access). See generally Anderson, Takings and Expectations: Toward a "Broader Vision" of Property Rights, 37 U. KAN. L. REV. 529 (1989) (arguing that land is a public resource, so public purpose should prevail over investment-backed expectations); Fisher, The Significance of Public Perceptions of the Takings Doctrine, 88 COLUM. L. REV. 1774 (1988) (stressing the importance of public attitudes towards takings analysis); Mandelker, supra note 278 (applying the concept of investment-backed expectations to real property).

284. For a concise, incisive criticism of traditional uses of expectations arguments that explains why the real question is whether a claimant has a strong normative case to support the expectation, see Kaplow, supra note 19, at 522-27.

285. Id. at 522-23.

286. For a recent essay stressing the need to explore how judicial decisions affect the public's view of private property and how the public's perceptions in turn influence takings theory, see Fisher, supra note 283.

it on the grounds that longstanding legal practice has engendered constitutionally protected expectations, circularity is avoided. Over time, however, the more the Court's own pronouncements tend to shape public expectations, the more the Court's reliance on these expectations threatens to deteriorate into a blatant case of self-fulfilling prophecy.

Finally, the Court must somehow limit the vast array of claims that expectations analysis invites. If the Court were to grant compensation whenever a citizen could show that his or her expectations were thwarted, almost every regulation would be vulnerable. A traditional zoning ordinance, for example, might succumb to constitutional attack by a landowner whose plans to build a multi-family dwelling were disrupted. Indeed, to the extent that citizens are permitted to point to the existing law as a valid source of expectations, any change in the rules would automatically give rise to legitimate constitutional claims from those harmed by the new legal regime. Accordingly, courts that desire to protect expectations must either freeze existing law or develop a strategy for minimizing the number of situations where rule changes would frustrate constitutionally protected expectations. Since the first approach is unrealistic, the Court has attempted to accomplish the latter by explicitly affording protection not to all expectations but only to those that are "reasonable and investment backed."

If the Court retreats from wholesale protection of expectations, however, it must reconcile its desire to protect the subjective attitudes of the claimant with its insistence that only objectively reasonable intentions deserve protection. Otherwise, expectations analysis risks dissolving into a meaningless label whereby courts that conclude compensation is required point to shattered expectations whereas courts who find compensation unnecessary stress how unreasonable the expectations were.

288. The Court has long recognized that the Constitution cannot protect citizens' expectations that the law will remain the same. "[N]o one has a vested right in any particular rule of the common law . . . ." Truax v. Corrigan, 257 U.S. 312, 329 (1921).

289. Kaiser Aetna v. United States, 444 U.S. 164, 175 (1979). The requirement that expectations be "investment-backed" contains an ambiguity. On one hand, the fact that the expectation must be backed by money may prevent fraud. Thus, it is more certain that a landowner sincerely intended to develop a piece of property if the owner has spent thousands on architectural plans. However, the focus on an investment is rather harsh. Certainly, claimants may have other ways of proving the sincerity of their intentions. Alternatively, the investment requirement may serve as an indicator of the extent to which the claimant has actually suffered harm. Here, however, one wonders whether the Court is indirectly blurring the expectations analysis with the diminution in value question that is already part of the three-factor test. Moreover, in the absence of a theory delimiting particular claimant expectations, the magnitude of the claimant's investments is more properly part of the calculation of the amount of compensation rather than a factor in whether the plaintiff deserves compensation at all.
short, inquiring whether the claimant's expectations were reasonable simply threatens to rehash the whole question of whether property has been taken. As noted above, unless still another theory is available to distinguish reasonable expectations from unreasonable ones, a court that labels expectations unreasonable so as to deny compensation will simply be begging the question.

The mystery then is how expectations analysis continues to thrive. The most obvious answer is that there seems to be nowhere else to turn. The takings clause is simply not viable if courts do not have a method to determine when government has taken something away and must therefore compensate the claimant. A pure physicalist model suggests that the things taken are physical items. As we have seen, however, government can severely harm citizens without confiscating tangible resources, and it can legitimately take some physical items without paying. Moreover, “ownership” of physical items consists largely of rules that prohibit others from using or harming privately owned resources. Even claims for compensation when land is confiscated, therefore, seem plausible only to the extent that the claimant alleges not simply possession of the taken land but an expectation that possession would continue. Accordingly, the collapse of naïve physicalism propels expectations analysis to the fore.

Moreover, expectations analysis does have a compelling rationale. If the essence of a valid takings claim is that the government should pay for what it has taken, government has a strong rejoinder whenever it can assert that the claimant had no reason to expect to continue holding the lost “property.” In one sense, this government response might be viewed as relevant to the amount of compensation required, and not to whether compensation is required at all. Thus, if a landowner purchases land at a discount because there is a high probability that subsequent zoning will restrict its use, perhaps the government should pay less—but not nothing—when it actually zones the land. Even here, however, the question is defining the relevant risks that owners bear. It would seem wholly unfair for courts to insist that no amount of advance notice of possible

290. In Connolly v. Pension Benefit Guaranty Corp., 475 U.S. 211 (1986), the Court upheld federal legislation limiting pension plan withdrawals even though the legislation cost one appellant approximately $200,000, or nearly 25% of the firm's net worth. In Mugler v. Kansas, 123 U.S. 623 (1887), the Court sanctioned the uncompensated destruction of the claimant's liquor that was produced before any statute outlawed the practice.

291. Professor Epstein has suggested that the seller should be able to recover the difference between the so-called market price and the discounted price caused by the specter of government regulation. R. Epstein, supra note 3, at 155. For a discussion of problems with this proposal, see Paul, supra note 25, at 756 n.51.
rule changes could insulate the government from compensating for the effects of those changes. Should a citizen who builds a factory on land already designated for a highway receive compensation for the full value of the factory when the land is eventually condemned?

A constitutional regime that quite properly differentiates between expected and unexpected shifts in the rules governing the marketplace, however, risks simply pushing the takings question, and ultimately the positivism problem, back a step. Expectations analysis brings sharply into focus the differing sources of expectations upon which citizens may rely in pressing claims for compensation. Citizens can point to past practice as an argument that new rules altering that practice create valid compensation claims. But citizens can also rely on the existing rule structure to suggest that challenged legislative measures altering that rule structure engender a duty to compensate. Once again the plausibility of both these approaches permits courts to overlook the deeper problems with expectations analysis and instead to engage in vigorous dispute over the appropriate source of expectations. Nor should it come as any surprise that a citizen basing expectations on past practice invokes one more version of the physicalist model, while rules-based expectations are at the core of sequentialist, market model ideas. Both models readily suggest a method for determining which expectations deserve the "property" label for purposes of constitutional protection. The problem, of course, is that the persuasive power of each model renders the other at least partially unsatisfactory. Accordingly, as this section will demonstrate, expectations analysis must extend beyond these two models to address explicitly the underlying constitutional question. What kinds of stability are so important to the smooth functioning of our democratic society that legislative changes are unacceptable unless compensation is paid to those whose fortunes will dim under the new regime?

1.1 Expectations and the Physicalist Model

Consider first the strength that physicalism can provide to expectations analysis. If courts are forced to distinguish protected, reasonable

292. A company that has long engaged in a particular practice, such as brickmaking, may argue that a new rule prohibiting the practice has disrupted expectations and creates a governmental obligation to compensate. See Hadacheck v. Los Angeles, 239 U.S. 394 (1915). The government will, of course, argue that the company never had a right to engage in harmful activity, see supra Part II(A)(1), text accompanying notes 96-182, and therefore the company had no reasonable expectation that its practice could continue. The point at which a longstanding practice is sufficiently entrenched so that government should bear the cost of labeling the banned activity "harmful" is likely to continue to be a source of dispute within expectations analysis.
expectations from unprotected, unreasonable ones, citizens whose expectations stem from the physical state of things have a clear head start in proving their claims to be reasonable. Contrast, for example, a zoning ordinance that prohibits certain types of building on a particular parcel with a governmental decision ordering a citizen to tear down an already constructed house. The zoning restriction might in fact seriously disrupt investment-backed expectations. The landowner may have spent a large sum for the land expecting to build in a way that now violates the newly enacted ordinance. The owner may have hired architects, solicited partners, perhaps planned a business that would operate its headquarters there. All these expectations, however, ultimately arise from a physical alteration of the land that has yet to take place. In light of continued judicial allegiance to physicalism, it seems unlikely that courts would grant compensation for the rule change. Unsurprisingly, contemporary judicial decisions support that conclusion.293

Alternatively, the homeowner threatened with demolition may have known for a long time that local building and planning authorities discourage construction, say, of two homes on single, one-acre plots. Indeed, the owner may have had strong reason to suspect that the second house would be declared illegal. Something about the tangible existence of that house, however, suggests that its owner will capture the judiciary's sympathy even if she cannot succeed in securing compensation for her loss.

From the standpoint of expectations theory, these intuitions initially appear anomalous. If the point of compensation is to protect citizens against governmentally created surprise, then the new zoning ordinance that thwarts the business planner is clearly more threatening than the "expected" rule ordering destruction of the now-illegal house. Upon a second look, however, our sympathy for the aggrieved homeowner plays a crucial role in preventing expectations analysis from descending into the circularity already described. What distinguishes the owner of the illegal dwelling is that her expectations are rooted in a source other than

293. Recent Supreme Court cases have tended to ask developers to recast their plans rather than flatly deny their constitutional claims. See, e.g., MacDonald, Sommer & Frates v. Yolo County, 477 U.S. 340 (1986) (The Court did not reach the question of whether a taking occurred because the developer retained the opportunity to submit an alternative subdivision plan.); Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172 (1985) (refusing to entertain a takings claim because a developer failed to seek zoning variances). It is fair to say, however, that the Court has shown little concern for landowners whose development plans have been thwarted by zoning regulations. Id. See also Agins v. City of Tiburon, 447 U.S. 255 (1980) (finding no taking where claimants alleged that zoning prevented them from developing their land but no specific plan of development had been proffered or rejected).
the existing or anticipated rule structure. Instead, her claim is that it is simply unreasonable to tear down an existing house. This suggests that the physical world will provide a brake on government’s ability to deny compensation simply by announcing the likelihood of future rule changes. In broader terms, expectations analysis is purely circular when a court relies on the rule it establishes as a source of the expectations it protects. If the rule is already established, circularity is attenuated, but the initial decision is called into question. But if expectations are derived from a nonlegal source such as physical facts in the world, then circularity seems to disappear.

Our sophistication about inferences drawn from physical facts, of course, immediately tells us that the existence of tangible things, like the embattled house, would be meaningless without a social system that supported the idea that houses are not to be destroyed. Accordingly, it is not merely the house but a pattern of social life that limits government’s ability to threaten the individual with pronouncements that all rules are subject to change without compensation. In the long run, however, even an entrenched pattern of social life could not protect private property unless citizens were confident that social life itself is not infinitely manipulable at the hands of the state. Several aspects of civil society might hinder governmental efforts at reconstruction, but few are as powerful as the simple fact that physical reality cannot be transformed with the stroke of a pen. Citizens told that any house built in the future would be subject to uncompensated condemnation would have good reason to expect that the government would not voluntarily pay when houses were later taken. But no matter how widely publicized the new rule, citizens would still have to watch as places of shelter were destroyed before their eyes. Telling them that they have not really lost anything because the destruction was expected would simply not be convincing.

The physicalist model is powerful enough so that few legislatures have attempted to authorize actual destruction of tangible resources, but *Kaiser Aetna v. United States* illustrates the point. Despite the

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294. Cf. R. UNGER, KNOWLEDGE AND POLITICS 31-36 (1975) (describing the antinomy of theory and fact presented when one recognizes that all facts depend on an observer who employs a theoretical framework and all theoretical frameworks seek validation in appeals to facts).

295. To use Professor Michelman’s term, the “demoralization costs” of such an enterprise would be very high. See Michelman, supra note 3, at 1214.


297. For one case where the government did authorize physical destruction and the court insisted on compensation, see Department of Agriculture v. Mid-Florida Growers, 521 So. 2d 101 (Fla. 1988) (requiring compensation where the Florida Department of Agriculture had destroyed healthy citrus trees in an effort to prevent the spread of citrus canker). The Florida Legislature's
Court's increased focus on claimant expectations, Kaiser Aetna is perhaps the only case where disrupted expectations led the Court to insist on compensation where it otherwise might have deferred to the decision of another branch not to compensate. The Court held that the federal government could not, without paying compensation, require Kaiser Aetna to grant public access to a private lagoon which Kaiser Aetna had connected to navigable waters. From one standpoint this result seems odd. As a general matter, Kaiser Aetna was not an overly sympathetic claimant. The case involved protection for a group of luxury homes with access to private waters, not the taking of shelter from needy citizens. Moreover, Kaiser Aetna chose to connect its lagoon to navigable waters against a clear background regime under which the right of access to navigable waters had been held a noncompensable interest.

But Kaiser Aetna had two very strong factors weighing in its favor. Kaiser Aetna had obtained permission from the Army Corps of Engineers before connecting the lagoon to navigable waters, and the private marina was an existing tangible resource upon which the government wished to intrude. Although the Court could have relied principally on the assurances Kaiser Aetna received before commencing construction, Justice Rehnquist feared the implications of a holding that government workers could "'estop' the United States." Accordingly, the Court focused instead on the government's effort to deprive Kaiser Aetna of the "fundamental right to exclude" and on the physical invasion that the United States wished to authorize without compensation. Indeed, the Court specifically linked the physicalist aspect of the case with its

response, consistent with the argument advanced supra, Part II(A)(2)(d), notes 254-56 and accompanying text, has been to establish mandatory compensation amounts for the different types of trees destroyed in the program. See Fla. Stat. Ann. § 602.015 (West 1987).

298. In Ruckelshaus v. Monsanto Co., 467 U.S. 986 (1984), the Court suggested that the claimant might have a valid claim for compensation resulting from the government's disclosure of data submitted by the claimant between 1972 and 1978. The Court relied principally on the claimant's reasonable expectation that the law during that period prevented disclosure of the data. Ultimately, however, the Court found that if the claimant had a valid claim it must be pursued in the U.S. Claims Court under the Tucker Act. Thus, the Court never explicitly ruled on the merits of the claimant's expectation arguments.

299. See, e.g., United States v. Willow River Power Co., 324 U.S. 499 (1945) (denying compensation to a claimant who suffered economic loss when government raising of navigable waters spilled over into nonnavigable waters which interfered with claimant's electricity production); see also Kaiser Aetna v. United States, 444 U.S. 164, 188 (1979) (Blackmun, J., dissenting) (stressing that the navigability of Kaiser Aetna's waters eviscerated any claims for compensation).

300. Kaiser Aetna probably succeeded because it could rely on both the physicalist model (disrupting ships) and the market model (breached government promise) to support its claim. The latter model is discussed infra, Part II(C)(2), notes 305-22 and accompanying text.

301. Kaiser Aetna, 444 U.S. at 179.

302. Id. at 179-80.
emphasis on requiring compensation when claimants are injured after the "fruition of expectancies." At first glance, the Court appears to be mixing apples and oranges. However, we now see protection of physical boundaries plays an important role in legitimizing the Court's expectations approach. It is precisely those expectations grounded in tangible practice that the Court can label reasonable and thus generative of valid constitutional claims.

Ultimately, however, physicalism can stave off the circularity of expectations analysis only by sacrificing the advantages gained by looking to expectations in the first place. Indeed, the same under- and overinclusiveness that undermine the simpler physical invasion test also doom physicalism here. If the Court held that people may reasonably expect only things they already possess, it would strip rules of normative meaning and open the way for drastic governmental manipulation. Imagine, for example, a statute that said anyone who buys a house in the future will take possession subject to a new legal regime that permits all regulation short of seizure without compensation. On the other hand, deeming all legally obtained physical possessions as worthy of blanket constitutional protection would drastically impede government projects we now take for granted. Consider, for example, the routine refusal to award takings damages when a highway route is altered or a prison constructed so as to harm nearby residents.

What prevents us from seeing the flaws in a physicalist defense of expectations, however, is the equal plausibility of the market model, which often hides the overinclusiveness referred to above. We might say to our supposedly dissatisfied residents, for example, that they have not lost a "property" interest because title to their land did not give them a right to continued highway access or to a prison-free locale. But this begs the question of what property interests the takings clause protects. We might also say that these government projects have not interfered with physical enjoyment, but this simply recreates the primitive physical invasion test. The real point is that we simply do not wish to award damages to people harmed by governmental choices about where to place certain public facilities because these are risks we wish to build into the

303. *Id.*

304. Pure expectations analysis might go further and suggest that even seizure would be permitted. After all, the citizenry would then certainly have "reason to expect" their land would be taken without compensation. But here the physicalism discussed in the text might kick in a second time to invalidate the statute when passed. Indeed, one might argue that the example posed in the text resembles the existing system and that only physicalism prevents the move to expectations established solely by government.

305. *See supra* Part II(A)(2), text accompanying notes 181-255.
system. We want people to know that damages will not be available because for substantive reasons we believe damages are undeserved. A truly serious approach to constitutional adjudication would start with the question of what leads us to this conclusion. It is much easier, and in many cases equally plausible, however, to justify denying compensation by reliance on a preexisting rule that renders compensation unavailable. That route, now readily identifiable as the market model, presents its own difficulties.

2. Expectations and the Market Model

Expectations analysis represents the current triumph of market ideas within takings jurisprudence. The relationship is therefore quite straightforward. The market model depends upon a well-recognized set of legal entitlements to protect citizens against government overreaching. The Court's emphasis on the claimant's expectations simply formalizes that approach. If a claimant can point to a clear legal rule establishing a right to a certain use of resources, then government alteration of the pre-existing rule presents a prime facie case for compensation because the rule itself gave the aggrieved citizen reason to expect that the use could continue. But just as the market model as a whole is incoherent if it prevents government from ever changing any rules, so expectations analysis cannot work if any legal rule can become the source of constitutionally protected expectations. Accordingly, the Court's shift toward protecting only "reasonable, investment-backed" expectations presents the obvious question of how a theory that takes comfort from the certainty of preexisting rules will be able to distinguish rules that create constitutionally protected expectations from rules that do not.

Here again the unconscious combination of physicalist ideas with a basic market orientation allows the Court to employ this portion of its ad hoc inquiry without explicitly confronting the difficult value choices presented by the takings clause. In this context, physicalism is needed to limit certain government arguments that are necessary to render expectations analysis plausible but that threaten to turn that analysis into nonsense. Consider first the most powerful government response when a citizen demands compensation for disrupted expectations. When a citizen claims that existing law was changed, the government will suggest that the citizen had every reason to expect the change to occur. The strength of the government's position is that it denies the legitimacy and ultimately the existence of the claimant's asserted expectations. The weakness, however, as noted above, is that it threatens to obliterate expectations analysis altogether. After all, the government can always
argue that citizens should expect the law to change. It often does. The government will therefore have difficulty arguing that laws change all the time without undermining the market model's central premise that the background rules form an objective source for determining citizens' legitimate expectations.

Consider some techniques the Court has employed. In *Connolly v. Pension Benefit Guaranty Corp.*, for example, the Court found no taking and no interference with claimant's reasonable, investment-backed expectations following Congress's imposition of substantial financial liability on an employer wishing to withdraw from a multi-employer pension plan. At the time the plan was created no such legal liability existed, and the claimant's contracts with the plan explicitly exempted it from any additional cost upon withdrawal. Nonetheless, the Court was unsympathetic to claimant's arguments that the rules had been unfairly changed. As the Court put it, "pension plans . . . were the objects of legislative concern long before the passage of ERISA." Moreover, "those who do business in the regulated field cannot object if the legislative scheme is buttressed by subsequent amendments to achieve the legislative end."

On their own terms, these arguments are silly. The fact that pension plans were "the objects" of regulation prior to enactment of the challenged statutes says nothing about whether the claimant could have reasonably expected the precise regulation that led to substantial costs being

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306. Remember that the market solution to the positivism problem depends upon the idea that government can avoid being a judge in its own case by settling issues in *sequential order*. See supra Part I(B)(2), text accompanying notes 71-76. Thus, expectations analysis works wonderfully to the extent that a judge deciding a takings case looks to the state of settled law prior to that case to determine whether the claimant had reason to expect to be able to pursue plans without legal interference. If, however, courts are permitted to treat the possibility of legal change as part of settled law, it becomes increasingly difficult to maintain the idea that anything is settled at all. Courts resolving takings cases are then in the position of determining the relevant law at precisely the moment they are under pressure from the other branches to find no compensation is required. Whatever success courts may achieve at this endeavor, the task of serving as a judge in the government's own case places undeniable pressure on the legitimacy of the constitutional enterprise.


308. *Connolly*, 475 U.S. at 226 (emphasis added). The plan at issue had been created in 1960. The Employee Retirement Income Security Act ("ERISA"), which led to claimant's initial challenge, was passed in 1974. It created potential employer liability in the event the Pension Benefit Guaranty Corporation ended up paying benefits to covered employees. By the time the case reached the Supreme Court, Congress had also passed the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"). This Act created the claimant's certain liability upon its withdrawal from the multiemployer plan.

309. *Id.* at 227 (quoting FHA v. The Darlington, Inc., 358 U.S. 84, 91 (1958)).
imposed upon it. Moreover, the Court failed to explain the significance of a “regulated field.” Suppose pension plans were previously unregulated. Could not the government argue that the lack of any government regulation concerning a highly important area of economic life should have put the claimant on notice that regulation was likely? Indeed, could not a claimant in a regulated field argue that the existence of complex government regulation led the claimant to believe the government had so carefully delineated rights and obligations in this area that further changes are even more disruptive of settled expectations?

The point, of course, is not that Connolly was wrongly decided. Indeed, the Court had good reason to be “far from persuaded that fairness and justice require the public, rather than the withdrawing employers and other parties to pension plan agreements, to shoulder the responsibility for rescuing plans that are in financial trouble.” What Connolly reveals, however, is that the Court needs a seemingly objective way to characterize certain expectations, like those of the withdrawing employer, as unreasonable. The Court cannot say that any reliance on existing law is unreasonable without destabilizing constitutional protection of property as a bulwark against legislative change. Thus, the Court turns to dividing lines that convey the image of tangible, that is physicalist, boundaries. Those within “regulated fields” should expect changes

310. Moreover, the Court’s cavalier use of chronology highlights another deficiency in traditional expectations analysis. The Court argues that as a prudent employer the claimant had reason to believe that additional liability for withdrawal might be imposed if the 1974 statute failed to meet its objective of securing employee benefits. Id. The point, however, is that the claimant wanted to know its potential withdrawal liability not only at the point of withdrawal but at the point of establishing the plan in the first instance, especially because the statute calculated withdrawal liability based on the overall finances of the plan. Although it is true, as the Court seems to suggest, that claimant might have pulled out of the plan between 1974 (the date of ERISA) and 1980 (the date of the MPPAA imposing withdrawal liability), ERISA had already placed a potential liability on claimant in the event the plan failed. The claimant may have thus feared that withdrawal would have contributed to the instability of the plan. In any event, the point remains that in calculating claimant expectations the market model seems to call for measuring those expectations at the point when claimant is free to change behavior, and not merely at some court-selected time prior to the full impact of the challenged government conduct. See also Ruckelshaus v. Monsanto Co., 467 U.S. 986 (1984) (finding that claimant had no right to expect nondisclosure of data submitted under a statute that allowed disclosure despite the fact that the claimant likely spent time and money developing this data during periods prior to imposition of the new disclosure rule).

311. Connolly, 475 U.S. at 227. Andrea Peterson suggests that Connolly was rightly decided if the Court could have fairly concluded that the public would think the claimant was wrong in withdrawing from the plan without providing for the workers. The public might condemn withdrawal, she notes, because payments “would help solve a problem for which the employers were in some sense responsible.” Peterson, Part II, supra note 1, at 118. The challenge, of course, is to articulate a theory that would explain what sense of responsibility would justify imposing a burden on the withdrawing employer. In this context, as noted in the text, the Court’s contention that the claimant became responsible as a result of advance warning is unpersuasive.
concerning "objects" of regulation. In this way, the Court relies on physicalist ideas to navigate between the positivist nightmare that all laws are subject to change without notice and the equally unacceptable notion that all expectations based on existing law are constitutionally protected.

The Court's most significant contribution to limiting expectations analysis also relies on physicalist concepts. The Court has defined entire categories of existing law as insufficient to give rise to the kind of expectations necessary to create what Andrea Peterson calls "vested rights." Professor Peterson correctly notes that actual practice may lead citizens to become accustomed to certain economic rights that the government desires to alter without paying compensation. The government may pay welfare or social security benefits, for example, without intending to create constitutional claims should Congress decide to alter or even eliminate certain payments. The constitutional question, however, is not whether there are strong policy reasons to permit government to alter economic rights without compensation. Rather, the issue is whether there are judicially cognizable ways to distinguish between protected and unprotected economic rights.

The Court's approach has centered on the introduction of the right/benefit distinction that mirrors the harm/benefit distinction discussed earlier. From the right/benefit perspective, certain legal rules that afford economic advantage to their beneficiaries are readily subject to change because these rules afford mere "governmental benefits." The main category here consists of rules concerning the government's monetary payments to needy and deserving citizens.

In contrast, the Court treats other legal rules, typically those governing the right to use real

312. Peterson, Part II, supra note 1, at 67.
313. For the classic statement that these benefits should be considered property deserving constitutional protection, see Reich, The New Property, 73 YALE L.J. 733, 785 (1964). But cf. Simon, supra note 87 (suggesting that progressives made a serious mistake in attempting to fashion what should be need-based programs around more formal notions of property and contract).
314. See supra Part II(A)(1), text accompanying notes 96-182. For the classic description of the collapse of the right/benefit distinction in other parts of constitutional law, see Van Alstyne, The Demise of the Right-Privilege Distinction in Constitutional Law, 81 HARV. L. REV. 1439 (1968). See generally Sullivan, Unconstitutional Conditions, 102 HARV. L. REV. 1413 (1989) (exploring competing attitudes toward the view that certain governmental benefits may be made available to citizens with whatever strings the government chooses to attach to them).
315. This category is clearly described in Bowen v. Gilliard, 483 U.S. 587 (1987). The Bowen Court rejected a takings claim by a family whose Aid to Families with Dependent Children ("AFDC") benefits were reduced when Congress changed eligibility requirements. The new rules demanded that child support payments made to one member of the eligible family count as income to the family and that the family may not exclude that member for purpose of calculating AFDC levels. The Court was not persuaded that these new rules "took" any property because
property, as having unquestioned constitutional status. Changes in these rules do not always create valid claims for compensation, but they do create a status quo which the government cannot alter without good reason.

The right/benefit distinction's rationalizing effect on takings law is obvious. Once certain legal rules can no longer be the anchor for constitutionally protected expectations, it becomes much easier for the Court to portray itself as the guardian of expectations without having to invalidate many legislative or executive decisions. The political slant is equally apparent. Upper- and middle-class citizens are more likely to own land and other kinds of property protected under the right/benefit distinction.

What is of interest, here, however, is the Court's inability to find the nature of the distinction between rights and benefits within the terms of the market model. The market model is attractive because it treats pre-existing rules as the source of constitutionally protected property. But, if the government can pick and choose the rules that create property interests, and worse still, if the selection process occurs during judicial compensation decisions, then the market model's legitimating power is dramatically lessened.

It is imperative to recognize that the [new rules] at issue merely incorporate a definitional element into an entitlement program. It would be quite strange indeed if, by virtue of an offer to provide benefits to needy families through the entirely voluntary AFDC program, Congress or the States were deemed to have taken some of those very family members' property. Id. at 604-605 (emphasis in original). But, of course, this is only strange if one grants the premise that the original AFDC rules failed to rise to the level of constitutionally protected property. Imagine, for example, if the Court said that landowners could no longer exclude strangers from their property because the government could now not afford to provide the benefit of police protection. 316. Of course, not only welfare benefits but even the right to build additional structures on one's land can arguably be construed as a privilege outside of constitutionally protected expectations if the reasonableness of one's expectations is judged against a view of property growing up from tangible existence rather than down from government command. Consider Justice Brennan's comment that the owners of Grand Central Station had not lost their "primary expectation" because they were still operating their railroad station. Penn Central Transp. Co. v. City of New York, 438 U.S. 104, 136 (1978). The current Court, however, has been highly solicitous of landowners' expectations that they will have the right to build on their property. See Nollan v. California Coastal Comm'n, 483 U.S. 825, 833 n.2 (1987) ("The right to build on one's own property . . . cannot remotely be described as a 'governmental benefit.' "). For discussion, see infra Part II(C)(3), text accompanying notes 322-36.

317. The market model can easily bounce back so as to make the right/benefit distinction appear one of its greatest creations. After the distinction is drawn, it becomes easy for courts to tell recipients of benefits that they have no right to expect benefits to continue and thus to turn a deaf ear when aggrieved recipients seek to challenge rule changes. Indeed, many readers may experience a deep-seated reaction that welfare benefits simply are not the same sort of property, so recipients should not expect the same rules. By now, however, the potential circularity of relying on what the recipients expect should be obvious. The government could tell all property owners to expect nothing and then never pay compensation again. The question is why welfare recipients can fairly be told
Moreover, the right/benefit distinction cannot be grounded with an easy reference to the existing state of affairs. Indeed, the central point made by those seeking constitutional protection for government outlays such as welfare is that prior to the challenged rule change, the aggrieved citizens were actually receiving the benefits in question. Accordingly, to defend the idea that certain economic advantages are privileges, not property, the Court must appeal to a still more primitive form of physicalism.

Imagine, then, the nature of welfare benefits in terms of the structure developed in Part I. Unlike tangible items such as houses, clothes, or furniture, government benefits reflect property interests that are obviously creatures of law. Citizens cannot actually possess their benefits until after the government has paid them. Thus, from this physicalist perspective the government is not actually taking anything when it cancels welfare benefits. Rather, it is simply ceasing to give something to prior recipients. These recipients, the argument continues, do not have the same right to expect subsidies to continue as they would to expect to hold on to what they’ve already got.

By now, of course, we recognize the ambiguity in the phrase “holding on to what you have.” From a purely physicalist standpoint, this language literally suggests keeping the tangible items within one’s grasp. And, the Constitution’s language prohibiting uncompensated takings certainly invokes such physicalist ideas. From a market standpoint, however, the idea of freezing the status quo suggests an entirely different notion of limitations on governmental power. Here, citizens wanting to hold what is theirs expect a continuation of the legal rules in force. Thus, the welfare recipient would describe the “right” to receive a monthly check as if it were a “thing” capable of destruction. Nor would this description represent anything particularly fancy or contemporary. A common law future interest, for example, is the right to hold a physical item (land) in the future; the law often treats this interest as a presently vested right.

\footnote{not to develop expectations; the fact that they may now actually have none is irrelevant to the inquiry.}

\footnote{318. See, e.g., Bowen v. Gilliard, 483 U.S. 587 (1987) (rejecting claim by a family whose monthly check would be lowered by the imposition of the challenged statute).}

\footnote{319. See generally T. BERGIN & P. HASKELL, PREFACE TO ESTATES IN LAND AND FUTURE INTERESTS 56-80 (2d ed. 1984) (describing future interests and the concept of vested rights).}
The Court’s continued use of the right/benefit distinction, however, indicates that we still have a long way to go in persuading the legal culture that property is little more than a set of rules governing what individuals may do in the future.\textsuperscript{320} Nor could the system function as presently constituted if we succeeded. The point of the right/privilege distinction is that it affords the Court a needed way to analyze the legitimacy of claimant expectations by reference to a source other than the immediately relevant legal rules.\textsuperscript{321} The Court can, more or less persuasively, pretend it is not delegitimizing certain expectations so as to minimize constitutional claims. Rather, these expectations are already delegitimized by a world view that treats property rights that are not grounded in tangible items as less deserving of constitutional protection. It is precisely this world view that makes it possible for the Court to speak of protecting expectations at all. Without this physicalist backstop, the Court’s inability to protect citizens’ expectations would expose the limited protection property receives within contemporary constitutional law.

Ultimately, the Court’s inability to rely on physicalism or the market model as the single source of constitutionally protected expectations points us toward the conclusion of this Article. There simply is no way to transcend the underlying constitutional dilemma that places the Court (and thus the government) both in the role of creating expectations and in the role of protecting them. The only alternative is for the Court to adopt a candid stance towards its problematic position and begin forthrightly to discuss the kinds of expectations that people need in order to give their allegiance to the collective without fear of being trampled by the State.\textsuperscript{322} This, however, is precisely the approach the Court has recently abjured.

\textsuperscript{320}. \textit{See generally} B. \textsc{Ackerman}, \textit{supra} note 3 (describing the layman’s view of property as tangible things, not legal rules).

\textsuperscript{321}. To repeat for emphasis, the right/benefit distinction once adopted immediately fits within traditional market model analysis. The Court announces that the receipt of certain benefits such as welfare cannot create constitutionally protected expectations. Citizens must then treat that announcement itself as a legal rule, dashing any expectations of the current recipients that they have a right to continue to receive welfare. The difficulty, however, is in finding a justification for the Court’s initial announcement. It is here that the Court appeals to our collective recognition of physicalism to sustain its attack on welfare and other obvious creatures of law.

\textsuperscript{322}. \textit{See R. \textsc{Unger}, The Critical Legal Studies Movement} 39, 84-85, 98-99 (1986) (identifying as key to a progressive agenda the task of defining property or “immunity rights” in terms of human need for security against the state).
3. *Expectations and Nollan*

Return finally to Justice Scalia's treatment of the government's expectations argument in *Nollan*. Recall that the Coastal Commission argued that it did not need to pay compensation when it required the Nollans to grant public access across their beach in exchange for a permit to build a larger home on their land. The Commission pointed out that the Nollans had every reason to expect to make this trade since the Commission's rule was in effect at the time the Nollans purchased the property. Justice Brennan, in dissent, found the Commission's argument entirely persuasive. As he put it, the Nollans were clearly on notice when requesting a new development permit that a condition of approval would be a provision ensuring public lateral access to the shore. Thus, they surely could have had no expectation that they could obtain approval of their new development and exercise any right of exclusion afterward.\(^{323}\)

Moreover, Brennan continued, the Nollans' situation was much like that of the pesticide company in *Ruckelshaus v. Monsanto Co.*\(^{324}\) In *Monsanto*, the Court rejected a claim for compensation for the loss of trade secrets precisely because the pesticide company was on notice that the government would disclose the information the company had submitted. Brennan thus argued that the Nollans were similarly on notice that they would have to grant public access in exchange for a permit.

Justice Scalia, however, flatly rejected Brennan's analogy between the Nollans' case and that of the Monsanto Company: In Scalia's words:

> In *Monsanto*, . . . [the Court] found merely that the Takings Clause was not violated by giving effect to the Government's announcement that application for "the right to [the] valuable Government benefit" of obtaining registration of an insecticide would confer upon the Government a license to use and disclose the trade secrets contained in the application. . . But the right to build on one's own property—even though its exercise can be subjected to legitimate permitting requirements—cannot remotely be described as a "governmental benefit." And thus the announcement that the application for (or granting of) the permit will entail the yielding of a property interest cannot be regarded as establishing the voluntary "exchange" that [the Court] found to have occurred in *Monsanto*.\(^{325}\)

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325. *Nollan*, 483 U.S. at 833-34 n.2 (citations omitted).
The crucial question is why the right to build on beachfront property is not a governmental benefit, at least as much as is the right to sell pesticides.\footnote{326} Significantly, Scalia never even addressed this issue, upon which his entire opinion turns. Nor is the distinction between \textit{Nollan} and \textit{Monsanto} as self-evident as Scalia assumed.\footnote{327}

What makes \textit{Monsanto} appear as though it involves a benefit granted by the government is not that \textit{Monsanto} sought permission to engage in the disputed course of conduct. The Nollans also sought permission to undertake a controversial project. Rather, \textit{Monsanto} appears to have asked for governmental largesse precisely because the selling of pesticides evokes the image of a private actor spreading dangerous chemicals into the environment. Thus, Scalia can paint \textit{Monsanto} as seeking permission to engage in potentially harmful conduct in a way that the Nollans are not.\footnote{328}

But, if this is the real reason why the Nollans won, then Scalia has merely restated his conclusion rather than argued for his result. Expectations analysis has now been reduced to the idea that a citizen may lose any claim to expectations if he wishes to engage in conduct that the Court ultimately judges to be undesirable. Thus, Monsanto could not develop a generalized expectation to keep its data secret because selling

\footnote{326. It would be foolish to describe the right sought in \textit{Monsanto} as the right to sell pesticides with a license. Government regulations prevented selling without a license, and thus the license was a precondition to selling them at all.}

\footnote{327. Andrea Peterson agrees that \textit{Monsanto} and \textit{Nollan} have more in common than first appears, and concludes that neither case involved a true "governmental benefit." Peterson, \textit{Part II}, supra note 1, at 77-79. Her view is that \textit{Monsanto} had a strong prima facie case for compensation because the regulation at issue limited the uses \textit{Monsanto} could make of its own resources. In contrast, Professor Peterson believes that the government has much greater latitude to alter traditional government benefit schemes like welfare because in those cases the government is merely restricting the claimants' rights with regard to actions taken by the government. Thus, when the government keeps \textit{A} from acting with respect to her own resources, \textit{A} has a stronger claim than when the government tells \textit{A} that she may no longer depend upon a formal legal right to control the actions of \textit{B}.}

\footnote{The physicalism inherent in this account is obvious, in that it treats things owned by \textit{A} as closer to some core of property rights than \textit{A}'s legal controls over \textit{B}. Indeed, the Court's allegiance to physicalism helps explain why Professor Peterson's account is, as she claims, often descriptively accurate. \textit{Id.} at 58. Since \textit{A}'s ability to make use of physical items at root depends on her ability to prevent \textit{B} from interfering, however, the normative power of this distinction is highly questionable. If, for example, the Coastal Commission in \textit{Nollan} had simply ordered the Nollans to begin admitting strangers across their beach, would the Commission have been preventing the Nollans from using their land or cancelling the Nollans' right to control the actions of beachgoers? The point, by now a familiar one, is that we cannot answer normative questions about the appropriate degree of individual responsibility to the collective by creating artificial categories that divide citizens' physical property from more abstract legal rights.}

\footnote{328. For a discussion of the different ways to characterize harm and \textit{Nollan}'s reliance on the harm/benefit distinction, see supra Part II(A)(1)(X), text accompanying notes 175-81.}
pesticides is dangerous.\textsuperscript{329} At the same time, citizens contemplating traditionally less threatening uses of resources may reasonably expect to pursue their desired course of action even in the face of explicit government pronouncements to the contrary.\textsuperscript{330} So despite what the Commission told the Nollans, they were entitled to expect to proceed with their construction.

The net effect of permitting the Court to redefine the legitimacy of expectations based on undefended views of the desirability of the claimant's conduct is that the major rationale behind the focus on expectations is undermined. Expectations analysis represents takings law's effort to assure the citizenry that plans based on existing law will not be disrupted unless compensation is paid.\textsuperscript{331} This project cannot be completed if only because government must retain the flexibility to change laws without incurring the massive transaction costs of compensating for every change.\textsuperscript{332} But neither can it be abandoned, unless property is to lose its place as the constitutional right that protects minority holdings against changing majority views.

The challenge for the Court then is to find a substantive, normative way to differentiate between expectations based on existing law that will receive constitutional protection and expectations based on existing law that will not. Perhaps a meaningful strategy would lead to the conclusion that the Nollans and the Monsanto Company deserve different treatment. The Nollans' proposed home might be close enough to a basic shelter to fit within the core of expectations the Court finds central to the takings clause.\textsuperscript{333} Alternatively, the Court might decide that the right to sell any product falls within the world of commercial exchange rather

\textsuperscript{329} Of course, the Court did allow Monsanto to defend the specific expectation that the data submitted during the 1972-78 period of explicit governmental promises of confidentiality would be kept secret. \textit{See Monsanto,} 467 U.S. 1010-14.

\textsuperscript{330} By now it should be clear that the Court's, and our own, off-the-cuff judgments concerning the harmfulness of different activities may not accurately correspond with reality. The construction of a private beach home, for example, may cement private ownership of beaches in a way that produces more ecological damage than the marketing of a pesticide which has been proven safe and effective.

\textsuperscript{331} \textit{See generally} Rose-Ackerman, \textit{supra} note 19 (describing the protection of expectations as a crucial function of takings law).

\textsuperscript{332} No one has said this better than Holmes: "Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law." \textit{Pennsylvania Coal Co. v. Mahon,} 260 U.S. 393, 413 (1922).

\textsuperscript{333} On the other hand, perhaps the Nollans should not have expected that they would be able to build a luxurious second home on a scarce beachfront lot without reimbursing the community for the privilege.
than the realm of private property. But these judgments should be defended with appeals to the role of private property within the constitutional scheme and, more precisely, with reasons why some expectations are more legitimate or reasonable than others.

Nor can the Court continue to pretend that the appeal to citizen expectations represents a turn to pre-established values that the Court takes as it finds them. Citizens do form expectations as a result of factors that appear temporarily immune from legal control. Thus, in our society it is likely that people believe they have a much greater right to build on their land than to sell pesticides without a license. However, in the longer run, the Court's decisions shape people's expectations. For the Court adequately to perform the necessary task of distinguishing valid expectations from invalid wants, it has a responsibility to explain why it chooses to protect the expectations that it does. In short, the Court has an obligation to own up to the problems with expectations analysis detailed above, even if it understandably wishes to continue treating citizen demands for stability as one of the takings clause's core values.

It is difficult to decide whether a landowner who wants to build a beachfront house should be able to do so without bearing any of the costs associated with society's commitment to private ownership of beaches.

The mere fact that others have built such homes in the past says nothing about whether society should now be able to change its attitude toward beach construction at the expense of current owners. The Coastal Commission informed the Nollans of this changing attitude and of precisely how it would be implemented in their case. It is clear that the government cannot always defeat property rights by announcing its intention to ignore them. But, why in this case did the takings clause entitle the Nollans to ignore the Coastal Commission's explicit policy of requiring a grant of access in exchange for a building permit? This is Nollan's ultimate question, which Justice Scalia's opinion begs.

III. TAKINGS' LESSONS

For many readers, and patient ones at that, it is only now that this Article is turning to the point. The real question, such readers might say,
is not whether the property models described here actually dominate takings clause jurisprudence but whether these models can help the Court address the inevitable takings controversies that await it. This Part attempts to sketch the lessons of Parts I and II in an effort to make peace with readers’ understandable desire for programmatic suggestions.

The point here, however, is not to offer a solution to the takings dilemma. Indeed, were an “answer” proposed, many readers would tend to dismiss all that has gone before and rush instead to identify the numerous flaws that any programmatic suggestions would no doubt entail. More important, it should by now be clear that the physicalist and market models of property are built deeply into the fabric of our thought and our law. It would be naïve and arrogant to believe that the conflicts between them could somehow be immediately transcended if we simply thought hard enough about the problem. Finally, any well-crafted approach to the takings clause would require not only a theory of property and a theory of what constitutes unfair individual sacrifice, but also a theory of constitutional law that explained the proper role of judges in enforcing the ambiguous guarantees within the Bill of Rights. The development of such a theory, however, is well beyond the scope of this Article.

But the absence of a magic bullet that would somehow make the takings problem go away does not leave us without conclusions or direction. We know first that we should be suspicious of so-called unifying answers to the takings controversy, and we should be suspicious in a particular way. Unified theories must be carefully scrutinized to determine the extent to which they rely on one model of property at the expense of another. We know further that appeals to generalized concepts like “fairness” run the risk of simply reproducing our deep-seated conflicts rather than moving us toward a desirably flexible approach. In addition, we have reason to believe that the takings controversy would


339. See, e.g., Costonis, supra note 18, at 469, 485-95 (basing a key component of his takings model on whether the challenged governmental action causes redistribution that is “fair” in principle); Michelman, supra note 3, at 1218-24 (describing how one vision of “fairness” might inform just compensation practice); Peterson, Part II, supra note 1, at 162 (concluding that Supreme Court
benefit from judicial efforts to identify substantive components that are contained within the notion of "property" deserving of constitutional protection. The hope is that the current multi-factor test might be supplemented with a vision of the values property serves in a democratic republic.

Ultimately, however, the takings clause poses an almost imponderable question. How can the same government which is to protect the property rights of the citizenry be charged with creating and altering those rights? The takings clause is designed to remind us of this question and never to allow the government to act without examining whether indeed it has gone "too far." In this sense defining the takings question is itself "the answer" and a detailed understanding of the riddles the question poses is our best protection against both majoritarian tyranny and the illegitimate claims of the economically entrenched.

A. THE MISGUIDED QUEST FOR UNIFYING THEORIES

The Court's inability to move beyond ad hoc inquiry and the undeniable difficulty of reconciling the Court's takings cases have provided an irresistible challenge to scholars, who seek to impose order upon this chaos. Many have attempted to find an overarching test, model, or theory that would describe how the Court has or, more boldly, should resolve controversies under the takings clause. These efforts to find a "unifying" approach have deeply enriched our collective understanding of the takings problem. This strategy is doomed, however, to at least partial failure.

Andrea Peterson, in her recent insightful and provocative study of the takings clause, argued that the Court has tended to deny compensation whenever the government has advanced a plausible claim that new restrictions on a particular use of property stem from the public's belief that the use is morally wrong. Thus, laws banning liquor sales are essentially upheld because the Court could accept that the public finds such sales morally repugnant. In contrast, the Coastal Commission's
actions in *Nollan* were unconstitutional because the public does not find moral fault with building a private beach house.\(^{345}\) Cases like *Penn Central* are difficult because the public may or may not believe that it would be wrong to destroy a landmark in pursuit of profit.\(^{346}\) Overall, Professor Peterson concludes that the moral justification for the government's conduct is at the core of a "unified set of principles" the Court uses to resolve takings cases.\(^{347}\)

Although Professor Peterson clearly expressed the caveat that she intended a descriptive rather than a normative account of the takings decisions,\(^{348}\) many may find that her formulation merely restated rather than advanced the question.\(^{349}\) If the key issue in takings cases is whether the individual has been called upon to make an unfair sacrifice to the collective, Professor Peterson has merely suggested that a sacrifice is not unfair if the public believes a citizen would be wrong not to make it. What little she says about how the public is to determine what conduct is morally wrong only adds to the puzzle.\(^{350}\) She not only grants the public authority to condemn conduct that contradicts preexisting norms but also to change those norms at any time. Thus, a rent control ordinance would seem to be an unconstitutional taking under her theory because the public does not really believe it is wrong to charge market rents. However, Professor Peterson can defend rent control through her notion of "civic obligation," which holds that citizens have an obligation to make special sacrifices to maintain the community.\(^{351}\) She thus avoids the extreme conclusions of scholars like Richard Epstein by giving the public permission to find anything (or nothing) morally wrong. On this view, Professor Peterson leaves us in almost the same position from which we started.

Professor Peterson's approach is subtle and powerful, however, despite her inability to limit the public's judgments of wrongdoing and her broader unwillingness to embrace a normative framework. She has devised a sophisticated version of the sequentialist (or market) model.

\(^{345}\) *Id.* at 103-104. For problems with this defense of *Nollan*, see *supra* Part II(A)(1)(f), text accompanying notes 175-81. Peterson rejects the alternative argument that the public might simply find fault with the private owner's refusal to allow people to walk across the beach. Her point is that only those wishing to build are required to grant access. Peterson, *Part II, supra* note 1, at 103-104.

\(^{346}\) Peterson *Part II, supra* note 1, at 95.

\(^{347}\) *Id.* at 61.

\(^{348}\) See, e.g., *id.* at 58.

\(^{349}\) *Id.*

\(^{350}\) Professor Peterson is forthright in stating that her thesis does not depend upon "establishing how judgments of wrongdoing are made." *Id.* at 90.

\(^{351}\) *Id.* at 131-40.
that she hopes will subdue the takings question. Professor Peterson envisions the public first forming a judgment concerning whether a particular use of property is morally wrong. This judgment is manifested through operation of the legislative branch and is largely independent of constitutional law. Then, only after this judgment has been made, the Court determines whether the legislature is acting to implement the public's value judgments. In this way, the positivism problem disappears, because the Court is no longer responsible for any tough decisions concerning the nature of property. It merely reaffirms the community's pre-existing value choices.

Like all market model solutions, Professor Peterson's approach gains considerable stability from reliance on preexisting values determined outside the Court. This approach has enormous appeal for a Court wishing to escape the burden of defining core constitutional values. Judicial disagreements under Peterson's system do not hinge on whether the Constitution protects a particular right, such as the right to charge market rent. Instead, judges will focus the debate only on whether the public that adopted rent control "reasonably believed" that landlords would be wrong to charge anything above the new rents. At the same time, however, Professor Peterson avoids traditional market-model rigidity because the preexisting values she relies on are not fixed legal rules but rather the ever-changing mores of the community. Thus, her approach leaves courts free to approve or condemn a wide range of government practices simply by offering differing accounts of community norms.

Professor Peterson's sophisticated market-model strategy appears to offer us the best of both worlds. The Court gains the appearance of objectivity by looking outside itself to find the relevant standards to define an unconstitutional taking. These objective standards are formed prior to constitutional adjudication and thus satisfy the crucial sequential element of separating the constitutional decisions from the definition of

352. "Although the borderline takings cases are difficult, the principles underlying the takings decisions are surprisingly straightforward." *Id.* at 162.

353. Like the Court's own phraseology of "reasonable expectations," Professor Peterson's formulation involves both a question of the sincerity of the public's condemnation of the restricted conduct as well as a question of whether that condemnation is objectively reasonable. Thus, the Court's purportedly unified principles already contain two different inquiries that may point in opposite directions. Moreover, Professor Peterson does not tell us whether the Court would sanction any rent controls once persuaded that the public believed it would be wrong to charge market rents or whether the Court would only approve rents set precisely at that level above which a landlord could not charge without offending the community. The latter seems more consistent with her view, but it further adds to the judicial burden of determining exactly where community morality lies.
fundamental property rights. At the same time, because community standards conform to something approaching a legal scholar's idea of property within constitutional adjudication, the Court under Professor Peterson's scheme can escape the blatant arbitrariness of relying on physicalism to resolve takings disputes. As a bonus, the Court gets a framework flexible enough to support a variety of outcomes. No wonder the Court's decisions can be persuasively described as fitting within the Peterson framework. Indeed, Professor Peterson's work may be the most compelling descriptive account to date.

The problem is that taken normatively, Professor Peterson's account, like all versions of the market model, underestimates the difficulty of sequentially separating what are supposedly independent decisions. She would have the public decide when it is wrong for citizens to make certain uses of property and then have the Court scrutinize legislative enforcement of these public value judgments. But upon what basis is the public to make such decisions? Either the public gains knowledge on the morality of property usage from some source other than the Constitution and the courts, or judicial decisions will ultimately play a key role in shaping public attitudes. In the former hypothetical case, a Court that gave free reign to an unguided public would run the risk of losing sight of any constitutional norms. After all, the takings clause cannot serve as a protection of individual rights if the courts defer to mercurial majority beliefs. It is much more likely that Court decisions will significantly determine what the public believes is right to do with one's property. If this is true, then the Peterson account may lead to a circular argument. For now, Court deference to public sentiment will in significant part be Court deference to its own decisions of an earlier era. Thus, the Court will have abdicated its role as articulator of public values in exchange for adherence to its own earlier pronouncements. The positivism problem will have reappeared.

354. Suppose, for example, that the public came to believe that owning more than one house is unconscionable as long as others are homeless (not an unreasonable view). Would the Court have to defer to this public perception and permit uncompensated confiscation and redistribution? 355. It is important not to overstate the case. The public will have many sources of morality concerning property usage other than Court decisions. As this Article has suggested, one of the major sources will be the public's allegiance to physicalism, an allegiance we may or may not wish to promote. Thus, judicial deference to public attitudes will never be wholly circular. And, an interesting model of constitutional law might be developed suggesting that the courts should do no more than keep the legislatures from getting too far ahead of public sentiment. The bottom line, however, is that an approach to takings law which asks the Court to defer to the reasonable beliefs of the public must address the extent to which the public's beliefs are themselves a product of Court decisions. The positivism problem cannot be finessed through reliance on a supposedly neutral public.
Professor Sax's equally thoughtful effort at a unified description of takings clause jurisprudence runs the opposite risk of relying on physicalism at the expense of market ideas. Sax's initial perception is that even a typical nuisance suit between neighbors has takings implications. If the court rules for the plaintiff who alleges nuisance, the defendant can argue that the judicial ruling constitutes a taking. Alternatively, a ruling that no nuisance exists leaves the plaintiff with the plausible takings argument. Sax notes, however, that traditional takings law is unlikely to be sympathetic to either side because courts adjudicating nuisance disputes are typically seen as establishing property rights rather than taking them from one side or the other. Thus, Sax asks the obvious question: Can the principle that immunizes judicial nuisance rulings from close takings scrutiny be extended to sanction a wider array of government conduct?

Sax's answer is that many government regulations share a common thread with judicial nuisance determinations. He notes that just as courts use nuisance law to prevent one party's use of land from having adverse "spillover" effects on the land of a neighbor, so government regulations, for example, those prohibiting pollution, restrict owners from adversely affecting the rights of the public as a whole. Thus, Sax concludes that any government regulation designed to prevent "spillover" effects is not an unconstitutional taking, even if it deprives an owner of 100% of that owner's property value. The problem, of course, is in defining "spillover effects."

Sax's examples suggest that the key determinant is whether the government is barring a property owner from a use of the property that will tangibly affect what occurs outside the owner's boundaries. Sax does refer to what he calls "less physical" kinds of spillover effects that occur, for example, when an owner dumps toxic substances on property resulting in the death of wildlife, or builds a rural residential development that requires additional police protection. The first example, however, is easily analogized to a physical spillover because the wildlife presumably leave the contaminated land. In addition, the noxious effects of toxic substances cannot be contained within the boundaries of the original dump site. The second example is not as obviously physical, but it calls into question Sax's entire distinction. If use of land as a residence has spillover effects in the form of requiring police protection, this would seem to apply even to a one-room house. Indeed, it is hard to imagine any use of property that would not create this type of spillover effect. No wonder Sax devotes considerable energy to convincing us that his approach will not entirely eviscerate private property.

356. Reference is made here only to Sax's second major contribution to takings scholarship, Sax, supra note 3, since within that article, id. at 150, he explicitly departed from the conclusions of his earlier work, Sax, supra note 18.
357. Sax, supra note 3, at 152-54.
358. Id. at 159.
359. Id. at 155-61.
360. Id.
361. Sax does refer to what he calls "less physical" kinds of spillover effects that occur, for example, when an owner dumps toxic substances on property resulting in the death of wildlife, or builds a rural residential development that requires additional police protection. Id. at 162. The first example, however, is easily analogized to a physical spillover because the wildlife presumably leave the contaminated land. In addition, the noxious effects of toxic substances cannot be contained within the boundaries of the original dump site. The second example is not as obviously physical, but it calls into question Sax's entire distinction. If use of land as a residence has spillover effects in the form of requiring police protection, this would seem to apply even to a one-room house. Indeed, it is hard to imagine any use of property that would not create this type of spillover effect. No wonder Sax devotes considerable energy to convincing us that his approach will not entirely eviscerate private property. Id. at 161-72.
strip mining regulation that prevents a mining company from causing subsidence of nearby property is not a taking because, if the miners are left unchecked, their actions will "spillover" to nearby land.\textsuperscript{362} In contrast, a government edict that an owner must provide land for an airport runway is a Saxian taking because the owner might wish to use the land for other purposes, such as a personal residence, that would have no direct impact outside the physical boundaries.\textsuperscript{363}

At first glance, there is significant irony in Sax's attempt to limit government's power by focusing on "spillover" effects. The obvious physicalism inherent in the "spillover" metaphor appears in the same article where Sax wants to redraw the line between "mine" and "thine" so as to remove the emphasis placed on physical boundaries.\textsuperscript{364} Viewed through the lens of the positivism problem and our property models, however, Sax's solution is entirely understandable.

Sax's goal is to use the government's power to define property in the first instance as a wedge to expand its power to engage in what is commonly thought of as regulation. He relies then on the market model's familiar inability to specify a time at which property rights are established and after which further government actions constitute change. Sax correctly points out that the market model cannot work if all existing rules establish constitutionally protected property. Sax wants the Court to look not only at the explicit legal rules in effect at the time of the challenged regulation but also at an unspecified background rule that prohibits any property owner from using land to harm another.\textsuperscript{365} However, if harm is defined too broadly, this approach threatens to undo the market model so completely that the notion of private property is called into question.

Sax, then, must search for a definition of harm that is broad enough to permit the government wide latitude to regulate private land uses but not so broad as to permit the government to say, for example, that a landowner's decision not to build a post office on his or her land harms the neighbors who need one. Sax's concept of spillover effects is precisely tailored to fit this demand. It is extraordinarily broad in that Sax wants to allow the government to prevent any use of property that will interfere with the legitimate uses of neighbors or the public. Thus, Sax would not require compensation for landowners located near a naval gunnery range on

\textsuperscript{362} Id. at 161.
\textsuperscript{363} Id. at 165.
\textsuperscript{364} Id. at 161.
\textsuperscript{365} See generally supra Part I(A)(1), text accompanying notes 96-181 (exploring the limits of the no-harm principle as a solution to the takings problem).
even if the noise rendered the private land virtually uninhabitable. 366 His reasoning is that the government is only making use of its own resource (a commonly held bay) and is not responsible for the impact on adjacent lands. At the same time, however, Sax would not allow the navy to store goods on shoreland adjacent to the bay because that would involve using another citizen’s land rather than merely the government’s own resources. 367

Such primitive physicalism, however, undermines Sax’s own crucial insights concerning the interdependence of property uses. First, there is only a very small correlation between whether an owner’s intended activity will affect what others do within their boundaries and whether the claimant’s activity is illegitimate. On one hand, Sax’s position would seem to grant government unbounded authority to prohibit landowners from building. Neighbors could argue that any construction would block the view from their adjacent land and thus that all construction would have “spillover effects.” 368 On the other hand, Sax’s position would seem to call for compensation in Loretto 369 because the building owner would presumably have nonspillover uses for the space occupied by the cable box, and thus the government could not rely on its power to adjudicate conflicts among neighbors. 370 It seems doubtful that Sax would wish to endorse either position.

366. Sax, supra note 3, at 167.
367. Id.
368. Id. at 162 (recognizing that interference with views constitutes spillover effects).
370. Sax could offer numerous challenges to Loretto. He might argue that the landlord’s refusal to allow cable to run through her land would itself have spillover effects in that it would prevent the neighbors from receiving cable within their boundaries. But this approach threatens to obliterate the spillover concept. My refusal to use my land as a parking lot might make it impossible for the government to open a restaurant next door. Sax is clear, however, that this is not the kind of adverse effect upon a neighbor that justifies the government’s forcing me to accept parked cars on my land. Sax, supra note 3, at 163.

Alternatively Sax might highlight the desire of the tenants within the building to receive cable. The government might then be described as merely adjudicating a conflict among owners (landlord and tenants) who share boundaries. Here, however, Sax’s problem would be to indentify some reason why the residents of the building in question have a right to receive cable superior to that of the landlord to refuse cable. The tenants cannot rely on ownership of the space occupied by the cable box because the landlord controls this space.

The bottom line is that Sax has re instituted a focus on physicalism that his work promised to transcend. Sax’s vision would sometimes permit the government to physically invade land without paying compensation. He views government-created smoke and noise, for example, as a necessary concomitant of conflicting land uses. Id. at 163. Accordingly, he has not merely recreated the traditional physical invasion test. It is difficult to see what we have gained, however, through a
But Sax is trapped in the position of using physicalism to differentiate spillover from nonspillover effects precisely because he seeks an "objective" way to protect private property from his own powerful attack. Sax relies on the difficulty of separating the government's power to define property from some supposedly more limited power to regulate it. He wants the power of definition to include any instance when the government is arguably mediating between conflicting uses rather than imposing a specific use on an unwilling citizen. The problem, as Sax recognizes, is that any government regulation can be described as accommodating conflict. An ordinance requiring that land be kept vacant to limit neighborhood congestion certainly fits this characterization.

Traditional market model approaches respond to the state's creeping power of definition by treating existing legal rules as a brake on public authority. Thus, certain conflicts are seen as already accommodated by the rules of the property system. A requirement that land be kept vacant, for example, is suspect not only because of the potentially severe economic impact on the landowner but also because prior to the new requirement the legal system could be described as including a right to build. In contrast, Sax rejects the idea that the legal system settles any conflicts so definitively. Instead, the legislature under Sax's scheme is free to continually accommodate resource conflicts as they arise.

If nothing is ever settled, however, courts must explain what it means to say that a piece of land is "mine." One approach would involve the courts in a struggle to identify certain uses that form the core of individual prerogative and that citizens could use as a bar to collective action. But courts empowered to engage in such open-ended substantive inquiry would possess the very power of definition that Sax wishes to reserve for the legislature. Accordingly, Sax prefers constructing a judicial role that centers on the more formalistic definition of spillover effects.

Ultimately what Sax gains in perceived objectivity, he loses in plausibility. Sax's limited definition of property's core does not correspond to whether a citizen seeks protection for illegitimate activity. More important, he embraces the physicalist definition of spillovers at the expense of any constitutional protection for those who rely on existing rules. He seeks to persuade us that the government can change any rule at all, provided it can describe newly prohibited conduct as creating a conflict renewed focus on physicalism that asks whether newly prohibited uses will cross physical boundaries. Instead, we should be asking whether the claimant's use falls within metaphysical boundaries of the right to hold property delineated in the Constitution.
that restricts uses within other boundaries. At the same time, government must keep hands off any planned use, no matter how trivial or expected the loss, as long as the use will not bleed across physical property lines. Beyond his desire for a familiar spot to anchor some notion of property against his own positivist tidal wave, however, Sax offers little to convince us that he has located the correct dividing line. In short, Sax again offers physicalism as an alternative to the traditional market model. But his ideas must be rejected, because of both physicalism’s flaws and the market model’s strengths.

Finally, consider Professor Humbach’s effort to unify takings clause jurisprudence. He begins with the classic lawyer’s approach of dividing the prerogatives of ownership into mutually exclusive categories. In the first group, which he calls rights, Humbach places the legal causes of action available to owners to prevent others from interfering with their property. The prototypical example is the right to prevent a neighbor from trespassing upon one’s land. In contrast, Humbach’s second set of property’s attributes consists of the freedoms available to owners to make use of their own property. Here Humbach refers to the freedom to build upon one’s land or use it for particular activities.

Humbach builds upon his right/freedom distinction to reach a seemingly simple formula. When the government takes rights, as it does in the case of the typical condemnation of land for a post office, the government must pay just compensation. But when the government limits freedoms, as it does when it zones land to prohibit more than one

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372. Humbach is building on the work of Wesley Hohfeld, whose distinction between rights and privileges parallels Humbach’s distinction between rights and freedoms. Humbach’s relationship to Hohfeld, however, is beyond the scope of this Article. The extent to which Professors Humbach and Peterson extract different lessons from Hohfeldian analysis, though, is worth noting. While Humbach argues compensation must be paid whenever government extinguishes my legal right to stop others from acting, Peterson suggests compensation need not be paid when government merely terminates my rights to force others to continue to act. Both conclusions depend heavily on the ability to separate regulations aimed at the claimant’s own activities from regulations aimed at the behavior of others, a distinction that Hohfeldian analysis may not directly support. For citation to Hohfeld’s works and a full discussion of its relevance for contemporary law, see Singer, supra note 65.

373. Id. at 257.

374. Humbach correctly notes that the government also takes freedoms when it condemns an owner’s land, since the owner now cannot make use of it as before. Humbach, supra note 18, at 262-67. Thus, Humbach does not rely on the distinction between rights and freedoms to explain the result in the typical condemnation case. Rather, Humbach seeks to show merely that since rights
home per acre, no compensation is necessary. Humbach defends this formula both as a descriptive account of the Court's actual practice and as a necessary accommodation to the practicalities of modern government.375

The problems with the right/freedom distinction, however, are numerous and severe. First, there is the difficulty of maintaining the distinction in the face of multiple characterizations of the same events. Thus, Humbach classifies the property owner's ability to exclude others as a right because it involves the owner's authority to invoke the power of the state to prevent others from acting. Surely, however, the owner might also claim a right (as opposed to a freedom) to build, if the issue is whether a neighbor may physically interfere with the planned construction.376 Second, there is the problem that the distinction may not answer any of the hard questions. Humbach concedes, for example, that sometimes a restriction on a freedom may be so great as to amount in substance to a deprivation of right.377 Indeed, he argues that the overlap between loss of rights and mere deprivation of freedoms is the genesis of the "too far" test.378 But if only a "too far" test can meaningfully distinguish between loss of right and deprivation of freedom, one must wonder whether the distinction has advanced our understanding. Finally, and most importantly, the right/freedom distinction does not correspond to the issues normally at stake in takings litigation. Thus, a citizen can be unexpectedly and severely damaged by the loss of a freedom, as in the case of an outright ban on construction, whereas the loss of a right can be trivial, as in a case like Loretto. It is not surprising then, that the Court has not moved toward explicit adoption of Professor Humbach's suggestion.

What is noteworthy, however, is the extent to which Professor Humbach is correct in offering the right/freedom distinction as a rough account of Supreme Court precedent.379 Humbach has combined the

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375. Id. at 279-80.
376. Humbach might respond that the rules which bar the neighbor's interference are general prohibitions on violence rather than property rules. Clearly, however, if I knowingly tried to build a house on my neighbor's land, my neighbor would be free to hinder my activities, even to the point of demolishing my structure. Thus, the distinction between rules governing property and rules governing conduct generally is not easily drawn. For further discussion, see Paul, Can Rights Move Left?, 88 MICH. L. REV. 1622, 1636 n.32 (1990).
378. Id. at 273-74 n.144.
379. As noted above, Professor Peterson's more recent account is significantly more persuasive. See Peterson, Part II, supra note 1.
market and physicalist models in a way that will tend to point them in the same direction. The trick lies in the familiar pattern whereby the preexisting rules at the core of the market model themselves often spring from physicalist roots. Thus, Humbach persuasively advocates compensation for the loss of the right to stop neighbors from crossing boundaries precisely because it is clearly already settled that a landowner may go to court to prevent trespass.\(^{380}\) Trespass rules, in turn, are themselves likely to be settled precisely because they rely on the physicalist distinctions at the core of a basic private property system. In contrast, prior to zoning, the legal system is unlikely to have carefully considered what an owner might build. Absent a physical conflict between uses, courts would have had little reason to adjudicate the limits on landowner freedom. Thus, Humbach can allow the government freely to alter permissible uses without creating as direct a challenge to preexisting rules.\(^{381}\) In short, Humbach offers a distinction between rights and freedoms that appeals to preexisting rules while simultaneously protecting physicalist rights such as the right to exclude.

The easy congruence Humbach finds between physicalism and the market model, however, is largely an illusion. Moreover, it is an illusion that obscures the values at stake in takings controversies. The problem is that Humbach’s right/freedom distinction cannot be linked to any recognizable purpose of the takings clause, once the distinction is considered in light of the broad range of situations that raise takings issues. The key is the lack of a readily available, noncontroversial method for establishing the rights that the Constitution protects. Consider, for example, Congress’s passage of the antitrust laws. These laws clearly restricted freedoms that business owners formerly had to conduct business in certain ways. Humbach, however, would see no taking issue because only so-called freedoms were lost. Now suppose, however, that Congress chooses to repeal the antitrust laws. If a small business owner loses a right to sue larger competitors, who engage in predatory pricing, this might force the small owner out of business. Here, under Humbach’s terminology, the small business owner has a stronger case for compensation since that person has lost a right to prevent others from acting. The crucial question then is why the repeal of the antitrust laws evokes

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380. Even here Humbach is forced to qualify his position to take into account judicial decisions altering trespass law. He unpersuasively describes deviations from strict trespass rules as noncompensable because they involve the limitation of property rights and not takings.

381. Of course, a new zoning regulation will conflict with a background rule that permits me to act as I please unless specifically forbidden to do so. But, as Humbach implicitly recognizes, a constitution that protected a citizen’s reliance on such a rule would render governing virtually impossible.
greater constitutional sympathy than their original enactment. In more
general terms, why do conscious governmental decisions to structure
economic life not raise the same sorts of takings issues as decisions to
alter an already recognized structure?

"This problem repeats itself over and over again." Under Humbach's
view, a rule making it easier to establish adverse possession would give
rise to a takings claim because the true owner would arguably lose the
right to exclude the adverse possessor.382 But Humbach would see no
problem with a rule making it harder to obtain adverse possession, since
the adverse claimant has no legal rights against others until adverse pos­
session is achieved. Humbach would give courts free reign to create new
causes of action for nuisance, since nuisance defendants would merely be
losing the freedom to engage in the restricted activity. But when courts
refuse to grant a plaintiff a nuisance cause of action, the plaintiff has no
claim under Humbach's system because the plaintiff lost no preexisting
right. The question is, what accounts for these results?

The answer is that Humbach has no choice but to pick the set of
legal rules he perceives as currently in place and sanctify them against
future change. Otherwise the distinction between rights and freedoms
will evaporate. Nevertheless, Humbach's reliance on some supposedly
fundamental set of preexisting rights, has the effect of ignoring the pro­
cess by which these rights came into being in the first instance. More­
over, it constrains the ability of legislatures to adapt to changing
circumstances. Citizens are protected against changes that disrupt
causes of action but not against changes that may disrupt their lives.
Aside from practicality, Humbach can offer no defense of this arbitrary
line, precisely because he wants us to miss the degree of its arbitrariness.
Rights and freedoms seem meaningfully different when we conceive of
rights as falling neatly in line with physical boundaries. Once we focus
on the controversial character of rights, however, the right/freedom dis­
tinction becomes one without a difference.

In the end, Humbach's right/freedom approach breaks down for the
same reason that all attempts to find a unified approach to takings inevi­
tably fail. Humbach wishes to completely separate the supposedly pri­
ivate law process of the creation of rights from the public law process of
the constitutional protection of already existing rights. The appeal of

382. Of course, Humbach might find that there was no taking, since he creates a category under
which violations of rights and indirect obstacles to the enforcement of rights do not count as the
taking of rights. Humbach, supra note 18, at 263. This distinction, however, continues to under­
mine his claim that he devised a "unifying" theory, since now another theory is needed to distinguish
"violations" from "takings."
Humbach’s position lies in a convincing effort to find an overlap between that market-like vision and property’s physicalist roots. But because the overlap between market and physicalist ideas is not complete, and because both are deeply entrenched as our collective solution to the positivist dilemma, Humbach’s approach cannot ultimately succeed. As long as we remember that the takings problem is not merely a problem of which already-created rights deserve protection but also a problem of deciding how and which rights have been created, a unified approach to takings law will never work. We should all stop trying to find one.

B. THE INCOMPLETENESS OF GENERALIZATIONS

The most tempting alternative to unified theories is the attempt to capture the conflicting strands of takings jurisprudence within broad formulations of principle that point toward relevant considerations without necessarily determining or predicting outcomes. Professor Michelman’s classic work represents the pinnacle of this approach, and he has already so successfully described its strengths and weaknesses that little will be added here. 383 It is worth recalling some of what Michelman has taught us, however, so as to avoid an overly optimistic attitude toward general, abstract solutions. More important, our experience with a Michelman-influenced Court fully vindicates Michelman’s suspicions concerning the judicial tendency to translate general formulations into mechanistic rules. 384 Indeed, as this Article demonstrates, the Court’s attraction to formal models of property has enabled it to employ a so-called flexible, ad hoc test without confronting its own role in assessing the fairness of particular governmental actions.

Michelman identified two general considerations at the heart of takings jurisprudence. First, Michelman focused on a utilitarian conception of private property that excludes capricious redistributions as inconsistent with the secure expectations necessary for investment and initiative. 385 At first glance, this perspective might suggest a complete ban on uncompensated governmental interference with private property. But Michelman rightly explained that a committed utilitarian would not

384. Id. at 1249 ("We should not be surprised at the emergence of a number of partial, imperfect, or overbroad surrogate rules from among which judges may pick and choose in order to avoid explaining compensability decisions in terms by which a litigant is, in effect, simply told that his sensation of having been victimized is not justified."). Michelman’s influence on the Court is best seen by comparing Penn Central Transportation Co. v. City of New York, 438 U.S. 104, 122-38, with Michelman, supra note 3, at 1224-45.
want to block public projects when the efficiency gains of those projects are sufficient to outweigh the costs to uncompensated victims but still less than the settlement costs involved in reimbursing those harmed by the project.\textsuperscript{386} Thus, Michelman argued that utilitarianism suggested a practice whereby compensation would be awarded if the demoralization costs of failing to compensate exceed the settlement costs of arranging for compensation.\textsuperscript{387}

Second, Michelman suggested that judicial compensation practice might be explained in terms of fairness to the victim. Thus, extrapolating from Rawls’s theory of justice, Michelman asks courts to imagine themselves in the position of a patient person suffering the impact of an uncompensated redistribution.\textsuperscript{388} Would it be possible to convince this person that it was fair for him or her to bear the project’s costs using the argument that in the long run, he or she, or persons similarly situated, would benefit from similar projects that would have been blocked by a stringent compensation rule? If so, then compensation need not be awarded.

Michelman’s approach provides the best explanation for the fact that the Court often permits the government to diminish citizens’ holdings without paying compensation. Not surprisingly, conservatives have been arguing with Michelman about this ever since.\textsuperscript{389} What everyone tends to forget is Michelman’s own well-expressed caveats concerning the possibility of judicial application of general standards of utility and fairness. He worried, for example, that they may be “inescapably vague” and that “fairness as a standard may simply be too difficult for courts to grasp and apply successfully.”\textsuperscript{390}

What we can now add, with 20/20 hindsight, is precisely the way in which standards like utility and fairness have turned out to be vague. We

\textsuperscript{386} \textit{Id.}

\textsuperscript{387} Michelman defined demoralization costs as including not only the costs to the victims of a particular governmental project but also costs to others resulting from the knowledge that their property was less secure against governmental redistribution. Moreover, he was careful to make clear that no project would go forward if both settlement costs and demoralization costs were greater than gains from the project.

\textsuperscript{388} The analogy to Rawls is that the person directly harmed by a governmental project resembles the least advantaged person in society. Rawls’s theory of justice commands that the least advantaged person be benefited by any departure from economic equality. Michelman, \textit{supra} note 3, at 1219 (citing Rawls’s early articles). For the complete version of Rawls’s theory of justice, see J. RAWLS, \textit{supra} note 35.

\textsuperscript{389} See, e.g., R. EPSTEIN, \textit{supra} note 3, at 116-21, 154-58; E. PAUL, \textit{supra} note 3, at 141-43.

\textsuperscript{390} Michelman, \textit{supra} note 3, at 1246-47, 1249.
can also describe the content that courts will likely impart to such stan-
dards in an effort to conform simultaneously to the need for clear judicial
guidelines and the desire for just outcomes. It will come as no surprise
that market and physicalist ideas dominate our understanding of utility
and fairness within the context of takings law.

Consider first the root of Michelman’s utilitarian description of
compensation practice. To oversimplify, Michelman suggests that courts
have, and should, award compensation when the demoralization costs of
not compensating are high. However, courts cannot measure demorali-
zation costs without a baseline notion of property against which to judge
how severely expectations have been disrupted. Michelman suggests two
such notions. First, demoralization costs will be high when the citizens
perceive that the government has physically invaded or actually taken an
entire parcel of property or other tangible item. 391 Second, demoraliza-
tion costs will be high when the government alters explicit legal rules
that have given rise to “sharply crystallized” expectations. 392 For ex-
ample, if a new zoning ordinance negates the effect of a previously issued
building permit, the landowner will have a stronger compensation claim
than if the same ordinance merely prevents the owner from proceeding
with future building plans. The correspondence between Michelman’s
baselines and the physicalist and market models is clear. 393

Michelman attributed these two cases of high demoralization to
aspects of human psychology. However, that psychology is itself a prod-
uct of a collective struggle to create a concept of property that fits into a
judicially enforceable package. Why are demoralization costs high when
physical space is invaded or an entire item taken rather than when any
large loss is inflicted? The answer lies partly in citizens’ efforts to make
sense of their holdings in terms of a conceptual model they can apply to
many different situations. Physical boundaries form the most basic, com-
prehensible model. Why are people particularly upset when government
disrupts “sharply crystallized” expectations? Again, part of the answer

391. Id. at 1228 (“The psychological shock, the emotional protest, the symbolic threat to all
property and security, may be expected to reach their highest pitch when government is an
unabashed invader.”).

392. Id. at 1233. The phrase “sharply crystallized expectations” reveals how deeply physicalism
is at the core of our notion of “real” property. We simply take expectations more seriously as they
begin to resemble solid objects.

393. Physical invasion and loss of tangible items are the primary evils within a model of prop-
erty that focuses on things possessed by individuals. Sharply crystallized expectations can be dis-
rupted when government either alters the existing state of affairs (enlightened physicalism) or breaks
an explicit promise. Government’s promises communicate to citizens that certain issues have
already been decided, and thus breaches are more directly in conflict with a market or sequential
view of property.
is that the government's breaking of explicit promises directly conflicts with the idea that some allocations of property are already decided such that the government is not free to reconsider them without compensating those harmed by the change. Thus demoralization costs are high when government departs from the market model.

The bottom line is that judicial focus on general considerations like utility runs the risk of merely duplicating society's existing ideas about property. If those ideas are themselves confused and contradictory, as this Article has suggested, then judicial evaluation of takings cases is unlikely to escape the confusion. As we have seen, the Court's application of its tripartite test has been riddled with appeals to competing models of property. But this is exactly what one would predict, if the judicial task is to decide when compensation is due based on society's general perceptions of which uncompensated losses are demoralizing and which uncompensated takings are unfair. How precisely are citizens to know when to be demoralized or justly aggrieved if they do not assess their own experience in light of a model of property that applies universally rather than to their situation alone? If this is so, the Court seems to be the social institution best positioned to interact with the citizenry while providing guidance through construction of its own normative view of property. In the end, the greatest danger of appeals to general considerations is that they may allow the Court to forget that part of its constitutional role.

394. No separate analysis of Michelman's concern with fairness is necessary. The same considerations that would render a person attempting to judge demoralization dependent on separating constitutionally protected entitlements from mere desired interests would also apply to a citizen seeking to discern the fairness of governmental actions. Indeed, Michelman himself argues that utility and fairness will often, although not always, produce similar questions and point in the same direction. Michelman, supra note 3, at 1223-24. Interestingly, even the word demoralization, which Michelman chooses to reflect utilitarian concerns, contains a hint of the moral perspective. Citizens adversely affected by government projects are presumably demoralized rather than disappointed because these projects interfere with their efforts to construct a moral vision of the workings of property law.

395. The fact that systematic theories like Michelman's need to refer back to the views of ordinary citizens creates reason to doubt that any sharp distinction can be maintained between an "ordinary" and a "scientific" approach to takings controversies. But see B. Ackerman, supra note 3 (devising such a distinction). Michelman's hypothetical citizens have the best interests of the community at heart, and thus perhaps differ from real citizens whose demoralization may result simply from the fact of loss. Michelman's principal point, however, is that the most comprehensive view of takings depends upon day-to-day practice and social expectations. This dependence is precisely why courts must consider their role in shaping such expectations rather than merely reflecting those that already exist.

396. Professor Michelman did not forget the moral dimension of takings law. Indeed, he took great pains to explain that some government regulations are not takings because they are anti-theft-like in that they protect society's vision of property. Michelman, supra note 3, at 1236. A law, for
Professor Costonis's effort to solve the takings controversy reveals just how great the danger of generalizations can be. Costonis proposes a four-part model for deciding when a compensable taking has occurred. The second part of his model is the focus here. After arguing that government regulations that inflict loss should be viewed as presumptive rather than per se takings, Costonis suggests that courts should ask the crucial question: "whether [the] government has established that the redistribution effected by the measure is fair in principle." His key point concerning fairness is that the courts must ensure that no property owner is singled out in a manner inconsistent with what he calls the "just share principle." Costonis sums up this principle, taken from Monongahela Navigation Co. v. United States, as follows:

[The takings clause] prevents the public from loading up on one individual more than his just share of the burdens of government, and says that when he surrenders to the public something more and different from that which is exacted from other members of the public, a full and just equivalent shall be returned to him.

No serious student of the takings clause could deny the relevance of the "just share" principle. As a general statement, it may be as close as we can come to describing the role of the takings clause in constitutional law. The problem, however, is that this formulation of the just share principle is open to such vast differences in interpretation that it is not clear whether it can settle any particular controversy. The key must be in the application, and here again the demand for formal solutions risks undermining the normative vision implicit in ideas like "just share."

397. Costonis, supra note 18, at 469.
398. Id.
399. Id. at 486.
400. Id. at 486 n.92 (quoting Monongahela Navigation Co. v. United States, 148 U.S. 312 (1893) (bracketed material added by Costonis, emphasis added)).
Consider Professor Costonis's interpretation of "just share." He suggests that it is fair in principle for government to single out some owners to bear special burdens if there is sufficient "linkage . . . between the purpose of a [governmental] measure and the use of the affected property." The problem lies in specifying what kind of linkage is required. Even the paradigm case for compensation, when the government takes land for a post office, involves a link between the choice of the best spot and the government's intended use. Such a location-contingent taking is not at all what Costonis means when he suggests that the just share principle mandates an inquiry into "use-dependency" linkage. Instead, like Scalia in Nollan, Costonis expects-the government to compensate aggrieved owners unless it can show that it seeks to prevent evil that is "plausibly connect[ed]" to the owner's intended use of the land.

To define "plausibly connected" Costonis turns to an example. A local land use regulation that requires developers to set aside land for interior streets and parks "uniquely attributable to the subdivision in question" is, for Costonis, clearly not a taking. Because the subdivision physically creates the need for the streets and parks, it is "fair" to ask the developer to pay for them. In contrast, Costonis expresses doubts over the appropriate result should a municipality establish regulations requiring a developer to set aside a certain percentage of a project for low- or moderate-income housing. The problem is that the link between the proposed new construction and the community's need for low and moderate income housing is more questionable. Yet Costonis never tells us why the appropriate standard for judging the link between the regulation and the burdens imposed must depend on the specific problems physically caused by the affected owners.

If Costonis were sincerely concerned about the idea of "just shares," he could plausibly argue for the reverse outcome in both cases. The developer asked to create streets and parks might note that the rest of the community has streets and parks built with tax funds. Thus, the new requirements ask him to bear a cost that before has been spread through the tax system. In contrast, the developer fighting the minority set-aside may be taking advantage of artificially high property values that are themselves based on the community's prior exclusion of low and moderate income housing. Perhaps then it would be just to require the set-asides but unjust to demand the dedication of streets and parks.

401. *Id.* at 487.
402. *Id.* at 493.
403. *Id.* at 489.
The important point is not that Costonis has led us to the wrong outcomes. Rather, his examples show the tendency of general formulations like “just share” to collapse into more formalistic models. Costonis's effort to give content to “just share” is little more than wholesale adoption of physicalist ideas of property that his article purports to reject. He sees protection against government overreaching in the physical link between an owner's purported use and the harm the government seeks to prevent. But while he is entirely correct that without some notion of just share, the government could “indiscriminately . . . single out property owners for losses that they should not be forced to bear,” the notion of just share simply must be more complicated than Costonis's notion of cause and effect. Indeed, as the Court has long recognized, a true notion of just share would include, focus on the owner's ability to bear the supposed burden and on the question of whether the owner had reason to expect that burdens might attach to the property. This notion of just share would, of course, reproduce the problems of application that the Court has experienced and that are described in Part II. The bottom line is that these problems cannot be escaped through abstract description.

C. THE GROUNDS FOR HOPE

The real question then is whether the riddles posed by our allegiance to conflicting views of property can be escaped at all. The most obvious improvement would involve coming to terms with the absence of a “set formula” for takings decisions so that our current state of affairs need no longer pejoratively be judged “ad hoc.” Indeed, given the complexities described here, the Court already deserves credit for its willingness to approach takings controversies on a case-by-case basis. As we have seen, however, particularistic calculations unguided by normative goals run a substantial risk of depending on the precise global theories that case-by-case analysis was meant to reject. Accordingly, the task facing future judges and commentators is to attempt a richer description of takings controversies that will more directly address the competing values at stake.

Although there is hardly space here to attempt such a description, it may be a fitting conclusion to consider two familiar strands of property theory that hold promise in light of the demonstrated inadequacies of the physicalist and market models. The first would involve judicial specification of concrete aspects of human existence that the takings clause is

404. Id. at 512.
designed to protect. Thus, rather than embarking upon global protection of all physical objects, courts might note certain objects, such as one's home, that a constitution would sensibly mark out as deserving of special protection. A second, related strategy would entail judicial separation of those aspects of private property deemed essential to the creation of a community and those an existing community would adopt as useful to further other purposes. Pursuing this strategy, courts might seek to ascertain and protect the amount and types of property citizens need to participate meaningfully in a self-governing society.

The ingredient linking these strategies is that they depend upon identifying constitutional norms at what might be called an intermediate level of generality. Candid assessment of takings jurisprudence requires us to doubt the possibility of capturing a universal model of property that would resolve the positivism problem. Nor can we easily retreat to analysis of particular circumstances without a guide to which circumstances point in which direction. The strategies suggested here seek to create a doctrinal framework that helps to identify, but does not determine, when private claims to economic stability fit within the Constitution's contemplated safeguards.

The problems with this enterprise are grave and come from both directions. On one hand, it is extraordinarily difficult to provide enough content to an abstract formulation so that it does not merely restate the problem. The Court's reliance on expectations analysis demonstrates this. At the same time, to the extent the Court openly attempts to develop a normative theory of constitutionally protected property, it

405. See generally Radin, Property and Personhood, 34 STAN. L. REV. 957 (1982) (arguing for greater protection for personal items, like wedding rings, that help citizens maintain and develop unique identities). For an example of legal recognition of the importance of the home, consider California's rule guaranteeing a bankrupt debtor the first $45,000 from the forced sale of her home to use for new lodging.

406. See Michelman, Property as a Constitutional Right, 38 WASH. & LEE L. REV. 1097, 1112-13 (1981) (exploring the idea of property as primarily a political right).

407. Intermediate levels of generality face the same conflicts within liberal jurisprudence that intermediate entities of government encounter within liberal political theory. See generally Frug, The City as a Legal Concept, 93 HARV. L. REV. 1059 (1980) (describing liberal theory's hostility to intermediate levels of government). Thus, just as the Hobbesian premise of the all-powerful sovereign points toward one nation-state with final say over all matters of consequence, the Hobbesian-style of argument based on the universal premise of self-interest tends to dismiss arguments that leave some aspects of a problem unsettled. As long as any part of a problem is unsettled, the risk remains that conflict will escalate into "the war of all against all." T. HOBBS, LEVIATHAN (C.B. MacPherson ed. 1968). See generally Boyle, supra note 41 (comparing Hobbes's political theory with legal positivism).

408. See supra Part II(C), text accompanying notes 283-336.
risks challenges to its underlying legitimacy as an applier, not maker, of law.

Consider first the strengths and weaknesses of a substantive standard that arises out of the concrete needs of affected citizens. Suppose, for example, that the Court found the real lesson of the takings clause to be that citizens who have managed to carve out ownership of a place to live should not be deprived of their homes without receiving the resources necessary to find similar quarters and the chance to reconnect with the community that only a home can provide. In more abstract terms, this might be described as a constitutional right to shelter. What it would do for takings jurisprudence is to place the Court squarely in the role of giving substantive content to the constitution's vague command that "property" not be taken without just compensation.

The initial legitimacy of protecting personal residences above other well-recognized forms of property would, of course, be open to question. Since the Constitution does not differentiate among kinds of property, why can the Court? By now, however, this first-stage objection is insignificant. The entire twentieth-century history of takings clause jurisprudence involves judicial efforts to distinguish protected from unprotected economic rights, and the proposed emphasis on individual homes would be merely one more chapter in that history.

409. Of course, current law does not guarantee that citizens will receive replacement cost. In some circumstances, the market may place such a low value on a person's home that the government could take it without paying compensation sufficient to allow purchase of a similar dwelling. Perhaps this insufficient compensation problem is a shortcoming of current doctrine. In any event, in the typical case involving condemnation of a personal residence, the compensation will be great enough to allow the purchase of a substantially similar dwelling that lacks only the subjective qualities of the taken home. See Michelman, supra note 406, at 1112-13 (stressing the value of a home as an important component of property).

410. Of course, a right to shelter might be interpreted in much broader ways. Not only might the constitution be read to prevent the uncompensated taking of privately owned places of residence, but it might be read, contrary to Lindsey v. Normet, 405 U.S. 56, 73-74 (1972), to require the state to provide shelter to the homeless. Analysis of this broader reading is beyond the scope of this Article. To the extent, however, that the Court gives affirmative content to the Constitution's use of the term property, the government's failure to provide judicially defined property to needy citizens rests on the questionable distinction between "prohibition" and "refusal to subsidize" that has been a mainstay of contemporary conservative jurisprudence. Cf., e.g., Harris v. McRae, 448 U.S. 297 (1980) (holding that a woman's right to choose an abortion does not carry with it a constitutional right to have the government pay for abortions for women who cannot afford them). See generally Sullivan, Unconstitutional Conditions, supra note 314 (exploring the difficulties in distinguishing ordinary regulations from coercive penalties and proposing that this distinction be recognized as normative, not objective).

411. It would, of course, be theoretically possible to argue that this entire history is misguided and to propose interpretations of the takings clause that seek to remove the Court from any role in defining property. Professor Epstein's efforts along these lines, however, appear the best we might
A second question is whether there is any basis at all for protecting selected substantive rights, like a right to shelter. Here a detailed account would involve inquiry into precisely those situations the framers and ratifiers had in mind when enacting the takings clause. A safe guess, however, is that the paradigm case of land taken for a public project often involved loss of a family farm or homestead, and that in any event the image of a dispossessed family has always affected the rhetoric surrounding protection for private property. The point, of course, is not that there is a clear case for special constitutional protection for the loss of a private home. Rather, the emphasis here is on the advantages of asking this type of question.

A takings jurisprudence that differentiated among types of property based on the extent to which that property met core human needs would involve an explicit attempt to answer the question that everyone, including the Court, sees at the heart to the takings problem. If the takings clause is about preventing the government from demanding unfair sacrifice, the Court has no choice but to be involved in defining what is fair. The only question is whether the Court continues to pretend that it can articulate principles universal enough to defy dissent, or whether it will instead attempt to defend certain aspects of property as more central to the idea of constitutional protection. Perhaps the most significant advantage of the latter approach is that it would directly focus disagreements on the competing values at stake in takings controversies. Moreover, providing increased protection for selected property rights, such as a right to shelter, would bring some of the traditional benefits of permitting the citizenry to guide behavior, and it would enable us to predict more accurately what the Court is likely to do.

Imagine the *Nollan* case, for example, being fought out in Court on the issue of whether the Nollans' contemplated beach house was sufficiently like a primary residence such that California's ability to regulate construction should be subject to strict constitutional limits. Unlike any current formulation of takings doctrine, this approach would consider whether the Nollans planned to live in the house all year or whether this is a vacation retreat. Should this not be a crucial factor in determining whether the Nollans are being asked to sacrifice too much for collective welfare? Moreover, the public would learn more about the nature of constitutionally protected property from an opinion that defended the
Nollans' right to build in this particular context, as opposed to one that simply assumed that right as part of an undefended political philosophy.

Ultimately, however, a judicial effort to derive property law from a set of core human needs will prove empty and ungrounded unless it can be linked to a political theory concerning the role property serves in constituting the republic. There may be many reasons why people need shelter more than speculative profits, or why a personal residence belongs high on the list of desired resources. The constitutional question, however, is why the takings clause should be interpreted to place courts in the position of making special efforts to prevent the other branches from taking a person's home without paying compensation. Thus, it is necessary to identify a political (that is, group-focused) as opposed to a personal (that is, individual-focused) definition of what is meant by an unfair sacrifice.

It is not difficult to discern that the crucial political question involved in evaluating constitutional claims to property is whether it is possible to identify the aspects of property that people need to make the society work, as opposed to those society grants so as to work better. One theory along these lines might stress the role of certain aspects of property, such as a place to live and other essential items, as the economic ingredients a citizen needs to participate freely in collective affairs. Land ownership was once a qualification for voting, and it is crucial to remember that the takings clause protects political as well as economic rights. Accordingly, courts have reason in every takings case to ask whether the government's power to alter economic rights risks depriving a citizen of the economic means to form independent political judgments, or worse still to strip political opponents of the wherewithal to combat government policy.

The advantage of this "republican" approach is that it again forces courts to return to the question of what values underlie the constitutional protection of property. Once more, courts can abandon the search for a unified definition of property and explicitly adopt a multi-factor approach that seeks to define what constitutes an unfair sacrifice. Now, however, unfair sacrifices may be judged by evaluating the extent to which government policy threatens to take economic resources that the citizen physically possesses, that the rules protect, and that the citizen

sizable segment of the public that feels it wrong for any family to have two homes while some families have none.

413. See Michelman, supra note 406, at 1112-14.
needs to be part of the political community. In other words, the protected baseline may be set by constitutional norms as well as by independent visions of property law.

It will be no easier to establish the content of republican norms than it might be to identify those aspects of property that correspond to core human needs. Who is to say what level of property the Constitution protects as a mechanism for ensuring independent political dialogue? The point is that as long as the Court persists in avoiding the task of articulating some substantive vision of property, it will remain trapped in the hopeless vacillation between inadequate models that this Article has described in detail. Moreover, the prospect of judicial articulation of property's normative content holds a significant additional advantage. The question of which property interests the Constitution protects will become more explicitly linked to substantive discussions concerning the nation's distribution of resources. A Court that explicitly recognizes its power to approve or disapprove legislative alterations of the status quo based on a normative choice among different models of property can hardly pretend to be neutral concerning the nature of its choice.

In the end, of course, the takings clause is an unlikely source of inspiration for an inquiry into society's appropriate distribution of resources. The takings clause comes into play only after some distribution is in place, and courts are asked whether government may disturb that distribution. Any sophisticated analysis of distributional questions would thus involve an inquiry into the law that creates property rights as well as the law that takes them away. But if this exhaustive study has proven anything, it is that nowhere in our jurisprudence do we get a better look at society's struggle to define an overarching vision of property than we do in takings law. Takings law shows us the models of private property that capture our imagination and that inform our collective vision concerning the nation's distribution of entitlements. It shows us that our society defines property in many different ways and that we are deeply divided over which kinds of property the Constitution protects.

What has united us to this point is the goal of maintaining a society where a majority vote to demand individual sacrifice is not always sufficient justification to demand individual compliance. What each generation must decide for itself, therefore, is which kinds of sacrifice constitute the price of civilization and which sacrifices are themselves uncivilized. The framers and ratifiers passed on the takings clause as a permanent reminder of this fundamental question. In the end, it is this question that
is the “answer” to the takings controversy. The problem with our current law is not its failure to answer this timeless question. Instead, the search for a unified answer ironically prevents us from continuing to ask it.