RECONCILING THE INTERNAL INCONSISTENCY AND RESOLVING THE DENOMINATOR PROBLEM IN TAKINGS LAW

Takings law suffers from an internal inconsistency. Two distinct kinds of takings have emerged from the Takings Clause: takings arising out of government's physical intrusion on private property and takings resulting from government regulation of private property. Physical and regulatory takings both involve encroachments by government upon a private owner's use and enjoyment of his property. While the nature of the encroachment may differ qualitatively, the practical consequences to the owner can be identical. Unfortunately, courts have focused exclusively on the qualitative dissimilarities to the point of being unable, or unwilling, to recognize the practical similarities. As a result, physical and regulatory takings each enjoy their own rules, precedents, and methods of analysis.

Regulatory takings analysis further suffers from its own inconsistency arising in connection with what has been labeled the "denominator problem." While physical takings analysis asks whether there was an invasion of the property,[1] regulatory takings analysis is a question of degree: how much regulation is too much.[2] This latter question has recently been answered: use regulations that deprive an owner of all economically beneficial use of his property constitute a taking.[3] This answer, however, has revived the infamous denominator problem. The denominator problem lies in selecting the standard against which to determine whether a regulation deprives an owner of all economically beneficial use of his property.[4] Alternative solutions include measuring deprivation of use against (1) the property as a whole, (2) the physical portion of the property affected by the regulation, or (3) the specific property interest affected by the regulation.[5]

This note examines and proposes a solution to the internal inconsistency in takings law. It suggests that both physical and regulatory takings consist of restrictions on property use. Recognizing use as the conceptual and practical link be-

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

[2] *See* Lucas v. South Carolina Coastal Comm'n, 505 U.S. 1003 (1992); Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922).

[3] *See* Lucas, 505 U.S. at 1015 (citing Agins v. City of Tiburon, 447 U.S. 255 (1980)).

[4] *See id.* at 1016 n.7.

[5] *See id.*; *See generally* Margaret Jane Radin, *The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings*, 88 COLUM. L. REV. 1667(1998).

tween physical and regulatory takings, it then proposes that both kinds of takings be analyzed under a use regulation framework of analysis. In advocating the use regulation analysis, this note suggests that the denominator problem be solved by measuring use deprivation against the available use of the physical portion of the property affected by a use restriction.

This note is organized in five primary sections. The first presents an overview of the current state of takings law. The second introduces the denominator problem. The third section of the note examines the internal inconsistency of takings law. The fourth proposes a reconciliation of the internal inconsistency based on the recognition that use restrictions underlie both physical occupations and use regulations. Finally, the last section of the note proposes solving the denominator problem by measuring deprivation of use against the available use of the physical portion of the property affected.

I. A BRIEF OVERVIEW OF THE CURRENT STATE OF TAKINGS LAW

The Fifth Amendment to the Constitution prohibits "private property [from] be[ing] taken for public use, without just compensation."[6] As incorporated through the Fourteenth Amendment, the Takings Clause applies to federal, state, and local governments alike.[7] Under the Clause, the scope of "public use" is "coterminous" with the scope of the police power.[8] Accordingly, "any government activity deemed to further a legitimate government purpose is *ipso facto* a public use."[9] Just compensation "means in most cases the fair market value of the property on the date it is appropriated."[10]

Initially, the Takings Clause was understood to prohibit only "direct appropriation" of property.[11] "[The] original understanding of the Takings Clause itself, and the weight of early judicial interpretations of the federal and state takings clauses all indicate that compensation was mandated only when the government physically took property."[12] However, in *Pennsylvania Coal Co. v. Mahon*,[13] the Supreme

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

[7] *See* Penn Cent. Transp. Co. v. New York, 438 U.S. 104, 122 (1978) (Rehnquist J., dissenting). "[T]he Fifth Amendment. . .is made applicable to the States through the Fourteenth Amendment." *Id.*

[8] Hawaii Housing Auth. v. Midkiff, 467 U.S. 229, 240 (1984).

[9] Radin, *supra* note 5, at 1686 n.93.

[10] Kirby Forest Indus., Inc. v. United States, 467 U.S. 1, 10 (1984).

[11] Legal Tender Cases, 79 U.S. 457, 551 (1870). *See also* William Michael Treanor, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 YALE L.J. 694, 697 n.9 (1985); LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 66-68 (1973).

[12] Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 798 (1995); *See also* Frank Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1184 (1967).

[13] 260 U.S. 393 (1922).

Court explicitly recognized that regulation could amount to a taking: "[t]he 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."[14]

The Court has fully embraced the rule in *Mahon* to the point of disregarding prior case law and the original understanding of the Takings Clause. In response to Justice Blackmun's argument supporting an original interpretation of the Clause, Justice Scalia, writing for the majority in *Lucas v. South Carolina Coastal Commission*,[15] proclaimed that the fact that the Court's "description of the 'understanding' of land ownership that informs the Takings Clause is not supported by early American experience . . . is largely true, but entirely irrelevant."[16] As Scalia noted further:

> [While] Justice Blackmun is correct that early constitutional theorists did not believe the Takings Clause embraced regulations of property at all . . . even he does not suggest (explicitly at least) that [the Court] renounce [its] contrary conclusion in *Mahon*. Since the text of the Clause can be read to encompass regulatory as well as physical deprivations . . . [the Court] decline[s] to do so as well.[17]

A government's ability to regulate and restrict property use is authorized under the auspices of its police powers.[18] Under its broad police powers, a government may act to promote "the public health, safety, morals, or general welfare."[19] Such actions are constitutional unless found to be "clearly arbitrary and unreasonable, having no substantial relation" to such goals.[20] A government's police powers include prevention of harmful land uses as well as promotion of beneficial land uses.[21] In promoting beneficial uses, a government may act to "enhance the quality of life by preserving the . . . aesthetic features of a city"[22] or to protect "family values, youth values, and the blessings of quiet seclusion, and clean air."[23]

Regulatory takings analysis in one sense represents an effort to balance a government's police power actions with a private owner's right to use and enjoy his private property. As the Court in *Mahon* explained:

> 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

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[14] *Id.* at 415.
[15] 505 U.S. 1003 (1992).
[16] *Id.* at 1028 n.15.
[17] *Id.* (internal citations omitted).
[18] *See* Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 387 (1926).
[19] *Id.* at 395.
[20] *Id.*
[21] *See* Lucas, 505 U.S. at 1022-26.
[22] Penn Cent. Transp. Co., 438 U.S. at 129.
[23] Village of Belle Terre v. Boras, 416 U.S. 1, 9 (1974).

have its limits.[24]

However, whether an action is within the State's police power is a "separate question" from whether the proper police action in question "so frustrates property rights that compensation must be paid."[25] After *Mahon,* government's encroachment upon an owner's property rights may constitute a taking whether that encroachment is in the form of physical "invasion"[26] or use regulation,[27] and regardless of whether it is a proper exercise of government's police powers.

The Takings Clause is "designed to bar Government from forcing some people alone to bear public burdens which, in all fairness, should be borne by the public as a whole."[28] Takings analysis, however, operates without a "set formula," requiring instead "essentially *ad hoc*, factual inquiries."[29] Nonetheless, such inquiries are guided by certain prescribed considerations: "[t]he economic impact of the regulation, especially the degree of interference with investment-backed expectations, is of particular significance. 'So, too, is the character of the governmental action.'"[30] Of the available considerations, however, the character or type of the government encroachment has historically been given priority. A direct result of this priority is the bifurcation between physical invasions and use regulations, and the resultant inconsistency of takings law.

A. *Physical Occupation Takings*

In general, "[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."[31] The Court has "long considered a physical intrusion by government to be a property restriction of an unusually serious character for purposes of the Takings Clause."[32] Physical intrusion amounting to a "permanent physical occupation" constitutes an automatic taking.[33] In such instances, the "character of the government action" becomes more than an important factor; it becomes determinative.[34] It is so determinative that a "permanent physical occupation . . .is a taking without regard to the public interests that it may

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[24] Mahon, 260 U.S. at 413.

[25] Loretto, 458 U.S. at 425.

[26] *See id.* at 426; United States v. Causby, 328 U.S. 256 (1946).

[27] *See* Lucas, 505 U.S. at 1014-15.

[28] Penn Cent. Transp. Co., 438 U.S. at 123 (quoting Armstrong v. United States, 364 U.S. 40, 49 (1960)).

[29] *Id.* at 124.

[30] Loretto, 458. U.S. at 426 (quoting Penn Cent. Transp. Co., 438 U.S. at 124).

[31] Penn Cent. Transp. Co., 438 U.S. at 124 (internal citations omitted).

[32] Loretto, 458 U.S. at 426.

[33] *Id.* at 427.

[34] *Id.* at 426.

serve."[35]

B. *Regulatory Takings*

Most regulatory takings claims face the *ad hoc*, fact-intensive inquiry in which consideration is given to the economic impact of the regulation and the character of the government action. A "use restriction on real property may constitute a 'taking' if not reasonably necessary to the effectuation of a substantial public purpose."[36] However, use restrictions that are found to reasonably promote "health, safety, morals or [the] general welfare" have been upheld even where they adversely affect or destroy an owner's recognized property interests.[37]

However, two "discrete categories of regulatory action [are] compensable without case-specific inquiry into the public interest advanced in support of the restraint."[38] The first category consists of regulations that "compel the property owner to suffer a physical 'invasion" of his property."[39] Like outright direct appropriations, regulations creating permanent invasions require compensation "no matter how minute the intrusion, and no matter how weighty the public purpose behind it."[40] The second category consists of regulations that "den[y] all economically beneficial or productive use of land."[41] Compensation must be paid to an owner who is required "to sacrifice all economically beneficial uses in the name of the common good, that is, to leave his property economically idle."[42]

There is an exception to the second categorical taking. Compensation can be avoided even when all economically beneficial or productive use is prohibited by regulation if such use was already prohibited by "background principles of the State's law of property and nuisance." [43] In this case, the limitation on use "inhere[s] in the title itself."[44] Accordingly, the use prohibited by regulation was always unlawful.[45] Thus, the second categorical taking is qualified: a regulation prohibiting all economically productive or beneficial uses of land constitutes a compensable taking only where it "goes beyond what the relevant background principles would dictate."[46]

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[35] *Id.* at 434.

[36] Penn Cent. Transp. Co., 438 U.S. at 127 (citing Nectow v. Cambridge, 277 U.S. 183 (1928)).

[37] *Id.* at 125.

[38] Lucas, 505 U.S. at 1015.

[39] *Id.*

[40] *Id.*

[41] *Id.* (citing: Keystone Bituminous Coal Assn. v. DeBenedictis, 480 U.S. 470 (1987), Nollan v. California Coastal Com'n., 483 U.S. 825 (1987), Hodel v. Virginia Surface Mining & Restoration Assn., Inc., 452 U.S. 264 (1981), Agins, 447 U.S. 255 (1980)).

[42] Lucas, 505 U.S. at 1019.

[43] *Id.* at 1004.

[44] *Id.* at 1029.

[45] *See id.* at 1030.

[46] *Id.*

II. THE DENOMINATOR PROBLEM

The denominator problem was first prominently addressed by the Supreme Court in *Pennsylvania Coal Co. v. Mahon*.[47] There the plaintiff purchased the surface rights to a tract of land, upon which his house was located, from the defendant coal mining company.[48] The surface rights were conveyed by deed which expressly provided that the coal mining company reserved the right to mine all of the coal under the surface and that the plaintiff waived all claim to damages that may arise from such mining.[49] After the transaction, Pennsylvania passed the Kohler Act, which prohibited mining operations that caused the subsidence of residences.[50] The Act prevented the coal company from mining the coal located under the plaintiff's house.[51]

Writing for the majority, Justice Holmes focused on the extent of diminution the use regulation ,concluding that a taking had occurred.[52] As the Court noted: "[w]hen [diminution] 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."[53] In applying this standard, the majority measured the diminution in value against the coal affected by the Act (the portion of coal located under the plaintiff's land). In his dissent, Justice Brandeis embraced the standard, but disagreed with this application. He argued:

> [V]alues are relative. If we are to consider the value of the coal kept in place by the restriction, we should compare it with the value of all other parts of the land. That is, with the value not of the coal alone, but with the value of the whole property.[54]

Instead of looking solely at the diminution of the affected coal's value, Brandeis argued that the extent of diminution in value that the coal company suffered should be assessed either against the value of the whole property or against the remaining coal under the surface that could be mined under the Act.[55]

The Court appeared to definitively resolve the denominator problem in *Penn Central Transportation Co. v. New York City*.[56] There, New York City's Landmarks Preservation Commission designated the Grand Central Terminal as a historic landmark pursuant to New York's Landmark Preservation Law.[57] As a his-

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[47] 260 U.S. 393 (1922).
[48] *See id.* at 412.
[49] *Id.*
[50] *Id.* at 412-413.
[51] *Id.*
[52] *See id.*
[53] Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413 (1922).
[54] *Id.*
[55] *Id.* at 419.
[56] 438 U.S. 104 (1978).
[57] *Id.* at 115-16.

toric landmark, any exterior alterations required Commission approval.[58] The Commission refused to allow the Terminal owners to build an office tower above the existing building.[59] The owners claimed, *inter alia*, that the Landmarks Law deprived them of the use of their air rights above the terminal and thus constituted a taking.[60]

In rejecting the owners' argument, the Court, in an opinion by Justice Brennan, resounded:

> '[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. In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the action and on the nature and extent of the interference with rights in the parcel as a whole.[61]

Citing *Pennsylvania Coal v. Mahon*, the Court disposed of the contention that deprivation of any rights tied to an owner's investment-backed expectations constitutes a taking "irrespective of the impact of the restriction on the value of the parcel as a whole."[62] In his dissent, Justice Rehnquist argued that the Landmarks Law effectively destroyed the Terminal owners' valuable "air rights."[63] Noting that the Court had previously held air rights to be property for purposes of the Fifth Amendment,[64] Rehnquist argued that the city had "thus destroyed – in a literal sense, 'taken' – substantial property rights of Penn Central."[65]

With the Court's adoption of the "deprivation of all economically beneficial use" standard as a category of automatic regulatory takings, the denominator problem has been revived. The Court has neither clearly conceived nor fully explicated how to determine deprivation of all economically beneficial use; the Court merely recites the rule. As the Court admitted in *Lucas v. South Carolina Coastal Commission*,[66] the "rhetorical force [of the rule] is greater than its precision, since [it] does

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[58] *Id.* at 112.

[59] *Id.* at 117.

[60] *Id.* at 130.

[61] *Id.* at 130-31. The Landmarks Commission designated the terminal as a landmark and the surrounding "city tax block" a "Landmark site." *Id.* at 115-16. The owners of the Terminal also owned several properties in the same "area of midtown Manhattan." *Id.* at 115. It is not clear whether the Terminal itself occupied the entire city tax block or whether the owners' other properties comprised the block. Nonetheless, the Court considered the city tax block as the "parcel as a whole." *See id.* at 130.

[62] Penn Cent. Transp. Co., 438 U.S at 131, n.27.

[63] *Id.* at 143.

[64] *Id.* (citing United States v. Causby, 328 U.S. 256 (1946) (recognizing "air rights" taken by low-flying planes); Griggs v. Allegheny County, 369 U.S. 84 (1962); Portsmouth Harbor Land & Hotel Co. v. United States, 260 U.S. 327 (1922) (firing projectiles over summer resort can constitute a taking); Butler v. Frontier Telephone Co., 186 N.Y. 486 (1906) (stringing of telephone wires across property constitutes a taking)).

[65] Penn Cent. Transp. Co. v. New York City, 438 U.S. at 143.

[66] 505 U.S. 1003 (1992).

not make clear the 'property interest' against which the loss of value is to be measured."[67]

The practical import of the denominator problem under the deprivation-of-all-use rule is easily illustrated.[68] Suppose a regulation prevents an owner from developing ninety-five percent of his land.[69] The regulation must deprive the owner of all economically beneficial or productive use of the land for the owner to receive compensation. This deprivation can be measured either against the portion of the property affected, that is, the ninety-five percent restricted from development, or against the property as a whole, that is, the one-hundred percent owned. Under the first method, the owner suffers total deprivation because no part of the ninety-five percent affected by the regulation can be used. Accordingly, the owner is compensated. However, under the second method the owner retains the economically beneficial or productive use of the five percent of his land unaffected by the regulation. As a result, the owner receives no compensation.[70]

The Court in *Lucas* acknowledged that "this uncertainty regarding the composition of the denominator in [its] 'deprivation' fraction has produced inconsistent pronouncements."[71] In response, the Court has arguably suggested three possible solutions. First, in its most direct discussion of a solution, the Court stated:

The answer . . . may lie in how the owner's reasonable expectations have been shaped by the State's law of property-i.e., whether and to what degree the State's law has accorded legal recognition and protection to the particular interest in land with respect to which the takings claimant alleges a diminution in (or elimination of) value.[72]

By speaking in terms of the "particular interest in land" allegedly affected, the Court suggests a willingness to consider not only entire fee simple interests, but also more specific property interests. Second, based on its own illustration of the denominator problem – in which the alternative denominators include the entire parcel of land and the affected portion of the land – the Court suggests a willingness to consider measuring deprivation against the physical portion of the land affected by the regulation.[73] Third, combining these alternatives suggests further the

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[67] *Id.* at 1016 n.7.

[68] *See* Carol M. Rose, Mahon *Reconstructed: Why the Takings Issue is Still a Muddle*, 57 S. CAL. L. REV. 561, 566-69 (1984).

[69] This example mirrors the hypothetical employed by the Court in Lucas, 505 U.S. at 1019 n.8.

[70] *See* Lucas, 505 U.S. at 1019 n.8 (noting that while this is not necessarily the result, it is more likely than not).

[71] *Id.* at 1016 n.7 (citing Pennsylvania Coal v. Mahon, 260 U.S. at 414, and Keystone Bituminous Coal Assn v. DeBenedictis, 480 U.S. at 497-502).

[72] *Id.*

[73] Another alternative is that the Court is suggesting its willingness to consider specific interests, for example, mineral interests or air rights, as affected over the entire tract of land. Thus, for example, if a portion of an owner's land is affected and she alleges interference with her mineral interests, the effect on that interest would be measured against her mineral interests for the entire tract of land.

possibility of the Court's willingness to measure deprivation against the specific interests within the physical portion of the land affected. Unfortunately, to date the Court has neither explained its remarks, nor re-addressed the issue. The denominator problem remains unresolved and continues to be a source of uncertainty within takings law.

III. THE INTERNAL INCONSISTENCY IN TAKINGS JURISPRUDENCE

The incongruity between the two categorical takings recognized in regulatory takings law mirrors the larger internal inconsistency within takings law in general: the disparate treatment of physical occupations and use regulations. A well-known paradox epitomizes this internal inconsistency: an owner whose property is occupied or invaded, no matter how minor or insignificant the intrusion, automatically is entitled to receive compensation, while an identical owner who is deprived of most (but not all) of the economic or productive use of his land by a use restriction goes uncompensated.[74] This result undermines the legitimacy of takings jurisprudence by promulgating, at a minimum, the appearance of unfairness and formalistic nonsense.

Understanding and resolving this paradox and the larger internal inconsistency of takings law requires examining and comparing the rationales underlying the respective rules on each side of the divide. Therefore, we must examine situations where use regulations and physical occupations are treated most similarly, namely, where use regulations are held to deprive an owner of all economically beneficial use of his property. In these instances, the analysis of regulations and physical occupations converges in the total deprivation rule.

A. *Justifications of the Total Deprivation Rule*

In *Lucas v. South Carolina Coastal Commission*,[75] the Court set out four reasons why a regulation that deprives an owner of all economically beneficial use of his property is a taking. [76] Examining the underlying principles and premises of the Court's justifications offers a starting point from which to reconcile the internal inconsistency in takings law.

The first reason concerns the "average reciprocity of advantage principle". As the Court explained, "when no productive or economically beneficial use of land is permitted, it is less realistic to indulge [the] usual assumption that the legislature is simply 'adjusting the benefits and burdens of economic life' in a manner that secures an 'average reciprocity of advantage' to everyone concerned."[77] According to the "average reciprocity of advantage" principle, use restrictions are justified because, in limiting an owner's use of his property, they simultaneously benefit that

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[74] *See* Radin, *supra* note 5 at 1672-73.

[75] 505 U.S. 1003 (1992).

[76] *Id.* at 1017.

[77] *Id.* at 1017-18 (internal citations omitted).

owner by imposing the same restrictions on surrounding property uses.[78] However, to be a convincing justification, the burden must be "shared relatively evenly" so that it is reasonable to conclude that, on the whole, an individual's harm is offset by the benefits he receives from the regulation's general application to others.[79] Accordingly, the average reciprocity of advantage principle fails in justifying total deprivation of economically beneficial use because the harm to the restricted owner is far greater than any possible benefit he would receive from the restriction's general application to others.

Average reciprocity of advantage is applied only to use regulations. Nonetheless, its application to physical occupations would appear to be appropriate where such occupations were made of similarly situated owners and secured to each a reciprocal advantage. For instance, requiring cable boxes on all buildings along a street to make cable service available to every building would impose a burden on each owner. However, each owner would benefit from the imposition of the same box on his neighbors.

More important than its limited application to use regulations, however, is the fact that the average reciprocity of advantage principle values the owner's perspective. The harm to an owner is balanced against the benefit he receives. This perspective accords well with the fundamental proposition that "[t]he Just Compensation Clause 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."[80]

The second reason why total deprivation of economically beneficial use is a taking is the fact that such takings are rare. The rationale that government could not continue if required to compensate for every change in the law affecting values incident to property does not apply to "the relatively rare situations where the government has deprived a landowner of all economically beneficial uses."[81] This reason, however, suggests that a harm that would otherwise require compensation would go uncompensated if such harm were inflicted more frequently. Furthermore, such reasoning suggests that if compensation is limited in particular cases so as not be too cost prohibitive in the aggregate, then demands for compensation would presumably enjoy closer judicial consideration. Limiting compensation paid for total takings could be achieved either by reducing the *number* of takings recognized (thus presumably reducing larger payments for interference with all the owner's interests), or by reducing the *degree* of the takings recognized (thus presumably having to pay less for interference with only particular interests of owners).

The third reason is that use regulations that deprive the owner of economically beneficial land or that require the land to be left substantially in its natural state

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[78] *See, e.g.*, Pennsylvania Coal Co. v. Mahon, 260 U.S. at 415.

[79] *See* Penn Cent. Transp. Co., 438 U.S. at 117.

[80] National Bd. of Young Men's Christian Ass'ns. v. United States, 395 U.S. 85, 89 (1969) (quoting Armstrong v. United States, 364 U.S. 40, 49 (1960)).

[81] Lucas, 505 U.S. at 1018.

"carry with them a heightened risk that private property is being pressed into some form of public service under the guise of mitigating serious public harm."[82] This reasoning emphasizes the necessity of scrutinizing the purported public interest or common good that the regulation allegedly promotes. Also, distinguishing between public service and the common good (mitigating public harm) suggests that a benefit to the government is not necessarily a benefit to the public.

Fourth, and most importantly, regulations that deprive an owner of all economically beneficial use are a taking because "the total deprivation of beneficial use is, from the landowner's point of view, the equivalent of a physical appropriation."[83] This reasoning recognizes the landowner's perspective and offers an important conceptual and practical link between physical appropriation and regulatory takings. This reasoning also emphasizes the *effect*, over the character, of the governmental action. The similarity it draws is not between the character of government regulation and occupation. No matter how severe from the owner's perspective, the *character* of the two actions is plainly discernible. The *effect* of the two actions, however, could be practically identical. In making this realistic comparison between occupation and regulation, the Court recognizes that encroachment is encroachment. Occupation and regulation represent potential differences in degree, not kind.

In support of this last justification, the Court injects "what is land but the profits thereof?"[84] While this equation may not seem novel, when the notion of "profits" is inserted into the comparison of physical occupation and regulatory takings, two points become clear: the *effect* of governmental action is again given priority over its character and *use* of land is given priority over its mere possession. First, an owner's profits from his land are not derived from his mere possession of the land, but from his use of the land. Examples of this proposition are growing crops on the land or renting out the land. Although possession is a prerequisite to selling the land, the profit from such a sale or lease results from more than possession alone. The sale itself is a use of the land. To sell property is to use it as a component in the transaction with another party. An overly narrow conception of use must be avoided here. For example, whether an iron is used to press clothes or as a doorstop, it is used in a meaningful way. Second, when a regulation deprives an owner of profits from his land, what the regulation really deprives that owner of is use – either his own or that of potential future buyers. A regulation prohibiting development deprives a current owner of the profits from such development. Similarly, the regulation deprives the owner of the profits from the sale of the land, lost as a result of the regulation's prohibition on future owners.

Two of the justifications the Court gave for the total deprivation rule serve to further distinguish use regulation from physical occupation; the average reciprocity and cost prohibition rationales are applied only to use regulations. The other rationales seem to conflict with one another. While the third rationale recognizes that

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[82] *Id.*

[83] *Id.* at 1017.

[84] *Id.* (quoting IE. COKE, INSTITUTES ch. 1 §1 (1st Am. ed. 1812)).

a benefit to the government is not necessarily a benefit to the public, the second rationale prioritizes minimizing the financial burden upon the government. However, the fourth rationale offers a valuable conceptual and practical link between use regulations and physical occupations. This rationale not only recognizes the similarities between the two forms of government encroachment, but also emphasizes the effect of the government action as the owner perceives it. This last justification provides a starting point for reconciling the internal inconsistency in takings law.

B. *Use By Another Name: The Underlying Use Restrictions of Physical Occupations*

The internal inconsistency of takings law can best be seen at its source: the special treatment traditionally given to permanent physical occupations. As discussed above, permanent physical occupations span the internal inconsistency of takings law by serving as a standard or benchmark used in determining when regulation constitutes a taking. When use regulations reach a certain point where they deprive an owner of all economic or beneficial use of his property, they have the same effect on the owner as a physical occupation. These use regulations similarly require compensation. However, application of the permanent physical occupations as a standard to use in takings law fails to offer a resolution to the internal inconsistency problem. This is because, as a standard or measure, it fails to take into account its underlying determinative variable: use deprivation. Physical occupation obscures its underlying use deprivation. Physical occupations require compensation purportedly because of the severity of the governmental action. However, the severity of physical occupations lies in its inherent extreme deprivation of use.

The Court's clearest pronouncement and its most thorough survey of the special treatment of physical occupations occurs in *Loretto v. Teleprompter Manhattan CATV Corp.*.[85] In *Loretto*, a New York statute required a landlord to permit a cable television company to install cables and cable boxes upon his property, for which the landlord could not demand payment greater than the one dollar amount the State Commission determined to be reasonable.[86] The cable company installed a thirty-foot cable, approximately one-half inch in diameter, along a length of the landlord's building about eighteen inches above the roof.[87] It also installed four-inch square boxes on the front and rear of the building, along with two large silver boxes along the roof cables.[88] The cables were screwed or nailed into the building at two-foot intervals and the other equipment was bolted into the building.[89] The Court held that whether or not the New York statute served a legitimate police power, the installation of the equipment required compensation under the "tradi-

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[85] 458 U.S. 419 (1982).
[86] *Id.* at 423-24.
[87] *Id.* at 422.
[88] *Id.*
[89] *Id.*

tional rule that a permanent physical occupation of property is a taking."[90]

Recognizing that it has "long considered a physical intrusion by government to be a property restriction of an unusually serious character for purposes of the Takings Clause," the Court emphasized that "[w]hen faced with a constitutional challenge to a permanent physical occupation of real property, the Court has invariably found a taking."[91] From its in-depth survey of precedent, the Court's pronouncements in *Loretto* stand atop a long tradition of affording special treatment to physical occupations. A close examination of the Court's survey of case law reveals an underlying reason for this special treatment: the real harm underlying physical occupations is deprivation of use. Physical occupations are takings because of their absolute deprivations of use.

In one of the earliest takings cases, *Pumpelly v. Green Bay Co,*[92] a unanimous Court stated without qualification:

> [W]here real estate is *actually invaded* by superinduced additions of water, earth, sand, or other material, or by having any artificial structure placed on it, so as to effectually *destroy or impair its usefulness*, it is a taking, within the meaning of the Constitution.[93]

In *Pumpelly*,[94] Wisconsin authorized the construction of a dam to improve navigation of a state river.[95] The dam caused flooding of the plaintiff's land, damaging the land and preventing its use for six years.[96] In finding that a taking had occurred, the Court noted that "there are numerous [sic] authorities to sustain the doctrine that a serious interruption to the *common and necessary use* of property may be . . . equivalent to the taking of it, and that under the constitutional provisions it is not necessary that the land be absolutely taken."[97] Accordingly, at a minimum, the effect on the use of the land is either equally important as, or an integral part of, physical invasions held to be takings.

The Court in *Loretto* next relied on *Northern Transportation Co. v. Chicago,*[98] as evidence of its "reemphasiz[ing] the importance of a physical occupation by distin-

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[90] *Id.* at 441.

[91] Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 427 (1988).

[92] 80 U.S. 166 (1872)

[93] *Id.* at 181 (emphasis added). The Loretto court quoted this directly in its analysis. *See* Loretto, 458 U.S. at 427.

[94] The plaintiff in Pumpelly alleged a taking in violation of the Wisconsin Constitution, not the Constitution of the United States. *See* Pumpelly, 80 U.S. at 177. However, provisions were "almost identical in language, viz: that 'the property of no person shall be taken for public use without just compensation therefor.'" *Id.* Moreover, the Court's adjudication was guided by its recognition that "this limitation on the exercise of the right of eminent domain is so essentially a part of American constitutional law that it is believed that no State is now without it." *Id.*

[95] Pumpelly, 80 U.S. at 174.

[96] *Id.* at 167.

[97] *Id.* at 179 (emphasis added).

[98] 99 U.S. 635 (1879)

guishing a regulation that merely restricted the use of private property."[99] In *Northern Transportation*, the Court held that a city's construction of a temporary dam, which denied owners access to their property, was not a taking.[100] Unlike the situation in *Pumpelly*, the construction did not flood the plaintiff's land, but only partially blocked its access.[101] In its holding, the Court distinguished the two cases:

> In [*Pumpelly* and other cases] it was held that permanent flooding of private property may be regarded as a 'taking.' In those cases there was a *physical invasion* of the real estate of the private owner, and a *practical ouster* of his possession. But in the present case there was no such invasion. No entry was made upon the plaintiff's lot. All that was done was to render for a time its use more inconvenient.[102]

Thus, according to *Northern Transportation*, "physical encroachment" or "entry" is the key characteristic and justification for the different treatment of physical invasions and use impairments.[103]

Upon further consideration, however, the distinction blurs. In *Northern Transportation*, plaintiffs were not denied total access to their property.[104] They were merely unable to access their property from one side.[105] Furthermore, "[i]t [was] not claimed that the obstruction was a permanent one." The plaintiffs were prevented access for approximately nine months, during which time they rented other docks.[106] These facts taken together with the Court's characterization of the case as one of consequential damages caused by government improvement of a public way and its recognition that "persons appointed or authorized by law to make or improve a highway are not answerable for consequential damages"[107] suggest that *Northern Transportation* was not really a takings case and its comparison with *Pumpelly* is of little value.

Moreover, the Court's formalistic reliance on physical encroachment is problematic. For example, suppose that the harm suffered in *Pumpelly* was caused by government action similar to that in *Northern Transportation*. Surely the Court would find complete and permanent denial of access to one's property to constitute a taking. But if the formalistic distinction between physical encroachment and non-trespassory harm is applied to this example, no taking would be found. More importantly, applying the formalistic distinction fails to recognize similar underlying harms in both scenarios. Permanent physical encroachments will always severely restrict property use. If a portion of land is occupied by another, its owner cannot put it to use. Non-trespassory harms may similarly restrict use and such restriction

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[99] Loretto, 458 U.S. at 427.
[100] Northern Transp. Co., 99 U.S. at 635.
[101] *Id.* at 642.
[102] *Id.* (emphasis added).
[103] *Id.* at 643.
[104] *Id.* at 636.
[105] Northern Transp. Co. v. Chicago, 99 U.S. 635, 639 (1879).
[106] *Id.*
[107] *Id.* at 641.

may be equally severe. To require physical encroachment for a taking overlooks the similarity between physical encroachments and non-trespassory harms: both are, in the end, use deprivations.

The Court in *Loretto* cites a list of cases in support of its "consistent[ ] distinction between flooding cases involving a permanent physical occupation, on the one hand, and cases involving a more temporary invasion . . . on the other."[108] In *Sanguinetti v. United States,*[109] the Court held that to be a taking, flooding must "constitute an actual, permanent invasion of the land, amounting to an appropriation of, and not merely an injury to, the property."[110] However, the *prima facie* distinction between permanent and temporary floods is misplaced. Regardless of the duration, all flooding involves a physical invasion. Accordingly, the more accurate distinction between these two scenarios is how long the physical invasion persisted. A permanent flood constitutes a taking. The permanency of the physical invasion associated with a flood is important, however, mainly as a measure of the severity of the resultant use restriction. It is a measure of the loss the owner suffered; the extent of the loss of use of his property. The difference between injury and appropriation is one of degree, not one in kind. This difference lies not between temporary and permanent floods, but between the duration of the resultant use restriction.

Another case relied upon by the Court in *Loretto* is *St. Louis v. Western Telegraph Co.*.[111] In *Western Telegraph*, the city of St. Louis passed an ordinance charging telegraph and telephone companies for use of the city streets for erecting telegraph poles.[112] In holding that the city could exact reasonable compensation for the companies' placement of the poles, the Court focused on the effect of the occupation:

> [t]he use made by the telegraph company is, in respect to so much of the space it occupies with its poles, permanent and exclusive. It as effectually [sic] and permanently dispossesses the general public as if it had destroyed that amount of ground . . . that space is, so far as respects its *actual use* for purposes of a highway and personal travel, *wholly lost* to the public.[113]

Again, underlying the character of physical occupation is the effect on use. In fact, the Court comes close to saying as much in holding that "compensation [is owed] to the general public for being deprived of the common *use* of the portion thus appropriated."[114] The special character of physical occupations that result in their constituting takings ultimately lies in the severity of use restriction imposed on the owner.

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[108] Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 428 (1988) (citing, *inter alia*, Sanguinetti v. United States, 264 U.S. 146, 149 (1924); Bedford v. United States, 192 U.S. 217, 225 (1904); and United States v. Lynah, 188 U.S. 445, 468-70 (1903)).

[109] 264 U.S. 146 (1924).

[110] *Id.* at 149.

[111] 148 U.S. 92 (1893).

[112] *Id.* at 93-94 .

[113] *Id.* at 99 (emphasis added).

[114] *Id.* at 101-2 (emphasis added).

The Court in *Loretto* next discusses *United States v. Causby*,[115] as a case "confirm[ing] the distinction between physical occupation, a physical invasion short of an occupation, and a regulation that merely restricts the use of property."[116] In *Causby*, plaintiffs owned property adjacent to an airport where they lived and raised chickens.[117] The government leased the airport and used it for frequent flights of army and navy aircraft.[118] Stating that "it is obvious that if the landowner is to have full enjoyment of the land, he must have exclusive control of the immediate reaches of the enveloping atmosphere,"[119] the Court framed the takings issue as involving the government's appropriation of the plaintiff's land for the flight of its planes.[120] In finding that the flights constituted a taking, the Court's rationale is reminiscent of *Pumpelly*:

> We would not doubt that, if the United States erected an elevated railway over respondents' land at the precise altitude where its planes now fly, there would be a partial taking, even though none of the supports of the structure rested on the land. The reason is that there would be an *intrusion* so immediate and direct as to subtract from the owner's *full enjoyment* of the property and to limit his *exploitation* of it.[121]

Similar to *Pumpelly*, both physical encroachment and deprivation of use are important in *Causby*. However, deprivation of use can be determinative, even if encroachment is still a requisite: "If, by reason of the frequency and altitude of the flights, respondents could not *use* this land for any purpose, their loss would be complete. It would be as complete *as if* the United States had entered upon the surface of the land and taken exclusive possession of it."[122] Presumably a physical intrusion absent a resultant deprivation of use would not constitute a taking. The Court seems to recognize that use deprivation is the touchstone of a taking and that it can be caused by various government actions, merely one of which is by physical encroachment.

Although *Causby* is treated as a physical invasion case,[123] it represents a significant extension of the category. Altering the facts of the case to extend the category further even more clearly reveals the underlying use deprivation involved. For example, suppose that the planes flying above the plaintiff's land in *Causby* were completely silent. Would there still be a taking? Technically, there would still be an intrusion as the planes would still be flying at the same altitude through the plaintiff's air space. However, no sound waves or reverberations would encroach upon plaintiff's property. The Court in *Causby* concluded by stating:

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[115] 328 U.S. 256 (1946).
[116] Loretto, 458 U.S. at 430.
[117] *See* Causby, 328 U.S. at 258.
[118] *See id.*
[119] *Id.* at 264.
[120] *See id.* at 262 n.7.
[121] *Id.* at 264-65 (emphasis added).
[122] United States v. Causby, 328 U.S. 256, 261 (1946) (emphasis added).
[123] *See* Penn Cent. Transp. Co., 438 U.S. at 124.

> [T]he super-adjacent airspace at this low altitude is so close to the land that continuous invasions of it *affect the use* of the surface of the land itself. We think that the landowner, as an incident to his ownership, has a claim to it and that invasions of it are in the same category as invasions of the surface.[124]

Presumably, if the continuous invasions of the airspace did not affect the use of the land's surface, there would be no taking.

In addition to these more implicit realizations that occupational takings turn ultimately on their resultant deprivation of use, the Court has explicitly recognized, on at least one occasion, that "governmental occupation of private property deprives the private owner of his *use* of the property, and it is *this deprivation* for which the Constitution requires compensation."[125] In *United States v. General Motors Corp.*,[126] the Court interpreted the meaning of "property" and "taken" in the Takings Clause. The Court found "property" 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."[127] Property means the "individual's 'interest' in the thing in question," and the Takings Clause "is addressed to every sort of interest the citizen may possess."[128] With regard to "taken," the Court held that "the deprivation of the former owner rather than the accretion of a right or interest to the sovereign constitutes the taking. Governmental action short of acquisition of title or occupancy has been held, if its effects are so complete as to deprive the owner of all or most of his interest in the subject matter, to amount to a taking."[129]

In summary, close examination of the precedents the Court relied upon in reaffirming the special treatment of physical occupations shows that such special treatment is misplaced and that the underlying harm of physical occupations is use deprivation. The determinative characteristic of physical occupations is the severity of the use restriction they impose on the occupied property. It may be contended, however, that this analysis of the case law goes too far. Instead of showing that use deprivations underlie physical occupations, it may be argued that use deprivation may be a component of physical occupations, even a necessary one, but that it is not the determinative or underlying harm. It may be argued that physical occupations possess some other quality or characteristic that justifies special treatment. However, a similarly close examination of the justifications of the physical occupations rule confirms that the underlying harm of physical occupation is its inherent use deprivation on the owner.

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[124] Causby, 328 U.S. at 265.

[125] YMCA, 395 U.S. at 92 (emphasis added); *see e.g.*, United States v. General Motors, 323 U.S. 373, 378 (1945).

[126] 323 U.S. 373 (1945).

[127] *Id.* at 378.

[128] *Id.*

[129] *Id.*

C. *Justifications of the Special Treatment of Physical Occupations*

Asserting that "[t]he historical rule that a permanent physical occupation of another's property is a taking has more than tradition to commend it,"[130] the Court in *Loretto* proceeded to delineate several justifications for the rule. First, a permanent physical occupation is "perhaps the most serious form of invasion of an owner's property interests . . . [T]he 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."[131] The property rights in a physical thing include the right "to possess, use and dispose of it."[132] Accordingly, "to the extent that the government permanently occupies physical property, it effectively destroys each of these rights."[133]

However, all of these rights can be understood as different *uses* of property. Possession includes the ability to use or not use. Possession is an empty attribute unless the possessor can control or use the thing possessed. Moreover, the inability of potential future possessors to use the land essentially prevents the sale or disposal of the land. As realized by the Court in *Loretto*, disposal of land is intimately connected to its future use: "the permanent occupation of [land] by a stranger will ordinarily empty the right [to dispose] of any value, since the purchaser will also be unable to make any use of the property."[134]

Second, the rule that a permanent physical occupation automatically constitutes a taking is justified because "an owner suffers a special kind of injury when a stranger directly invades and occupies the owner's property."[135] Permitting another person to exercise control over an owner's land, in addition to disturbing him in his own possession, "literally adds insult to injury."[136] Focusing on this "added insult," however, shifts the proper emphasis from what really matters, namely, the practical injury suffered by the property owner. There are several problems with this analytical shift. Placing determinative significance on the "additional insult" prioritizes the psychological impact over the practical impact on the owner. Any effort to assess the psychological harm of the property owner creates a slippery slope in terms of the amount of psychological harm that must occur to constitute "added insult" sufficient to invoke this justification. Of course, this presumes the ability to even accurately assess an owner's psychological harm. Since each property owner will have a unique relationship to his or her property and a unique psychological sensitivity to encroachments on that relationship, taking owners' psychological harm into account cannot be generalized into a rule applicable to all owners.

Third, the physical occupation rule is justified because "an occupation is qualita-

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[130] Loretto, 458 U.S. at 435.

[131] *Id.*

[132] *Id.* (quoting United States v. General Motors Corp., 323 U.S. 373, 378 (1945)).

[133] *Id.*

[134] *Id.* at 436.

[135] Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 436 (1982).

[136] *Id.* (citing Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1228 n.110 (1967)).

tively more severe than a regulation of the use of property, even a regulation that imposes affirmative duties on the owner, since the owner may have no control over the timing, extent, or nature of the invasion."[137] The lack of control over the timing, extent, or nature of the invasion, however, is merely derivative harm the owner suffered from lack of control over his land. In other words, the owner lacks control over the control of his land. Control is a form of use and the analysis of the loss of control one step removed does not diminish an owner's underlying loss of use.

Fourth, "[t]he traditional rule also avoids otherwise difficult line-drawing problems."[138] Because of the difficulty in determining how much space must be occupied to constitute a taking, it is easier to hold that all physical occupations, regardless of the amount of space occupied, are takings. While this arguably justifies why any occupation is a taking, it does not justify the special treatment of physical occupations. Furthermore, it makes the disparate treatment of physical occupations and use regulations in takings analysis even more drastic and creates the infamous paradox in takings law: permanent physical occupations, no matter how insignificant, are automatic takings, while extensive use regulations, unless they deprive all economic and beneficial use, are not takings. Formalistic unfairness is too high a price to pay for administrative ease.

Finally, the rule is justified because "whether 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."[139] This attribute of occupations, however, does not distinguish it from use regulations: occurrences of use regulations are no more difficult to prove than those of physical occupations. The real difficulty in both cases lies in assessing the extent of the resultant injury to the owner's use and enjoyment of his property and, consequently, the compensation due. After occupation is shown, the extent of the occupation becomes merely one relevant factor in determining the compensation due.[140] Another relevant factor is the availability of alternative uses of the occupied space to the owner.[141] Presumably, the greater the occupation, the greater the availability of alternative uses prohibited and, as a result, the greater the compensation due. In the end, the occurrence of a physical occupation is no easier to prove than the occurrence of a use regulation. In both instances, the difficulty lies in calculating the compensation owed to the owner based upon the extent of the resulting restriction on use.

In summary, the justifications for the physical occupations rule fail to warrant the special treatment of physical occupations. The right "to possess, use and dispose of" property is ultimately a right to use one's property. While the severity of physical occupations stems from their severe resultant use restrictions, the special treatment of physical occupations rests largely upon considerations of psychologi-

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[137] *Id.*

[138] *Id.*

[139] *Id.* at 437.

[140] *See* Loretto, 458 U.S. at 437 (1982).

[141] *See id.* at 438 n.15.

cal harm and administrative ease. Prioritizing the psychological harm of government encroachment shifts the analysis away from the practical harm suffered by the owner. Moreover, the administrative ease of holding that all physical occupations, regardless of the size of property occupied, are takings fails to justify the special treatment of physical occupations and provides for the paradox arising between minor physical occupations and extensive use regulations. Also, occurrences of use regulations are no more difficult to prove than those of physical occupations and focusing on the proof of their occurrence overlooks the real difficulty of both use regulations and physical occupations: calculating compensation based on the extent of the restriction on the owner's use.

The weakness of the justifications for the special treatment of physical occupations is further evidenced by the Court's subsequent extension of the physical occupation rule to include use regulation-type encroachments.

D. *Extension of the Physical Occupation Rule*[142]

Traditionally, the physical occupation rule has been applied to *permanent* physical encroachments upon an owner's property. In *Northern Transportation Co. v. Chicago*,[143] the Court emphasized the necessity of a direct and permanent entry upon the owner's property.[144] The Court found that a temporary obstruction that did not physically encroach upon the owner's property did not constitute a taking.[145] Similarly in *Loretto*, the Court re-emphasized the necessary permanence and physicality of the government occupation required by the physical occupation rule.[146] Also in *Loretto,* the Court emphasized the necessary exclusivity of an occupation, justifying its application of the rule on the basis that permanent physical occupation "effectively destroys each of [an owner's property] rights."[147] However, application of the physical occupation rule has more recently been extended to include non-exclusive, non-permanent, and non-physical encroachments. Reducing the divide between physical occupations and regulations of property, this expansion of the physical occupation rule belies the Court's implicit recognition of the use deprivations underlying physical encroachments.

The physical occupation rule was extended to include non-permanent, non-physical encroachments in *First English Evangelical Lutheran Church v. County of Los Angeles*.[148] In *First English*, an interim flood control ordinance temporarily prevented a church from using its property, prohibiting construction or reconstruction in a flood area pending a study of permanent flood control measures. The

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[142] Much of this section relies on Radin's discussion in *The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings*, 88 COLUM. L. REV. 1667 (1988).

[143] 99 U.S. 635 (1879).

[144] *See id.* at 642.

[145] *See id.* at 643.

[146] *See* Loretto, 458 U.S. at 432.

[147] *Id.* at 435.

[148] 482 U.S. 304 (1987).

Court held that, if regulations work a temporary taking, then compensation is due for the period from the imposition of the legislation until its judicial invalidation. Justice Rehnquist's opinion for the majority declared that "temporary takings . . . are not different in kind from permanent takings."[149] In the wake of *First English*, an occupation need neither be permanent nor physical to constitute a taking.[150]

More significant to narrowing the divide in takings law between physical occupations and regulations of property, *Kaiser Aetna v. United States*,[151] extended the physical occupation rule to non-exclusive physical invasions.[152] There, petitioners had converted a private pond into a marina having ocean access.[153] The Government contended that the marina constituted a navigable water of the United States and sought to impose a navigational servitude upon the property.[154] This servitude would give the public a federally protected right to access and use the marina.[155] In requiring compensation for the imposition of the servitude, the Court found that the servitude would "result in an actual physical invasion of the privately owned marina."[156] In its conclusion, the Court noted that "even if the Government physically invades only an easement in property, it must nonetheless pay just compensation."[157] *Kaiser Aetna* involved no physical occupation by the government. The physical invasion that the servitude represented was the public's non-exclusive invasion. Thus, *Kaiser Aetna* effectively extends the notion of physical occupation to include non-exclusive, non-occupation physical invasions, where government imposes "only an easement" upon an owner's property.[158] Prior to *Kaiser Aetna*, "an easement would more readily have been considered a restriction on use," not an instance of a physical occupation.[159]

Kaiser Aetna and *First English* both correctly, if not explicitly, recognize that the harms suffered in physical occupations turn ultimately on the severity of the use restrictions they impose. An "occupation" need not be permanent, physical, or exclusive to constitute a taking. If permanence, exclusivity, or physical entry is not required, what characteristics are left to consider in determining which "occupations" constitute a taking? In *Kaiser Aetna,* the Court emphasized its protection of the right to exclude: "[i]n this case, we hold that the 'right to exclude,' so universally held to be a fundamental element of the property right, falls within [this] cate-

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[149] *Id.* at 318.

[150] *See* Radin, *supra* note 5, at 1675.

[151] 444 U.S. 164 (1979).

[152] *See also* Nollan, 483 U.S. at 830 (using a similar analysis in finding that a public access easement was a taking).

[153] Kaiser Aetna, 444 U.S. at 165-66.

[154] *Id.* at 170.

[155] *Id.*

[156] *Id* at 180.

[157] *Id.* at 180 (citing United States v. Causby, 328 U.S. 256, 265 (1946) and Portsmouth Co. v. United States, 260 U.S. 327 (1922)).

[158] Radin, *supra* note 5, at 1674

[159] *Id.* at 1674 n.39.

gory of interests that the Government cannot take without compensation."[160] However, as discussed above, the right to exclude is ultimately a right to determine the use of one's property; who can or cannot use, and when they can or cannot use. The right to exclude is a use of property. To construct the syllogism: protection against occupations is protection of the right to exclude; the right to exclude is a right of use; therefore, protection against occupations is protection of a right of use. Thus, the extension of the physical occupation rule shows a recognition of the underlying harm of use deprivation.

IV. RECONCILING THE INTERNAL INCONSISTENCY AND SOLVING THE DENOMINATOR PROBLEM

The internal inconsistency of takings law arises from the disparate analysis applied to physical occupations and use regulations in determining whether a taking has occurred. Reconciliation of the internal inconsistency requires analyzing these two types of government encroachment in a similar fashion. This process begins with the realization that use restrictions underlie both physical occupations and use regulations. Accordingly, whether a physical occupation or a use restriction constitutes a taking is contingent on the severity of the restrictions they impose on an owner's use of his property. The next step in the process is to apply a uniform analysis to both kinds of government encroachment.

A. *A Uniform Takings Analysis*

The analysis of use restrictions is well developed in regulatory takings adjudication. In recognizing that use restrictions underlie both physical occupations and use regulations, this analysis lends itself as an appropriate and effective framework for analyzing both forms of government encroachment. Within the regulatory takings framework there are three different approaches or tests available: (1) performing an *ad hoc*, factual inquiry, (2) determining whether the regulation caused the owner to suffer a physical invasion, and (3) determining whether the regulation denied the owner of all beneficial use of the property. The first approach offers too lenient a standard, finding a taking only when a use restriction cannot be reasonably located within the government's broad police powers. The second approach is circular since use restrictions themselves underlie both use regulations and physical invasions. Also, the realization that use restrictions underlie physical occupations shows the second approach to be an over-abbreviated formulation of the third approach since physical occupations inherently deprive an owner of the use of the property occupied. The third approach, however, offers a consistent analysis of both physical occupations and use regulations. To reflect the similarities between use regulations and physical occupations, the standard should be revised to whether the government encroachment denies the owner of all beneficial use of the property. This approach brings use regulations and physical occupations under a single

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[160] Kaiser Aetna, 444 U.S. at 179-80.

framework of analysis that recognizes use deprivation as the determinative variable in deciding whether a taking has occurred.

Adopting the total deprivation of use test, however, requires addressing the denominator problem. Thus, solving the denominator problem becomes crucial to successfully developing and applying a uniform takings analysis necessary in reconciling the internal inconsistency in takings law.

B. *Solving the Denominator Problem*

Adopting the total deprivation of use standard is consistent with the realization that use restriction underlies both physical occupations and use regulations: restriction on use is properly recognized as the determinative variable in assessing government encroachment. Adopting this standard, however, raises the question of what to measure deprivation of use against in determining whether a government encroachment constitutes a taking. Regulatory takings analysis offers three possible denominators against which to measure total deprivation of use. Restating these denominators to reflect the realization that use is the critical underlying factor, they are as follows: (1) the available uses of the property as a whole, (2) the specific use affected, and (3) the available uses of the physical portion of the property affected.

The first option shifts the analytical focus from the extent of the government encroachment to the amount or size of the property owned. This shift not only impedes proper analysis, but also penalizes owners of larger properties. For example, suppose the same encroachment depriving all use of one acre of land is imposed on two property owners. One owner possesses one acre of land and the other possesses ten acres of land. In both cases, the extent of government encroachment is identical. However, the encroachment affects all of the land owned by the first owner while only affecting one-tenth of the land of the second owner. Measuring use deprivation against the property as a whole, the first owner would be compensated and the second owner would not, although the extent of the government encroachment in each case would be the same.

The second option is also problematic. Involving a version of what Margaret Radin has labeled "conceptual severance," this option consists in measuring the deprivation against the specific use affected.[161] As Radin explains, conceptual severance operates by "delineating a property interest consisting of just what the government action has removed from the owner, and then asserting that that particular whole thing has been permanently taken."[162] The result is to "conceptually 'sever[ ]' from the whole bundle of rights just those strands that are interfered with by the regulation, and then hypothetically or conceptually construe [ ] those strands in the aggregate as a separate whole thing."[163] Countless interests can potentially be severed under this approach. As Radin notes, adopting conceptual severance

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[161] Radin, *supra* note 5, at 1676.

[162] *Id.*

[163] *Id.*

leads to "an easy slippery slope" towards finding every restriction of any identifiable portion of an owner's property rights to constitute a "taking of the whole of that particular portion considered separately."[164] As a result, measuring use deprivation against the specific interest affected creates an incentive to divide property along these hypothetical or conceptual lines. For example, an owner of only the mineral interest in a property suffers a total deprivation by a regulation restricting mining although other interests would be unaffected.

Recognizing that use is the critical underlying factor in takings analysis, "specific uses" assume the role of the "specific interests" within the traditional notion of conceptual severance. All property interests are interests in the use of property. Moreover, all property interests are reducible to uses of property in general such that uses of property are fungible and individual uses should be assessed against all possible uses available to the owner. To avoid a fragmentation of property use (similar to the fragmentation of interests under conceptual severance) and the necessity of prioritizing specific uses, restrictions on use should be measured against the total uses available, not the specific uses affected.

Therefore, the optimal solution to the denominator problem is to measure total deprivation of use against the available uses of the physical portion of the property affected. This is the approach traditionally, although not explicitly, applied in physical occupations analysis. Physical occupations constitute takings no matter how minute the portion of the property affected since occupations deprive all use of the portion occupied.[165] Thus, measuring use deprivation against the available uses of the physical portion of the property affected solves the denominator problem by merging the two traditional kinds of takings: adopting a physical occupation denominator within a use regulation framework in a takings analysis that properly focuses on an owner's deprivation of use.

Measuring total deprivation of use against this denominator also represents a compromise between the interests of property owners and government. It benefits property owners by properly focusing on the extent of the government encroachment *per se*, not in relation to an owner's available uses of non-affected portions of his property. No matter how large an owner's property, nor how many uses exist in the portion free of encroachment, the government is held responsible for encroachments that deprive all use of any portion of an owner's property. Moreover, measuring use deprivation against the available uses of the physical portion of property affected benefits government by finding a taking only where government encroachment is severe. An owner cannot identify a specific use affected and seek compensation for its restriction. Although the severity of use restriction is measured against the available uses of the physical portion of property affected, an encroachment restricting less than all available uses is not a taking.

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[164] Radin, *supra* note 5, at 1678. For example, in Hodel v. Irving, 481 U.S. 704 (1987), the Court declared that disposition at death was a severable property interest. *See also* Radin, *supra* note 5, at 1673.

[165] Accordingly, use of this denominator would result in outcomes consistent with traditional physical occupations decisions.

V. CONCLUSION

Although physical occupation and regulatory takings both consist of government encroachments upon a private owner's use and enjoyment of his property, each kind of taking has received disparate treatment and analysis. Resolving this internal inconsistency in takings law requires treating both kinds of takings similarly. This note has attempted to show that the underlying harm in both physical occupation and regulatory takings is use deprivation. Based upon this realization, it has suggested that both kinds of takings be analyzed according to a total deprivation of use standard. Finally, it has proposed that under this standard, use deprivation be measured against the available uses of the physical portion of the property affected. In this way, the Takings Clause is consistently applied to protect owners against government encroachment regardless of the form of encroachment suffered. Emphasis is placed properly on the practical injuries resulting from government encroachment, and a compromise is reached between the interests of property owners and government by disregarding an owner's available uses of non-affected portions of his property while preventing owners from identifying a specific use affected and receiving compensation for its restriction regardless of other uses available to the owner.

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