California Law Review

VOL. 77 DECEMBER 1989 NO. 6

The Takings Clause: In Search of Underlying Principles Part I—A Critique of Current Takings Clause Doctrine

Andrea L. Peterson

TABLE OF CONTENTS

The Takings Clause: In Search of Underlying Principles Part I—A Critique of Current Takings Clause Doctrine

Andrea L. Peterson†

In this Article, Professor Peterson argues that the Supreme Court's current takings clause doctrine is in chaos. Focusing on Nollan v. California Coastal Commission, *she shows that the Court has used so many different definitions of "property" and so many different tests for determining when a compensable "taking" of property has occurred, that the Court's current doctrine is more confusing than it is helpful in determining whether a taking has occurred. Yet she concludes that the results in the Supreme Court's takings decisions are surprisingly predictable given the state of the doctrine, and suggests that there may be a pattern underlying the results in the Court's takings decisions. Professor Peterson then considers whether any elements of the Court's current doctrine could be used as the basis for constructing a set of principles that would account for the results in the great majority of the Court's takings decisions. In a second Article, Professor Peterson will build on this analysis, offering a unified theory of when the Court will find that a compensable taking of property has occurred.*

INTRODUCTION

The two Articles that constitute *The Takings Clause: In Search of Underlying Principles*‡ address the controversial and perplexing issue of when a "taking" occurs within the meaning of the takings clause of the fifth amendment, which provides that "private property [shall not] be

† Acting Professor of Law, Boalt Hall School of Law, University of California, Berkeley. A.B. 1974, Stanford University; J.D. 1978, Boalt Hall School of Law, University of California, Berkeley.

I would like to thank the many colleagues who provided helpful comments on this Article, including Jesse Choper, Jack Coons, Willy Fletcher, Jim Gordley, Paul Mishkin, Robert Post, Dan Rubinfeld, Joe Sax, Martin Shapiro, and Larry Sullivan. I owe special thanks to Michael Rubin, Steve Bundy, and Paul Kahn, who offered unflagging support and many thoughtful suggestions. Finally, I greatly appreciated the assistance of Mike Miller of the *California Law Review,* and of my research assistants, Susan Huber, Steve Holtzman, Eric Esler, Jim Smith, and Bill McElyea.

‡ The second Article, *The Takings Clause: In Search of Underlying Principles, Part II—Takings as Intentional Deprivations of Property Without Moral Justification,* will appear in 78 CALIF. L. REV. (forthcoming January 1990).

taken for public use, without just compensation."[1] The controversy centers on cases in which the government does not formally exercise its power of eminent domain, but instead either enacts a law or takes physical action that allegedly effects a taking of the claimant's property.[2] Although it is now settled that a taking can occur even when the government has not formally exercised its eminent domain power, the Supreme Court has found it difficult to articulate when regulation or physical action by the government constitutes a taking.

This is a matter of considerable consequence, for takings litigation has become increasingly common. Lawmakers are enacting an ever-expanding array of land-use and environmental laws, which have long been a target for takings clause challenges. Moreover, there seems to be a growing recognition that takings claims are not limited to the land-use context, for regulatory takings claims are being raised in an increasingly broad range of circumstances.[3]

The takings issue is of particular significance to governmental entities, which are justifiably concerned about incurring liability for regulatory takings. The Supreme Court's decision in *First English Evangelical Lutheran Church v. County of Los Angeles*[4] has magnified that concern. In *First English,* the Court announced that even if a regulation is repealed immediately after being found to effect a taking, the government must still pay just compensation for the period the regulation was in effect. In light of *First English,* local government officials have expressed apprehension that their governments could incur substantial monetary liability, since a variety of local laws, including open-space zoning and growth control laws, are susceptible to takings challenges.[5]

---

1. U.S. CONST. amend. V. The takings clause is applied to the states through the due process clause of the fourteenth amendment. *See* Chicago, B. & Q.R.R. v. Chicago, 166 U.S. 226 (1897).

2. It is undisputed that a taking occurs when the government formally exercises its eminent domain power, as when it proceeds under an eminent domain statute to acquire *A*'s land as a site for a public post office.

3. For example, in recent years the Court has considered takings challenges to a federal law authorizing the Environmental Protection Agency to disclose certain health and safety data submitted by pesticide manufacturers, Ruckelshaus v. Monsanto Co., 467 U.S. 986 (1984), and to the Multiemployer Pension Plan Amendments Act of 1980, 29 U.S.C. §§ 1381-1461 (1982), which imposes liability on employers withdrawing from multiemployer pension plans, in order to provide adequate funding for vested pension benefits, Connolly v. Pension Benefit Guar. Corp., 475 U.S. 211 (1986).

4. 482 U.S. 304 (1987).

5. *See, e.g.,* N.Y. Times, June 21, 1987, § 23 (Connecticut Weekly), at 1, col. 6. In response to *First English,* President Reagan issued an Executive Order directing the Justice Department, in consultation with the executive departments and agencies, to promulgate "Guidelines for the Evaluation of Risk and Avoidance of Unanticipated Takings." Exec. Order No. 12,630, 53 Fed. Reg. 8,859 (1988). Under current takings doctrine, however, it would be difficult to determine when the Court would find a taking. Justice Stevens commented in his dissenting opinion in Nollan v. California Coastal Commission, 483 U.S. 825 (1987), that "[e]ven the wisest lawyers would have to acknowledge great uncertainty about the scope of this Court's takings jurisprudence. Yet, because of

This Article begins by analyzing and criticizing the Supreme Court's current takings clause doctrine. Although it is widely acknowledged that the Court has not provided anything approaching a bright-line definition of when a taking occurs,[6] there is also a common perception that the Court's takings doctrine provides significant guidance as to when the Court will find a taking. The Supreme Court purports to decide takings cases within a coherent doctrinal structure,[7] and lower courts regularly analyze takings cases within that perceived structure.[8] Moreover, a number of respected commentators apparently view the Court's current takings doctrine as offering discernible principles that can be used to predict how the Court will decide takings cases, although the commentators may disagree with those principles.[9]

A major theme of this first Article is that the Court's takings doc-

---

the Court's remarkable ruling in *First English,* local governments and officials must pay the price for the necessarily vague standards in this area of the law." *Id.* at 866 (Stevens, J., dissenting) (citation omitted).

6. The Court itself often acknowledges that it has not provided clearcut guidelines for determining when a taking occurs. *See, e.g., Connolly,* 475 U.S. 211, 224 (1986); Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 426 (1982); Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978).

7. For example, the Court has explained that its "no economically viable use" test for a taking applies in the case of a facial challenge to a law, while the three-factor *Penn Central* test should be used in the case of an "as applied" challenge. *See, e.g.,* Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 295-96 (1981).

8. *See, e.g.,* Moore v. City of Costa Mesa, 886 F.2d 260 (9th Cir. 1989) (applying the "no economically viable use" test to find that no taking occurred when the city refused to permit the claimant to construct a commercial building on his land unless he deeded part of the land to the city for a street widening project); Empire Kosher Poultry, Inc. v. Hallowell, 816 F.2d 907 (3d Cir. 1987) (finding that regulations requiring the quarantine of infected poultry did not effect a taking, in part because the government had not interfered with the claimant's "reasonable, investment-backed expectations"); Hall v. City of Santa Barbara, 833 F.2d 1270 (9th Cir. 1986) (applying the *Loretto* per se rule to find that a takings challenge to a rent control ordinance should not have been dismissed on the pleadings), *cert. denied,* 485 U.S. 940 (1988); Pompa Constr. Corp. v. City of Saratoga Springs, 706 F.2d 418 (2d Cir. 1983) (applying the two-part *Agins* test to reject a takings challenge to a zoning ordinance).

9. Frank Michelman, for example, has recently summed up the current state of the Court's takings doctrine as follows:

> [The d]octrine appears to be moving in the direction of resolution into a series of categorical "either-ors": *either* (a) the regulation is categorically a taking of property because (i) it works a permanent physical occupation (however practically trivial) of private property by the government, or, perhaps, specifically undermines a "distinct investment-backed expectation," or (ii) it totally eliminates the property's economic value or "viability" to its nominal owner, *or* (b) the regulation is categorically not a taking.

Michelman, *Takings, 1987,* 88 COLUM. L. REV. 1600, 1622 (1988) (citations omitted); *see also* Sax, *Property Rights in the Supreme Court,* 3 CAL. WATERFRONT AGE 6, 6, 9 (1988) (under Supreme Court takings doctrine, land-use regulations are not takings unless the government either denies a landowner all economically viable use of his land or forces a landowner to donate all or part of his land as a public facility when the government is not asking the landowner to solve a problem he created); Haar & Kayden, *Private Property vs. Public Use,* N.Y. Times, July 29, 1987, at A23, col. 2 ("[T]he basic rule [applied by the Supreme Court is] that . . . to prove a constitutional violation, [property owners] must in most cases show that land-use regulations deny them all reasonable use of their property.").

trine is in far worse shape than has generally been recognized—indeed, that it is difficult to imagine a body of case law in greater doctrinal and conceptual disarray. Two basic questions underlie any approach to the takings issue: What constitutes "property" under the takings clause, and when does a compensable "taking" of property occur? The Court has not provided a coherent response to either question.

In recent takings decisions, the Court has defined "property" in different and conflicting ways without even acknowledging the inconsistencies in its definition, much less trying to resolve them. The Court also has announced at least four different tests for determining when a "taking" occurs, without explaining why its inquiry should differ from one takings case to the next or providing clear guidelines as to when each takings test should be applied.[10] The Court has even used more than one takings test in a single opinion.[11] Even when the Court confines itself to only one of its announced tests, the structure of the Court's analysis is difficult to predict, for the Court's interpretation of each takings test can vary from one opinion to the next.

If one focuses on the Court's articulation of the principles underlying its takings doctrine, its decisions fare no better. The Court has repeatedly stated that the ultimate issue in a takings case is whether "fairness and justice" require that compensation be paid for economic injuries caused by the government.[12] Yet the Court has provided little explanation of how its present array of takings tests bear on the fairness issue.

After exploring the inadequacies of current takings doctrine, I turn to the task of formulating a coherent definition of a "taking" of "property" that could account for the results reached by the Court in the great majority of its takings decisions. This task is less implausible than it might first appear. The results in the Court's takings decisions are far more predictable than one would anticipate, given the current disarray of the Court's takings doctrine. One can often predict how the Court will rule in a takings case, or at least anticipate whether the case will be diffi-

10. For example, although the Court has stated that the "no economically viable use" test applies in the case of a facial challenge, while the *Penn Central* test should be used in the case of an "as applied" challenge, *see supra* note 7, the Court neither has explained why this should be so, nor has it even consistently followed this rule. *See infra* text accompanying notes 338-42.

11. *See, e.g.*, Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1987) (applying both the three-factor *Penn Central* test and the two-part *Agins* test to reject a takings challenge to Pennsylvania's Bituminous Mine Subsidence and Land Conservation Act).

12. *See, e.g.*, Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978) (stating that in assessing whether a compensable "taking" occurred, the Court is seeking to determine "when 'justice and fairuess' require that economic injuries caused by public action be compensated by the government"); Armstrong v. United States, 364 U.S. 40, 49 (1960) (stating that "[t]he Fifth Amendment's guarantee . . . [is] designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole").

cult for the Court to decide.[13] Moreover, there are many cases in which it is widely accepted that a taking has or has not occurred.[14]

In this first Article, I show that the Court's current doctrine does not provide a coherent theory of when a compensable "taking" of "property" occurs. I also consider which elements of the Court's current doctrine might be used to construct a coherent and analytically powerful structure for deciding takings cases. Building on this framework, in the second Article[15] I offer a theory as to when a taking occurs, seeking to account not only for the results in the Court's takings decisions, but also for generally accepted propositions as to when a taking occurs.[16]

I
THE CHAOS OF CURRENT TAKINGS CLAUSE DOCTRINE

A. An Illustrative Case: Nollan v. California Coastal Commission

It may be easier to get a sense of the chaotic state of current takings clause doctrine by focusing on a specific case, *Nollan v. California Coastal Commission.*[17] The takings claim in *Nollan* arose because the California Coastal Commission, acting pursuant to the California Coastal Act,[18] prohibited the Nollans from building a single-family residence on their beachfront land unless the Nollans granted an easement

13. This Article uses the case of Nollan v. California Coastal Commission, 483 U.S. 825 (1987), to show that current takings doctrine provides no basis for predicting how the Supreme Court would analyze any given takings case. Yet one can often predict the result the Supreme Court would reach in a takings case by ignoring the complexities of current takings doctrine and simply considering whether fairness would require the government to pay compensation.

14. For example, no one would argue that a compensable taking had occurred if the government required *A* to pay damages for committing a tort or to forfeit a valuable resource she had used in the commission of a crime, although in each case the government clearly would have deprived *A* of her property. If, however, the government forced *A* to give up her land so that it could be used for a public park, this would be widely regarded as a compensable taking.

15. Peterson, *The Takings Clause: In Search of Underlying Principles, Part II—Takings as Intentional Deprivations of Property Without Moral Justification,* 78 CALIF. L. REV. (forthcoming January 1990) [hereinafter Peterson II].

16. In Peterson II, *supra* note 15, I argne that a taking occurs whenever the government intentionally forces *A* to give up something of economic value, unless the government is preventing or punishing wrongdoing by *A*. More specifically, no taking occurs if the lawmakers are requiring *A* to give up her property to prevent or punish conduct that they reasonably believe the public would consider wrongful or blameworthy. If the government is not preventing or punishing wrongdoing, but is simply taking *A*'s property to promote the common good, compensation must be paid.

17. 483 U.S. 825 (1987).

18. The Coastal Act provided that unless certain exceptions applied, "[p]ublic access from the nearest public roadway to the shoreline and along the coast shall be provided in new development projects." CAL. PUB. RES. CODE § 30212(a) (West 1986). Although the Nollans were replacing an existing dwelling on their land, their proposed construction qualified as "new development" under the statute because the new dwelling would be substantially larger than the old one. *Nollan,* 483 U.S. at 830.

permitting the public to walk along the beach on their land.[19] The Nollans argued that the government could not require them to give up an easement unless it paid just compensation.

How might we decide whether the governmental action challenged in *Nollan* constitutes a taking? First, let us set aside the complexities of the Court's doctrine and simply ask whether notions of fairness that are fairly widely held in our society would require the government to pay compensation to the Nollans. After all, the ultimate question in every takings case, according to the Court, is whether fairness requires that the burden be borne by the public as a whole, rather than by the particular claimant.[20] In effect, the claimant in a takings case is asking: "Why me? Why should I have to bear this burden?"

The government offered two responses to that question in *Nollan*. First, it argued that providing public access along the beach would promote the common good.[21] But the fact that the government is acting for the good of the public cannot by itself establish that no compensable taking has occurred. The public benefit from the government's action does not explain why it is *fair* that the Nollans, in particular, should have to bear the burden imposed by the government's action. Moreover, the public use requirement of the takings clause demands that the government be acting for the benefit of the public whenever it takes private property. The government's satisfaction of the public use requirement does not by itself establish that no compensable taking has occurred.[22]

The government's second argument was that the Nollans were simply being asked to solve a problem they had created.[23] According to the government, the Nollans' new house would cause harm by blocking the public's view of the beach, thereby reducing people's desire to use the beach.[24] The government argued that the Nollans should be required to

19. *Nollan*, 483 U.S. at 828. The historic mean high tide line determined the oceanside boundary of the Nollans' beachfront lot. *Id.* at 827.

20. *See, e.g.*, Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 123 (1978) (quoting the Court's statement in Armstrong v. United States, 364 U.S. 40, 49 (1960), that "[the] Fifth Amendment's guarantee . . . [is] designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole").

21. As the Court put it, the Coastal Commission argued in *Nollan* that "the public interest [would] be served by a continuous strip of publicly accessible beach along the coast." 483 U.S. at 836.

22. *See infra* text accompanying notes 316-19.

23. In making this argument, the government was attempting to justify imposing the lateral access requirement on only those beachfront owners who wanted to build on their land. As discussed in my second Article, this made the access requirement particularly difficult to defend. *See* Peterson II, *supra* note 15, at text accompanying notes 222-23.

24. As the Coastal Commission expressed it, the Nollans' new house would interfere with "visual access" to the beach, thus interfering with the desire of people to use the beach and creating a "psychological barrier" to access. *Nollan*, 483 U.S. at 828-29.

remedy this harm by providing lateral public beach access.[25] It is difficult, however, to see how the government's proposed solution would mitigate the harm caused by the new house. How would allowing people who are using the beach to walk across the Nollans' land remedy other people's lack of desire to use the beach?[26] The theory is so implausible that it suggests that the government simply wanted free lateral access.[27] Thus, if one focuses on the question of "Why should the Nollans have to bear this burden?" one ought to conclude that the government should have to pay the Nollans for the easement.

The case presents one other issue that may affect one's view of what fairness requires. The Nollans bought their land knowing that the government would require them to give up an easement if they built a single-family residence. At the time the Nollans purchased the land, the Coastal Commission had already issued a building permit that required the dedication of an easement before a single-family residence could be built on the lot.[28] Does the Nollans' knowledge of this restriction on their right to build mean that fairness does not require the payment of compensation in this case?

A hypothetical may clarify discussion of this issue. Suppose the Nollans were thinking of buying a particular car, and the government warned them: "If you buy that car, we will take it from you without paying for it." If the Nollans nevertheless bought the car, and the government then took it from them, would the mere fact that the Nollans had been *warned* of the government's intended action be sufficient to establish that fairness would not require the payment of compensation? Most people probably would conclude that it would not.[29] If that is true, it would seem that the government should compensate the Nollans for the lateral public access easement even though it forewarned them of its

25. *Id.* The Coastal Commission also argued that the Nollans' new house would increase use of the public beaches, and that the increased congestion could be remedied by the Nollans' providing lateral public access. *Id.* at 829.

26. Similarly, even if building this house might somehow lead to increased (rather than decreased) use of the beach, how would that problem be solved by providing lateral public beach access?

27. If the government actually had been concerned about the Nollans' blocking the public's view of the beach, why would the government not have required the Nollans to build in a manner that did not block the public's view?

28. *Nollan,* 483 U.S. at 828. Although the Nollans actually violated the permit requirement by building a new house on the land without dedicating an easement to the public, the Supreme Court ignored that fact in analyzing the Nollans' takings claim.

29. Some readers might be concerned that the taking of a whole thing (a car) is distinguishable from the taking of part of a thing (a mere easement). But why would the fact that a whole thing is being taken affect whether the government can avoid paying compensation simply by issuing a warning that it intends to deprive the claimant of something of economic value? The same analysis would seem to apply whether the government warned, "If you buy that car, we will later require you to let third parties use it periodically without paying you any compensation," or whether it warned, "If you buy that car, we will take the car's engine from you without paying for it." Most people

intended action.[30]

Nollan, then, does not appear to be an extremely difficult case when examined without the overlay of the Supreme Court's takings doctrine. However, after exploring how the Court defines "property" in takings cases and how it determines whether a "taking" has occurred, we will discover that the Court's takings doctrine makes analysis of *Nollan* considerably more complex.

B. The Supreme Court's Definitions of Property

One cannot determine whether a compensable taking has occurred without first determining whether the government has deprived the claimant of any property. If there has been no deprivation of property, no compensable taking has occurred.[31] Unfortunately, the Court has offered a number of conflicting definitions of property, and it is very difficult to predict what the Court would consider the relevant "property" to be in any given takings case.

Suppose the government required *A,* a landowner, to permit members of the public to walk across a path on her land, and *A* claimed that this amounted to a taking of her property. What would the Court identify as the relevant "property" here? Would it be the narrow strip of land the public actually would be using? Would it be *A*'s entire parcel of land? Or would the Court view this as a case in which the government was depriving *A* of her pre-existing legal right to exclude the public from her land? Given the Court's various definitions of property in its takings decisions, any of the foregoing answers is possible.

1. Property as Tangible Things

The Court often defines property for takings clause purposes in terms of a physical thing. Sometimes the Court says that the property is

---

presumably would not view the warning, by itself, as establishing that it was fair for the government to impose this burden on the owners without payment of compensation.

Other readers might be concerned that in the hypothetical the government did not limit the circumstances under which the owners would be required to give up their car, whereas the Nollans were required to give up an easement only if they built on their land. Yet even if the government limited the circumstances under which it would take the car (for example, "If you buy that car and install a sunroof, we will take the car from you"), the mere fact that the government had *warned* the owners of its intended action would not establish that fairness did not require the payment of compensation.

30. Compare a case in which *the government* sold a car to *A* and said: "We are selling you this car on the condition that we can take it back whenever we need it." In such a case, no taking would occur if the government later took the car back. See the discussion of "vested rights," *infra* text accompanying notes 264-69.

31. The definition of property is also significant in determining the measure of just compensation, since the Court generally awards the fair market value of the property taken. *See, e.g.,* Kirby Forest Indus. v. United States, 467 U.S. 1, 10 (1984) (" 'Just compensation' . . . means in most cases the fair market value of the property on the date it is appropriated.").

the entire thing. For example, in *Penn Central Transportation Co. v. New York City,*[32] the Court defined the relevant unit of property as a parcel of land that had been designated as an historic landmark site. The claimants argued that they had been deprived of the airspace above Grand Central Terminal, since the government had denied them permission to construct an office building on top of the terminal. The Court, however, insisted that the takings claim be analyzed with respect to the "parcel as a whole,"[33] including the airspace. According to the Court, " '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."[34] Having defined the relevant unit of property as the city tax block designated as the landmark site, the Court then analyzed the effect of the landmark law's restrictions on the entire parcel of land.[35]

The Court also defines the relevant unit of property as the entire parcel of land in cases that apply the "no economically viable use" test.[36] When the Court asks whether a challenged land-use regulation denies landowners all "economically viable use" of their land, it has viewed the "property" at issue as "the land itself"[37] and has refused to treat a portion of the entire parcel of land as the relevant geographic unit.[38]

Although the Court has often insisted that the relevant "unit of property" is the entirety of a tangible thing, it has sometimes defined the

---

32. 438 U.S. 104 (1978).

33. *Id.* at 131.

34. *Id.* at 130.

35. Applying the three-factor *Penn Central* test, which is discussed at *infra* text accompanying notes 81-141, the Court concluded that no compensable "taking" of property had occurred. *Penn Central,* 438 U.S. at 138.

36. *See, e.g.,* Hodel v. Indiana, 452 U.S. 314 (1981); Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264 (1981). The "no economically viable use" test is discussed at *infra* text accompanying notes 156-72.

37. Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 192 n.12 (1985).

38. Not surprisingly, the Court has not always found it easy to define the physical boundaries of the relevant "thing." In Keystone Bituminous Coal Association v. DeBenedictis, 480 U.S. 470 (1987), for example, the Court considered a takings challenge to Pennsylvania's Bituminous Mine Subsidence and Land Conservation Act (Subsidence Act), PA. STAT. ANN. tit. 52, §§ 1406.1-.21 (Purdon Supp. 1989), which prohibited mining that would cause subsidence damage to certain structures, such as public buildings and dwellings used for human habitation. The Court in *Keystone* refused to define the unmined coal as the property at issue, since the Court in *Penn Central* had insisted that takings analysis does not focus on one physical segment of a parcel of land. Yet the Court foundered when faced with the task of defining the appropriate unit of property. In the end, the Court in *Keystone* did not define the property with any precision but simply asserted:

> When the coal that must remain beneath the ground is viewed in the context of any reasonable unit of petitioners' coal mining operations . . . , it is plain that the petitioners have not come close to satisfying their burden of proving that they have been denied the economically viable use of that property.

Keystone, 480 U.S. at 499.

relevant unit of property as an identifiable physical portion of a larger tangible thing. This was true, for example, in *Loretto v. Teleprompter Manhattan CATV Corp.*[39] In that case, the Court adopted a per se rule that any permanent physical occupation of an owner's property authorized by government constitutes a taking[40] and held that a law requiring landlords to permit the installation of cable facilities on their buildings effected a taking. In effect, the Court concluded that the government had taken the small area actually occupied by the cable facilities.[41] The Court did not even attempt to explain how it could view the occupation of merely a portion of the claimant's building as a deprivation of "property" in *Loretto*, when the Court in *Penn Central* and other cases had insisted that the only relevant property for takings purposes is the "parcel as a whole."[42]

2. *Property as Economically Valuable Rights Created by Positive Law*

In cases in which the Court has adopted the "parcel as a whole" approach, it not only has refused to consider smaller geographic units as the relevant units of property, but it also has refused to consider previously existing legal rights with respect to the land as the relevant property. In *Penn Central*,[43] for example, the Court refused to treat either the airspace above the terminal or the previously existing legal right to develop in this airspace as the relevant property.[44]

Yet in other takings cases, the Court has defined "property" as economically valuable rights created by positive law. In *United States v. General Motors Corp.*,[45] for example, the Court stated that property for

39. 458 U.S. 419 (1982).

40. *Id.* at 426.

41. The Court conveyed the notion of a taking of a physical portion of the premises by saying that in physically occupying this space, the "government does not simply take a single 'strand' from the 'bundle' of property rights; it chops through the bundle, taking a slice of every strand." *Id.* at 435. The Court spoke in terms of a deprivation of rights—slicing through every strand in the bundle. Yet it seemed to view the property taken as an identifiable portion of Loretto's building.

42. One could argue that *Penn Central* was different from *Loretto* because in *Penn Central* the government did not physically invade the claimants' land or building. Yet why should the fact that a physical invasion is involved change the definition of "property" for takings clause purposes? The Court could use a consistent definition of property in its takings decisions and still find a compensable taking more readily when the government deprives *A* of her property by means of a physical invasion.

43. 438 U.S. 104 (1978).

44. *Id.* at 130. Similar issues arose in Keystone Bituminous Coal Association v. DeBenedictis, 480 U.S. 470 (1987). The Court in *Keystone* not only rejected the notion that the coal that could not be mined was the "property" at issue, but also stated that the case could not be analyzed as a taking of the previously existing legal right to mine in a manner that causes subsidence. *Id.* at 498-501. Rather, the "property" at issue was some larger tangible unit, which the Court never defined with any precision. *See supra* note 38.

45. 323 U.S. 373 (1945).

takings clause purposes consists not of the tangible thing itself, but rather of certain "rights recognized by law" with respect to that thing:

> It is conceivable that [the term "property" in the takings clause] 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.[46]

In *General Motors,* the government had formally exercised its eminent domain power to acquire a short-term lease from a tenant holding a long-term lease.[47] The Court did not view the building as the relevant property. Rather, it viewed the government as taking from the tenant certain economically valuable legal rights.[48]

The Court has also defined property in terms of economically valuable rights created by positive law in takings cases that do not involve a formal exercise of the eminent domain power. In a number of such cases, the Court has quoted *Board of Regents v. Roth,*[49] a procedural due process case, which states that "[p]roperty interests . . . 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."[50]

---

46. *Id.* at 377-78. The Court still cites this passage in its takings decisions. *See, e.g.,* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 435 (1982); PruneYard Shopping Center v. Robins, 447 U.S. 74, 82 n.6 (1980). In fact, the dissent in *Penn Central* relied on this passage in arguing that the claimants' "air rights" were property within the meaning of the takings clause. 438 U.S. at 142-43 & n.5 (Rehnquist, J., dissenting).

47. The issue the Court addressed in *General Motors* was not whether a taking had occurred, but how to measure "just compensation" for the property taken.

48. The Court stated:

> When the sovereign exercises the power of eminent domain it substitutes itself in relation to the physical thing in question in place of him who formerly bore the relation to that thing, which we denominate ownership. In other words, it deals with what lawyers term the individual's "interest" in the thing in question. That interest may comprise the group of rights for which the shorthand term is "a fee simple" or it may be the interest known as an "estate or tenancy for years," as in the present instance. . . .
>
> . . . .
>
> . . . [Here] the Government does not take [the individual's] entire interest, but . . . takes only what it wants, . . . and leaves him holding the remainder . . . .

General Motors, 323 U.S. at 378, 382.

49. 408 U.S. 564 (1972).

50. *Id.* at 577; *see, e.g.,* Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 161 (1980).

In these cases, the Court has not discussed whether the definition of property used in procedural due process cases should be used in takings cases. Even if one were persuaded that property should be defined in the same manner in both contexts, this would not resolve the current uncertainty as to how property should be defined in the takings context, for the Court's definition of property in procedural due process cases also has been far from constant. *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 678-706 (2d ed. 1988).

The Court relied on this definition of property in *Ruckelshaus v. Monsanto Co.*,[51] holding that a pesticide manufacturer's trade-secret rights in certain health and safety data submitted to the EPA were property for purposes of the takings clause because these rights were recognized under state law.[52] Similarly, in *Webb's Fabulous Pharmacies, Inc. v. Beckwith*,[53] the Court concluded that money deposited in an interpleader fund with a county court was property for takings clause purposes because "[t]he creditors . . . had a state-created property right to their respective portions of the fund."[54] In each of these cases, the Court defined the relevant unit of property as a legal right that the claimant possessed under state law. The Court did not even attempt to explain how these cases could be harmonized with those in which it had refused to treat discrete economically valuable legal rights as property.

Apart from its failure to explain why pre-existing legal rights are "property" in some cases but not in others, the Court also has left unclear whether property for takings clause purposes is solely a creature of positive law. In *PruneYard Shopping Center v. Robins*,[55] the majority spoke of the states' authority "to define 'property' in the first instance,"[56] which could be interpreted as suggesting that positive law is the only source of property rights. Similarly, in *Keystone Bituminous Coal Association v. DeBenedictis*,[57] the four dissenting justices suggested that property rights exist only if they are recognized by positive law, citing *Monsanto* and *Webb's* for the proposition that the Court had previously evaluated takings claims "by reference to the units of property defined by state law."[58]

On the other hand, Justice Marshall, concurring in *PruneYard*, argued that constitutionally protected property is not defined solely by state law, but rather has "a normative dimension as well, establishing a sphere of private autonomy which the government is bound to respect."[59] Consistent with this view, the Court several times has considered takings claims even where the government did not deprive the

51. 467 U.S. 986 (1984).

52. The Court also emphasized that under Missouri law, trade secrets were labelled "property." *Id.* at 1001-03.

53. 449 U.S. 155 (1980).

54. *Id.* at 161.

55. 447 U.S. 74 (1980). In *PruneYard*, the Court rejected a takings challenge to a provision of the California Constitution that (as interpreted by the California Supreme Court) prohibited a shopping center owner from excluding members of the public who were exercising rights of free expression and petition protected by the state constitution.

56. *Id.* at 84.

57. 480 U.S. 470 (1987).

58. *Id.* at 518-19. Justice Rehnquist wrote the majority opinion in *PruneYard* and the dissenting opinion in *Keystone*.

59. *PruneYard*, 447 U.S. at 93. Justice Marshall commented further: "This understanding is embodied in cases in the procedural due process area holding that at least some 'grievous losses'

claimant of a right she had previously possessed as a matter of positive law. The clearest example of this is *Nollan*,[60] where the Court found a taking even though the Nollans never had acquired a right under California law to build without providing lateral public access.[61] In other cases as well the Court has assumed that a takings claim was properly raised without regard to whether the government had deprived the claimant of a right that she had previously possessed as a matter of positive law.[62]

3. *Property as Economically Valuable Vested Rights Created by Positive Law*

In a number of other takings cases, the Court has said that unless a right created by positive law is a "vested right," it is not property within the meaning of the takings clause. The Court's reasoning is that when the government grants *A* a legal right, it normally retains the power to change the law to promote the general welfare, and thus no taking occurs when the government exercises its retained power, even though the change in the law eliminates *A*'s rights under the prior law. As the Court expresses it, *A* has not lost any "vested rights."

For example, in *Bowen v. Public Agencies Opposed to Social Security Entrapment*,[63] the Court held that no taking occurred because the legal rights the claimants lost were not vested.[64] The State of California had entered into a written agreement with the Secretary of Health and Human Services in which the state had agreed to participate in the Social Security System. The agreement contained a termination provision mir-

---

amount to deprivation of 'liberty' or 'property' within the meaning of the Due Process Clause, even if those losses are not protected by statutory or common law." *Id.* at 93 n.2 (citations omitted).

60. 483 U.S. 825 (1987).

61. *See infra* text accompanying note 188.

62. In Hurtado v. United States, 410 U.S. 578 (1973), for example, the Court apparently assumed that a law that forced a private party to provide economically valuable services to the government without receiving compensation at fair market value would deprive the claimant of "property," although it stated that this would not effect a compensable taking if the individual had a "public duty" to render these services. The Court did not find it necessary to inquire whether the individual had ever acquired a right under the applicable positive law not to render these services to the government.

Similarly, in Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982), the Court announced that any permanent physical occupation constitutes a taking. The *Loretto* rule does not ask whether the claimant ever acquired a right as a matter of applicable positive law to exclude others from her land or her building. It simply regards a permanent physical occupation as a deprivation of "property."

In Penn Central Transportation Co. v. New York City, 438 U.S. 104 (1978), one of the claimants, UGP Properties, Inc., had never acquired a right, as a matter of local law, to build an office building on top of Grand Central Terminal. UGP had leased the airspace above Grand Central Terminal *after* the challenged landmark law was enacted and *after* Grand Central Terminal was designated as a landmark. Yet the Court did not reject the takings claim for that reason.

63. 477 U.S. 41 (1986).

64. *Id.* at 55.

roring the statutory right to withdraw from the Social Security System upon two years' notice. After this right to terminate was eliminated through a change in the law, the claimants[65] argued that the termination provision was a valuable property right that had been taken without payment of just compensation. The Court responded that no taking occurred because the claimants had acquired no "vested right"—and therefore no "property right"—in the termination clause:

> [T]he "contractual right" at issue in this case bears little, if any, resemblance to rights held to constitute "property" within the meaning of the Fifth Amendment. . . . The [termination] provision constituted neither a debt of the United States nor an obligation of the United States to provide benefits under a contract for which the obligee paid a monetary premium. . . . [T]he provision was simply part of a regulatory program over which Congress retained authority to amend in the exercise of its power to provide for the general welfare. . . . [Thus, it] did not rise to the level of "property."[66]

The Court considered the case particularly clearcut because Congress had *expressly* reserved the power to amend or repeal any provision of the prior law.[67]

In other cases, the Court has found that the government *implicitly* reserved the power to change the law. In *Bowen v. Gilliard,*[68] for example, the Court rejected a takings challenge to a law that required any child entitled to support payments from a noncustodial parent to assign that claim to the government if the custodial parent applied for AFDC benefits. Citing *Bowen v. Public Agencies,*[69] the Court concluded that this law did not deprive the child of any vested rights.[70] The Court stated that "[a]ny right to have the State force a noncustodial parent to make payments is, like so many other legal rights (including AFDC payments themselves), subject to modification by 'the public acts of government.' "[71]

The notion expressed in these two cases, and in a number of earlier Supreme Court cases involving takings claims and "vested rights," is that ordinarily legislation only articulates current policy, and does not purport to bind the government in the future.[72] Thus, it does not create

65. The claimants included the State of California and various public agencies of California.

66. *Bowen v. Public Agencies,* 477 U.S. at 55 (citations omitted).

67. *Id.*

68. 483 U.S. 587 (1987).

69. 477 U.S. 41 (1986).

70. According to the Court, the child had no "vested protectable expectation" that his or her right to support payments would not be modified. *Gilliard,* 483 U.S. at 607.

71. *Id.* at 608 (quoting Reichelderfer v. Quinn, 287 U.S. 315, 319 (1932)).

72. In Reichelderfer v. Quinn, 287 U.S. 315 (1932), for example, the Court held that an Act of Congress authorizing the establishment of Rock Creek Park in the District of Columbia and providing that lands taken for the park were "perpetually dedicated and set apart as a public park

"vested rights." The Court made the same point in a recent case involving the contract clause, stating:

> For many decades, this Court has maintained that absent some clear indication that the legislature intends to bind itself contractually, the presumption is that "a law is not intended to create private contractual or vested rights but merely declares a policy to be pursued until the legislature shall ordain otherwise."[73]

The Supreme Court's takings cases, then, leave the proper definition of property in considerable disarray. To illustrate the confusion created by the Court's varied approaches to the definition of property, consider how the Court might analyze a claim by *A* that the government committed a taking by prohibiting her from building on a portion of her land. What would the Court consider the relevant "property"? Would it be the parcel as a whole? Or would it be a portion of the lot? Or would the Court inquire whether *A* had been deprived of a legal right she previously had to build on the land? If so, would the Court ask whether that right was a "vested right"? There is support for each of these approaches in the Court's takings decisions, yet those decisions provide no criteria for choosing among them.

The Court itself does not seem particularly troubled by, or even aware of, the inconsistency in its definitions of property. Generally, it uses one of its definitions of property without acknowledging that it has used other definitions in other takings cases. Indeed, the Court has on

---

. . . for the benefit and enjoyment of the people of the United States," *id.* at 317, did not vest in neighboring landowners a right to have the government use the land for park purposes only. The Court rejected the neighboring landowners' claim that the Act had granted them rights constituting "property," which could not be taken without payment of just compensation, stating:

> Statutes said to restrict the power of government by the creation of private rights are, like other public grants, to be strictly construed for the protection of the public interest. Thus construed, the dedication of the park, a declaration of a present purpose, does not imply a promise to neighboring land-owners that the park would be continued in perpetuity.

Id. at 321 (citations omitted); *see also* Northern Cheyenne Tribe v. Hollowbreast, 425 U.S. 649 (1976) (construing a federal statute providing that "[in] fifty years, [certain mineral deposits] shall become the property of [certain Indian allottees] or their heirs" as not granting the allottees "vested property rights" that could not be terminated without payment of just compensation); United States v. Jim, 409 U.S. 80 (1972) (construing a federal statute providing that a certain percentage of the royalties generated by oil and gas leases in the Aneth Extension of the Navajo Indian Reservation in Utah were to be expended for the benefit of Indians residing in the Aneth Extension as not granting individual residents of the Aneth Extension "vested property rights" that could not be terminated without payment of just compensation); *cf.* Choate v. Trapp, 224 U.S. 665 (1912) (construing a federal statute providing for the issuance of land patents to certain Indians and providing that such land would be exempt from taxation for a period of time, as granting each patent holder a "vested property right" to the tax exemption, where the statute implemented an agreement between the Indians and the federal government, and where, in conformity with that agreement, each patent holder had relinquished his or her claims to tribal land in return for the issuance of the patent and the grant of the tax exemption).

73. National R.R. Passenger Corp. v. Atchison, T. & S.F. Ry., 470 U.S. 451, 465-66 (1985) (quoting Dodge v. Board of Educ., 302 U.S. 74, 79 (1937)).

occasion referred to more than one definition of property in the same opinion.[74]

C. *The Court's Tests for Determining Whether a Taking Occurred*

The confusion in the Court's definition of property is surpassed only by its confusion in explaining when a taking occurs. The Court has often stated that the ultimate issue in a takings case is whether fairness requires that compensation be paid.[75] Yet rarely does it directly address the fairness issue in takings cases. Instead, the Court applies one of four tests to determine whether governmental action other than a formal exercise of the eminent domain power constitutes a taking: the three-factor *Penn Central* test;[76] the two-part *Agins* test;[77] the "no economically viable use" test (which is the second part of the *Agins* test standing alone);[78] and the *Loretto* per se rule.[79]

The Court's use of these various takings tests is doctrinally unsatisfying. It is difficult to discern from the Court's takings decisions which test the Court would apply in any given case. Moreover, whichever test is used, there is considerable uncertainty as to what each test means. These tests are also unsatisfying in terms of principle, for the Court has not explained how they address the question of when fairness requires that compensation be paid, or why that question should be answered by

74. For example, in Williamson County Regional Planning Commission v. Hamilton Bank, 473 U.S. 172 (1985), the Court concluded that the takings claim was not ripe, regardless of whether the property taken was viewed as "the land itself" or the claimant's "vested right" to build. *Id.* at 190-91 n.12.

As *Williamson County* illustrates, the Court has not even defined "property" in a consistent manner within any particular category of takings cases. (The same point is made in the discussion of Nollan v. California Coastal Commission, 483 U.S. 825 (1987), *infra* text accompanying notes 186-96.)

Nor has each individual Justice adhered to a consistent definition of property. In some cases, like *Williamson County* and *Nollan,* the Justice writing the majority opinion has been unable to settle on a single definition of "property." Moreover, even if a Justice adopts one definition of property in any given case, the same Justice may advocate a different definition of "property" in the next case, without explaining why the definition should change. For example, Justices Brennan, Marshall, Blackmun, and Powell all joined in the Court's opinion in Penn Central Transportation Co. v. New York City, 438 U.S. 104 (1978), stating that the relevant property for takings clause purposes is the "parcel as a whole," and rejecting the view that discrete economically valuable rights created by state law constitute property for takings clause purposes. *See supra* text accompanying notes 32-35. Yet the same four Justices also joined in the majority opinion in Ruckelshaus v. Monsanto Co., 467 U.S. 986 (1984), where the Court viewed an economically valuable legal right created by state law as the relevant property and relied on the definition of property in Board of Regents v. Roth, 408 U.S. 564 (1972). *See supra* text accompanying notes 49-52.

75. *See supra* note 12 and accompanying text.

76. *See infra* text accompanying notes 81-141.

77. *See infra* text accompanying notes 142-55.

78. *See infra* text accompanying notes 156-72.

79. *See infra* text accompanying notes 173-84.

using a number of different and logically incompatible tests.[80]

1. The Three-Factor Penn Central *Test*

Since 1978, the primary test the Court has employed in determining whether a taking has occurred is the three-factor test announced in *Penn Central Transportation Co. v. New York City.*[81] In that case, the Court acknowledged that in its previous takings decisions it had been engaging in "essentially ad hoc, factual inquiries,"[82] and attempted to provide some structure for its future inquiries by identifying three factors it considered particularly significant in determining whether governmental action constituted a taking. Those three factors are the character of the governmental action, the extent to which the government's action interferes with the claimant's reasonable, investment-backed expectations, and the economic impact of the governmental action on the claimant.[83]

However, these three factors have provided little structure to the Court's takings analysis. First, the Court has defined each factor in a variety of ways, without acknowledging the shifts in definition. Second, it is difficult to predict what weight the Court will give to each factor. At different times the Court has actually regarded each one of these so-called "factors" as dispositive of whether a taking occurred. Finally, it is not clear when the *Penn Central* test, rather than some other takings test, is to be applied. Examining the Court's application of each factor illustrates these difficulties.

a. The Character of the Governmental Action

The Court usually employs the "character of the governmental action" factor[84] to ask whether the government physically invaded the

80. As shown below, the Court has not consistently applied a particular takings test in any given category of takings cases. That point is illustrated most vividly by the discussion of Nollan v. California Coastal Commission, 483 U.S. 825 (1987), *infra* text accompanying notes 197-221, and by the discussion of the Court's treatment of "facial" and "as applied" takings challenges, *infra* text accompanying notes 335-42.

Nor has each individual Justice consistently adhered to a particular takings test. For example, Justices Brennan, Stewart, White, Marshall, Blackmun, and Powell all joined in the majority opinion in both Penn Central Transportation Co. v. New York City, 438 U.S. 104 (1978) (adopting the three-factor *Penn Central* test) and Agins v. City of Tiburon, 447 U.S. 255 (1980) (adopting the two-part *Agins* test). Moreover, Justices Brennan, White, Marshall, Blackmun, and Stevens all joined in the majority opinion in Keystone Bituminous Coal Association v. DeBenedictis, 480 U.S. 470 (1987), in which the Court relied on both the *Penn Central* test and the two-part *Agins* test. *See infra* note 152.

81. 438 U.S. 104 (1978).

82. *Id.* at 124.

83. *Id.* Although the Court used the phrase "distinct investment-backed expectations" in *Penn Central,* it generally uses the phrase "reasonable, investment-backed expectations." *See, e.g.,* Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 191 (1985); Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1005 (1984); PrnneYard Shopping Center v. Robins, 447 U.S. 74, 83 (1980).

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

claimant's tangible property or authorized a third person to do so. The Court has stated that in such cases it is more likely to find a taking,[85] explaining that it considers a physical invasion to be "a property restriction of an unusually serious character."[86] In fact, in *Loretto v. Teleprompter Manhattan CATV Corp.*,[87] the Court adopted a per se rule that any permanent physical occupation of private property authorized by government constitutes a taking. The Court stated that in the case of a permanent physical occupation, " 'the character of the government action' not only is an important factor in resolving whether the action works a taking but [is in fact] determinative."[88]

In *Hodel v. Irving*,[89] the Court again concluded that the "character of the governmental action" leaned heavily in favor of finding a taking because the government's action was of an unusually serious nature. The Court held that a federal statute prohibiting the devise or descent of certain small, undivided interests in land was a taking of the decedents' property because the "character of the Government regulation [was] extraordinary"—the government had "virtually [abrogated] the right to pass on a certain type of property . . . to one's heirs."[90] The Court emphasized that "the right to pass on property—to one's family in particular—has been part of the Anglo-American legal system since feudal times."[91]

The Court used the "character of the governmental action" factor in an entirely different manner in *Keystone Bituminous Coal Association v. DeBenedictis*.[92] There the Court focused not on the unusually serious nature of the government's action, but rather on the government's justifi-

85. The Court stated in *Penn Central:* "A 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by government, than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good." *Id.* (citing United States v. Causby, 328 U.S. 256 (1946)).

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

87. 458 U.S. 419 (1982).

88. *Id.* at 426.

89. 481 U.S. 704 (1987).

90. *Id.* at 716.

The statute in *Hodel v. Irving* was designed to deal with the problem of extreme fractionation of ownership of certain Indian lands. The legislative history supported the view that such fractionation generated high administrative costs and that the land often was not put to productive use because of the difficulties of managing property held by a large number of owners. Congress responded to this problem by providing that any 2% or smaller fractional interest in such lands that had produced less than $100 in income in the preceding year would not descend by intestacy or devise upon the death of its owner, but instead would escheat to the tribe. *Id.* at 706-09, 712-13.

91. *Id.* at 716. The Court stated that the case was similar to Kaiser Aetna v. United States, 444 U.S. 164 (1979), where the government had deprived the claimant of the right to exclude others from its property, thereby depriving the claimant of an " 'essential stick[ ] in the bundle of rights that are commonly characterized as property.' " *Hodel v. Irving,* 481 U.S. at 716 (quoting *Kaiser Aetna,* 444 U.S. at 176).

92. 480 U.S. 470 (1987).

cation for its action. In *Keystone,* the Court rejected a takings challenge to a state law prohibiting mining that caused subsidence damage to certain categories of structures, including public buildings and dwellings used for human habitation. The Court emphasized the "nuisance-like" qualities of the prohibited conduct, and stated that the character of the governmental action "lean[ed] heavily against finding a taking" because the government had acted "to arrest what it perceive[d] to be a significant threat to the common welfare."[93] The Court relied heavily on early takings decisions in which it had applied what is often called the "noxious use" test. In *Mugler v. Kansas,*[94] the Court articulated the "noxious use" doctrine:

> A prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or an appropriation of property for the public benefit. . . . The exercise of the police power by the destruction of property which is itself a public nuisance, or the prohibition of its use in a particular way, whereby its value becomes depreciated, is very different from taking property for public use . . . . In the one case, a nuisance only is abated; in the other, unoffending property is taken away from an innocent owner.[95]

Thus, in *Keystone* the Court used the first *Penn Central* factor to inquire whether the government was seeking to prohibit a land use that would be unduly harmful to the public. In doing so, the Court moved from asking whether the government had imposed a serious loss on the claimant to asking whether the government's actions were justified.[96] Although it noted in a footnote that the case did not involve a physical invasion,[97] the Court did not explain why the focus of its inquiry under the "character of the governmental action" factor had shifted so dramatically.

---

93. *Id.* at 485. Although the Court in *Keystone* did not rest its holding solely on the fact that the government was prohibiting nuisance-like conduct, it strongly suggested that this fact alone could have supported its holding. *See infra* note 155 and accompanying text.

94. 123 U.S. 623 (1887).

95. *Id.* at 668-69. The Court in *Keystone* did not comment on the fact that it had explicitly rejected the "noxious use" test in a footnote in *Penn Central,* 438 U.S. at 133 n.30. *See infra* note 324 and accompanying text.

96. In the noxious use cases, which the Court relied on so heavily in *Keystone,* the Court found no takings because of the government's justifications for its actions, even though the government had imposed serious losses on the claimants. In *Mugler,* a distiller who had built a brewery while it was legal to do so claimed that a state law prohibiting the manufacture and sale of intoxicating liquor had taken his property. The Court found no taking even though the value of the claimant's brewery had diminished dramatically because of the challenged law. In Hadacheck v. Sebastian, 239 U.S. 394 (1915), another noxious use case, the Court held that no taking occurred when the City of Los Angeles banned brickyards from a residential area, even though the claimant brickyard owner suffered serious financial losses as a result.

97. *Keystone,* 480 U.S. at 488 n.18.

b. The Extent of the Interference with Reasonable, Investment-Backed Expectations

The second *Penn Central* factor—the extent to which the governmental action interferes with the claimant's reasonable, investment-backed expectations—has also been interpreted in a variety of ways. When the Court discusses this factor, it usually is considering whether the claimant reasonably relied to her economic detriment on an expectation that the government would not act as it did—that is, that it would not deprive her of the property at issue. Sometimes, however, the Court focuses not on the claimant's reliance, but rather on whether the challenged law permits the claimant to make some reasonable use of her tangible resource. In still a third class of cases, the Court equates "reasonable expectations" with "property." Furthermore, the Court sometimes treats the second *Penn Central* factor as decisive, and at other times it does not.

In the majority of cases, the Court concludes that no reasonable expectations were interfered with, since the government's action was foreseeable. The clearest case of foreseeability is when the claimant actually knew the government planned to take such action. For example, in *Ruckelshaus v. Monsanto Co.*,[98] the Court concluded that the government would not interfere with Monsanto's reasonable, investment-backed expectations if it disclosed health and safety data that Monsanto had submitted to the EPA when the law expressly authorized such disclosure.[99] The Court stated that the law put Monsanto "on notice" that such disclosure might occur.[100]

When the challenged governmental action involves a change in the law, the Court sometimes finds that the change in the law was foreseeable given the history of regulation of the industry. For example, in *Connolly v. Pension Benefit Guaranty Corp.*,[101] employers argued that the withdrawal liability provisions of the Multiemployer Pension Plan Amendments Act of 1980 (MPPAA) effected a taking. Those provisions required employers withdrawing from multiemployer pension plans to pay a sum of money to the pension plan to provide adequate funding for vested pension benefits. The Court responded that given the legislation preceding the MPPAA, "[p]rudent employers . . . had more than sufficient notice not only that pension plans were currently regulated, but also that withdrawal itself might trigger additional financial obligations."[102]

98. 467 U.S. 986 (1984).
99. Any trade secrets contained in the data would be lost if such disclosure occurred.
100. *Monsanto*, 467 U.S. at 1006.
101. 475 U.S. 211 (1986).
102. *Id.* at 227.

In other cases, the Court concludes that the government expressly or implicitly reserved the power to change the law. For example, in *Bowen v. Gilliard,*[103] the Court determined that a change in the law that required any child whose family received AFDC benefits to assign his child support payments to the government did not interfere with the child's reasonable, investment-backed expectations. The Court stated:

> The prospective right to support payments, and the child's expectations with respect to the use of such funds, are clearly subject to modification by . . . 'the public acts of government.' . . . Congress, and the States, through their implementing statutes and regulations, have modified those rights through passage of (and the States' compliance with) the DEFRA amendments.[104]

Thus, the second *Penn Central* factor did not support a finding of a taking.[105]

The one circumstance in which the Court is likely to find that reasonable expectations were disappointed is when the government has broken a promise. In *Monsanto,* for example, the Court found that the government would interfere with Monsanto's reasonable, investment-backed expectations (and a taking would occur) if the government disclosed data that Monsanto had submitted to the EPA at a time when the law had "explicitly guaranteed" that the government would not disclose the data.[106]

Although it rarely discusses the term "investment-backed" explicitly, the Court seems to be concerned with whether the claimant parted with something of economic value in reliance on an expectation that the government would not act in a particular manner. In *Hodel v. Irving,*[107] for example, the Court stated that it doubted whether any of the landowners had "investment-backed" expectations that they could pass on their property at death, since the property had "overwhelmingly [been] acquired by gift, descent, or devise" and generally had been leased rather

---

103. 483 U.S. 587 (1987).

104. *Id.* at 607-08 (quoting Reichelderfer v. Quinn, 287 U.S. 315, 319 (1932)).

105. As discussed at *infra* note 119, in *Bowen v. Gilliard* the Court's analysis of "reasonable expectations" and of "vested rights" was intertwined.

106. The Court found that between the 1972 and the 1978 amendments to the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) (currently codified as amended at 7 U.S.C. §§ 136-136y (1988)), the statute "explicitly guaranteed" anyone submitting data to the EPA that the EPA would not disclose to the public any data that both the applicant and the EPA determined constituted trade secrets. According to the Court, "[t]his explicit governmental guarantee formed the basis of a reasonable investment-backed expectation." *Monsanto,* 467 U.S. at 1011. In 1978, Congress amended FIFRA in a manner that authorized the EPA to breach the government's promise. The Court held in *Monsanto* that a taking would occur if the EPA, acting pursuant to the 1978 amendments, were to publicly disclose trade secrets that Monsanto had submitted between the 1972 and 1978 amendments to FIFRA. *Id.* at 1010-14.

107. 481 U.S. 704 (1987).

than improved and used by the owners.[108]

In assessing the reasonableness of the claimant's expectations, the Court seems to consider whether those expectations were reasonable when the investment was made. For example, in discussing the second *Penn Central* factor in *Ruckelshaus v. Monsanto Co.*,[109] the Court stated that "the relevant consideration . . . is the nature of the expectations of the submitter at the time the data were submitted."[110]

At other times, the Court uses the reasonable, investment-backed expectations factor to ask whether the challenged law permits the claimant to make some reasonable use of her tangible resource, rather than to ask whether the claimant relied on a reasonable expectation that the government would not act as it did. In *Penn Central*,[111] for example, the Court emphasized that the challenged law permitted "reasonable beneficial use" of the landmark site and concluded that the claimants' reasonable expectations had not been disappointed.[112] The Court implied that no taking occurs so long as some "reasonable" use of the land is permitted.[113] It did not consider whether the claimants in *Penn Central* had relied on a reasonable expectation that the governmental action com-

108. *Id.* at 715. The Court apparently was saying that it would consider a claimant's expectations to be "investment-backed" if the claimant had expended money or labor or otherwise parted with something of economic value in reliance on those expectations, but a donee could not step into the donor's shoes by claiming that his or her expectations were "investment-backed" because the donor had expended money or labor. Although the Court discussed whether the appellees had investment-backed expectations, *id.*, in context it appears that the Court was actually discussing the claims of the appellees' decedents.

As discussed at *supra* text accompanying notes 89-91, the Court found a taking in *Hodel v. Irving*. Thus, the "interference with reasonable, investment-backed expectations" factor was not dispositive.

109. 467 U.S. 986 (1984).

110. *Id.* at 1013 n.17.

111. 438 U.S. 104 (1978).

112. *Id.* at 138. The Court considered the existing use of the site to be a "reasonable" use. In fact, the Court came close to saying that the claimants could only reasonably expect to use their property for that purpose. The Court stated:

> [The Terminal's] designation as a landmark not only permits but contemplates that appellants may continue to use the property precisely as it has been used for the past 65 years: as a railroad terminal containing office space and concessions. *So the law does not interfere with what must be regarded as Penn Central's primary expectation concerning the use of the parcel.*

Id. at 136 (emphasis added).

The Court went on to state that it was significant that the law permitted Penn Central not only to profit from the Terminal but to obtain a reasonable return on its investment. This statement seems to refer to the third *Penn Central* factor—the severity of the regulation's economic impaet on the claimant. It is sometimes difficult to know, however, whether the Court is discussing the second or third factor, for occasionally the Court seems to use the term "reasonable expectation" to refer to an expectation of obtaining a certain level of economic return from a particular resource.

113. By asking whether some "reasonable" use of the land is permitted, the Court seems to be asking whether the government effectively deprived the claimant of the parcel of land. If so, the second *Penn Central* factor is similar to the "no economically viable use" test, whieh is discussed at *infra* text accompanying notes 156-72.

plained of would not occur.[114]

To add to the confusion, in other cases the Court seems to equate reasonable, investment-backed expectations with "property." In *Williamson County Regional Planning Commission v. Hamilton Bank,*[115] for example, the claimant bank argued that a taking occurred when the government deprived it of a "vested right" to develop its land in a certain manner.[116] The Court referred to this claim both as a claim that the bank's "vested rights" had been destroyed and as a claim that the bank's "expectation interests" had been destroyed. The Court clearly used the phrase "expectation interest" to refer to the second *Penn Central* factor.[117] Yet the Court also suggested that the "expectation interest" might be the relevant unit of property, insofar as the bank based its takings claim on the loss of its vested right to build.[118] Thus, it is not always clear when the Court refers to "expectations" and "vested rights" if the Court is considering whether the claimant was deprived of property or if it is considering whether such a deprivation constituted a compensable taking.[119]

---

114. If it had, the Court would have noted that one of the claimants, UGP Properties, Inc., had acquired the right to build on top of Grand Central Terminal after the Landmark Law had been enacted and after Grand Central Terminal had been designated as a landmark. *Penn Central,* 438 U.S. at 109, 115-16. Although the claimants' proposal to build an office building on top of Grand Central Terminal had not yet been denied, such action was reasonably foreseeable.

In Agins v. City of Tiburon, 447 U.S. 255 (1980), the Court again suggested that "reasonable expectations" are not disappointed so long as some reasonable use of the land is permitted, *id.* at 262, and again did not discuss whether the claimants should have foreseen that the challenged governmental action would occur. The Court discussed interference with "reasonable investment[-backed] expectations" in *Agins* even though it purported to be deciding the case under a two-part test that differed from the three-factor *Penn Central* test. The two-part *Agins* test is discussed at *infra* text accompanying notes 142-55.

115. 473 U.S. 172 (1985).

116. The bank contended that under state law it had acquired a "vested right" to complete a subdivision in accordance with plans previously submitted to the county legislative body.

117. Citing *Penn Central,* the Court stated that two factors of particular significance in determining whether a taking occurred are the economic impact of the challenged action and the extent to which it interferes with reasonable, investment-backed expectations. *Williamson County,* 473 U.S. at 191.

118. The Court stated:

> *[W]hether the "property" taken is viewed as the land itself or respondent's expectation interest in developing the land as it wished,* it is impossible to determine the extent of the loss or interference until the Commission has decided whether it will grant a variance from the application of the regnlations.

Id. at 192 n.12 (emphasis added).

119. Bowen v. Gilliard, 483 U.S. 587 (1987), provides another example of this confusion. In discussing the extent to which the change in the law interfered with the claimant's reasonable, investment-backed expectations, the Court asserted that the child had no vested right to support payments, since this right was subjeet to modification. *Id.* at 607. If the Court was equating a "vested right" with "property" and was saying that no property had been taken, the Court's analysis of the takings claim could have ended there. In fact, the Court strongly suggested that its conclusion that no vested right was involved resolved the takings issue. On the other hand, the Court purported to be analyzing just one of the three *Penn Central* factors, and it did discuss the other two factors.

Under the *Penn Central* test, interference with reasonable, investment-backed expectations is supposedly just one factor for the Court to consider in determining whether a taking occurred. It is not at all clear, however, what role "interference with reasonable expectations" plays in the Court's takings analysis.

When the Court uses the phrase "interference with reasonable expectations" to inquire whether the claimant relied to her economic detriment on an expectation that the government would not act as it did, the Court sometimes treats this as just one factor to consider in determining whether a taking occurred. In *Hodel v. Irving,*[120] for example, the Court found a taking even though it doubted that any investment-backed expectations had been disappointed.[121] Yet in other cases this "factor" is dispositive. In *Monsanto,*[122] for example, where the Court found that disclosure of the data would *not* interfere with Monsanto's reasonable, investment-backed expectations, the Court found no taking without even discussing the other two *Penn Central* factors.[123] Where the Court found that disclosure *would* interfere with Monsanto's reasonable, investment-backed expectations (because the government would be reneging on a promise), the Court found a taking.[124]

These cases raise a number of questions about the role that "interference with reasonable expectations" plays in the Court's takings analysis. Is a finding of interference with reasonable, investment-backed expectations a prerequisite to finding a taking?[125] Is it sufficient to establish a taking?[126] Or must the Court also consider the other two *Penn Central* "factors" before determining whether a taking has occurred?[127]

The answers to these questions vary from case to case as the Court changes its definition of governmental interference with reasonable expectations. When the Court uses the phrase "interference with reason-

120. 481 U.S. 704 (1987).

121. *Id.* at 715.

122. 467 U.S. 986 (1984).

123. The Court stated that "the force of this factor is so overwhelming, at least with respect to certain of the data submitted by Monsanto to EPA, that it disposes of the taking question regarding those data." *Id.* at 1005.

124. Although the Court did refer to the third *Penn Central* factor—the economic impact on the claimant—this plainly was not the key. The same economic impact was present with respect to other data disclosed by the government, yet the Court found no taking because there had been no interference with reasonable, investment-backed expectations.

125. *Monsanto* suggests that interference with reasonable, investment-backed expectations must be established to prove a taking, while *Hodel v. Irving* suggests that a taking can be found even if there is no interference with reasonable, investment-backed expectations.

126. In *Monsanto,* for example, the Court found a taking solely because the government had interfered with Monsanto's reasonable, investment-backed expectations.

127. Under this approach, the Court could find a taking even if there had been no interference with reasonable, investment-backed expectations, so long as one or both of the other factors weighed heavily in favor of finding a taking. This is the approach the Court took in *Hodel v. Irving.*

able expectations" to inquire whether the government permitted the claimant to make any reasonable use of her land, the Court seems to be saying that if some reasonable use is permitted, no taking occurs. Thus, this "factor" alone could establish that no taking had occurred. However, when the Court equates "reasonable expectations" with "property," the Court is asking whether the government deprived the claimant of any property, not whether that deprivation constituted a compensable taking. Interference with reasonable expectations would be a *prerequisite* for establishing a compensable taking if "property" were defined in terms of "reasonable expectations."

c. *The Economic Impact of the Governmental Action*

The final *Penn Central* factor is the economic impact of the governmental action on the claimant. Once again, the Court has been neither clear nor consistent in defining this factor. The Court at times has inquired whether the challenged law greatly diminished the value of the claimant's tangible thing, while at other times it has inquired whether the law denied the claimant all "economically viable use" of the thing. Moreover, although the economic impact on the claimant supposedly is just one factor to be considered, the Court has often suggested that this factor is an independent test for determining whether a taking occurred.

The notion that a taking occurs when regulation greatly diminishes the value of a thing originated in *Pennsylvania Coal Co. v. Mahon.*[128] There a mining company claimed that the Kohler Act, which prohibited mining that caused subsidence under certain structures even if the mining company had previously acquired a legal right to cause such subsidence, effected a taking. The Court agreed, stating in part:

> 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. 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 .... One fact for consideration in determining such limits is the extent of the diminution. When it reaches a certain magnitude, in most if not in all cases there must be an exercise of eminent domain and compensation to sustain the act.[129]

When the Court focuses on "diminution in value," it is not inquiring how great the loss was in dollars. Indeed, the Court has found a taking in a number of cases where the loss, measured in dollars, was quite small.[130] Instead, the Court considers what proportion of the original

128. 260 U.S. 393 (1922).

129. *Id.* at 413.

130. *See, e.g.*, Hodel v. Irving, 481 U.S. 704 (1987); Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982). Justice Stevens remarked in *Hodel v. Irving* that "[t]he Fifth

value of the land (or other tangible resource) has been destroyed as a result of the challenged regulation.

The Court has not taken a consistent position on the role that "diminution in value" plays in its takings analysis. In *Penn Central,* the Court asserted that whether a taking occurs does not depend on how much the challenged law has diminished the value of the land, but rather on whether the challenged law permits the claimant to use the land for some "economically viable" purpose.[131] Thus, the Court seemed to be saying that severe diminution in value does not establish a taking so long as the land can still be put to some economically beneficial use. Yet the Court later relied on the "diminution in value" test in *Keystone,* stating that "our test for [a] regulatory taking requires us to compare the value that has been taken from the property with the value that remains in the property."[132] The Court in *Keystone* did not distinguish between the "diminution in value" test and the "no economically viable use" test. Rather, it appeared to equate the two.[133]

Whether the Court is focusing on diminution in value or denial of all economically viable use, it is often unclear whether the Court views economic impact as an independent test for establishing a taking or simply as one factor to be considered. For example, in *Bowen v. Gilliard,*[134] addressing the "severity of the economic impact" factor, the Court stated, "Whatever the diminution in value of the child's right to have

---

Amendment draws no distinction between grand larceny and petty larceny." 481 U.S. at 727 (Stevens, J., concurring in the judgment).

131. *Penn Central,* 438 U.S. at 131, 138 n.36. As discussed more fully at *infra* text accompanying notes 156-72, one standard that later emerged from this statement in *Penn Central* was that a taking would occur if a law regulating land use permitted "no economically viable use" of the property. However, the Court did not articulate this as an independent test in *Penn Central.* Instead, the Court appeared to be saying that in assessing the economic impact of the law (as one of the three factors to be considered), the issue was not whether the property had diminished in value, but rather whether the regulation permitted the landowner to make any economically beneficial use of the property.

132. *Keystone,* 480 U.S. at 497. This "diminution in value" test suggests that a taking could occur even if the value of the land had not been reduced to zero. By way of contrast, the "no economically viable use" test seems to ask whether the effect of the law would be to reduce the fair market value of the land to close to zero, if a denial of all "economically viable use" means that the landowner is precluded from obtaining any significant economic benefit from owning the land. Thus, the "no economically viable use" test is an extreme version of the diminution in value test.

133. The Court first asserted that a statute regulating land use effects a taking if it denies an owner economically viable use of his land, *id.* at 495, and then stated that "our test for [a] regulatory taking requires us to compare the value that has been taken from the property with the value that remains in the property," *id.* at 497.

An additional source of confusion in *Keystone* was that, in discussing the economic impact of the Subsidence Act on the claimants, the Court at times appeared to be discussing the third *Penn Central* factor and at other times appeared to be discussing the second part of the two-part *Agins* test (which asks whether the challenged land-use regulation denies landowners all economically viable use of their land).

134. 483 U.S. 587 (1987).

support funds used for his or her 'exclusive' benefit may be, it is not so substantial as to constitute a taking under our precedents."[135] Although it supposedly was discussing only one factor in the takings analysis, the Court's language suggested that if the governmental action sufficiently diminished the value of the relevant property, a taking would occur on that basis alone.[136]

On the other hand, in some cases the Court has found no taking even though the challenged law deprived the claimant of all economically viable use of a valuable resource. In *Monsanto,*[137] for example, the Court concluded that if the EPA disclosed health and safety data submitted by Monsanto, the claimant would be completely deprived of its "property," since it would lose its trade secrets in the data.[138] Yet the Court did not consider this sufficient to establish a taking. Similarly, in *Connolly v. Pension Benefit Guaranty Corp.,*[139] the Court stated, "[T]here is no doubt that the Act completely deprives an employer of whatever amount of money it is obligated to pay to fulfill its statutory liability,"[140] and yet the Court held that no taking had occurred.[141]

2. *The Two-Part* Agins *Test*

Although the three *Penn Central* factors have provided the framework for the Court's analysis of many takings cases since 1978, the Court has also relied on other tests to determine whether a taking occurred. In *Agins v. City of Tiburon,*[142] decided only two years after *Penn Central,* the Court announced:

The application of a general zoning law to particular property effects a

135. *Id.* at 607. The Court did not view this as a law that completely deprived the child of an economically valuable claim by forcing a transfer of that claim to the state. Instead, the Court viewed this as a law that simply diminished the value of the child's right to have support payments spent for his or her benefit.

136. Similarly, the Court's statement in *Keystone* that "our test for [a] regulatory taking requires us to compare the value that has been taken from the property with the value that remains in the property," 480 U.S. at 497, suggests that a taking would occur if the governmental action sufficiently diminished the value of the relevant property.

137. 467 U.S. 986 (1984).

138. In discussing the economic impact of the governmental action on Monsanto, the Court stated that "[o]nce the data that constitute a trade secret are disclosed to others . . . the holder of the trade secret has lost his property interest in the data." *Id.* at 1011. Here the "thing" that Monsanto lost, as the Court saw it, was the intangible economically valuable legal right to exclude others from its data.

139. 475 U.S. 211 (1986).

140. *Id.* at 225.

141. The Court explained that the assessment of liability "directly depend[ed] on the relationship between the employer and the plan to which it had made contributions" and would not "always be out of proportion to [the employer's] experience with the plan." *Id.* at 225-26. The Court seemed to be saying that the government was justified in requiring employers to pay the sums required by the statute.

142. 447 U.S. 255 (1980).

> taking if the ordinance does not substantially advance legitimate state interests, see *Nectow v. Cambridge*, 277 U.S. 183, 188 (1928), or denies an owner economically viable use of his land, see *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 138, n.6 (1978).[143]

Thus, in *Agins* the Court created a new, two-part takings test, under which governmental action that meets either part of the test is considered a taking. The Court did not acknowledge that this test differed from the three-factor test it had announced in *Penn Central*.[144]

Again, the meaning of the Court's announced test is unclear. At times the Court has appeared to equate the first part of the *Agins* test with the minimum rationality standard of substantive due process, but it has also used the first part of the test to determine whether the government is preventing nuisance-like conduct.[145] Sometimes the Court has used the second part of the test in conjunction with the first part. At other times, the Court has used the second part as the sole test for determining whether a taking occurred. Finally, in a few cases the Court has suggested that even if a law denied a landowner all economically viable use of his land, a taking would not necessarily occur.

The first part of the *Agins* test provides that a taking occurs if the land-use regulation does not "substantially advance legitimate state interests."[146] In *Agins* the first part of the test appeared to be equivalent to the minimum rationality standard of substantive due process, even though the word "substantially" was used: The Court readily found that the governmental action was not a taking under the first part of its test, since the challenged ordinance furthered a legitimate governmental purpose.[147] The Court did not explain, however, why it applied the mini-

---

143. *Id.* at 260.

144. The Court in *Agins* simply remarked that "no precise rule determines when property has been taken." *Id.* at 260-61. In later cases, the Court announced that the "no economically viable use" standard (the second part of the *Agins* test) should be used when a law is challenged on its face, while the three-factor *Penn Central* test should be used when a law is challenged as applied in a particular case. *See infra* text accompanying notes 335-37. In *Agins* itself, however, the Court did not state that a different test should be used when the claimant raises a facial challenge rather than an "as applied" challenge. In fact, the Court said that its test was to be used to determine whether "[t]he application of a general zoning law to particular property" effects a taking. *Agins*, 447 U.S. at 260.

For a discussion of whether facial and as applied takings challenges should be analyzed under two different tests, see *infra* text accompanying note 338.

145. As discussed at *infra* note 154 and accompanying text, these two inquiries are not identical.

146. *Agins*, 447 U.S. at 260.

147. The Court stated that the first part of the test was satisfied because the challenged ordinance, which reduced the permitted density of residential use, would "protect the residents of Tiburon from the ill effects of urbanization," which the Court characterized as a "legitimate governmental goal[ ]." *Id.* at 261.

The sole authority cited for the first part of the *Agins* test was a substantive due process case, Nectow v. Cambridge, 277 U.S. 183 (1928). There the Court considered whether certain use restrictions in a zoning ordinance failed to promote the general welfare and therefore "deprived [the

mum rationality standard of substantive due process to determine whether a taking had occurred.[148]

In a number of later cases, the Court dropped the first part of the *Agins* test without explanation, and simply stated that a taking would occur if a land-use regulation denied landowners the economically viable use of their land.[149] Then in *Keystone Bituminous Coal Association v. DeBenedictis,*[150] the Court resurrected the first part of the *Agins* test, stating that a taking would occur if the challenged law did not substantially advance legitimate governmental interests *or* if it denied landowners the economically viable use of their land.[151]

The Court in *Keystone* interpreted the first part of the *Agins* test in two different ways.[152] First, the Court appeared to equate the first part of the *Agins* test with the minimum rationality standard of substantive due process. The Court asked whether the Subsidence Act served a legitimate public purpose and readily concluded that it did.[153] Then the Court inquired whether the government was seeking to prevent a "nuisance-like" or "noxious" land use. Thus, the Court did not merely ask whether the government's action promoted the common good, but rather whether it did so in a particular way—by preventing nuisance-like

---

claimant] of his property without due process of law." *Id.* at 185. In *Nectow,* decided in 1928, the Court stated that it was deferring to the legislative body's judgment, *id.* at 187-88, but did not do so by today's standards. However, the Court in *Agins* did not suggest that it would adopt a non-deferential stance in applying the first part of its test.

148. The minimum rationality standard plainly would be applied to determine whether a taking was for a "public use," since the Court has stated that the public use requirement of the takings clause is "coterminous" with the minimum rationality standard of substantive due process. Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229, 240 (1984).

149. *See, e.g.,* Hodel v. Indiana, 452 U.S. 314 (1981); Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264 (1981). As discussed at *infra* text accompanying notes 157-59, in these cases the Court stated that the "no economically viable use" test would be applied as the sole test for a facial takings challenge.

150. 480 U.S. 470 (1987).

151. *Id.* at 485.

152. *Keystone,* however, did not involve a straightforward application of the two-part *Agins* test. The Court combined the two-part *Agins* test with the three-factor *Penn Central* test, without acknowledging that its approach varied from that employed in prior cases. In discussing the public purpose served by the Subsidence Act, the Court not only found that a "substantial" and "legitimate" state interest was being served (showing that the first part of the *Agins* test had been met), but also stated that the "character of the governmental action" leaned heavily against finding a taking (showing that the first *Penn Central* factor supported its holding). *Keystone,* 480 U.S. at 485-93.

Yet the *Penn Central* test and the two-part *Agins* test are analytically quite different. Under the *Penn Central* test, three factors must be weighed, while under the *Agins* test, a taking occurs if the land-use regulation meets *either* the first or the second part of the test. Moreover, the three *Penn Central* factors appear to be quite different from the two parts of the *Agins* test.

153. The Court contrasted the Subsidence Act with the Kohler Act, which was challenged in Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922). According to the *Keystone* majority, in *Pennsylvania Coal* the Court concluded that the Kohler Act had been enacted purely for private benefit. *Keystone,* 480 U.S. at 485-88.

conduct.[154]

The Court in *Keystone* concluded that the challenged statute was directed at nuisance-like activity. Under the "noxious use" cases, this alone would have established that no taking had occurred. Under the two-part *Agins* test, however, the Court could not conclude that no taking had occurred without inquiring whether the challenged law would deprive landowners of all economically viable use of their land. Thus, the Court in *Keystone* went on to address that issue, although it came close to finding no taking solely because the government was preventing nuisance-like conduct.[155]

3. *The "No Economically Viable Use" Test*

The second part of the *Agins* test—the requirement that the land-use regulation not deny landowners all economically viable use of their land—sprang from a footnote in *Penn Central.* In that footnote, the Court noted that New York City had conceded that Penn Central would be afforded relief under the Landmark Law if Grand Central Terminal ceased to be "economically viable."[156] In *Agins,* the Court converted this comment into the second part of its takings test.

In a number of takings cases that followed *Agins* and preceded *Keystone* and *Nollan,* the Court stated that *the only test* for when a land-use regulation effects a taking (at least on its face) is whether the law denies landowners all "economically viable use" of their land. The clearest announcement that the "no economically viable use" test would be applied as the sole test for a facial takings challenge appeared in *Hodel v.*

---

154. The Court recognized that asking whether the government was preventing nuisance-like conduct was not equivalent to asking whether the governmental action furthered a legitimate public purpose:

> [A]s the current CHIEF JUSTICE has explained: "The nuisance exception to the taking guarantee is not coterminous with the police power itself." *Penn. Central Transportation Co.*, 438 U.S., at 145 . . . . This is certainly the case in light of our recent decisions holding that the "scope of the 'public use' requirement of the Takings Clause is 'coterminous with the scope of a sovereign's police powers.' " See *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1014 (1984) (quoting *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 240 (1984)).

Keystone, 480 U.S. at 491 n.20.

155. The Court made a strong argument that this was a sufficient basis for finding no taking:

> Long ago it was recognized that "all property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community," and the Takings Clause did not transform that principle to one that requires compensation whenever the State asserts its power to enforce it. . . . Courts have consistently held that a State need not provide compensation when it diminishes or destroys the value of property by stopping illegal activity or abating a public nuisance.

Keystone, 480 U.S. at 491-92, 492 n.22 (quoting Mugler v. Kansas, 123 U.S. 623, 665 (1887)) (citations omitted). The Court did not explain why, in determining whether fairness required the payment of compensation, it was required to proceed further, once it had determined that the government was preventing nuisance-like conduct.

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

Virginia Surface Mining & Reclamation Association.[157] There, the Court stated that if the application of a statute to a particular parcel of land is challenged as a taking, the Court uses the *Penn Central* factors. But in the case before it,

> the only issue . . . is whether the "mere enactment" of the Surface Mining Act constitutes a taking. The test to be applied in considering this facial challenge is fairly straightforward. A statute regulating the uses that can be made of property effects a taking if it "denies an owner economically viable use of his land . . . ." The Surface Mining Act easily survives scrutiny under this test.[158]

The Court applied the same standard in *Hodel v. Indiana,*[159] decided the same day.

In each case, the Court readily found that the governmental action was not a taking under the "no economically viable use" test. In *Virginia Surface Mining,* the Court stated that the steep-slope provisions of the Surface Mining Act did not, on their face, "prevent beneficial use of coal-bearing lands."[160] The steep-slope provisions merely regulated surface coal mining, rather than categorically prohibiting it, and did not regulate alternative uses to which the land might be put. In *Hodel v. Indiana,* the Court found that the "prime farmland" provisions of the Surface Mining Act did not, on their face, "deprive a property owner of economically beneficial use of his property."[161] Thus, for a claimant to establish a taking under the "no economically viable use" test, he evidently must show that the challenged law prevents landowners from obtaining any significant economic benefit from owning their land.

In *San Diego Gas & Electric Co. v. San Diego,*[162] Justice Brennan, joined in dissent by three other Justices, explained the "no economically viable use" test in the following manner:

> Police power regulations such as zoning ordinances and other land-use restrictions can destroy the use and enjoyment of property in order to promote the public good just as effectively as formal condemnation or physical invasion of property. From the property owner's point of view, it may matter little whether his land is condemned or flooded, or whether it is restricted by regulation to use in its natural state, if the effect in both

157. 452 U.S. 264 (1981).

158. *Id.* at 295-96 (quoting Agins v. City of Tiburon, 447 U.S. 255, 260 (1980)).

The Court relied on this statement from *Virginia Surface Mining* later, in *Keystone,* but only after it had already addressed the first part of the *Agins* test. In Nollan v. California Coastal Commission, 483 U.S. 825 (1987), the Court applied both parts of the *Agins* test without even discussing the fact that the case did not involve a facial challenge.

159. 452 U.S. 314 (1981).

160. *Virginia Surface Mining,* 452 U.S. at 296.

161. Hodel v. Indiana, 452 U.S. at 335.

162. 450 U.S. 621 (1981).

cases is to deprive him of all beneficial use of it.[163]

Thus, the focus is on what the government did to *A*—it effectively took away all of *A*'s thing.[164]

The Court has often suggested that a law that deprives a landowner of all economically viable use of his land is necessarily a taking.[165] For example, in *Williamson County Regional Planning Commission v. Hamilton Bank,*[166] the Court assumed that a taking would occur if, once a final decision had been made on how the law applied to their property, the claimants were " 'unable to derive economic benefit' from the land."[167] Similarly, in *MacDonald, Sommer & Frates v. Yolo County,*[168] the Court assumed that a taking would occur if, once a final decision had been made, it were evident that the claimant had been denied all economically viable use of his land.[169]

Occasionally, however, the Court suggests that in some cases the government might be justified in denying a landowner all economically viable use of his land, so that fairness would not require the payment of compensation. In *First English Evangelical Lutheran Church v. County of Los Angeles,*[170] for example, a landowner claimed that a taking occurred when the County of Los Angeles adopted an interim ordinance prohibiting the construction or reconstruction of buildings in an area that had been swept by floods. Since the buildings on the claimant's land had been destroyed by a flood, and the ordinance prohibited him from rebuilding these structures, the landowner claimed that while the interim ordinance was in effect it denied him all economically viable use of his land.[171] The Court suggested that even if the ordinance denied the land-

163. *Id.* at 652 (Brennan, J., dissenting) (footnote omitted).

164. As discussed at *supra* text accompanying notes 36-38, when the Court inquires whether the challenged law deprives a landowner of all economically viable use of his land, it defines the relevant unit of property in terms of the parcel of land "as a whole" or some other larger tangible thing. This is true whether the Court is applying the "no economically viable use" test by itself or as the second part of the two-part *Agins* test.

165. At times the Court has even suggested that this is the only way to establish a taking. For example, in United States v. Riverside Bayview Homes, Inc., 474 U.S. 121 (1985), the Court stated that "*[o]nly* when a permit is denied and the effect of the denial is to prevent 'economically viable' use of the land in question can it be said that a taking has occurred." *Id.* at 127 (emphasis added).

166. 473 U.S. 172 (1985).

167. *Id.* at 191. The Court in *Williamson County* did not assume that this was the only way to establish a taking. It also referred to the *Penn Central* test, stating that it was "express[ing] no view of the propriety of applying the 'economic viability' test when the taking claim is based upon . . . a theory of [destruction of the claimant's] 'vested rights' or 'expectation interest.' " *Id.* at 192 n.12.

168. 477 U.S. 340 (1986).

169. Indeed, the Court concluded its opinion in *Yolo County* by stating that "the holdings of both courts below leave open the possibility that some development will be permitted, and thus . . . leave us in doubt regarding . . . whether appellant's property has been taken." *Id.* at 352-53 (footnote omitted).

170. 482 U.S. 304 (1987).

171. *Id.* at 311, 321. On remand, the California Court of Appeal, discussing whether the

owner all economically viable use of his land, it would not necessarily effect a taking, since the ordinance had been enacted as a safety measure.[172] Thus, the Court turned from asking *what* the government had done to the claimant, to inquiring *why* the government had acted.

4. *The* Loretto *Per Se "Permanent Physical Occupation" Rule*

The one area of takings law where the Court has attempted to provide a bright-line rule is where the government has physically invaded the claimant's land (or other tangible thing) or has authorized third parties to do so. In *Loretto v. Teleprompter Manhattan CATV Corp.*,[173] the Court announced a per se rule that any "permanent physical occupation" of an owner's property authorized by government constitutes a taking. A New York statute required landlords to permit the installation of cable facilities to enable their tenants to receive cable television service and to facilitate connections to other buildings. The Court applied the per se rule and found a taking when a cable television company, acting under the authority of this statute, installed its cable facilities on the roof and side of a landlord's apartment building.

The Court announced in *Loretto* that any "permanent physical occupation" of property is an intrusion of such an "unusually serious character"[174] that it constitutes a taking "without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner."[175] Thus, in *Loretto* the Court focused not on the government's justification for its action, but exclusively on what the government had done to the claimant.[176]

---

interim ordinance had denied the claimant all economically viable use of his land, stated that *most* of the buildings had been destroyed by the flood and that the interim ordinance did not affect eight of the claimant's twenty-one acres of land because they were not in the flat land near the river channel. First English Evangelical Lutheran Church v. County of Los Angeles, 210 Cal. App. 3d 1353, 1368-69, 258 Cal. Rptr. 893, 903 (1989). The Supreme Court, however, assumed for the purposes of its decision in *First English* that the interim ordinance had denied the claimant all use of his property. 482 U.S. at 321.

172. The Court stated:

> We [ ] have no occasion to decide whether the ordinance at issue actually denied appellant all use of its property or whether the county might avoid the conclusion that a compensable taking had occurred by establishing that *the denial of all use was insulated as a part of the State's authority to enact safety regulations.*

First English, 482 U.S. at 313 (emphasis added) (footnote omitted) (citing Goldblatt v. Hempstead, 369 U.S. 590 (1962); Hadacheck v. Sebastian, 239 U.S. 394 (1915); Mugler v. Kansas, 123 U.S. 623 (1887)).

On remand, the California Court of Appeal concluded that the interim ordinance did not effect a taking. The primary ground for its decision was that the ordinance was designed to protect the public health and safety. *First English*, 210 Cal. App. 3d at 1373-74, 258 Cal. Rptr. at 906-07.

173. 458 U.S. 419 (1982).

174. *Id.* at 426.

175. *Id.* at 434-35.

176. The Court considered the injury to the claimant to be particularly serious not because of the dollar loss involved, but because of the intrusiveness of the government's action.

The *Loretto* rule distinguishes between "temporary physical invasions" and "permanent physical occupations." The Court stated, "Not every physical *invasion* is a taking. . . . [T]emporary limitations are subject to a more complex balancing process to determine whether they are a taking. The rationale is evident: they do not absolutely dispossess the owner of his rights to use, and exclude others from, his property."[177] The Court explained that the "more complex balancing process" applicable to temporary physical invasions was the three-factor *Penn Central* test, and that the "character of the governmental action" factor would weigh in favor of finding a taking in temporary physical invasion cases.[178]

The Court characterized two prior cases involving public access requirements as cases involving "temporary" physical invasions. In one, *Kaiser Aetna v. United States,*[179] the Court found a taking; in the other, *PruneYard Shopping Center v. Robins,*[180] it did not.[181] As examples of cases involving "permanent" physical occupations, the Court referred to several early Supreme Court decisions in which governmental action that resulted in the permanent flooding of privately owned land had been held to have effected a taking. It also relied on a number of cases characterizing the installation of telegraph and telephone lines as physical invasions requiring the payment of compensation.[182]

Turning to the case before it, the Court found that the installation of cable facilities had "permanently appropriated" space on the roof and side of the claimant's building and thus constituted a taking. It declared that the case involved a "permanent" physical occupation even though the landlord could terminate the physical occupation by ceasing to rent the property.[183] The Court also stated that the *Loretto* rule applied even though a property owner could avoid the physical occupation by not renting his property, for "a landlord's ability to rent his property may not be conditioned on his forfeiting the right to compensation for a physical occupation."[184]

---

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

178. *Id.* at 434.

179. 444 U.S. 164 (1979).

180. 447 U.S. 74 (1980).

181. In *Kaiser Aetna,* the Court found that a taking occurred when the government required the claimants to grant members of the public access to their marina because the claimants had connected the marina to a navigable bay. In *PruneYard,* the Court held that provisions of the California Constitution permitting individuals to exercise free speech and petition rights at a privately-owned shopping center did not effect a taking.

182. *Loretto,* 458 U.S. at 428-30.

183. *Id.* at 439.

184. *Id.* at 439 n.17.

By way of contrast, in FCC v. Florida Power Corp., 480 U.S. 245 (1987), the Court held that the *Loretto* per se rule did not apply to a federal statute regulating the rates utility companies may charge cable television companies that install cables on utility poles, since the utility companies were

D. *Applying the Court's Takings Doctrine to* Nollan v. California Coastal Commission

Let us return now to the takings claim presented in *Nollan.*[185] Putting aside for the moment the Supreme Court's actual decision in *Nollan,* how might a lower court judge analyze such a case using the Court's takings doctrine?

The first issue would be whether the government was depriving the Nollans of any "property" within the meaning of the takings clause. If not, the government's action could not be considered a taking. Yet it would be difficult to predict how the Court would define the relevant "property" in *Nollan.*

Since the Court often insists that the relevant unit of property is the parcel of land as a whole, it might consider the property at issue to be the Nollans' entire beachfront lot. Under that approach, the Court would find no taking, for requiring the Nollans to provide lateral public beach access would not effectively deprive the Nollans of the entire parcel of land.[186]

Or the Court might consider the strip of land actually used by the public to be the property at issue, just as the Court in *Loretto* seemed to view the area actually occupied by the cable equipment to be the relevant unit of property. If so, would the challenged governmental action effectively deprive the Nollans of that property? Arguably not, for the Nollans could still use that strip of land for some purposes.[187]

It is also possible that the Court would view the property at issue as certain economically valuable legal rights that the Nollans had previously possessed, rather than the land itself. The Court might say that the government was forcing the Nollans to give up their pre-existing legal right to exclude others from this strip of land, thus depriving them of one of the sticks in their bundle of rights. However, when the Nollans bought their land, state law already provided that they would have to give up an easement if they wished to build.[188] Thus, if property were viewed as solely a creature of positive law, one could argue that no

---

not *required* to rent space to the cable television companies. Thus, the government did not require the claimants to submit to a physical occupation.

185. 483 U.S. 825 (1987).

186. If the Court were to apply the "no economically viable use" test, for example, it should find no taking because the beach access requirement would not deprive the Nollans of all economically viable use of the parcel *as a whole. See infra* text accompanying note 208.

187. By way of contrast, in *Loretto* the Court found that the claimant could not use the physical area occupied by the cable equipment for any purpose. Thus, the claimant had effectively been deprived of that physical area. The Court stated that in the case of a permanent physical occupation, "the owner has no right to possess the occupied space himself, . . . [he] cannot exclude others [from the space, and he] can make no nonpossessory use of the property." *Loretto,* 458 U.S. at 435-36.

188. Thus, the government might argue that the Nollans claim they should have the legal right to build without giving up an easement, yet they never acquired that right as a matter of state law.

property was taken from the Nollans, and thus no compensable taking occurred.

On the other hand, the Court might adopt the position taken by Justice Marshall in *PruneYard Shopping Center v. Robins*[189] that constitutionally protected property is not defined solely by positive law.[190] The Court then might conclude that the Nollans had a right to build on their land without providing lateral public access even if state law never granted them that right.

In fact, when the Supreme Court decided *Nollan,* it defined the relevant "property" in a number of different ways. During much of the opinion, the Court viewed *Nollan* as a situation in which a discrete legal right—the right to exclude others—had been taken.[191] The Court described this as a case in which one stick in the Nollans' bundle of rights—the "right to exclude"—had been taken,[192] and it referred to "the appropriation of a public easement" as a taking of a property interest.[193] Yet the Court also indicated that a taking would occur if the government's action deprived the Nollans of all economically viable use of their land,[194] and the relevant property is the parcel of land as a whole when the Court applies the "no economically viable use" test.[195] Finally, the Court stated that public access across the Nollans' land constituted a physical occupation comparable to that involved in *Loretto.*[196] This suggests that the relevant property in *Nollan* was the land traversed by the public, since the Court in *Loretto* apparently considered the physical space actually occupied to be the property taken.

Let us set aside for the moment the question of what "property" the Nollans arguably would lose if forced to provide public beach access. The second issue the lower court judge would face is which of the Court's various takings tests should be applied in *Nollan.*

First, does *Nollan* involve a "permanent physical occupation," so that the *Loretto* per se rule would apply? Given the Court's opinion in *Loretto,* one would think the answer would be "no." In *Loretto* the Court stated that the public access easements imposed in *Kaiser Aetna v.*

189. 447 U.S. 74 (1980).

190. *See supra* text accompanying note 59.

191. The Court did not inquire whether this right was a "vested right."

192. *Nollan,* 483 U.S. at 831. Arguably, the Court meant to refer to a right to exclude that is recognized as "property" under the Constitution apart from the provisions of state law, since the Court referred to the right to exclude as " 'one of the most essential sticks in the bundle of rights that are commonly characterized as property.' " *Id.* (quoting *Loretto,* 458 U.S. at 433).

193. *Id.*

194. *Id.* at 834.

195. *See supra* text accompanying notes 36-38.

196. *Nollan,* 483 U.S. at 831-32.

United States[197] and *PruneYard Shopping Center v. Robins*[198] were "temporary" rather than "permanent" physical invasions and thus were not takings per se.[199]

Yet in *Nollan* the Court announced that the public access easement should be viewed as a "permanent physical occupation."[200] The Court attempted to distinguish *Kaiser Aetna* on the questionable ground that the analysis in that case "was affected by traditional doctrines regarding navigational servitudes."[201] *PruneYard* was termed a case in which "permanent access was not required."[202]

If the public access easement in *Nollan* were viewed as a "permanent physical occupation," would a per se taking be established? Based on *Loretto,* the answer should be "yes." The government might argue that the per se rule should not apply because the Nollans could avoid granting an easement by not building on their land. But the Court responded to a similar argument in *Loretto* by asserting that "a landlord's ability to rent his property may not be conditioned on his forfeiting the right to compensation for a physical occupation."[203] Thus, the Court might be expected to respond in *Nollan* that "a [landowner]'s ability to [build on] his property may not be conditioned on his forfeiting the right to compensation for a physical occupation."

Yet the Court in *Nollan* did not apply the *Loretto* per se rule. The Court stated that the *Loretto* rule would have applied if the government had simply required the Nollans to dedicate an easement, but since the

197. 444 U.S. 164 (1979). *Kaiser Aetna* is discussed at *supra* note 181.

198. 447 U.S. 74 (1980). *PruneYard* is discussed at *supra* note 181.

199. The Court stated in *Loretto* that "the easement of passage [in *Kaiser Aetna*], not being a permanent occupation of land, was not considered a taking *per se.*" *Loretto,* 458 U.S. at 433. Similarly, the public access requirement in *PruneYard* was said to involve a "temporary" physical invasion. *Id.* at 434. Indeed, the Court remarked that the fact that no taking occurred in *PruneYard* "underscores the constitutional distinction between a permanent occupation and a temporary physical invasion." *Id.*

Moreover, at the close of its opinion in *Loretto,* the Court stated, "[W]hether a permanent physical occupation has occurred presents relatively few problems of proof. The placement of a *fixed structure* on land or real property is an obvious fact that will rarely be subject to dispute." *Id.* at 437 (emphasis added). Under this definition of a "permanent physical occupation," it is clear that no permanent physical occupation was involved in *Nollan.*

200. The Court explained:

> We think a "permanent physical occupation" has occurred, for purposes of [the *Loretto* per se] rule, where individuals are given a permanent and continuous right to pass to and fro, so that the real property may continuously be traversed, even though no particular individual is permitted to station himself permanently upon the premises.

Nollan, 483 U.S. at 832 (footnote omitted).

201. *Id.* at 832 n.1. The Court did not explain how the navigational servitude issues affected the determination of whether a "permanent" or "temporary" physical invasion was involved.

202. *Id.* Yet the claimants in *PruneYard* were required to grant access to those exercising free speech rights under the California Constitution for as long as the claimants continued to operate a shopping center.

203. *Loretto,* 458 U.S. at 439 n.17.

Nollans had to dedicate an easement only if they wished to build, the *Loretto* rule did not apply.[204]

If the *Loretto* rule were not applicable in *Nollan,* one would think that the Court would have applied the three-factor *Penn Central* test. The Court has stated on several occasions that the three-factor *Penn Central* test should be used when a land-use regulation is challenged "as applied,"[205] and the Nollans claimed that the public access provisions of the California Coastal Act as applied by the California Coastal Commission in their particular case effected a taking. In fact, two of the dissenting justices in *Nollan*—Justices Brennan and Marshall—did rely on the *Penn Central* three-factor test.[206] They argued that no taking occurred because there had been no interference with reasonable, investment-backed expectations.[207] The majority, however, did not apply the *Penn Central* test.

If neither the *Loretto* per se rule nor the *Penn Central* three-factor test were applied, what other test might the Court use to determine whether a taking occurred? Prior to *Keystone,* the other alternative would have been the "no economically viable use" test.[208] If that test were applied in *Nollan,* the Court presumably would not find a taking. When the Court applies the "no economically viable use" test, it defines the property at issue as the parcel as a whole, and the government was not depriving the Nollans of all economically viable use of the entire parcel of land.

Yet in *Keystone* the Court revived the two-part *Agins* test. If that test were applied in *Nollan,* would the Court find a taking? It would depend on how the Court interpreted the first part of the test. If the Court merely asked whether the government was furthering a legitimate

204. *Nollan,* 483 U.S. at 831-32, 834. If the Court had concluded that the *Loretto* rule applied in *Nollan,* then many development exactions would constitute per se takings. For example, developers of residential subdivisions are often required to dedicate land to be used as public parks in the subdivision. This requirement is not generally regarded as a compensable taking.

205. *See supra* text accompanying note 158; *infra* text accompanying notes 335-37.

206. *Nollan,* 483 U.S. at 853-61 (Brennan, J., dissenting).

Yet the same Justices stated that no taking would have occurred if the Coastal Commission had simply denied the Nollans' request for a development permit, since the government would not have deprived the Nollans of all economically viable use of their property. They quoted with approval the Court's statement in United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 127 (1985), that "[o]nly when a permit is denied and the effect of the denial is to prevent 'economically viable' use of the land in question can it be said that a taking has occurred." *Nollan,* 483 U.S. at 845 n.2 (Brennan, J., dissenting).

207. *Nollan,* 483 U.S. at 857-60 (Brennan, J., dissenting). As the dissenters saw it, the Nollans were "on notice" that the government would require them to give up a lateral public access easement, and that fact should have been determinative, just as it was in *Monsanto. Id.* at 858-60.

208. Yet the "no economically viable use" test presumably would not be applicable in *Nollan,* since the Court had stated that this test was to be used for *facial* challenges to land-use regulation. *See supra* text accompanying note 158; *infra* text accompanying notes 335-37.

public purpose, the Court should find no taking in *Nollan,* for the government was furthering a legitimate public purpose by providing more public access along the coastline.[209]

In *Keystone,* however, the Court also used the first part of the *Agins* test to inquire whether the government was seeking to prevent a noxious use or nuisance-like conduct. If that question were asked in *Nollan,* would the Court find a taking? Could the Nollans' proposed conduct be considered noxious or wrongful or unduly harmful to the public?[210] The answer should be "no."

In *Nollan,* the government argued that building a single-family residence would harm the public and that the public beach access exaction was a method of reducing that harm.[211] In effect, the government claimed that building a single-family residence on this lot would be nuisance-like conduct unless the Nollans reduced the harmful effects of building to an acceptable level by providing public access. Even if one were to accept that the Nollans' proposed residence would be a "nuisance" because it would reduce some people's desire to use the beach (by blocking their view of the beach from the highway), it is difficult to see how that harm would be remedied by letting other people who are using the beach walk across the Nollans' land.[212] Thus, if the first part of the *Agins* test requires the Court to ask whether the government is preventing a noxious or wrongful or unduly harmful land use, the beach access exaction should be considered a taking.

In fact, the Court found a taking in *Nollan* because it considered this "mitigation of harm" theory to be implausible. The Court rejected the Coastal Commission's argument that this condition was "reasonably related to the public need or burden that the Nollans' new house [would] create[ ] or to which it [would] contribute[ ]."[213] Although the Court agreed that it was proper to focus on the relationship between the public access requirement and whatever burden the Nollans' new home would impose on the public,[214] the Court found it "impossible to understand"

209. Indeed, the Court explicitly acknowledged in *Nollan* that providing public access along the shoreline was a valid "public purpose." 483 U.S. at 841-42.

210. In the "noxious use" cases, which are discussed at *supra* notes 94-96 and accompanying text, the Court evidently concluded that no compensation was due because the government was stopping the claimant from doing something that was considered wrongful. In Mugler v. Kansas, 123 U.S. 623 (1887), for example, the Court stated that one must distinguish between taking property away from an "innocent owner" and prohibiting a use that is "injurious to the health, morals or safety of the community." *Id.* at 668-69.

211. *Nollan,* 483 U.S. at 828-29.

212. The Coastal Commission also argued that the Nollans' new house would lead to increased private use of the beach. *Id.* at 829. Again, it is difficult to see how that problem would be solved by requiring the Nollans to provide lateral public beach access.

213. *Id.* at 838.

214. The Court arrived at this conclusion by first *assuming* that for various "legitimate police-power purpose[s]," the Coastal Commission could simply prohibit the Nollans from building a new

how providing lateral beach access would remedy any of the harm that the new home allegedly would cause.[215]

As the Court expressed it, the beach access exaction effected a taking because the government's action did not "substantially advance legitimate state interests"[216] and thus failed to satisfy the first part of the *Agins* test. But the permit condition directly advanced the legitimate goal of obtaining public beach access.[217] The Court's concern could more accurately be summed up by saying that the government was advancing this governmental interest by unfair means. Thus, one difficulty with the two-part *Agins* test, as applied in *Nollan,* is that the articulated doctrine does not capture the nature of the Court's inquiry.

The Court rejected out of hand the government's second line of defense—that no taking occurred because the permit condition was imposed as " 'part of a comprehensive program to provide continuous public access along Faria Beach as the lots undergo development or redevelopment.' "[218] The Court responded that while this comprehensive program might well be beneficial to the public, "if [California] wants an easement across the Nollans' property, it must pay for it."[219] Thus, as the Court saw it, the fact that the government was seeking to promote the common good did not establish that no compensable taking had occurred.

Finally, the Court rejected the dissent's argument that no taking occurred because the Nollans were given notice of the government's intended action.[220] The Court stated that a "unilateral claim of entitlement" by the government could not alter the Nollans' property rights. Nor could the case be regarded as one in which the Nollans were voluntarily exchanging their easement for the right to build. As the Court saw it, "the right to build on one's own property—even though its exercise

---

home on their lot. *Id.* at 836. The Court then reasoned that if the Commission could deny a permit for a particular reason, it should be able to take the less drastic step of issuing the permit conditionally if the condition would serve the same legitimate purpose as the refusal to issue the permit. The Court stated, "[U]nless the permit condition serves the same governmental purpose as the development ban, the building restriction is not a valid regulation of land use but 'an out-and-out plan of extortion.' " *Id.* at 837 (quoting J.E.D. Assocs., Inc. v. Atkinson, 121 N.H. 581, 584, 432 A.2d 12, 14-15 (1981)). The Court stated that if the "essential nexus" between the permit condition and the justification for a development ban is absent, "[t]he purpose then becomes, quite simply, the obtaining of an easement to serve some valid governmental purpose, but without payment of compensation," which clearly is not a " 'legitimate state interest[ ]' in the takings and land use context." *Id.*

215. *Id.* at 838.

216. *Id.* at 834-42.

217. As noted above, the Court recognized that providing lateral public beach access was a legitimate public purpose. *See supra* note 209.

218. *Nollan,* 483 U.S. at 841 (citing Joint Appendix at 68).

219. *Id.* at 842.

220. *See supra* note 207.

can be subjected to legitimate permitting requirements—cannot remotely be described as a 'governmental benefit.' "[221]

In the end, then, the Court decided *Nollan* in a manner that is consistent with the analysis one might expect if one were to consider the case in terms of societal notions of fairness, without regard to the Court's elaborate takings doctrine.[222] The Court assumed that the Nollans, having bought this land from the prior owners, had a right to build on it if they would not be unduly harming the public. The Court rejected the implausible claim that the public access requirement was designed to undo the harm the Nollans would cause by blocking the public's view of the beach. Finally, it rejected the argument that merely because the public would benefit by walking across the Nollans' land, fairness did not require the payment of compensation.

Yet a lower court judge who attempted to decide *Nollan* using the Court's pre-existing takings doctrine would not have been likely to analyze the case in the same manner. As illustrated above, the judge would have found it very difficult to predict which definition of "property" and which test for a "taking" the Court would use. Moreover, some of the paths the judge might have taken under the Court's takings doctrine would have led to the conclusion that no taking occurred in *Nollan*.[223] Thus, *Nollan* provides an illustration of a fundamental problem with the Court's current takings doctrine: The doctrine is not helpful in deciding whether a taking occurred, because it does not address the issue of fairness that the Court tells us is at the heart of every takings case.

II
SEARCHING FOR A UNIFIED THEORY TO EXPLAIN WHEN THE SUPREME COURT WILL FIND A COMPENSABLE TAKING

A. Is There a Pattern to the Court's Takings Decisions?

This Article has shown that the Court's current takings doctrine is in disarray. The problem is not simply that current doctrine does not provide clear guidelines as to when a taking occurs. The Court's doctrine is so confused that it is actually more of a hindrance than a help to a judge called upon to adjudicate a takings case. Given the Court's myriad

221. *Nollan*, 483 U.S. at 833 n.2.

222. *See supra* text accompanying notes 17-30.

223. For example, the judge might have concluded that the *Loretto* rule did not apply because the physical occupation was only "temporary" (as in *Kaiser Aetna* and *PruneYard*) and then might have found that no taking occurred under the "no economically viable use" test because the Nollans were not deprived of all economically viable use of the parcel as a whole. Or the judge might have found that no taking occurred under the *Penn Central* test, emphasizing that the Nollans were "on notice" of the government's intended action, as were the claimants in *Monsanto*.

definitions of "property" and its conflicting rules on how to decide whether a compensable "taking" of that property has occurred, there is no way to determine, based on the doctrine alone, how the Court would analyze any given takings case.

Yet, despite the doctrinal confusion, one can frequently predict the *result* the Court would reach in a takings case, or at least anticipate whether the Court would be likely to find a taking. For example, the result reached in *Nollan*[224] was not a great surprise, given the justifications the government had offered for requiring the Nollans to let the public walk across their land.[225] Nor was the Court's decision in *Keystone*[226] startling, given the nuisance-like qualities of the conduct the government was prohibiting.[227] In *Monsanto*,[228] it could be expected that the Court would be troubled by the unfairness of the government breaking its promise not to disclose certain data, and would thus be likely to require the government to pay compensation for disclosing that data.

Given the state of the Court's takings doctrine, it seems remarkable that one can nonetheless identify cases in which the Court is likely to find a taking. This predictability suggests an underlying pattern to the Court's takings decisions that has not been articulated by the Court. Stepping back from the articulated rationale of these cases, the underlying consistency of the Court's holdings suggests that the Justices are ultimately deciding takings cases by relying on their sense of when fairness requires the payment of compensation, even though the Court's current takings tests do not directly address the fairness issue.[229]

Struck by the sense that the results in the Court's takings cases were far more predictable than the articulated doctrine would lead one to expect, I began trying to formulate a set of principles that would conform to the results in the majority of the Court's decided cases and that would also account for the many instances in which one can confidently predict whether the Court would find a taking if the case were litigated.[230] I

224. 483 U.S. 825 (1987).

225. As discussed at *supra* text accompanying notes 211-19, the government's "mitigation of harm" theory was implausible, and its only other argument was that permitting the public to walk across the Nollans' land would promote the common good.

226. 480 U.S. 470 (1987).

227. In fact, both the district court and the court of appeals had found no taking in *Keystone*, despite the difficulty of distinguishing the Court's earlier decision in Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922). *See* Keystone Bituminous Coal Ass'n v. Duncan, 771 F.2d 707 (3d Cir. 1985); Keystone Bituminous Coal Ass'n v. DeBenedictis, 581 F. Supp. 511 (W.D. Pa. 1984).

228. 467 U.S. 986 (1984).

229. As illustrated above through *Nollan*, a lower court judge would be more likely to arrive at the result the Supreme Court would reach by asking whether fairness requires the payment of compensation, rather than by attempting to apply the Court's convoluted takings doctrine. Of course, it is not always easy to say what "fairness" requires. That issue is explored far more fully in Peterson II, *supra* note 15.

230. For example, it is generally agreed that no taking occurs when the government requires *A*

decided to search for a set of principles that would apply to the full range of cases in which takings claims are raised: cases in which the government has formally exercised its eminent domain power, cases in which the government has enacted a law that applies to the claimant, and cases in which the government has taken physical action, such as flooding the claimant's land. In part, I did so because I could see no principled basis for defining a "taking" of "property" differently in each context.[231] I also did so because the Supreme Court itself has often assumed that cases involving a formal exercise of the eminent domain power and other types of takings cases should be analyzed under a unified set of principles. The Court, for example, has reasoned that certain governmental actions should be considered takings because they are analogous to a formal exercise of the eminent domain power.[232] Moreover, the Court has

---

to pay a fine, to forfeit something used in the commission of a crime, or to pay damages for committing a tort or breaching a contract, even though the government in each case is forcing *A* to give up something of economic value. It is also generally agreed that a taking occurs whenever the government formally exercises its eminent domain power, as it does when it acquires title to *A*'s land to use it for a public park or highway. One can also predict with some assurance that the Court would find a taking if the government simply *zoned A*'s land for use as a public park or highway. *See infra* note 280.

231. If, for example, property for takings clause purposes does not consist of the tangible thing itself in an eminent domain proceeding, why should property consist of a parcel of land (or other tangible thing) in a regulatory takings case? And if in one case the Court considers factors such as "interference with reasonable, investment-backed expectations" in determining whether a deprivation of property constitutes a compensable taking, why should the Court in another case look solely at whether the government deprived the claimant of all "economically viable use" of a parcel of land or other thing?

Under a "unified" definition of a taking of property such as the one I propose, the definition of property might have more than one part, or the test for a taking might require the consideration of several factors. Nevertheless, the Court would consider the same issues whenever it asked whether a compensable taking of property had occurred.

232. For example, in First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304 (1987), the Court stated:

> While the typical taking occurs when the government acts to condemn property in the exercise of its power of eminent domain, the entire doctrine of inverse condemnation is predicated on the proposition that a taking may occur without such formal proceedings. In *Pumpelly v. Green Bay*, [80 U.S. (13 Wall.) 166, 177-78 (1871)], . . . this Court said:
>
> > "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."
>
> Later cases have unhesitatingly applied this principle.

First English, 482 U.S. at 316-17.

Similarly, in San Diego Gas & Electric Co. v. City of San Diego, 450 U.S. 621 (1981), Justice Brennan reasoned that certain governmental actions should be considered "takings" because they are analogous to formal condemnation of property. He stated:

> Police power regulations such as zoning ordinances and other land-use restrictions can destroy the use and enjoyment of property in order to promote the public good just as effectively as formal condemnation or physical invasion of property. From the property owner's point of view, it may matter little whether his land is condemned or flooded, or

decided that just compensation must be paid for a temporary "regulatory" taking, just as it must be paid for a temporary taking that occurs when the government formally exercises its eminent domain power.[233] Finally, my sense was that the pattern underlying the Court's takings decisions did not depend on the type of governmental action at issue.[234]

A unified description of when a compensable taking of property occurs would have to address at least two issues. First, how would "property" be defined? Second, how would one distinguish between noncompensable deprivations of property and compensable "takings"? I began my search by reviewing the Court's definitions of property and its various tests for takings, considering whether any elements of the Court's current doctrine might be useful in constructing a unified theory of when a compensable taking occurs. As shown below, that search yielded a number of conclusions that proved valuable in arriving at the set of principles set out in the second part of *The Takings Clause: In Search of Underlying Principles.*[235]

B. Defining Property

First, what definition of "property" could account for the wide range of takings cases in which the Court has explicitly stated or implicitly assumed that property was at issue?[236] This includes cases in which the government has formally exercised its power of eminent domain;[237] cases in which the government has taken physical action that interfered with the claimant's use of a tangible resource;[238] cases in which the gov-

---

whether it is restricted by regulation to use in its natural state, if the effect in both cases is to deprive him of all beneficial use of it.

Id. at 652 (Brennan, J., dissenting) (footnote omitted).

In addition, the Court in deciding a regulatory takings case may use a definition of "property" taken from cases involving a formal exercise of the eminent domain power. *See, e.g.,* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 435 (1982); PruneYard Shopping Center v. Robins, 447 U.S. 74, 82 n.6 (1980).

233. *First English,* 482 U.S. at 318. The Court also noted in *First English* that compensation had been required in United States v. Causby, 328 U.S. 256 (1946), a case involving physical action by the government. 482 U.S. at 317.

234. For example, we assume that a taking occurs when the government formally exercises its eminent domain power to acquire *A*'s land for a public park *or* simply zones *A*'s land for a public park.

235. Peterson II, *supra* note 15.

236. In some cases, the Court has expressly stated that a deprivation of property occurred and has then turned to the question of whether that deprivation constituted a compensable taking. In other cases, the Court has apparently considered it obvious that a deprivation of property occurred and has focused its attention on whether the government's action should be considered a compensable taking.

237. For example, the government may have acquired fee simple title to land, a leasehold interest in a building, or a servitude restricting a parcel of land to a particular use.

238. For example, the government may have flooded land or made low overflights that effectively prevented certain uses of a parcel of land. *See, e.g.,* United States v. Causby, 328 U.S. 256 (1946); Pumpelly v. Green Bay Co., 80 U.S. (13 Wall.) 166 (1871).

ernment has enacted a law prohibiting the claimant from using a parcel of land or other tangible resource for a particular purpose;[239] and cases in which the government has enacted a law requiring the claimant to pay a sum of money,[240] give up an economically valuable claim,[241] or provide economically valuable services at less than the market rate.[242] I also considered cases in which the Court stated that "property" was *not* at issue because the government had not deprived the claimant of any "vested rights."[243] In formulating a definition of property, I asked: "What definition of property, if any, could account for all of these cases?"

1. Property as Tangible Things

The entire array of takings cases cannot be explained by equating "property" with tangible things. Such a definition is not broad enough to account for all the cases in which a taking may occur. For example, the Court has held that a taking may occur when the claimant is deprived of an intangible economically valuable resource, such as a trade secret,[244] or when the government requires someone to perform economically valuable services.[245] Moreover, if one defines "property" in terms of physical things themselves, one cannot explain many takings cases that *do* involve land or other tangible resources.

If one were to define the relevant unit of property as the parcel of land *as a whole* (or as some other entire physical thing), one could not explain those cases in which the Court has found a taking even though the government did not deprive the claimant of the entire parcel of land (or other thing).[246] In *Nollan,*[247] for example, the Court found a taking, although providing lateral public beach access would not have deprived the Nollans of their whole parcel of land.[248] In addition, there are many

239. *See, e.g.,* Agins v. City of Tiburon, 447 U.S. 255 (1980); Penn Cent. Transp. Co. v. New York City, 438 U.S. 104 (1978).

240. *See, e.g.,* Connolly v. Pension Benefit Guar. Corp., 475 U.S. 211 (1986).

241. *See, e.g.,* Bowen v. Gilliard, 483 U.S. 587 (1987).

242. *See, e.g.,* Hurtado v. United States, 410 U.S. 578 (1973).

243. *See, e.g.,* Bowen v. Public Agencies Opposed to Social Sec. Entrapment, 477 U.S. 41 (1986).

244. *See, e.g.,* Ruckelshaus v. Monsanto Co., 467 U.S. 986 (1984).

245. *See, e.g., Hurtado,* 410 U.S. 578.

246. If the "property" is defined in terms of the parcel of land as a whole, then no deprivation of property occurred in these cases, and thus no compensable "taking" could have occurred.

247. 483 U.S. 825 (1987).

248. Similarly, in Kaiser Aetna v. United States, 444 U.S. 164 (1979), the Court found a taking when the government required the claimants to permit public access to their marina, even though the government did not deprive the claimants of the parcel as a whole. In Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982), the Court found a taking even though the installation of the cable equipment did not deprive the claimant of the parcel of land (or even the building) as a whole. In United States v. Causby, 328 U.S. 256 (1946), the Court found a taking when the government made frequent low flights over the claimants' land, thereby preventing them from using it for certain economically valuable purposes. Again, these flights did not effectively deprive the

instances in which no taking would occur even if the claimant were deprived of an entire physical thing. For example, no taking would occur if the government required *A* to forfeit a thing she had used in the commission of a crime,[249] or if the government required that *A*'s animals be destroyed because they had a communicable disease.[250] These cases might be explained, however, by saying that although a deprivation of property occurred, that deprivation was justified and thus did not effect a compensable taking.

If one were to define property in terms of *smaller* units of tangible things, one still could not account for many takings cases that involve tangible resources, since a taking can occur even if the government has not effectively deprived the claimant of even a *portion* of a tangible thing.[251] For example, a taking would occur if the government formally exercised its eminent domain power to acquire a servitude restricting *A*'s land to agricultural use. Yet the government would not have effectively

---

claimants of the parcel of land as a whole. Finally, a taking would occur if the government formally exercised its eminent domain power to condemn an easement across *A*'s land, although this would not deprive her of the entire parcel of land.

One might say that in each of these cases a "physical invasion" was authorized by the government. But why should the fact that a physical invasion is involved alter the definition of property for takings clause purposes? Moreover, there are cases that do not involve a physical invasion in which a taking would occur even though the government would not be depriving the claimant of the "parcel as a whole." For example, the government might exercise its eminent domain power to acquire a servitude over *A*'s land, restricting the use of the land to agricultural purposes. This would clearly constitute a taking even though *A* would not be deprived of the "parcel as a whole," and no physical invasion would be involved.

249. *See generally* Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974) (rejecting a takings challenge even where the owner of the property did not himself commit the crime and explaining that historically the courts have relied on the fiction that the thing itself was guilty of wrongdoing); United States v. U.S. Coin & Currency, 401 U.S. 715 (1971) (although a forfeiture proceeding may formally be a civil proceeding, where property is forfeited because of the owner's criminal conduct, the forfeiture proceeding plainly is designed to punish the owner for the crime).

250. Loftus v. Department of Agric., 211 Iowa 566, 583, 232 N.W. 412, 420 (1930) ("The right to compensation for diseased animals is not absolute. They, being nuisances, may be destroyed without compensation."), *appeal dismissed for want of a substantial federal question,* 283 U.S. 809 (1931); Nunley v. Texas Animal Health Commission, 471 S.W.2d. 144 (Tex. Civ. App. 1971) (state statute requiring the sale for slaughter of dairy cattle bearing a communicable disease did not effect a taking); *cf.* Miller v. Schoene, 276 U.S. 272 (1928) (state statute requiring the destruction of infected cedar trees did not effect a taking); Juragua Iron Co. v. United States, 212 U.S. 297 (1909) (no taking occurred when the government destroyed a building that was thought to house the germs of a contagious disease); Lawton v. Steele, 152 U.S. 133, 136 (1894) ("It is universally conceded [that the police power] justif[ies] the destruction or abatement . . . of whatever may be regarded as a public nuisance. Under this power it has been held that the State may order . . . the slaughter of diseased cattle."); Johansson v. Board of Animal Health, 601 F. Supp. 1018 (D. Minn. 1985) (state statute requiring hog farmers to quarantine or sell for slaughter hogs found to carry an infectious disease did not effect a taking); Conner v. Carlton, 223 So. 2d 324 (Fla. 1969) (state statute requiring owners of cattle infected with a communicable disease to sell them for slaughter and providing for compensation at less than fair market value did not effect a taking under the state constitution), *appeal dismissed for want of a substantial federal question,* 396 U.S. 272 (1969).

251. If the property is defined in terms of a portion of a tangible thing, then no taking should be found in these cases, since there has been no deprivation of the relevant unit of property.

deprived *A* of any discrete portion of the parcel of land, since she could still use the entire parcel of land for agricultural purposes.[252] In addition, there are cases in which no taking occurs even though the claimant *has* effectively been deprived of a discrete portion of a parcel of land or other tangible thing. For example, as the Court noted in *Penn Central Transportation Co. v. New York City,*[253] laws requiring setbacks could be said to deprive landowners of an identifiable portion of their parcels, yet the Court has upheld such laws against takings challenges.[254] Again, however, such cases might be explained by saying that the deprivation of property is justified and thus does not amount to a compensable taking.

2. *Property as Economically Valuable Rights Created by Positive Law*

Perhaps more of the case law could be accounted for if property were defined in terms of discrete, pre-existing, economically valuable legal rights. A deprivation of "property" would then occur if the government deprived *A* of one or more economically valuable legal rights that she had previously possessed.

Such a definition would account for cases in which the government committed a taking by formally exercising its eminent domain power to acquire *A*'s economically valuable legal rights. The government, for example, might condemn *A*'s legal right to use her land for certain purposes, thereby acquiring a servitude, or the government might condemn *A*'s rights against *B* under a lease.[255]

Such a definition would also account for takings cases involving physical action by the government, such as overflights or flooding. The government does not in these cases *formally* deprive the claimant of the economically valuable legal right to use her land in a certain manner. Yet the government's action may have that *effect.* In *United States v. Causby,*[256] for example, the Court found that the government's frequent,

252. Similarly, the Court found a taking in *Nollan,* even though the Nollans would not have been wholly precluded from using the strip of land used for public beach access. Thus, it would be difficult to say that the government had effectively deprived the Nollans of even a portion of their lot.

253. 438 U.S. 104 (1978).

254. *Id.* at 130. The Court stated that if a single parcel could be divided into "discrete segments," then "the Court would have erred . . . in upholding laws restricting . . . the lateral . . . development of particular parcels." *Id.* (citing Gorieb v. Fox, 274 U.S. 603 (1927) (holding that an ordinance requiring setbacks did not effect a deprivation of property without due process of law)). Therefore, the Court concluded that "property" must be defined as "the parcel as a whole." *Id.* at 130-31.

255. In United States v. General Motors Corp., 323 U.S. 373 (1945), for example, the government acquired the right to occupy a portion of a leased building for a short period of time from a tenant who had a long-term lease.

If the government acquired fee simple absolute title to a parcel of land formerly owned by *A,* one could say that the government had acquired the whole "bundle of rights" with respect to the land.

256. 328 U.S. 256 (1946).

low flights over the claimants' land prevented them from using their land for a chicken farm.[257] In a flooding case, the government's action could prevent the claimant from using the land for a large number of lawful and economically valuable purposes.

But could this definition of property explain "regulatory takings" cases, where the enactment of a law that applies to *A* is challenged as a taking? In such cases, the government usually *is* depriving the claimant of certain economically valuable legal rights that she had previously possessed. In *Keystone,*[258] for example, the claimants had possessed the legal right to mine in a manner subsequently prohibited by the Subsidence Act. In *Mugler v. Kansas,*[259] the claimant had previously possessed the legal right to manufacture beer. Regulatory takings cases could not be explained by saying that a taking occurs *whenever* the government deprives *A* of an economically valuable legal right that she had previously possessed, for in many cases, as in *Keystone* and *Mugler,* the loss of an economically valuable legal right is not considered a taking. Perhaps one could say, however, that in some cases the government's justification for depriving *A* of her property explains why no compensable taking occurs.

Even so, it would be difficult to explain the Court's regulatory takings decisions by saying that *A*'s "property" consists *solely* of economically valuable rights that *A* had previously possessed as a matter of positive law. The Court has assumed in a number of cases that a taking could occur even though the government was *not* depriving *A* of a right that *A* had previously acquired as a matter of positive law. In *Penn Central,*[260] for example, one of the claimants, UGP, had never acquired a right, as a matter of local law, to build an office building on top of Grand Central Terminal, yet the Court assumed that UGP could have suffered a taking.[261] Similarly, in *Nollan,*[262] the Nollans had never acquired a right under state law to build on their land without providing public access, yet the Court found a taking.[263]

It would thus seem that the Court's takings decisions could not be explained by defining "property" solely as a creature of positive law. However, a unified theory of when a taking of property occurs might

257. Thus, one could say that the "property" taken in *Causby* was the right to use the land for a chicken farm during the period in which the overflights occurred. Similarly, in Portsmouth Harbor Land & Hotel Co. v. United States, 260 U.S. 327 (1922), the government's firing of guns prevented the claimant from using his land for a residential hotel.

258. 480 U.S. 470 (1987).

259. 123 U.S. 623 (1887).

260. 438 U.S. 104 (1978).

261. *See supra* note 62.

262. 483 U.S. 825 (1987).

263. *See supra* note 188 and accompanying text; *supra* text accompanying notes 220-21.

utilize a broader definition of property that included, but was not limited to, economically valuable rights created by positive law.

3. *Property as Economically Valuable Vested Rights Created by Positive Law*

If one were to explain the takings cases using a definition of "property" that included economically valuable rights created by positive law, would one also need to recognize a distinction between "vested" and "nonvested" rights created by positive law? The distinction between vested and nonvested rights is consistent with the general understanding that some economically valuable legal rights are subject to change. For example, if the government has been giving *A* and others a certain level of welfare benefits, and then changes the law to reduce that level in the future, has *A* suffered a compensable taking? The general understanding seems to be that the legislature retained the right to change the level of welfare benefits, and thus *A* has not suffered a taking.[264] One way of expressing the concept that *A*'s rights were subject to change is to say that *A* did not lose any "vested rights."

The notion of vested rights also is consistent with the intuition that *A* has a stronger claim to compensation when the government makes a commitment to *A* and then reneges on that commitment.[265] In *Monsanto,*[266] for example, the Court found a taking when the government violated its "explicit guarantee" of nondisclosure. In *Lynch v. United States,*[267] the Court held that a taking occurred when Congress enacted a law repudiating disability and life insurance contracts that the government had issued to veterans under the War Risk Insurance Act.[268] The Court stated that the policy holders had acquired "vested rights," not mere "gratuities [that could] be redistributed or withdrawn at any time in the discretion of Congress."[269]

Moreover, it seems logical that the government could defend against a takings claim by showing that when it first granted the right at issue to

264. Indeed, the Court stated in Bowen v. Gilliard, 483 U.S. 587 (1987), that "Congress is not, by virtue of having instituted a social welfare program, bound to continue it at all, much less at the same benefit level." *Id.* at 604.

265. In such cases, contract clause claims may also be raised. *See* Peterson II, *supra* note 15, at text accompanying notes 332-44.

266. 467 U.S. 986 (1984).

267. 292 U.S. 571 (1934).

268. The government sought to renege on its commitment by enacting a statute repealing "all laws granting or pertaining to yearly renewable term insurance." *Id.* at 573.

269. *Id.* at 577. The Court explained that the terms of the government's bargain were to be found in the authorizing statute and regulations promulgated under it and in the insurance policies themselves, and that "no power to curtail the amount of benefits which Congress contracted to pay was reserved to Congress; and none could be given by any regulation promulgated by the Administrator." *Id.* at 577-78.

A, the government reserved the power to modify or eliminate that right. In other words, the government gave the right to *A* with strings attached. Thus, the "vested rights" distinction appears promising in developing a unified theory of when a compensable taking of property occurs.

In many takings cases, however, the Court has not inquired whether the legal rights that *A* lost were "vested rights." What logical basis might there be for addressing the issue of vested rights in some cases and not in others? In some of these cases, there was no need for the Court to inquire whether "vested rights" were involved, since the government did not purport to be exercising any reserved power to change the law. For example, in *United States v. General Motors Corp.*[270] the Court did not need to ask whether the legal rights being condemned were "vested rights," since the government did not seek to exercise any power it may have reserved to change the law with respect to the rights of lessees. It was simply acquiring the rights of a particular lessee, without making any change in the applicable law.[271]

In other cases, however, *A*'s takings claim has been directed at a change in the law, and the Court still has not inquired whether "vested rights" were taken. In *Agins v. City of Tiburon,*[272] for example, the claimants had never acquired a "vested right" to build on their lots,[273] but the Court did not dismiss the takings claim on that basis. Similarly, in *Village of Euclid v. Ambler Realty Co.,*[274] the Court analyzed a takings challenge to use restrictions imposed by a zoning ordinance without asking whether the claimants had acquired a "vested right" to build in a manner now prohibited by the challenged ordinance.[275]

One possible explanation of these cases is that "property" under the takings clause is not solely a creature of positive law. Thus, one might view *A* as having a right to build on her land (which constitutes *A*'s "property") even though she had never been granted that right as a matter of positive law. This would be consistent with the Court's statement in *Nollan*[276] that the Nollans had a right to build wholly apart from the provisions of state law at the time the Nollans acquired the land. As the

270. 323 U.S. 373 (1945). *General Motors* is discussed at *supra* text accompanying notes 45-48.

271. One could say that in an eminent domain proceeding, the government is forcing *A* to transfer to the government certain rights that she possesses under the current law.

272. 447 U.S. 255 (1980).

273. Compare Williamson County Regional Planning Commission v. Hamilton Bank, 473 U.S. 172 (1985), discussed at *supra* text accompanying notes 115-19, where the claimant contended that under state law it had already acquired a "vested right" to complete a subdivision in accordance with plans previously submitted to the county legislative body.

274. 272 U.S. 365 (1926).

275. In *Village of Euclid,* the Court rejected a takings challenge to a zoning ordinance that segregated land uses. For example, the ordinance excluded industrial and commercial uses from residential areas. *Id.* at 395-97.

276. 483 U.S. 825 (1987).

Court expressed it, the right to build was not simply a "governmental benefit."[277]

4. *Summary*

None of the Court's current definitions of "property" can fully account for the wide range of cases in which the Court has assumed or stated that the claimant suffered a deprivation of "property." One cannot simply equate "property" with tangible things, whether one defines the relevant unit of property as an entire parcel of land (or other thing) or some discrete portion of the whole. Nor can one explain the case law by defining property as consisting solely of economically valuable rights created by positive law. However, one could account for the Court's takings decisions by employing a two-part definition of property that included, but was not limited to, economically valuable rights created by positive law. Such a definition of property should also incorporate the notion that when the government grants private parties economically valuable legal rights, it may reserve the power to alter those rights, and that in exercising that reserved power, the government is not taking back something it has already given the claimant.

C. *Defining a Taking*

1. *The Focus of the Inquiry*

What aspects of the Court's current doctrine on when a "taking" occurs might be helpful in formulating a unified theory of the takings clause? Rather than dealing with each of the Court's takings tests separately, it may be more useful to summarize the major themes that appear to be running through the Court's various takings tests and then to address each of those themes.[278] These themes highlight the inconsistency in the Court's various approaches to determining whether a taking has occurred.

One theme that emerges repeatedly in the Court's takings decisions is that the key inquiry is what the government has done to the claimant, rather than the government's justification for its action. The Court may inquire whether the government inflicted harm of an unusually serious character on the claimant, such as a physical invasion. Or it may ask

277. *Id.* at 833 n.2.

278. These themes appear in various forms throughout the Court's takings tests. For example, the Court may use the first *Penn Central* factor—the "character of the governmental action"—to focus on the seriousness of the harm inflicted by the government *or* to consider whether the government was preventing a noxious use. The Court may use the first part of the *Agins* test, which asks whether the challenged governmental action substantially advanced legitimate governmental interests, to inquire whether the government was seeking to promote the common good *or* to inquire whether the government was seeking to prevent a noxious or wrongful use.

whether the government effectively deprived *A* of a thing. In either case, the Court's focus is on what the government did to *A*, not on why the government acted.

A second theme (which conflicts with the first theme) is that the government's justification for its action can be critical in determining whether a taking occurred. The Court may ask whether the government was seeking to promote the common good, suggesting at times that this could determine whether a taking occurred. Or it may ask quite a different question, inquiring whether the government was seeking to prevent a "noxious use" or "nuisance-like" conduct, and suggesting that in such a case no taking would occur.

A third theme is that one significant factor in determining whether a taking occurred is whether the claimant relied to her economic detriment on a reasonable expectation that the government would not act as it did. In fact, the Court sometimes suggests that proof of such reliance is a prerequisite to establishing a taking.

Thus, the Court appears to be focusing on a number of quite different issues in deciding whether a compensable taking occurred. Might any of these approaches be useful in developing a unified theory of the takings clause?

a. What the Government Did to the Claimant

i. Harm of An Unusually Serious Character

The Court often suggests that whether a taking occurs depends on whether the government inflicted harm of an unusually serious character on the claimant, such as a physical invasion. One manifestation of this approach is the *Loretto* per se rule, which provides that any "permanent physical occupation" authorized by government is a taking because it is such a serious intrnsion.[279]

This rule accounts for some of the relevant data, for in many instances a permanent physical occupation is considered a taking. For example, a taking would occur if the government formally used its eminent domain power to acquire *A*'s land as a site for a public park. Similarly, the Court would surely find a taking if the government zoned *A*'s land for public park use only.[280] In a number of cases, the Court has

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

280. *Cf. Nollan,* 483 U.S. at 831 ("Had California simply required the Nollans to make an easement across their beachfront available to the public on a permanent basis . . . we have no doubt there would have been a taking."); Fred F. French Inv. Co. v. City of New York, 39 N.Y.2d 587, 350 N.E.2d 381, 385 N.Y.S.2d 5 (1976) (ordinance rezoning two private parks for public park use only held to be a violation of substantive due process, on the theory that regulation that goes "too far" (as in Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922)) should be regarded as a violation of substantive due process rather than a taking), *cert. denied and appeal dismissed,* 429 U.S. 990 (1976); City of Plainfield v. Borough of Middlesex, 69 N.J. Super. 136, 173 A.2d 785 (Super. Ct. Law

found a taking when the government permanently flooded *A*'s land.[281] Thus, the rule that a "permanent physical occupation" constitutes a taking may appear to have considerable explanatory power.

On the other hand, there are cases in which the Court has held that no taking occurred even though the government permanently destroyed the claimant's tangible resource. In *United States v. Caltex, Inc.*,[282] for example, the Court held that no taking occurred when the government destroyed certain oil companies' facilities in the Philippines to prevent them from falling into the hands of the enemy during World War II. In *Miller v. Schoene,*[283] the Court found no taking when the government destroyed cedar trees infected by a disease that threatened neighboring apple trees. Moreover, the government does not commit a taking when, acting under forfeiture laws, it permanently confiscates land and other economically valuable resources used by *A* in the commission of a crime.[284] Thus, not every "permanent physical occupation" authorized by the government effects a taking.

Nevertheless, it seems that physical invasions, whether permanent or temporary, are more likely to be considered takings than are other governmental actions. The Court has found that the government committed a taking by requiring *A* to permit public access to *A*'s land,[285] by flooding *A*'s land,[286] by installing cable equipment on *A*'s building,[287] and by making frequent low flights over *A*'s land that prevented *A* from using the land for certain purposes.[288] Moreover, when the government effects a taking by formally exercising its eminent domain power, it usually acquires the legal right to occupy land or buildings.[289]

If one is seeking to identify a coherent set of principles that describe when a taking occurs, this observation naturally prompts a number of inquiries. First, what do the physical invasion cases in which the Court has found a taking have in common with the non-physical invasion cases in which the Court has found a taking? Second, what distinguishes the

---

Div. 1961) (zoning ordinance limiting plaintiffs to using their land for a school or for public parks and playgrounds held to effect a taking).

281. *See, e.g.,* United States v. Dickinson, 331 U.S. 745 (1947); United States v. Welch, 217 U.S. 333 (1910); United States v. Lynah, 188 U.S. 445 (1903); Pumpelly v. Green Bay Co., 80 U.S. (13 Wall.) 166 (1871).

282. 344 U.S. 149 (1952).

283. 276 U.S. 272 (1928).

284. *See supra* note 249.

285. *See, e.g., Nollan,* 483 U.S. 825 (1987).

286. *See, e.g.,* Pumpelly v. Green Bay Co., 80 U.S. (13 Wall.) 166 (1871).

287. *See* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982).

288. *See, e.g.,* United States v. Causby, 328 U.S. 256 (1946).

289. For example, the government might acquire a possessory interest in *A*'s land or building, or the government might acquire an easement permitting it to use *A*'s land for certain purposes. *See, e.g.,* United States v. General Motors Corp., 323 U.S. 373 (1945) (the government acquired a short-term lease from a long-term tenant).

physical invasion cases in which the Court has found a taking from those physical invasion cases in which it has not found a taking?

The Court at times responds to the first question by suggesting that whether a taking occurs depends on whether the government inflicted harm of an unusually serious character on *A*. Such harm often involves a physical invasion, but it need not. For example, in *Hodel v. Irving*,[290] the Court focused on the unusually serious nature of the harm inflicted on *A*, stating that the right to pass on one's property at death is an "essential stick" in the bundle of rights, like the right to exclude.[291]

Might the takings cases be explained by saying that a taking occurs whenever *A* suffers unusually serious harm at the hands of the government, whether or not a physical invasion is involved? There are two difficulties with such an approach. First, how would one define "unusually serious harm"? Second, we have already seen that even when *A* suffers the unusually serious harm of a permanent physical loss of a tangible resource, a taking does not always occur.

Another possible means of distinguishing takings from noncompensable deprivations of property would be to consider the government's justification for its action. Let us consider two cases involving a physical seizure of *A*'s economically valuable resource. First, the government destroys *A*'s cattle because they have a disease that poses a serious danger to the health of other cattle. The Court's decisions suggest that it would not find a taking in such a case, since the government is merely preventing *A* from causing serious harm to others.[292] Yet if the government were to seize *A*'s cattle because it wanted to use them to feed government employees, *A* surely would be entitled to compensation.[293] This suggests that we must look at the government's justification for its action,

290. 481 U.S. 704 (1987). *Hodel v. Irving* is discussed at *supra* text accompanying notes 89-91.

291. Hodel v. Irving, 481 U.S. at 716.

292. *See, e.g.*, Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 492 n.22 (1987) ("Courts have consistently held that a State need not provide compensation when it diminishes or destroys the value of property by . . . abating a public nuisance."); Miller v. Schoene, 276 U.S. 272 (1928) (state statute requiring the destruction of infected cedar trees did not effect a taking); Lawton v. Steele, 152 U.S. 133, 136 (1893) ("It is universally conceded [that the police power] justifies] the destruction or abatement . . . of whatever may be regarded as a public nuisance. . . . Under this power it has been held that the State may order . . . the slaughter of diseased cattle."); Mugler v. Kansas, 123 U.S. 623, 669 (1887) ("[T]he destruction of property which is itself a public nuisance . . . is very different from taking property for public use."); *see also supra* note 250 (citing lower court decisions rejecting takings challenges to state statutes requiriug the destruction of animals bearing communicable diseases).

293. *Cf. Mugler*, 123 U.S. at 669 ("[T]he destruction of property which is itself a public nuisance . . . is very different from taking property for public use" for "[i]n the one case, a nuisance only is abated; in the other, unoffending property is taken away from an innocent owner."); Griffin v. State, 595 S.W.2d 96, 100 (Tenn. Crim. App. 1980) ("[U]nless the animals are actually appropriated by the State, the Legislature may constitutionally order the destruction of diseased animals without payment of any compensation.").

not simply at what the government has done to *A,* in physical invasion cases as well as in other cases.

A similar analysis could be offered in the context of development exactions. If the government required *A* to dedicate a certain amount of land for park purposes in order to serve the needs of the future residents of *A*'s proposed subdivision, the Court would be unlikely to find a taking, even though this could be described as a "permanent physical occupation." If *A* built a subdivision *without* providing park facilities for the new residents, she would be contributing to the overcrowding of existing parks. Thus, one could say that the government is simply asking *A* to mitigate the harm to the public that her proposed conduct would create.[294]

By way of contrast, in *Nollan,*[295] the government asked the Nollans to provide lateral public beach access to promote the common good, not to remedy any harm to the public that the Nollans' proposed conduct would create.[296] The Court found a taking by examining the government's proffered justification for its action, not by applying a per se "permanent physical occupation" rule. *Nollan,* then, supports the view that one cannot distinguish a taking from a noncompensable deprivation of property simply by considering what the government has done to *A.* This is true even where the government's action involves a physical invasion of *A*'s land or other tangible thing.

ii. Deprivation of All Economically Viable Use of a Tangible Resource

The Court also focuses on what the government did to *A,* rather than on why the government acted, when it applies the "no economically

294. The exaction would therefore be "reasonably related to the public need or burden that [the new development] creates or to which it contributes." Nollan v. California Coastal Comm'n, 483 U.S. 825, 838 (1987). Justice Scalia, the author of the majority opinion in *Nollan,* expanded on this point in his separate opinion in Pennell v. City of San Jose, 485 U.S. 1 (1988), stating:

> [Where] the owner's use of the property is (or, but for the regulation, would be) the source of the social problem, it cannot be said that he has been singled out unfairly. [For example,] the common zoning regulations requiring subdividers . . . to dedicate certain areas to public streets, are in accord with our constitutional traditions because the proposed property use would otherwise be the cause of excessive congestion.

Id. at 20 (Scalia, J., concurring in part and dissenting in part); *see also* Associated Homebuilders of Greater East Bay, Inc. v. City of Walnut Creek, 4 Cal. 3d 633, 484 P.2d 606, 94 Cal. Rptr. 630 (1971) (rejecting takings challenge to a state statute that authorized local governments to require subdividers either to dedicate land for parks or to pay in-lieu fees, where the statute required that the land dedicated or fees paid bear a reasonable relationship to the use of the park and recreational facilities by the future inhabitants of the subdivision), *appeal dismissed for want of a substantial federal question,* 404 U.S. 878 (1971); R. ELLICKSON & A. TARLOCK, LAND-USE CONTROLS 755 (1981) ("Most courts now hold that it is coustitutional to compel a developer to contribute to the financing of a facility to the extent that the developer's project created the 'need' for that facility.").

295. 483 U.S. 825 (1987).

296. *See supra* text aceompanying notes 211-19.

viable use" test.[297] Could the "no economically viable use" test be applied across the full range of takings cases to determine when a compensable taking occurs?

In many cases the Court *would* find a taking if the government prohibited *A* from using a parcel of land or other tangible thing for any economically beneficial purpose. For example, one can predict with some assurance that the Court would find a taking if the government zoned *A*'s land for public park use only and prohibited her from charging admission to the park.[298] Yet one cannot separate takings from noncompensable deprivations of property merely by asking whether the government deprived *A* of all economically viable use of a thing. Often, a taking occurs even though the government did *not* deprive *A* of all economically viable use of a parcel of land or other tangible thing. Consider, for example, *Nollan*,[299] *Kaiser Aetna*,[300] *Causby*,[301] *Loretto*,[302] *Lynch*,[303] and *Monsanto*.[304]

There are also cases in which the government *has* deprived *A* of all economically viable use of a parcel of land or other tangible thing, yet the Court has held that no taking occurred. Consider, for example, *Caltex*[305] and *Miller v. Schoene*.[306] Similarly, in *First English*[307] the Court suggested that even if the challenged flood control ordinance denied the claimant all economically viable use of his land, this would not necessarily effect a taking, since the local government had enacted the ordinance for safety reasons.[308] Thus, the Court recognized that depriving the claimant of all economically viable use is not enough to establish a taking. It is also important to consider why the government acted.

297. The theory seems to be that when the government deprives *A* of all economically viable use of a parcel of land or other tangible thing, the government has effectively taken *A*'s thing, and thus a taking occurs. *See supra* text accompanying notes 163-64.

298. *See supra* note 280.

299. 483 U.S. 825 (1987) (public beach access required).

300. 444 U.S. 164 (1979) (public access to marina required).

301. 328 U.S. 256 (1946) (frequent low overflights interfered with use of land).

302. 458 U.S. 419 (1982) (cable TV equipment installed on building).

303. 292 U.S. 571 (1934) (government reneged on insurance contracts).

304. 467 U.S. 986 (1984) (government disclosed health and safety data despite explicit guarantee of nondisclosure).

305. 344 U.S. 149 (1952) (oil companies' facilities in the Philippines destroyed during World War II).

306. 276 U.S. 272 (1928) (infected cedar trees destroyed).

307. 482 U.S. 304 (1987).

308. *Id.* at 313; *see supra* note 172 and accompanying text.

b. The Government's Justification for Its Action

i. Promoting the Common Good

When the Court focuses on the government's justification for its action in takings cases, the Court sometimes inquires whether the government was acting to promote the common good. At times, the Court suggests that a taking would occur if the government were not seeking to promote the common good. For example, in *Keystone*[309] the Court sought to explain *Pennsylvania Coal Co. v. Mahon*[310] by saying that one reason a taking occurred there was that the Kohler Act was enacted for purely private benefit. Similarly, in *Agins*[311] the Court stated that a taking occurs if the government is not furthering a legitimate public purpose.

The Court has also suggested that no taking is likely to occur if the government *is* seeking to promote the common good. In *Penn Central*,[312] the Court asserted that it is less likely to find a taking when the challenged governmental action "arises from some public program adjusting the benefits and burdens of economic life to promote the common good."[313] In *Connolly*,[314] the Court stated that interference with employers' property rights resulting from the withdrawal liability provisions of the MPPAA "arises from a public program that adjusts the benefits and burdens of economic life to promote the common good and, under our cases, does not constitute a taking requiring Government compensation."[315]

It may well be that fairness would require that compensation be paid if the government were not acting to promote the common good when it forced the claimant to give up his or her property.[316] But why would the fact that the government was acting to promote the common good establish (or even strongly suggest) that no taking had occurred? Although the government must be acting to promote the common good to meet the public use test, a compensable taking plainly can occur even if the public use test is satisfied. For example, when the government formally exercises its eminent domain power to take *A*'s land for a public park, the government is acting to promote the common good. Similarly, the government was acting to promote the common good when it sought to

309. 480 U.S. 470 (1987).
310. 260 U.S. 393 (1922).
311. 447 U.S. 255 (1980).
312. 438 U.S. 104 (1978).
313. *Id.* at 124.
314. 475 U.S. 211 (1986).
315. *Id.* at 225.
316. Moreover, if the government was not acting to promote the common good, the claimant could seek an injunction on the ground that the government's action did not satisfy the public use requirement of the takings clause.

acquire a public beach access easement in *Nollan,*[317] when it sought to save public money in *Lynch,*[318] and when it sought to provide public disclosure of health and safety data regarding pesticides in *Monsanto.*[319] Yet in each case the Court found a taking. Thus, it seems that one cannot distinguish a compensable taking from a noncompensable deprivation of property simply by asking whether the government was acting to promote the common good.

ii. Preventing Nuisance-Like Conduct

When the Court focuses on the government's justification for its action in takings cases, the Court sometimes asks whether the government was preventing a "noxious use" or "nuisance-like" conduct. This is a narrower question than asking whether the government was acting to promote the common good, for the government can promote the common good by other means than preventing nuisances. Thus, this inquiry could serve to separate those instances in which the public use test is met and compensation must be paid, from those instances in which the public use test is met but compensation need not be paid. Moreover, if the terms "nuisance" and "noxious use" are used to describe conduct that is considered *wrongfully* offensive or harmful to others, fairness would not seem to require the government to pay compensation when it prohibits a nuisance or noxious use.

In early cases, the Court unhesitatingly asserted that no compensation was due when the government merely sought to prohibit a noxious use. The Court stated in *Mugler v. Kansas*[320] that the government need not compensate *A* when it prohibits her from "inflict[ing] injury upon the community"[321] through a noxious use of her property, for it is " '[a] fundamental principle that every one shall so use [her] own [property] as not to wrong and injure another.' "[322] In more recent cases, however, the Court has not consistently supported this test. In *Penn Central,*[323] the Court rejected the noxious use test.[324] The Court later relied on the noxious use cases in *Keystone,*[325] yet it did not rest its holding solely on the

317. 483 U.S. 825 (1987).

318. 292 U.S. 571 (1934).

319. 467 U.S. 986 (1984).

320. 123 U.S. 623 (1887).

321. *Id.* at 669.

322. *Id.* at 667 (quoting Fertilizing Co. v. Hyde Park, 97 U.S. 659, 667 (1878)).

323. 438 U.S. 104 (1978).

324. The Court asserted in a footnote in *Penn Central* that the "noxious use" theory did not explain all the so-called "noxious use" cases, for in some of these cases the conduct at issue was "perfectly lawful" and did not involve "moral wrongdoing." *Id.* at 133-34 n.30. Although the Court ostensibly rejected the noxious use theory, it also argued in *Penn Central* that the claimants' proposed conduct *could* be viewed as harming the public. *Id.*

325. 480 U.S. 470 (1987).

ground that the government was prohibiting nuisance-like conduct.[326]

Could this inquiry alone provide the means for distinguishing compensable takings from noncompensable deprivations of property? First, the term "noxious use" or "nuisance-like conduct" would have to be interpreted quite broadly. It could not simply mean a nuisance as defined at common law. Indeed, the Court has already made it clear that it has not confined the "nuisance exception" to those cases in which a nuisance would be found at common law.[327]

Even if the term "nuisance-like conduct" were construed quite broadly, could one say that a taking occurs whenever the government deprives *A* of her property unless the government is preventing nuisance-like conduct? How would one explain the fact that no taking occurs when the government requires *A* to pay a fine for committing a criminal offense? Or that no taking occurs when *A* must give up a tangible resource used in the commission of a crime? Or that the payment of income taxes is not considered a taking? It seems that the principle that no taking occurs when the government is acting to prevent a nuisance is a useful starting point. However, it does not furnish a complete theory of when a deprivation of property will constitute a compensable "taking."

c. *Interference with Relied-Upon Expectations*

The third major theme in the Court's takings decisions is that, in determining whether a taking occurred, one significant factor is whether the claimant relied to her economic detriment on a reasonable expectation that the government would not act as it did. Indeed, at times the Court suggests that no taking occurs if there has not been such reliance.[328]

Yet it cannot be true that no taking occurs unless *A* relied to her economic detriment on a reasonable expectation that the government

---

326. *See supra* note 155 and accompanying text.

327. When the Court first upheld the constitutionality of segregation of land uses through zoning in Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926), it drew an analogy between nuisance law and zoning. However, it did not consider it necessary to establish that the uses prohibited in a particular zone would actually be considered nuisances at common law. *Id.* at 387-95.

More recently, in *Keystone* the Court stated:

> [I]n *Miller v. Schoene,* [the Court held] that the Takings Clause did not require the State of Virginia to compensate the owners of cedar trees for the value of trees that the State had ordered destroyed . . . to prevent a disease from spreading to nearby apple orchards . . . . *[T]he Court did not consider it necessary to "weigh with nicety the question whether the infected cedars constitute a nuisance according to common law . . . ."* Rather, it was clear that the State's exercise of its police power to prevent the impending danger was justified and did not require compensation.

Keystone, 480 U.S. at 490 (quoting Miller v. Schoene, 276 U.S. 272, 280 (1928)) (emphasis added) (citations omitted).

328. *See supra* text accompanying note 123.

would not act as it did (that is, that the government would not deprive *A* of her property). In *Hodel v. Irving,*[329] the Court did not find such reliance, yet it found a taking. In *Nollan,*[330] the claimants knew when they purchased their land that the government would require them to give up an easement if they built a new home on the land. Yet the Court found a taking. Moreover, no showing of interference with relied-upon expectations is required to establish a taking when the government formally exercises its eminent domain power.

Even if a showing of interference with relied-upon expectations is not a prerequisite to establish a taking, is it helpful in establishing a taking? Such a showing appears to be most helpful in those takings cases in which the government has reneged on a commitment, such as *Lynch*[331] and *Monsanto.*[332] Beyond those cases, it is not clear that a showing of reliance is important in establishing a taking. In a number of the Court's takings decisions, the claimants had relied to their economic detriment on a reasonable expectation that the government would not act as it did, yet the Court found no taking. In *Caltex,*[333] the claimants had invested in reliance on a reasonable expectation that the government would not destroy their oil facilities. In *Hadacheck v. Sebastian,*[334] the claimant had invested in a brickyard outside the city of Los Angeles, relying on a reasonable expectation that he could continue to operate his brickyard in that location. Yet when the operation of the brickyard was later prohibited because it disturbed surrounding residences, the Court held that no taking had occurred. Thus, it is not at all clear that the claimant's reasonable reliance is critical in separating compensable takings from noncompensable deprivations of property.

2. *Facial and As Applied Takings Challenges*

Another issue that arises in formulating a unified theory of the takings clause is whether the same definition of a "taking" should be used in reviewing a takings challenge to a law on its face and to a law as applied. This issue arises in the wake of cases like *Hodel v. Virginia Surface Mining & Reclamation Association*[335] and *Keystone,*[336] where the Court asserted that the *Penn Central* test should be applied to an "as applied"

329. 481 U.S. 704 (1987).

330. 483 U.S. 825 (1987).

331. 292 U.S. 571 (1934) (government reneged on disability and life insurance contracts issued to veterans).

332. 467 U.S. 986 (1984) (government reneged on explicit guarantee not to disclose health and safety data submitted to the EPA).

333. 344 U.S. 149 (1952).

334. 239 U.S. 394 (1915).

335. 452 U.S. 264 (1981).

336. 480 U.S. 470 (1987).

challenge, while the "no economically viable use" test should be applied to a facial challenge.[337]

It is not at all apparent why the nature of the Court's inquiry should differ depending on whether the claim is that the law effects a taking in a *particular case* or that it effects a taking in *all cases* to which it applies. Why should the Court in one instance focus on such issues as the extent to which the law interferes with relied-upon expectations, as it would under the *Penn Central* test, and in the other focus on whether the government is essentially depriving the claimant of a thing, as it would under the "no economically viable use" test? If, for example, the critical issue were whether *A* had been deprived of all "economically viable use" of some tangible thing, one would think that would be the issue whether the claim was that the law as applied in a particular case worked such a deprivation, or that such a deprivation occurred in every case to which the law applied.[338]

The Court has not explained why it *should* focus on different issues depending upon whether the claim is that a law effects a taking in a particular case or in all cases.[339] Moreover, the Court has not even consistently followed its announced rule that the *Penn Central* test should be used for as applied challenges, while the "no economically viable use" test should be used for facial challenges. *Keystone,*[340] for example, involved a facial challenge, yet the Court relied on the *Penn Central* factors (as well as the two-part *Agins* test). The Court also applied the *Penn Central* test in *Connolly,*[341] although that case involved a facial challenge, and it applied the *Agins* test in *Nollan,*[342] although that case involved an "as applied" challenge.

337. *See supra* notes 157-59 and accompanying text.

338. In other words, if the Court had a consistent general theory as to the characteristics of a compensable "taking," one would expect to see the Court looking for those same characteristics, whether the claim was that a law effects a taking in a particular case or in all cases to which it applies.

339. The Court's only explanation for advocating the use of two different tests is that consideration of the three *Penn Central* factors involves ad hoc, factual inquiries that " 'must be conducted with respect to specific property,' " including " 'particular estimates of economic impact and ultimate valuation.' " *Keystone,* 480 U.S. at 495 (quoting *Virginia Surface Mining,* 452 U.S. at 295). Yet it is not at all clear that the *Penn Central* test *does* require an individualized assessment of the impact the law will have in each case to which it is applied. For example, in both Connolly v. Pension Benefit Guaranty Corp., 475 U.S. 211 (1986), and Bowen v. Gilliard, 483 U.S. 587 (1987), the Court applied the *Penn Central* test without examining the impact of the law in any particular case. Furthermore, the Court's statement does not explain why the Court should focus on such different questions in cases involving facial challenges and in cases involving as applied challenges.

340. 480 U.S. 470 (1987).

341. 475 U.S. 211 (1986).

342. 483 U.S. 825 (1987).

3. *Summary*

A unified theory of the takings clause would have to provide a basis for distinguishing between compensable deprivations of property ("takings") and noncompensable deprivations of property. None of the Court's current approaches fully explains the case law. One cannot explain the Court's takings decisions simply by examining what the government did to the claimant, regardless of whether one focuses on the severity of the harm or the unusual character of the harm suffered. If one looks at the government's justification for depriving the claimant of her property, one cannot merely ask whether the government acted to promote the common good, since the government frequently commits compensable takings when it is promoting the common good. Nor can one just ask whether the government sought to prevent a nuisance, for there are instances in which the government is not preventing a nuisance and yet no taking occurs. However, perhaps one *could* distinguish between compensable takings and noncompensable deprivations of property by defining more broadly the class of cases in which the government's justification for depriving the claimant of her property establishes that fairness does not require the payment of compensation. Finally, although the Court often asks whether the claimant relied economically on an expectation that the government would not act as it did, in most cases reliance does not appear to be the key to whether a taking occurred.

CONCLUSION

The Court's current takings doctrine provides no basis for determining when a compensable "taking" of "property" has occurred, since the Court has used so many different definitions of "property" and so many different tests for determining when a "taking" has occurred. Despite the chaos of current doctrine, however, the *results* in the Court's takings cases are surprisingly predictable. If, in fact, there *is* a pattern to the Court's takings cases, one should be able to articulate a set of principles that describe when the Court will find a taking.

In this Article, I have concluded that certain elements of the Court's current doctrine could be used as the basis for constructing a coherent account of when a taking occurs. Building on that analysis, I will argue in the second Article[343] that the pattern evident in the case law can best be explained by saying that the Court will find a taking whenever the government intentionally forces *A* to give up her property, unless the lawmakers are seeking to prevent or punish action (or failure to act) by *A* that they reasonably believe the public would consider wrongful or blameworthy. I conclude that the takings cases can best be explained by

343. Peterson II, *supra* note 15.

using a two-part definition of property. First, *A* possesses the freedom to act in ways that are economically valuable to her, whether or not this freedom to act has been granted to *A* as a matter of positive law. Second, *A* may acquire the legal right to force *B* or the government to act in ways that are economically valuable to *A*. However, the government may reserve the power to change the law in a manner that alters this right. If the government acts within the scope of its reserved power, no taking occurs.[344]

As I will show in the second Article, this explanation not only accounts for the results in the great majority of the Court's takings decisions, but it also accounts for many generally accepted propositions regarding when a taking occurs. It does not suddenly make the difficult takings cases easy to decide. But it does show why some takings cases are relatively easy to decide and others are far more difficnlt, and it offers a coherent framework for analyzing takings cases.

344. *Id.* at text accompanying notes 32-103.