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Laura M. Schleich

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Cover Page Footnote
This paper was awarded the Faculty Award for Excellence in Legal Scholarship by the University of Pittsburgh School of Law in May, 1991. I am indebted to Cyril Fox, Jr., Stuart Irwin, Paul Scibetta, Rebecca Dick-Hurtwitz, and Jim Chen for their insight, support, and assistance during preparation and edition of this article. Of course, I take full responsibility for any errors.
TAKINGS: THE FIFTH AMENDMENT, GOVERNMENT REGULATION, AND THE PROBLEM OF THE RELEVANT PARCEL

LAURA M. SCHLEICH

I. INTRODUCTION

Federal regulatory actions governing land use often lead to litigation over whether they constitute takings of private property for public use without just compensation in contravention of the Fifth Amendment. An inherently pivotal yet often ignored element in this analysis is the identification of the "relevant parcel," or, in other terms, the isolation of the actual property interest affected by the regulatory measure. Traditionally, courts have delineated this portion jealously so that it constitutes a small and usually insignificant segment of the landowner's whole property interest. These small degrees of interference do not rise to the level of a constitutional deprivation of property.

In the past, the issue of the relevant parcel may have received short shrift because challengers to a governmental regulation could first attack the constitutionality of the regulation for failure to provide for just compensation in the event of a taking. Any taking, regardless of its impact on the property, violated the Constitution and the reviewing court invalidated the statute. The United States Supreme Court, however, recently eliminated this line of attack in Preseault v. Interstate Commerce Commission. The

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* This paper was awarded the Faculty Award for Excellence in Legal Scholarship by the University of Pittsburgh School of Law in May, 1991.
** B.A., Susquehanna University, 1982; M.S., American University, 1985; J.D., University of Pittsburgh School of Law, 1991.

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1. The Fifth Amendment states in relevant part: "[N]or shall private property be taken for public use without just compensation." U.S. CONST. amend. V.

2. See Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2894 n.7 (1992) (recognizing the inadequacy of the "deprivation of all economically feasible use" rule in defining "the property interest" against which the loss of value is to be measured, and the resulting "inconsistent pronouncements by the Court").


4. See generally, Keystone, 480 U.S. at 493-96 (addressing facial challenge and noting differences between facial and as applied challenges).

Court rejected the argument that a regulation which failed to provide for just compensation should be struck down as a violation of the takings clause. Unless Congress explicitly states otherwise in the statute at issue, according to the Court, private parties alleging a regulatory taking must now proceed through the United States Claims Court and seek just compensation for the taking under the Tucker Act. Thus, the Court eliminated a common form of attack on regulatory takings.

The Court, in Preseault, focused the issues surrounding takings jurisprudence on the operation of the regulation itself: to recover, landowners must prove that the regulation so substantially interferes with the use and value of their property that a taking has occurred, and as a result, they are entitled to just compensation. The regulation and its effect are presumed constitutional. The debate shifts to an analysis of three issues: determination of how much of a loss the owner suffered, whether that loss is sufficient to constitute a taking, and the value of that loss. To address these issues, a court must identify the parcel affected by the regulation. Definition of the "part" and how much must be taken to require just compensation present elusive questions.

This article proposes a relevant parcel analysis in the wake of Preseault. The analysis addresses land use regulation and focuses exclusively on the affected portion of the property, without reliance on the entire parcel, its past or present use, or past benefits acquired by the landowner through use of the property. Drawing heavily from traditional property rules that favor landowners, the analysis includes consideration of the property rights affected by

6. Id. at 11-17.
7. Id. at 13; see also Northeast Savings, F.A. v. Director, Office of Thrift Supervision, 770 F. Supp. 19, 24 (D.D.C. 1991) (noting that "the Supreme Court has recently made clear that, as a substantive matter, there has been no taking without just compensation unless a plaintiff has presented a claim for compensation in Claims Court").
8. The Supreme Court established the presumption of constitutionality prior to Preseault. See, e.g., Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 494-95 (1987); Goldblatt v. Town of Hempstead, 369 U.S. 590, 594 (1962). Preseault, however, solidifies the presumption almost to the extent that it becomes irrebuttable.
9. Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2894 n.7 (1992) (noting that courts must identify the relevant parcel at issue, but that failure to clarify with precision the "denominator" to be used in the "deprivation of all economically feasible use" fraction has produced inconsistent results).
10. See CHARLES M. HAAR, LAND-USE PLANNING 875 (4th ed. 1989) (stating that the task of distinguishing between a regulation and a taking "may be the lawyer's equivalent to the physicist's hunt for the quark").
the regulation, the property rights exercised by the owners up to the date of the regulation's implementation, the policy arguments surrounding the regulation, and the property owners' interest in utilizing their property to the fullest extent possible.

II. TRADITIONAL APPROACH TO THE TAKINGS ISSUE

This section provides background information regarding the source and the nature of the government's powers to regulate private property. This includes a detailed discussion of the analysis typically used by courts to assess whether operation of a regulation rises to the level of a taking.

The inherent police power of the state permits the government to regulate private landowners' use of their property. Unlike takings accomplished through the power of eminent domain, which tend to be obvious and contested only for the amount of just compensation, regulatory takings generate dispute over every aspect of the application and impact of the regulation.

A. The Initial Hurdles: Legitimate Public Interest, Arbitrary and Capricious, and Nuisance Tests

Before determining whether an action of the government amounts to a taking of private property without just compensation, a court undertakes a substantive due process analysis. This involves a determination of whether the government acted within its powers to regulate in the public interest. To prevail at this step, the property owner must demonstrate that the regulation is an invalid exercise of the police power of the state or the Commerce Clause power of the federal government.


12. Eminent domain refers to the power of the government to physically take private property for public use in exchange for just compensation. The process of exercising this power is commonly referred to as condemnation. See FRANK GIBSON ET AL., REAL ESTATE LAW 169-74 (3d ed. 1992).


14. The Due Process Clause of the Fifth Amendment provides that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. V.


This poses a significant hurdle for the property owner, as a presumption of validity attaches to the government's rationale for the regulation.\textsuperscript{17} The regulation must work to benefit the common good of society by protecting interests such as the health of its citizens, the safety of its persons, homes, or work places, the prevention of impending danger, or the preservation of natural resources.\textsuperscript{18}

Although courts usually defer to the stated ends or public goals of regulations, the selected means of regulation is not always afforded the same deference. A court will ask whether the regulation "reasonably relate[s] to the accomplishment of that [public] purpose, that is, [whether the regulation is] not arbitrary, capricious, nor 'unduly oppressive upon individuals.'"\textsuperscript{19} An "essential nexus" must exist between the state's ends and the conditions placed on the property: "[t]he evident constitutional propriety disappears, however, if the condition . . . utterly fails to further the end advanced as the justification for the prohibition."\textsuperscript{20}

In limited circumstances, the due process issue is avoided if the government seeks to prevent or regulate a private use deemed detrimental to the public welfare. Termed the "nuisance exception," this involves regulation of property uses considered so noxious as to lack redeeming societal value or to harm society in some significant manner.\textsuperscript{21} Landowners do not have the right to use their land to the detriment of others; therefore, the government is not compelled to compensate the landowner when denying noxious uses.\textsuperscript{22}

The government simply prohibits the owner's injurious use of the property. In the instance of a legitimate public use, however, "unoffending property is taken away from an innocent owner"\textsuperscript{23} thus requiring just compensation. Modern industrialization and increased competing uses for land, however, have limited the application of the nuisance exception.\textsuperscript{24}


\textsuperscript{18} In Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1014 (1984), the Court stated that the regulation must provide a "conceivable" public character. Thus, the concern for the "common good" stretches to less tenable concerns while still satisfying the presumption of validity. For example, in Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 425 (1982), the Court acknowledged the lower courts' recognition that cable television provides important educational and community benefits.

\textsuperscript{19} Fox, supra note 15, at 14 (quoting Lawton v. Steele, 152 U.S. 133, 137 (1894)).

\textsuperscript{20} Nollan, 483 U.S. at 837.

\textsuperscript{21} See generally Connors, supra note 11.


Once beyond the due process hurdle, courts apply a three-factor test to determine whether the regulation amounts to a taking. These factors include the character of the governmental action, the economic impact of the regulation on the landowner, and the extent to which the regulation interferes with the landowner's distinct investment-backed expectations.25

B. Character of the Governmental Action

Assessment of the character of the governmental action involves a determination of whether the regulation has an invasive effect on the property. A court discerns whether the government, or a private party acting with governmental approval, has substantially interfered with the property owner's traditional property rights, particularly the rights to exclude26 and to use the property.27 Generally, if a court finds the governmental regulation to be invasive, a taking has occurred and the property owner is entitled to just compensation.28 Property owners, however, rarely prevail under this inquiry.29 If a court deems the regulation non-invasive, the evaluation of the regulation proceeds to application of the economic factors.

In most cases, invasiveness is readily discernible because the regulation calls for physical intrusion onto the property, allowing a

Laitos, Regulation of Natural Resources Use and Development in Light of the "New" Takings Clause, 34 ROCKY MTN. MIN. L. INST. 1, 38 (1988). But see Lucas, 112 S. Ct. 2886, 2897, 2900 (1992) (questioning the continued validity of the nuisance exception, labeling it "simply the progenitor of" the substantial state interest test and noting that a state's legislative declaration to restrict a noxious use is insufficient to sustain the regulation, yet holding that restrictions on noxious use are proper if they "inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership").

26. See Laitos, supra note 24, at 38; see also Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 435-36 (1982); cf. Federal Communications Comm'n v. Florida Power Corp., 480 U.S. 245, 251-54 (1987) (holding that no per se taking occurred under Loretto because Pole Attachments Act did not require permanent occupation of property, but was merely statute regulating economic relationships); California Housing Securities, Inc. v. United States, 959 F.2d 955, 958 (Fed. Cir.) (no taking under Loretto; plaintiff did not have a right to exclusive possession because government could impose conservatorship or receivership), cert. denied, 113 S. Ct. 324 (1992).
non-owner to make use of the property. 30 "[W]hen the physical intrusion reaches the extreme form of a permanent physical occupation, a taking has occurred." 31 This "is perhaps the most serious form of invasion of an owner's property interests," 32 because it effectively destroys the owner's rights to possess, use, and dispose of property. 33 A temporary physical invasion may amount to a taking if the invasion significantly impacts the use and value of the owner's property. 34

A taking can occur even though there has been no physical encroachment. 35 The determinative factor is whether the regulation inappropriately interferes with the owner's rights to exclude others and to make use of the property. 36 A regulation must completely abrogate these rights to amount to a taking. 37 For example, complete abrogation of a property owner's rights to descent and devise a property interest, regardless of its size, may amount to a taking. 38 This holds true even if the owner retains beneficial use during life. 39 A lien constitutes an essential property interest, 40 as does the right to interest. 41

In the absence of interference with these rights, courts remain reluctant to find an invasion. 42 In a case involving governmental regulation of protected birds, for instance, restrictions prohibiting the sale of artifacts using eagle feathers did not constitute a taking because the owner retained the right to possess, transport, devise, or donate his property. 43 Even though the regulations denied the owner the most profitable use of his property, the "loss of future profits—unaccompanied by any physical property restriction—

30. For example, in Loretto, a landlord challenged a New York statute which required her to permit a cable television company to install its cable facilities on her property. 458 U.S. at 421; N.Y. EXEC. LAW § 828(1) (McKinney 1982 & Supp. 1993); see also Kaiser Aetna, 444 U.S. 164, 170 (1979) (questioning whether improvements to private marina rendered it a navigable waterway under federal law).
32. Id. at 435.
33. Id.; see, e.g., Shepard, supra note 29, at 860.
34. See First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304, 318 (1987).
36. Id.; see also Southview Assocs., Ltd. v. Bongartz, 980 F.2d 84, 93 (2d Cir. 1992), cert. denied, 113 S. Ct. 1586 (1993).
38. Id. at 715.
42. Andrus, 444 U.S. at 66.
provides a slender reed upon which to rest a takings claim." The regulations did not destroy all future use because the owner could have developed other uses for the artifacts, such as showing them for a fee.44

Note that at this stage of the takings analysis the court evaluates the governmental action and its invasive impact on the property in the abstract. The court attempts to discern the character of the governmental action by applying the regulation to generalized traditional property rights, not to specific qualities such as size. For example, in *Loretto v. Teleprompter Manhattan CATV*,45 the Supreme Court held that installation of a television cable less than one-half inch in diameter constituted an invasion requiring just compensation even though the cable did not seriously interfere with the landowner's use of her property. Thus, if the character of the regulation is considered invasive, the court holds that a compensable taking has occurred, without determining the extent of its invasive qualities as applied to the specific property.46 The court never determines what portion of the property the regulation adversely affects. The government's action is invasive, in and of itself, and the regulation falls on this basis alone.

C. The Economic Factors

In the majority of regulatory takings claims, the focus of the case, and consequently the outcome, hinges on the economic analysis of the regulation's impact on the owner's property. The economic analysis consists of two parts: evaluation of the regulation's interference with the property owner's reasonable investment-backed expectations, and evaluation of the economic impact of the regulation on the property. Typically, a court isolates the relevant parcel affected by the regulation during the economic analysis.

1. Interference with Reasonable Investment-Backed Expectations

When analyzing the interference of the regulation with the property owner's reasonable investment-backed expectations, a court assesses whether "market or business conditions create a realistic expectation in the use" of the property interest in ques-

43. Id.
44. Id.
45. 458 U.S. 419 (1982).
46. Id. at 436-38. But see Hodel v. Irving, 481 U.S. 704, 717 n.2 (1987) (noting that "[i]t is entirely proper to note the extent of the rights taken").
tion. The analysis compares the economic value of the owner's anticipated or current use of the property with the property's economic value as affected by the regulation. Courts frequently do not treat the current use as the baseline; the comparison may rely on an anticipated use at the point of purchase or an anticipated new future use. If the regulation materially interferes with the use, a taking has occurred.

The case of *Penn Central Transportation Co. v. New York City* provides an example of how the Supreme Court has relied on both current and future uses to reject a property owner's allegations that a taking has occurred. *Penn Central Transportation Company* (Penn Central), the owner of the Grand Central Terminal (Terminal) in New York City, sought permission from the Landmarks Preservation Commission of New York City (Commission) to build a multistory office building over the Terminal.

The Commission rejected two plans submitted by Penn Central. The company subsequently brought suit on the ground that the City had taken its property without just compensation in violation of the Fifth Amendment. Penn Central argued that the denial of its rights to use the airspace above the Terminal and thus earn an economic return on that property constituted a taking.

The Supreme Court rejected this argument and found that the Commission had limited but not exhausted the uses for the airspace owned by Penn Central. Even though the company had submitted two proposals to the Commission, the Court found no indication that the Commission would reject every proposal. Further, Penn Central retained the right to earn a reasonable return on its investment through continued use of the Terminal as it stood.

*Penn Central* reveals a conservative approach in assessing changes in investment-backed expectations. When an alleged taking does not reduce current economic value, a taking has not occurred. Further, a court will not approximate the value of future anticipated uses unless the property owner has explored all alternatives to demonstrate that the applicable law prevents or materially inhibits all future uses.

50. *Id.* at 116.
51. *Id.* at 130.
52. *Id.* at 135-37.
2. Economic Impact

The economic impact of the regulation on the owner addresses the diminution in the property's value stemming from the governmental action. This step requires quantification of the regulation's impact. After comparing the pre- and post-regulation uses of the property, the court uses a balancing test to determine if the "diminution in value is sufficient to constitute a taking."53 The amount of decrease necessary to yield a taking remains unclear,54 although the basic power of the government to affect the economic return on private property through regulation for the public good lies beyond reproach.55 As Justice Holmes stated, "[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law."56

This discussion of the regulatory power of the government and the analysis traditionally used by the courts to determine whether the regulation amounts to a taking reveals a vast governmental capacity to interfere with private property. The initial hurdle of the substantive due process test favors the government, as does the character of the government action analysis. Inquiry into the economic factors presents the most plausible, although difficult, route to demonstrate that the regulation has worked a taking of private property.

III. PRESEAUlT AND THE TAKINGS ANALYSIS REVOLUTION

This section sets forth the facts and history of Preseault v. Interstate Commerce Commission.57 This case represents a watershed in takings jurisprudence because it holds that property owners must seek just compensation for alleged takings rather than mount a challenge to the regulation itself.58 Attacks on the constitutionality of the regulation are reserved for those rare cases where the property owner can prove that the regulation does not serve a public purpose, that the government has arbitrarily or capriciously applied the regulation, or that Congress has expressly refused to

53. Laitos, supra note 24, at 39.
54. The question remains, how far is "too far." Justice Holmes first used the term "too far," in Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922). He stated, "The general rule at least is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." Id. The phrase subsequently has become a term of art in takings jurisprudence. See Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 508 (1987) (Rehnquist, J., dissenting); Fox, supra note 15, at 27.
56. Pennsylvania Coal, 260 U.S. at 413.
58. See id. at 4.
permit compensation. Preseault reduces the property owner’s day in court to a proof of taking and a valuation of the property taken.

A. Preseault v. Interstate Commerce Commission

The dispute in Preseault centered on whether the application of the 1983 amendments to the National Trails System Act69 (Trails Act) to reversionary state property interests violated the Fifth Amendment. The Trails Act represents an effort by Congress to stem the loss of railroad rights-of-way by converting abandoned rail lines to recreational and conservation uses. Congress authorized the Interstate Commerce Commission (ICC) to preserve for future use rail lines not currently in use and to allow their public use as recreational trails until needed again for railroad purposes.60

1. The Early Decisions

The litigation began in 1981, with a claim by Vermont property owners to reversionary interests in the rights-of-way previously granted to railroad companies in portions of land adjacent to the owners’ property. The railroad’s use of the rights-of-way had ceased more than a decade earlier.61

The owners filed for a certificate of abandonment from the ICC. The state of Vermont and a railroad intervened and ultimately sought a transfer of the rights-of-way from the railroad to the City of Burlington for use as trails pursuant to the Trails Act. The state and the railroad prevailed before the ICC.62

2. The Decision of the Court of Appeals

On appeal to the Court of Appeals for the Second Circuit, the landowners launched two attacks. First, they alleged that the Trails Act was unconstitutional on its face because it took private property for a public purpose without just compensation. Second,

60. Under the amendments, interim trail use “shall not be treated . . . as an abandonment of the use of such rights-of-way for railroad purposes.” Id. § 1248(a).
61. See Trustees of the Diocese of Vermont v. State of Vermont, 496 A.2d 151 (Vt. 1985). The owners sought to quiet title in themselves. The state court dismissed the action, holding that the court lacked jurisdiction because the ICC had not authorized abandonment of the tracks and therefore continued to exercise exclusive jurisdiction over the rights-of-way. Id. at 152.
they claimed that the Trails Act did not constitute a valid exercise of congressional power under the Commerce Clause.63

The Court of Appeals upheld the Trails Act, finding that it fulfilled the legitimate congressional purposes of "preserving rail corridors for future railroad use" and "permitting public recreational use of trails."64 A taking did not occur because the ICC retains jurisdiction over all lands serving a railway purpose regardless of whether the purpose is immediate or future.65 Although the railroads had stopped using the rights-of-way, the railroads had not yet forfeited the right to future use. The owners' reversionary interests, therefore, could not vest until the ICC determined that the railroads had abandoned the rights-of-way.

3. The Decision of the Supreme Court of the United States

The Supreme Court held that "it [was] unnecessary to evaluate the merits of the takings claim because . . . even if the rails-to-trails statute gives rise to a taking, compensation is available to petitioners under the Tucker Act . . . and the requirements of the Fifth Amendment are satisfied."66 In reaching this conclusion, the Court framed the issue as whether the Claims Court retained jurisdiction under the Tucker Act for claims arising under the Trails Act and its amendments.67

The Court held that the Claims Court had jurisdiction because the legislation in question did not explicitly prohibit recovery under the Tucker Act.68 To eliminate jurisdiction, Congress must display an "unambiguous intention to withdraw the Tucker Act remedy."69 Even though neither the amendments nor the Trails Act expressly stated that the government would pay just compensation for taking private property, "the Tucker Act is an 'implie[d] promis[e]' to pay just compensation which individual laws need not reiterate."70 Thus, the owners' failure to seek a remedy in the United States Claims Court, under the Tucker Act, rendered their takings challenge premature. Therefore, the Supreme Court did not need to decide whether a taking had occurred.

64. Id. at 150.
65. Id. at 151.
67. Id. at 12.
68. Id. at 12-13.
69. Id. at 12 (quoting Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1019 (1984)).
70. Id. at 13 (quoting Yearsley v. W.A. Ross Constr. Co., 309 U.S. 18, 21 (1940) (alteration in original)).
B. Why Preseault Revolutionizes the Takings Analysis

*Preseault* revolutionized the traditional takings analysis by eliminating the analysis of the character of the government action.\(^{71}\) Prior to *Preseault*, landowners argued that the regulation as applied to their property invaded their traditional property rights—that the regulation goes "too far" and was invalid for want of just compensation.\(^{72}\) To prevail, the owners had to establish a qualitative, not a quantitative, interference with their property rights.\(^{73}\) Following *Preseault*, invasion alone no longer invalidates the regulation because just compensation is always available through the Tucker Act. A landowner must seek redress under the Tucker Act through the Claims Court,\(^{74}\) except in those rare instances in which Congress has issued an explicit directive otherwise.\(^{75}\)

The regulation may still go "too far," but "too far" no longer includes failure to provide for just compensation. Because the analysis of the character of the governmental action rarely favors the owner, a takings analysis will no longer focus on the breadth of the regulation from a traditional property rights perspective. Instead, the analysis will focus on an evaluation of the economic impact of the regulation. In this evaluation, a court will concentrate on the third part of the traditional takings test. Here, the focus is on the regulation's interference with the owner's reasonable investment-backed expectations and the economic impact on the property. A regulation that "goes too far" will interfere with the owner's economic interests to such an extent that it works a taking. The amount of compensation will reflect the level of interference. As a result of this change, the definition of the relevant parcel rises to a new level of importance because owners cannot show injury without first isolating the appropriate portion of their property affected by the regulation.

Several examples clarify the change wrought by *Preseault*. In the 1922 case of *Pennsylvania Coal Co. v. Mahon*,\(^{76}\) a case often described as the seminal case of takings jurisprudence,\(^{77}\) the

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71. See *supra* part II.B.
73. See *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) (holding that installation of cable, less than 1/2 inch in diameter, on the landlord's property required just compensation).
74. See *Narramore v. United States*, 960 F.2d 1048, 1051 (Fed. Cir. 1992) (stating that "the Tucker Act fulfills the promise of the Fifth Amendment").
76. 260 U.S. 393 (1922).
77. Chief Justice (then Justice) Rehnquist described the opinion as "a cornerstone of the jurisprudence of the Fifth Amendment's Just Compensation Clause." *Keystone Bituminous*
Mahons brought an action against Pennsylvania Coal Company (Pennsylvania Coal) to prevent it from mining coal underneath their property and thus causing surface subsidence. The Mahons owned the surface estate; Pennsylvania Coal owned the underlying mineral and support estates. The statute in question, the Kohler Act, prohibited, inter alia, mining of coal that would cause subsidence of any residence. One exception permitted mining when the owner of the surface estate also owned the underlying coal.

The Supreme Court struck down the Kohler Act on two grounds. First, the statute failed to protect a legitimate public purpose, and thus fell as an invalid exercise of the state's police power. This challenge remains available following Preseault. Second, the Kohler Act was unconstitutional because it did not provide for just compensation. The Supreme Court noted:

The rights of the public in a street purchased or laid out by eminent domain are those that it has paid for. . . . The protection of private property in the Fifth Amendment presupposes that it is wanted for public use, but provides that it shall not be taken for such use without compensation.

Had Preseault pre-dated Pennsylvania Coal, and had the Kohler Act satisfied the legitimate public interest test, Pennsylvania Coal would have faced the burden of demonstrating that by its specific terms and application the Kohler Act went "too far" in its regulation of the property. In all likelihood, the coal company would have had to pursue just compensation from the state in an inverse condemnation proceeding.


80. Id. § 666.

81. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413-14 (1922). Justice Holmes declared that the Kohler Act did not represent a valid exercise of the state's police power because the Act conferred a private benefit on property owners that acquired or owned only the surface estate. Id. at 414-16. Owners of the surface and underlying mineral estates, as well as the public at large, did not benefit from the law. Id. Further, the Act prohibited mining altogether in certain places, thus completely eliminating Pennsylvania Coal's support and mineral estate in the affected parcels. Id. at 412-13.

82. See infra part III.B.

83. Pennsylvania Coal, 260 U.S. at 415-16.

84. Id. at 415.

A second illustrative example of the effect of *Preseault* is the decision in *Kaiser Aetna v. United States.* In *Kaiser Aetna,* the landowners dredged and filled a private marina on their property to connect the marina to Maunalua Bay, a federally regulated public waterway. The government contended that the marina became subject to a federal navigational servitude upon its connection to the waterway. This would not only subject the marina to federal regulation but would also create a public right of access to the marina basin.

The landowners' suit questioned the right of the government to regulate the marina and the alleged public right of access. The Supreme Court found that the Commerce Clause provided the requisite authority for the government to regulate the operation of the marina, including details such as lighting and boating maneuvers. Regarding the alleged public right of access, however, the Court found in favor of the landowners. The public right of access amounted to an actual physical invasion and therefore a taking of private property in contravention of the Fifth Amendment.

Under a *Preseault* analysis, the *Kaiser Aetna* landowners might not have prevailed on the public access issue. *Preseault* directs property owners to the Claims Court to pursue an action for just compensation. Therefore, the landowners in *Kaiser Aetna* would never have reached a debate over application of the navigational servitude unless they could have proved that the servitude lacked a public purpose or that the government had arbitrarily or capriciously applied it. Consequently, if the landowners had questioned the right of public access following *Preseault,* they probably would have received just compensation and the marina would not have remained a private waterway.

III. THE RELEVANT PARCEL

This section explains in greater detail the problem of the relevant parcel. To begin, the section examines the traditional measure of the relevant parcel. This includes additional details on the diffi-
culties encountered in defining the relevant parcel and the impact of the measures ultimately used by the Supreme Court. The focus then turns to discussion of recent takings cases in which the issue of relevant parcel has played a crucial role. Finally, the section concludes with a suggested measure for the relevant parcel. The description and justification for the suggested measure attempts to accommodate traditional principles of takings jurisprudence as well as practical concerns surrounding land use in an era of vast governmental regulation.

A. The Pre-Preseault Measure of the Relevant Parcel

The term "relevant parcel" does not appear in most decisions involving takings claims. Typically, a court overlooks the problem of identifying the relevant parcel either because the affected parcel appears obvious to all parties, as in the case of a taking by eminent domain,\textsuperscript{94} or because the court makes unexplained assumptions about the dimensions of the parcel and then immediately shifts its attention to the economic analysis.

When attention does focus on identification of the relevant parcel, courts typically follow a conservative measure which favors the government. The approach typically results in a finding that the regulation has not worked a taking or that operation of the regulation results in an insignificant interference with the rights and interests of the property owner. The United States Supreme Court decisions in \textit{Penn Central Transportation Co. v. New York City}\textsuperscript{95} and \textit{Keystone Bituminous Coal Ass'n v. DeBenedictis}\textsuperscript{96} set the tone for this traditional analysis of the relevant parcel.

In \textit{Penn Central}, the landowners tried to define the relevant parcel as the precise segment of its property that it sought to use and develop: the airspace above an existing property interest.\textsuperscript{97} The United States Supreme Court rejected this attempt. The Court stated that "[t]aking' jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated... [T]his Court focuses... on... the parcel as a whole..."\textsuperscript{98} The Court defined

\textsuperscript{94} Typically, eminent domain involves a physical invasion and as a result, the litigation focuses on valuation of the property taken rather than a debate over how much property is subject to the taking. See \textit{Gibson et al.}, supra note 12, at 173-74.

\textsuperscript{95} 438 U.S. 104 (1978). For a discussion of the facts in this case, see supra part II.C.1.

\textsuperscript{96} 480 U.S. 470 (1987).

\textsuperscript{97} 438 U.S. at 130. In United States v. Causby, 328 U.S. 256, 265 (1946), the Court recognized a landowner's limited rights in the airspace above the property. The court stated that "[t]he landowner owns at least as much of the space above the ground as he can occupy or use in connection with the land." \textit{Id.} at 264.

\textsuperscript{98} 438 U.S. at 130.
the Terminal itself, which covered an entire city tax block, as the "whole."99 Thus, a limit on or deprivation of the use of the airspace above the Terminal amounted to an insignificant interference with the landowner's constellation of rights in its whole property.100 Further, the Court concluded, Penn Central retained a significant bundle of rights in the Terminal since it could continue to earn a reasonable return on its investment through its current use.101 Moreover, the Commission had only limited, not exhausted or destroyed, the possible uses for the airspace because Penn Central could submit additional proposals for its use and development.102

In *Keystone Bituminous Coal Ass'n v. DeBenedictis,*103 the Supreme Court reinforced this measure of the relevant parcel. The Court addressed a facial attack on Pennsylvania's Bituminous Mine Subsidence and Land Conservation Act (Subsidence Act)104 which prohibits coal mining that causes subsidence damage to pre-existing public buildings, dwellings, and cemeteries. The Pennsylvania Department of Environmental Resources (Department) regulations issued pursuant to the Subsidence Act require coal companies to leave fifty percent of the coal in place beneath protected surface structures to provide support.105

Several coal companies and Keystone Bituminous Coal Association (Keystone), an association representing coal mine operators, sued the Department.106 Keystone claimed, inter alia,107 that to fulfill the fifty percent rule, it had to leave twenty-seven million tons of coal in the ground.108 The company attempted to define this coal as the relevant parcel, arguing that it constituted a "separate segment of property for takings law purposes."109 Thus, Keystone maintained that operation of the fifty percent rule

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99. *Id.*
100. *Id.* at 131.
101. *Id.* at 136.
102. *Id.* at 136-37.
107. The *Keystone* plaintiffs unsuccessfully alleged that the Subsidence Act did not fulfill a public purpose. The Court rejected this argument for two reasons. First, unlike the Kohler Act at issue in *Pennsylvania Coal,* the Subsidence Act contains specific language indicating that it operates "for the protection of the health, safety and general welfare of the people of the Commonwealth." *Id.* at 485 (quoting § 2 of the Subsidence Act). Second, the Subsidence Act does not allow exceptions from coverage unless the waiving party obtains consent from Pennsylvania Department of Environmental Resources. *Id.* at 486. In *Pennsylvania Coal,* the Kohler Act did not apply when the holder of the surface estate also owned the mineral estate. *Id.*
108. 480 U.S. at 498.
109. *Id.*
worked a taking of twenty-seven million tons of coal because the coal that had to remain in the ground had, in effect, been taken by the government.\textsuperscript{110}

Relying on \textit{Penn Central}, the Court rejected this argument.\textsuperscript{111} The court defined the "whole" as the total amount of coal in all of the mines at issue in the litigation, approximately 1.46 billion tons.\textsuperscript{112} The Court determined that the twenty-seven million tons of coal to remain in the ground accounted for less than two percent of Keystone's coal.\textsuperscript{113} In light of Keystone's "financial-backed expectations,"\textsuperscript{114} denial of two percent of its coal did not deprive the owners of the "economically viable use of that property."\textsuperscript{115} In any event, other mining constraints prevented Keystone from mining more than 75% of its coal.\textsuperscript{116}

While the \textit{Keystone} and \textit{Penn Central} decisions set forth the traditional measure of the relevant parcel, a decision that predated these opinions--\textit{Pennsylvania Coal}--adopted a different approach.\textsuperscript{117} There, a coal company alleged that it could not mine any of its coal if required to comply with the Kohler Act, legislation that required coal companies to leave fifty percent of the coal beneath various surface structures to provide support.\textsuperscript{118} The Court impliedly endorsed the company's argument that the relevant parcel consisted of the coal to remain in the ground.\textsuperscript{119} Justice Holmes wrote: "What makes the right to mine coal valuable is that it can be exercised with profit. To make it commercially impracticable to mine certain coal has very nearly the same effect for constitutional purposes as appropriating or destroying it."\textsuperscript{120} Further, the Kohler Act, as applied to the facts in this case, operated to "abolish what is recognized in Pennsylvania as an estate in land."\textsuperscript{121} Isolated in this fashion, the injury inflicted on Pennsylvania Coal amounted to a 100% loss of its property, a loss large enough to constitute a taking without just compensation.\textsuperscript{122} The Kohler Act ultimately fell

\textsuperscript{110} \textit{Id.}
\textsuperscript{111} \textit{Id.}
\textsuperscript{112} \textit{Id. at 496.}
\textsuperscript{113} \textit{Id.}
\textsuperscript{114} \textit{Id. at 499.}
\textsuperscript{115} \textit{Id.}
\textsuperscript{116} \textit{Id.} Other mining constraints included those resulting from technological limitations.
\textsuperscript{117} \textit{Pennsylvania Coal Co. v. Mahon}, 260 U.S. 393 (1922). For a discussion of the facts of this case, see \textit{infra} part III.B.
\textsuperscript{118} 260 U.S. at 412.
\textsuperscript{119} \textit{Id. at 412.}
\textsuperscript{120} \textit{Id.}
\textsuperscript{121} \textit{Id.}
\textsuperscript{122} \textit{Id.}
because it did not serve a legitimate public purpose, not because it would yield a loss.\textsuperscript{123} Nevertheless, the approach adopted by Justice Holmes mirrors and legitimizes the arguments made by the property owners in \textit{Penn Central} and \textit{Keystone}.

\textbf{B. Recent Treatment of the Relevant Parcel}

Two recent lower court cases have addressed the issue of the relevant parcel head on, perhaps more directly than any past case. These cases are \textit{Loveladies Harbor, Inc. v. United States}\textsuperscript{124} and \textit{Florida Rock Industries v. United States}.\textsuperscript{125} In both instances, the courts defined the relevant parcels as the portions for which the property owners sought the permits necessary for their intended uses.\textsuperscript{126} The courts rejected the government's suggestion to consider the permit amount as a percentage of a larger expanse of property held by the landowners.\textsuperscript{127}

Florida Rock Industries (Florida Rock) purchased 1560 acres of land in 1972 for the purpose of limestone mining.\textsuperscript{128} Florida Rock did not mine the land after the purchase.\textsuperscript{129} Subsequently, Congress amended the Clean Water Act (CWA) to require landowners to obtain a permit from the Army Corps of Engineers (Corps) prior to any discharge of dredged or fill materials into waters covered by the Act.\textsuperscript{130} In 1978, Florida Rock decided to mine the property.\textsuperscript{131} Seeking to comply with the CWA, the company filed a permit application to cover ninety-eight acres, an area that Florida Rock estimated would take three years to mine.\textsuperscript{132} The company focused on this timeframe because "the Corps had indicated it would consider applications covering no more than a three-year need."\textsuperscript{133}

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\begin{itemize}
  \item \textsuperscript{123} \textit{Id.}
  \item \textsuperscript{124} 15 Cl. Ct. 381, 391-93 (1988). The valuation of the relevant parcel, as decided in this case, was addressed in \textit{Loveladies Harbor, Inc. v. United States}, 21 Cl. Ct. 153 (1990).
  \item \textsuperscript{126} \textit{Id.; Loveladies Harbor}, 15 Cl. Ct. 381, 393 (1988).
  \item \textsuperscript{127} \textit{Florida Rock}, 791 F.2d at 904; \textit{Loveladies Harbor}, 15 Cl. Ct. at 392.
  \item \textsuperscript{128} 21 Cl. Ct. 161, 164 (1990), \textit{judgment entered by} 23 Cl. Ct. 653 (1991).
  \item \textsuperscript{129} \textit{Id.}
  \item \textsuperscript{130} 33 U.S.C. § 1344 (1988).
  \item \textsuperscript{131} \textit{Florida Rock}, 21 Cl. Ct. at 164.
  \item \textsuperscript{132} \textit{Id.}
  \item \textsuperscript{133} \textit{Id.}
\end{itemize}
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The Corps denied the application, concluding that "the permit would not be in the public interest." \(^{134}\) Florida Rock brought suit in the Claims Court, seeking just compensation for a regulatory taking. \(^{135}\) Finding that limestone mining constituted the only economically viable use for the property, the Claims Court held that the permit denial amounted to a taking. \(^{136}\) The taking pertained only to the ninety-eight acres. \(^{137}\) Florida Rock retained the passive rights of ownership, including the right to exclude others and the right to sell or lease the property. \(^{138}\) Nonetheless, the court termed such rights "meaningless" because the plaintiff could no longer "put the property to productive use." \(^{139}\) The court found that "plaintiff's residual rights are hollow and cannot defeat its claim for just compensation." \(^{140}\)

The government appealed the decision, arguing that the ninety-eight acres represented an insignificant part of the 1560 acre tract; consequently, a permit denial for such a small portion did not yield a taking. \(^{141}\) Florida Rock, on the other hand, alleged on appeal that the entire 1560 acres, rather than the ninety-eight acres as determined by the lower court, had been taken because the Corps eventually would deny the necessary permits for those acres as well. \(^{142}\) Thus, denial of one permit amounted to a taking of the entire tract.

The court of appeals rejected both arguments, maintaining that ninety-eight acres had been taken. The court supported this decision with four reasons. \(^{143}\) First, the court stated that the Corps' interest in limiting its exposure through a test case of ninety-eight acres was "entitled to some judicial respect." \(^{144}\) Second, the court found no evidence that Florida Rock would mine more than ninety-eight acres in three years, thus there could be no "frustration of any viable economic use" as to the remaining land until the three years lapsed. \(^{145}\) Third, the court reasoned that "the real injury becomes more speculative as the time of intended

\(^{134}\) Id.
\(^{135}\) Id.
\(^{137}\) This determination was expressed orally by the presiding judge as explained in Florida Rock, 791 F.2d 893, 897 (Fed. Cir. 1986).
\(^{138}\) Florida Rock, 8 Cl. Ct. at 165.
\(^{139}\) Id.
\(^{140}\) Id.
\(^{142}\) See id. at 896, 904-05.
\(^{143}\) Id. at 905-06.
\(^{144}\) Id. at 905.
\(^{145}\) Id.
development becomes more distant."\textsuperscript{146} "Fourth, Florida Rock might have precipitated takings by filing a series of applications for 98 acre segments."\textsuperscript{147} Then, if the Corps refused to consider the applications, review would proceed under the Administrative Procedure Act, not the Tucker Act.\textsuperscript{148} The court, however, questioned the likelihood that the Corps' "refusal to consider applications relating to remote periods would be deemed an abuse of discretion."\textsuperscript{149} The court of appeals thus affirmed the determination of the Claims Court that the ninety-eight acres constituted the appropriate portion for the takings analysis and calculation of damages.\textsuperscript{150} On other issues, however, the court vacated and remanded.\textsuperscript{151} At that review, the Claims Court did not disturb the measure of the relevant parcel.\textsuperscript{152}

The \textit{Lovelandes Harbor}\textsuperscript{153} case involved a twenty-five year span of incremental development of approximately 250 acres of land. Lovelandes Harbor (Lovelandes) purchased the land in 1956 for residential development, and in 1982, fifty-one acres remained undeveloped. By this time, state and federal wetlands laws prohibited development of the land without first obtaining a permit from the appropriate state and federal agencies.\textsuperscript{154}

Initially, Lovelandes requested permission from the state regulatory agency to fill all fifty-one of the remaining acres.\textsuperscript{155} A second application and subsequent settlement negotiations resulted in a state permit for 12.5 acres. Because Lovelandes had filled one of these acres, the state issued the permit for 11.5 acres. The company experienced less success on the federal level: the Corps denied two permit requests that would have allowed Lovelandes to develop the 12.5 acres. Subsequently, Lovelandes brought suit in the Claims Court, alleging a taking of 12.5 acres and requesting just compensation.\textsuperscript{156}

While considering cross-motions for summary judgment, the Claims Court addressed the issue of the relevant parcel.\textsuperscript{157}

\textsuperscript{146} \textit{Id.}
\textsuperscript{147} \textit{Id.}
\textsuperscript{148} \textit{Id.}
\textsuperscript{149} \textit{Id.}
\textsuperscript{150} \textit{Id.}
\textsuperscript{151} \textit{Id.} at 905-06. The issues remaining for further review included a fresh assessment of the economic factors as applied to Florida Rock's loss.
\textsuperscript{154} \textit{Id.}
\textsuperscript{155} \textit{Id.} at 154.
\textsuperscript{156} \textit{Id.}
Loveladies argued that the court should compare the value of the 12.5 acres before the permit denial to the value of the 12.5 acres after the denial to measure the impact of the regulation.\textsuperscript{158} The Corps countered that the value of the original 250-acre parcel should be compared to the post-denial value of the 12.5 acres.\textsuperscript{159} Acknowledging the directive of \textit{Penn Central}\textsuperscript{160} to focus on the parcel as a whole, the court identified "the critical issue [to be] how to define what the whole parcel includes."\textsuperscript{161} The court turned to \textit{Keystone} and \textit{Florida Rock} for insight.\textsuperscript{162}

The Claims Court observed that the \textit{Keystone}\textsuperscript{163} Court "defined the value of the parcel as a whole as 'the value that remain[ed] in the property' when the taking was said to have occurred."\textsuperscript{164} This "included more than . . . that portion of the coal which the statute required to remain in place," yet it did not include all of the coal in the ground on the original date of purchase by Keystone.\textsuperscript{165} Consequently, the Claims Court focused only on the value of the 57.4 acres that Loveladies held at the time of the alleged taking, rather than "the value of all of the property originally purchased as the parcel as a whole."\textsuperscript{166}

Two additional factors led the court to further narrow its focus. Adopting the rationale of \textit{Florida Rock},\textsuperscript{167} the court stated that "[n]ot all properties held at the time of the taking can always be considered as part of the parcel as a whole."\textsuperscript{168} The court then excluded all noncontiguous acres which were not affected by the Corps' permit denial and those acres which had "already been denied the necessary permits from the State of New Jersey."\textsuperscript{169} This conservative approach limited the relevant parcel to the 12.5 acres which were covered in the permit application and claimed in the suit.\textsuperscript{170}

The Claims Court ultimately held that Loveladies had suffered a taking due to the permit denial.\textsuperscript{171} Prior to the government

\textsuperscript{158} \textit{Id.} at 391-92.
\textsuperscript{159} \textit{Id.} at 392.
\textsuperscript{161} \textit{Loveladies Harbor}, 15 Cl. Ct. at 391.
\textsuperscript{162} \textit{Id.} at 392-93.
\textsuperscript{164} \textit{Id.} (quoting \textit{Keystone}, 480 U.S. at 497 (alteration in original)).
\textsuperscript{165} \textit{Loveladies Harbor}, 15 Cl. Ct. at 392.
\textsuperscript{166} \textit{Id.}
\textsuperscript{168} \textit{Loveladies Harbor}, 15 Cl. Ct. at 392.
\textsuperscript{169} \textit{Id.} at 393.
\textsuperscript{170} \textit{Id.}
regulation, the 12.5 acres had a value of $2,658,000 as use for residential lots. Following the regulation, the value dipped to $12,500, a value of $1000 per acre for recreation and conservation uses and a decrease of more than ninety-nine percent. While change in value does not constitute the sole factor for consideration, the court recognized that in this case, the government's action had "virtually . . . eradicated" the value of the 12.5 acres.

C. A Suggested Measure of the Relevant Parcel

Courts typically avoid the issue of the relevant parcel. Reliance on a broad economic analysis substantiates the assessment of the impact of the regulation on the property, and in this way, a loose definition of the relevant parcel justifies the conclusion. Because Preseault removes consideration of the character of the regulation, the outcome of regulatory takings pivots on the economic impact of the regulation. Consequently, courts must now undertake an ordered analysis of the economic factors, including the relevant parcel. Without a structure for this analysis, neither government nor property owners will have sufficient information to plan their behavior or to allocate efficiently their enforcement and development resources.

A two-step process will afford all parties the necessary flexibility and certainty needed. First, the court, not the parties, should define the relevant parcel. Second, the court should apply the economic factors of interference with reasonable investment-backed expectations and economic impact. This approach ensures an independent analysis by the court rather than a rote endorsement of an analysis presented by either party. Without an ordered objective assessment, the past practice of allowing a pure economic analysis to shape the relevant parcel will continue.

An appropriate and accurate measure of the relevant parcel should isolate the property taken at the moment of regulation. A court should define the contours, including physical as well as intangible qualities, with rigorous and exclusive attention to the present status of the property. To accomplish this, the court should consider the following factors: identification of the property interest currently held by the owner; assessment of the present

172. Id.
173. Id.
174. Id.
175. See Azul Pacifico, Inc. v. City of Los Angeles, 948 F.2d 575, 585 (1991) (noting that "[c]ompensation becomes due all at once, or not at all"), withdrawn on other grounds, 973 F.2d 704 (9th Cir. 1992) (plaintiff's cause of action should have been brought under 42 U.S.C. § 1983 and the statute of limitations had passed), cert. denied, 113 S. Ct. 1049 (1993).
or reasonable planned use for the property; and application of basic takings jurisprudence principles. Although this approach provides essential structure to the analysis, the outcome of each case rests on a careful balancing of the factors. Therefore, the analysis must often give way to "essentially ad hoc, factual inquiries,"\textsuperscript{176} a necessity that prompted Justice Holmes to characterize takings issues as presenting "a question of degree."\textsuperscript{177}

1. Identification of the Property Interest

To begin its analysis of the relevant parcel, a court must determine the exact property interest held by the landowner at the moment of regulation.\textsuperscript{178} This includes examination of the property title to ascertain the nature of the intangible interest as well as its physical dimensions. The assessment should go beyond the property interest as set forth in court documents or permit applications. That interest is likely to be the product of the restrictions set by the government regulation the landowner questions in the suit.\textsuperscript{179}

Confining the examination to the owners' current property holdings prevents the government from relying on past benefits realized on portions no longer held by the landowners.\textsuperscript{180} Consideration of past gains forces landowners to somehow "pay" for the benefit of operating free of the regulation in the past. Also, past gains or benefits do not compensate landowners for present or future deprivations caused by the present regulation.

2. Present or Reasonable Planned Use for the Property

An accurate and fair measure of the relevant parcel considers the present or reasonable planned use for the property. The government should have to take landowners and their planned uses at the moment of regulation as it finds them, just as defendants in any civil context must take their opponents.

The court should determine discrete investment-backed expectations at the moment of regulation, not at the moment of purchase of the property. A vital element of property ownership is assump-

\textsuperscript{176} Kaiser Aetna v. United States, 444 U.S. 164, 175 (1979).
\textsuperscript{177} Pennsylvannia Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).
\textsuperscript{178} The "bundle of rights" that attach to the property interest are established when the landowner assumes title to the property. See Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2899 (1992).
\textsuperscript{179} See generally Florida Rock Indus. v. United States, 21 Ct. Cl. 161, 164 (1990) (noting that Florida Rock would have requested a permit to cover its entire parcel of land except for limitations imposed by the Corps).
\textsuperscript{180} See Loveladies Harbor, Inc., v. United States, 15 Ct. Cl. 381, 391-93 (1988).
tion of the risk inherent in that ownership. A measure of the relevant parcel that increases the risk of ownership by imposing past discrete investment-backed expectations contradicts two fundamental notions of law. First, a focus on the past contradicts the tenet of property law that owners should be encouraged to put land to its most productive use. Second, this perspective contradicts the proposition that landowners are entitled to a reasonable return on their investment. By taking landowners as it finds them, the court grants any windfall resulting from shouldering the risk of property ownership to the landowners rather than penalizing them for pursuing other productive uses for their property.

Assessment of the planned or present use of the property must reflect available options for other uses if the owner is pursuing a variety of uses. For example, if a property owner selects one use out of several options and the government denies regulatory approval, the owner retains the remaining use options. Since the owner has other options, a finding of a taking is less likely.

If, on the other hand, the property owner has a sole use for the land and the government denies that use, the owner lacks the opportunity to make a meaningful choice among options. When the governmental regulation effectively dictates what options the owner may pursue, a taking is more likely to result. Under these circumstances, the government has stripped the property owner of the flexibility to make a meaningful choice regarding the risks of ownership.


183. Of course, if landowners have notice of government regulation at the time of purchase, they should not be permitted to argue that they have suffered a taking due to operation of that regulation on their property. See Ciampitti v. United States, 22 Ct. Cl. 310, 321 (1991) (holding no taking as a result of a denial of a permit to fill wetlands in part because the landowner knew of development regulations prior to purchase).

184. Cf. United States v. 62.50 Acres of Land, 953 F.2d 886, 890 (5th Cir. 1992) (noting that "[p]otential uses must overcome a presumption in favor of the existing use").


186. Florida Rock exemplifies this point. Florida Rock purchased 1560 acres of land for the sole purpose of using the land for limestone mining. Following application of the regulation, the land could no longer be used for mining purposes. The government, however, stressed that the land could be used for conservation. Since the value of the land for conservation was so low relative to the value as a limestone quarry, Florida Rock was denied a meaningful choice regarding the use of its land. See also Whitney Benefits, 926 F.2d at 1174 (rejecting argument that plaintiffs "might have been able to farm [the] parcel" they purchased with the intent to mine).
A measure of the relevant parcel must also consider the specifics of the use of the property. That is, an owner may use or plan to use all of the property for the same use. In this case, the use is unitary. If the use varies, as would be the case in a farm setting where one segment would be used for crop production and another for residential purposes, the use is integrated. Use schemes can also involve noncontiguous segments of property or instances in which loss of one segment enhances or inhibits use of the remaining portions of property.

In each circumstance, a court should assess the relevant parcel to include contiguous and noncontiguous portions joined in an existing use. For example, if the property owner plans a unitary use, the court should consider the owner's entire holding as the relevant parcel even if the suit addresses only one segment of the property. Regulatory restrictions will affect the entire parcel in the same manner so that denial of one permit indicates that the government will deny similar future applications. This liberal measure of the relevant parcel relieves the landowner of the burden of owning not only one unproductive segment but also the

187. See Elsmere Park Club Ltd. v. Town of Elsmere, 771 F. Supp. 646, 653 (D. Del. 1991) (rejecting contention that apartments effected by ordinance constituted the relevant parcel, and instead considering the entire apartment building as the appropriate unit of measurement).

188. See United States v. 2,175.86 Acres of Land, 687 F. Supp. 1079 (E.D. Tex. 1988). The property owners held an irregularly shaped tract with many different uses, including residential, recreational, and timber production. The court valued the land as a whole parcel and subsequently assessed the contributory values of the component parts. Id. at 1087-88. The court prohibited valuation by summing the values of the individual uses which might result in double-counting. Id.

189. See Pete v. United States, 531 F.2d 1018, 1020 (Cl. Ct. 1976).

190. See, e.g., United States v. 104 Acres of Land, 666 F. Supp. 1017, 1020-21 (W.D. Mich. 1987) (assessing incidental damages to land adjacent to easement); United States v. 1,162.65 Acres of Land, 498 F.2d 1298, 1302 (8th Cir. 1974) (holding severance damages appropriate when one portion of unitary use, multi-tract parcel taken); Ochoa Realty Corp. v. Faria, 815 F.2d 812, 815-16 (1st Cir. 1987) (rejecting claim for equitable relief and noting availability of severance damages for injury to untaken property).


192. If a taking subordinates the use of property not taken, the owner can be compensated for value of the property not expressly taken. See Pete, 531 F.2d at 1034-35 (finding a taking of plaintiff's barges even though regulation effected a taking of realty); see also United States v. 2,560 Acres of Land, 836 F.2d 498, 501 (10th Cir. 1988) (affirming compensation of owner "for the diminution of value of the nonsubordinated affected area, as well as for the expressly condemned property").

On the flip side, land not expressly taken can increase in value due to a taking. In Washington Metropolitan Area Transit Authority v. One Parcel of Land, 691 F.2d 702 (4th Cir. 1982), the property owner held property adjacent to a site of a planned subway stop. The court stated that unity of use between the taken and retained land was relevant, although not determinative, in assessing the scope of the taking. Id. at 704. The court noted the possibility that the taking could have conferred a "special benefit" on the untaken land. Id. at 706.
entire unproductive site. The burden of ownership, as well as assumption of the risk that the regulation may never change, shifts to the government.

A similar conclusion results from contiguous and noncontiguous integrated uses. Integrated plans succeed due to the contribution and role of each segment of property in the overall use scheme. Further, this measure of the relevant parcel reflects the reality of the landowners' use and investment in their property. Ignoring such complex uses not only creates a disincentive to such schemes but also requires landowners to shoulder even higher losses on their investments when uses are integrated. This forced shift in the burden of ownership must occur since the government has eliminated the owners' preferred uses of their property and put the choice of use beyond their control. Regulation does not destroy or eliminate the property; it merely shifts and displaces the control from the private owner into the government's communal decision-making apparatus. Once the government has removed the power to make significant decisions, the landowner should no longer bear the risks of ownership.

193. In Naegle Outdoor Advertising, Inc. v. City of Durham, 844 F.2d 172 (4th Cir. 1988), the Court of Appeals examined a city ordinance limiting the locations on which billboards could appear throughout the city of Durham, N.C. Naegle, a billboard advertising company, owned 137 billboards in Durham, 85 of which were affected by the ordinance. Id. at 173. Naegle rented the billboards "on a 'showing' basis, an industry practice of renting several billboards throughout the area to carry the same advertising." Id. at 175. Challenging the ordinance, Naegle argued that since it used an integrated marketing scheme, compensation for the billboards alone was insufficient. Id. at 176.

In remanding the case for determination of the relevant parcel, the court stated: "Clearly the unit is not composed of the affected billboards, which, like the coal pillars in Keystone, do not constitute a separate segment of property for taking purposes." Id. "The appropriate unit is that one which is substantially affected by the ordinance. Its identification depends largely on the scope of Naegle's sharing contracts." Id. at 178.

On remand, the district court held that the relevant parcel was the combined group of Durham metro area signs owned by Naegle. Naegle, 803 F. Supp. 1068, 1074 (M.D.N.C. 1992). The court acknowledged that the regulation would reduce Naegle's annual revenue in the metro market by almost 30%, but held that the ordinance did not constitute a taking because Naegle "ha[d] not been deprived of all economically viable use of its property interests as a whole." Id. at 1078-80.

194. See Belville Mining Co. v. United States, 763 F. Supp. 1411 (S.D. Ohio 1991). Here, the court observed that choices between the environment and the use of land may vary over time, but such judgments should not destroy rights guaranteed by the Constitution. Id. at 1420.

195. See Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2894-95 (1992) (noting "that regulations that leave the owner of land without economically beneficial or productive options for its use . . . carry with them a heightened risk that private property is being pressed into some form of public service").

3. Basic Principles of Takings Jurisprudence

Two fundamental principles of takings jurisprudence provide guidance in determining the appropriate measure of the relevant parcel. Courts frequently give lip service to these rules, but rarely does the outcome of a takings case reflect their loyal and consistent application. First, courts have consistently recognized that takings issues should be approached from the perspective of the loss of the property owner rather than from the gain of the government.\textsuperscript{197} This demands not only a consistent perspective on the impact of a government regulation but also a refusal to evaluate the impact simply as a necessary consequence of public policy. The landowner's reasonable current or planned use for the property must stand alone, on its merits, rather than as an alternative to the use required by the regulation.

Second, fairness and equity demand that courts put property owners in the position they would have been in had the government never taken their land.\textsuperscript{198} Indeed, the Fifth Amendment requires that when the government takes land for a public purpose, the public at large should pay the cost rather than the individual landowner.\textsuperscript{199} Thus, a measure of the relevant parcel should favor the landowner since the taking benefits the community. Landowners should not bear the burden of forfeiting a reasonable return on their property. "The Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was 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."\textsuperscript{200}

V. APPLICATION OF THE "MOMENT OF REGULATION" MEASURE

This section applies the "moment of regulation" measure of the relevant parcel to the traditional and more recent takings cases discussed in Section IV. This comparison reveals subtle differences


\textsuperscript{200} Armstrong, 364 U.S. at 49.
that could result from application of the suggested measure as well as the benefits of using this measure.

In essence, the moment of regulation measure of the relevant parcel takes a snapshot of the property on the day the government imposes a regulation on the property. The measure assesses the physical dimensions of the property on that day, without reference to segments no longer used or owned.

The snapshot includes the present or reasonable planned use for the property. The measure does not retrospectively evaluate the planned use at the point of purchase; instead, it accommodates and respects the risk the owner has undertaken to improve the property and increase its productivity through a change in use. Thus, the picture includes consideration of meaningful use options, with attention paid to the flexibility afforded the owners relative to their right to earn a reasonable return on their investment.

A court must also consider the scheme of use for the property. This may entail a unitary or integrated use as well as contiguous and noncontiguous portions contributing to the use scheme. Recognition of these dynamic arrangements enhances the court's understanding of the regulation's impact on the property since the regulation makes the property subject to communal decision making. Complex and delicate use schemes often suffer when subjected to this type of governmental control.

A. Traditional Takings Cases

Application of the moment of regulation measure of the relevant parcel to the traditional takings cases reveals that the outcomes would probably remain the same with several notable concerns. For example, the Penn Central and Keystone focused on the owners' current property interests as suggested in the moment of regulation measure. Pennsylvania Coal provides a sharp contrast to these cases, however, as the Court focused exclusively on the coal to remain in the ground. Had Justice Holmes included the coal that the company could mine despite the regulation, he would have faced the difficult task of determining whether the amount to remain in the ground constituted a significant enough portion of the property interest to yield a taking. Like courts struggling with this problem today, Justice Holmes would have had to decide where to place this figure on the "too far" continuum.201

The Penn Central Court recognized the property owners' discrete investment-backed expectations in the planned use for the

property interest. Though the Commission denied the proposed plans for the Terminal, the Court observed that Penn Central would continue to benefit from the Terminal and could submit alternative plans for use of the airspace in the future. Thus, meaningful choices still existed for the property owner.

Keystone and Pennsylvania Coal contrast with Penn Central's treatment of the property owner's present or reasonable planned use. While the owners in Penn Central retained meaningful use options, the use options for the coal companies remained unclear because neither case addressed alternative uses. This dearth of information makes it impossible to determine whether the government failed to assess fully the impact of the regulation on the property owners' discrete investment-backed expectations. The comparison, however, demonstrates that under the moment of regulation measure property owners must investigate and evaluate the possible uses for their property and present this information to the court. Unless this is done, the court may fail to grasp the full impact of the regulation on the landowners' ability to earn a reasonable return on their property.

Reconciling these cases with the traditional principles of takings jurisprudence presents fewer problems. Certainly Pennsylvania Coal recognized these principles and adhered to them by focusing on the individual landowner's position before and after application of the regulation. The Penn Central Court appears to have given the principles consideration as well since the Court recognized that the property owners retained meaningful use options following application of the regulation. Consequently, the owners did not sustain a compensable loss, nor did they stand in a significantly different position subsequent to the Commission's denial of the two development plans.

In Keystone, however, the Court focused on the gain to the government—the importance of increased surface safety. The coal company certainly occupied a different position after application of the regulation since it could no longer realize an economic return on a portion of its property. Under the balancing test suggested by the moment of regulation measure perhaps the Court would have weighed these concerns more heavily in favor of Keystone.

203. Id. at 136-37.
B. Recent Takings Cases

Application of the moment of regulation measure of the relevant parcel would benefit the property owners in *Florida Rock* and *Loveladies Harbor*. In each case, the Claims Court concluded that the relevant parcel consisted of the property considered under the agency permit. Under the suggested measure, the relevant parcels would include the entire property interest currently held by the property owners. The parcels used by the court would be inappropriate not only because the parcels did not reflect the owners' actual property interests but also because the government agencies, not the property owners, set the permit amounts. Further, property owners should not be penalized for having earned benefits on their property in the past, especially if they no longer own the productive portion of the property.

The property owners in *Florida Rock* and *Loveladies Harbor* lacked any meaningful use options following application of the regulations. As noted, the alternatives to the owners' preferred use was conservation or recreational use of the property. Thus, the owners sustained a complete loss since they could no longer realize discrete investment-backed expectations for the property considered in the permits or for the remaining segments of their property.

To require landowners to continue ownership of unproductive property strips them of the essential rights of property ownership—the right to put property to productive use and to earn a reasonable return on their investment. The measure of the relevant parcel used by the Claims Court removed property from control by Florida Rock and Loveladies Harbor and subjected it to control by the communal decision-making process of the government.

Furthermore, the decisions of the Claims Court in these cases only partially recognized and applied the principles of takings jurisprudence. The court acknowledged the importance of focusing on the property owners' losses instead of the government's gain as well as the need to place the owners in the position they would have occupied had the government never taken their property. But, by failing to identify the correct property interest under the first prong of the moment of regulation measure, the court viewed these concerns as they applied to a small portion of the owners' property. Rather, the court should have extrapolated these findings to the owners' entire property interests.
VI. Conclusion

Application of the fundamental principles of takings jurisprudence ensures the landowner that a court will evaluate the impact of a regulation from an individual, rather than a communal, perspective. These principles reflect the consensus that our society prefers private productive use of land over governmental control of property.

The moment of regulation approach to determining the relevant parcel and its application to traditional and recent takings cases reveals concerns and benefits for both the government and the property owner. The measure assures the owner that if the planned or present use of the property runs afoul of a governmental regulation, the property owner will receive compensation for the entire property scheme even if the scheme is fragmented physically or by use. The measure eliminates much of the risk traditionally associated with unitary and integrated use. The downside of this approach is that the property owner may become entitled to just compensation, thus facing the problem of proving an accurate and fair value for the property. The suggested measure of the relevant parcel does not address this issue; the difficult problem of how to determine reasonable investment-backed expectations and a fair market value remains. Thus, property owners may receive compensation for their entire property but they still face uncertainty regarding the amount of compensation they will receive.

For the government, the suggested measure means that property owners have a better chance of proving a taking and therefore of becoming entitled to payment of just compensation. Consequently, the cost of property regulation is likely to increase. Because the government uses property regulation as a means to achieve social control and to prioritize values, society can no longer have things both ways. Regulation entails obvious, and in the case of land regulation, not so obvious costs. When the regulated matter is property, the government faces a constitutional obligation to compensate a private individual when that individual's property is taken for the public good.