Demystifying Conceptual Severance: A Comparative Study of the United States, Canada, and the European Court of Human Rights

Angela Chang

Follow this and additional works at: http://scholarship.law.cornell.edu/clr

Part of the Law Commons

Recommended Citation
Available at: http://scholarship.law.cornell.edu/clr/vol98/iss4/4
NOTE

DEMYSTIFYING CONCEPTUAL SEVERANCE:
A COMPARATIVE STUDY OF THE UNITED STATES,
CANADA, AND THE EUROPEAN COURT
OF HUMAN RIGHTS

Angela Chang†

INTRODUCTION ........................................ 965

I. CONCEPTUAL SEVERANCE IN U.S. TAKINGS LAW .............. 968
   A. Protecting Property Rights Against Regulations That Go “Too Far” ........................................ 968
   B. Conceptual Severance in Action ........................................ 970
      1. Vertical Severance ........................................ 971
      2. Functional Severance ........................................ 973
      3. Temporal Severance ........................................ 975
      4. Horizontal Severance ........................................ 977

II. EUROPEAN COURT OF HUMAN RIGHTS ................... 981
   A. Protecting Property Through Proportionality ........ 981
   B. An Emerging Regulatory Takings Doctrine? .......... 984

III. CANADA .................................................... 985
   A. Statutory Property Protection ........................................ 985
   B. Regulatory Expropriations Based on Public Benefit ........................................ 987

IV. MANY ROADS TO REGULATORY TAKINGS ................. 990
   A. Three Systems, One Common Goal ...................... 990
   B. Conceptual Severance: Merely a Path to Regulatory Takings ........................................ 992

CONCLUSION ................................................... 995

INTRODUCTION

Suppose a landowner buys two identically sized, adjacent lots with separate deeds in a single transaction. One lot is dry land, while the other is half dry land and half wetlands. A wetlands regulation forbids

† B.S., University of Illinois at Urbana-Champaign, 2005; J.D. Candidate, Cornell Law School, 2013; Articles Editor, Cornell Law Review, Volume 98. The author would like to thank Professors Gregory S. Alexander, Mitchel Lasser, Eduardo Peñalver, and Laura Underkuffler for their invaluable encouragement and advice, without which this piece would not be possible. Thank you also to Maryam Toossi, Judah Druck, Daniel Bakey, Sue Pado, and other members of the Cornell Law Review for your time, effort, and support throughout this process. Finally, I am deeply grateful for my friends and family for their faith and belief in me all these years.
all construction on the wetlands. Pursuant to the Takings Clause of the U.S. Constitution, the landowner brings a case claiming that the regulation has taken her property, requiring compensation. Under the Supreme Court’s regulatory takings doctrine, courts must determine the regulation’s economic impact—the extent to which the regulation impacts the property’s value. If the regulation renders the property valueless—causing a 100% loss—the regulation constitutes a taking, requiring just compensation. So has the regulation impaired 25%, 50%, or 100% of the owner’s property? That depends on whether the “relevant parcel” is the two lots combined, one lot, or just the wetlands portion of the property. What criteria should be used to determine the relevant parcel? Various factors—the deed, adjacency, the single transaction, and the nature of the regulation—could be used to determine the relevant parcel, with varying results. This is the issue of conceptual severance, also known as the denominator problem.

Conceptual severance refers to plaintiffs’ attempts to conceptually sever their property physically, functionally, or temporally to show that a regulation diminishes a significant portion or 100% of the parcel’s value. The Supreme Court has accepted some of these attempts at conceptual severance but has failed to provide a coherent theory justifying conceptual severance. As a result, confusion and debate ensue among courts and commentators on how best to determine the relevant parcel in a regulatory takings claim. Lower courts can and do accept the plaintiff’s proffered denominator without intense scrutiny, sometimes avoiding the conceptual severance issue altogether. This Note proceeds on the assumption that there is too much uncertainty in the relevant parcel determination and seeks to reevaluate the role of conceptual severance in U.S. regulatory takings.
doctrine through a comparative lens, looking to the European Court of Human Rights\(^9\) and Canada for contrast.\(^{10}\)

The goal here is not to provide a comprehensive doctrinal solution to conceptual severance; rather, this Note tries to answer an antecedent question: What *function* does conceptual severance currently serve in U.S. regulatory takings doctrine? A comparative approach is ideally situated for this task because although most (if not all) advanced Western democracies employ land-use regulations that impinge on private property interests, each system may employ a different set of solutions for resolving land-use disputes. Comparisons to the ECtHR and Canada provide needed contrast and help shed light on the idiosyncrasies of our approach to the basic conflict between private property rights and public interests.\(^{11}\) Our understanding of conceptual severance’s functions and flaws will only be more apparent upon comparison.

This Note makes two contributions to the area. First, a comparative analysis demonstrates that conceptual severance in U.S. regulatory takings jurisprudence is a ripe tool for concealing ad hoc judicial balancing of private property rights against the public interest. The United States takes a *definitional* or *constitutive* approach to regulatory takings, asking whether the regulation’s burden on an individual property owner has gone “too far” so as to constitute a compensable taking.\(^{12}\) The inquiry focuses almost entirely on the extent of an owner’s loss, an issue that mostly hinges on whether conceptual severance is permitted. The competing public interest behind a regulation is not extensively considered under the current framework. Lacking a coherent rule or standard on conceptual severance, courts are implicitly invited to engage in ad hoc balancing of the private versus public interests at stake.

Second, this Note contends that to rectify the hazards associated with conceptual severance, the relevant parcel inquiry should be stated in terms of an objective inquiry—the relevant parcel should be what the claimant reasonably expects the parcel to be, taking into ac-

---

\(^9\) The ECtHR was chosen over the European Court of Justice (ECJ) because the ECJ has consistently deferred to the ECtHR in matters relating to human rights and property rights. See Steven R. Ratner, *Regulatory Takings in Institutional Context: Beyond the Fear of Fragmented International Law*, 102 Am. J. Int’l L. 475, 502 (2008) (noting that as a result of guaranteeing fundamental rights, including property rights, in the Treaty on European Union, there “is a significant mandate for the ECJ to apply the norms of the ECHR”).

\(^{10}\) As conceptual severance and regulatory takings in the United States has mainly arisen in the land-use context, comparative analysis will be limited to the land-use context as much as possible.

\(^{11}\) See *Alexander*, supra note 6, at 8 (noting that a comparative approach may help yield insight into whether a particular practice is necessary); *infra* note 98 and accompanying text.

\(^{12}\) See *infra* Part I.A.
count the property's characteristics, the owner's expectations regarding the property's uses, and the community's background expectations in regards to property rights and land-use regulations.

This Note proceeds as follows. Part I provides an overview of U.S. regulatory takings jurisprudence and examines the various forms of conceptual severance and their treatment by the Court. Part II presents the European Court of Human Rights' approach to regulatory takings. Part III reviews Canada's regulatory takings scheme. Part IV seeks to address the underlying question: What roles or functions does conceptual severance play in our regulatory takings jurisprudence? A Conclusion follows.

I

CONCEPTUAL SEVERANCE IN U.S. TAKINGS LAW

This section first provides an overview of U.S. regulatory takings doctrine and then proceeds to examine conceptual severance, its case law, and the surrounding debate.

A. Protecting Property Rights Against Regulations That Go "Too Far"

As a threshold matter, the Takings Clause requires that government takings of private property be for a "public use." If a public use is not present, the government cannot take that property, regardless of compensation. In *Kelo v. City of New London*, the Supreme Court was confronted with the question of whether New London's condemnation of residential property for an economic development plan satisfied the public use requirement. The Court construed public use broadly, equating it with "public purpose"; governments may not transfer property from one individual to another for purely private purposes, but property may be taken and transferred to a private party where it serves a public purpose. The Court noted a "longstanding policy of deference to legislative judgments in this field" and upheld New London's exercise of eminent domain on the basis that the city development plan served a public purpose, thus satisfying the public use requirement. Since *Kelo*, commentators see the public use requirement as an extremely easy hurdle for the government to satisfy; almost any government project or regulation will qualify for the public use requirement.

---

14 See id. at 472.
15 See id. at 477–80.
16 See id. at 490, 488–89.
Beyond the public use requirement, government regulations that go "too far" will amount to a taking of property requiring just compensation.\textsuperscript{18} The foundational case for modern regulatory takings jurisprudence, \textit{Penn Central Transportation Co. v. New York City}, characterizes the "too far" test as "essentially ad hoc, factual inquiries," marked by the balancing of several factors.\textsuperscript{19} These include "[t]he economic impact of the regulation on the claimant," "the extent to which the regulation has interfered with distinct investment-backed expectations," and "the character of the governmental action."\textsuperscript{20} These factors can be thought of as proxies for eminent domain-like conduct.\textsuperscript{21} The heart of the inquiry is whether the regulation is more like an act of eminent domain or a routine exercise of state police powers to regulate public health and safety.\textsuperscript{22}

In the decades following \textit{Penn Central}, the Supreme Court qualified the open-ended "too far" test by announcing two per se rules on takings. In \textit{Loretto v. Teleprompter Manhattan CATV Corp.}, defendant Teleprompter Manhattan CATV Corporation installed some cable boxes and cable lines on top of Loretto’s apartment building without her permission, pursuant to a state law authorizing such installations.\textsuperscript{23} Finding that the installation constituted a permanent physical occupation, the Court held that because "a permanent physical occupation authorized by government is a taking," regardless of the public interest at stake or the extent of physical occupation,\textsuperscript{24} the state law effected a taking, requiring compensation.\textsuperscript{25} In \textit{Lucas v. South Carolina Coastal Council}, South Carolina passed a beach preservation law banning all construction on Lucas’s two vacant beachfront lots.\textsuperscript{26} Relying on the trial court’s undisputed finding that the construction ban rendered the lots valueless,\textsuperscript{27} Justice Antonin Scalia announced that a

\textsuperscript{18} See Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922) ("[W]hile property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.").


\textsuperscript{20} Id. In addition to the factors listed above, Justice Oliver Wendell Holmes in \textit{Mahon} listed several other factors that should also be considered in this inquiry. See \textit{Alexander}, supra note 6, at 75.

\textsuperscript{21} See \textit{David A. Dana \& Thomas W. Merrill, Property: Takings} 133 (2002).


\textsuperscript{23} See 458 U.S. 419, 422-23 (1982).

\textsuperscript{24} See \textit{id.} at 426.

\textsuperscript{25} See \textit{id.} at 441.

\textsuperscript{26} See 505 U.S. 1003, 1008-09 (1992).

\textsuperscript{27} See \textit{id.} at 1009.
regulation that "denies all economically beneficial or productive use of land" will constitute a per se taking.\textsuperscript{28}

Aside from the two per se rules of Loretto and Lucas, regulatory takings claims remain subject to the multifactor Penn Central balancing test, where the regulation's impact on the property plays a significant role.\textsuperscript{29} Courts ask: How close is the deprivation to a total or 100% loss? As the deprivation approaches 100%, the regulation is more likely to constitute a taking (if the deprivation is 100%, then the regulation is a taking per Lucas).\textsuperscript{30} The property owner, in an attempt to show that the regulation has caused a significant deprivation, will want to minimize the denominator of the deprivation calculation—the smaller the denominator, the larger the overall fraction, assuming the numerator remains unchanged. Accordingly, the property owner may attempt to conceptually sever the property into smaller segments and claim that a particular segment is the relevant parcel for this inquiry.

Various forms of conceptual severance have been attempted over the years with varying levels of success before the Supreme Court. But the Court has not addressed conceptual severance with consistency or clarity, leaving many uncertain as to whether a pronouncement in one case is truly binding or merely dicta.

B. Conceptual Severance in Action

Since Professor Radin coined "conceptual severance" in 1988, four categories of conceptual severance have emerged in the scholarly commentary: horizontal, vertical, functional, and temporal.\textsuperscript{31} But further consensus is lacking; commentators disagree on the current state of each of the four categories and how courts should address them.\textsuperscript{32} The following sequence for presenting conceptual severance—vertical, functional, temporal, and horizontal—coincide roughly with the history of conceptual severance in the Supreme Court. The discus-

\textsuperscript{28} See id. at 1015–16. At the same time, Justice Scalia implied that a regulation that denies all economically beneficial use would be "rare." See id. at 1018.

\textsuperscript{29} See Lingle v. Chevron U.S.A., Inc., 544 U.S. 528, 540 (2005) (rejecting the "substantially advances" formula of Agins v. City of Tiburon, 447 U.S. 255 (1980), and reaffirming that Penn Central governs in most takings inquiries); see also DANA & MERRILL, supra note 21, at 132–34 (recognizing the various factors that the Court has used in conducting the "too far" inquiry but suggesting that diminution in value is the most firmly established factor).

\textsuperscript{30} See DANA & MERRILL, supra note 21, at 135.

\textsuperscript{31} See Radin, supra note 4, at 1676; Wright, supra note 7, at 193.

\textsuperscript{32} For example, some claim that the Court accepted temporal severance in First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 318 (1987), but the Court clearly rejected plaintiffs' attempt at temporal severance in Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency, 535 U.S. 302, 331 (2002). See infra Part I.B.3; see also Nestor M. Davidson, The Problem of Equality in Takings, 102 Nw. U. L. Rev. 1, 2 (2008) (suggesting that the Court has rejected conceptual severance altogether).
sion ends with horizontal severance precisely because it is the most difficult of all four types and constitutes the heart of conceptual severance.

1. Vertical Severance

Although the cases on vertical severance are relatively few, the Supreme Court has consistently rejected vertical severance since *Penn Central* in 1978. In *Penn Central*, the plaintiff, Penn Central Transportation Company, challenged New York City’s Landmarks Preservation law which designated Grand Central Terminal as a protected site, claiming the law impaired Penn Central’s plans to build a high-rise above the Terminal. See *Penn Cent.* Transp. Co. v. New York City, 438 U.S. 104, 107 (1978); see also *Wright*, supra note 7, at 203 (noting that the Court has not resolved the situation where a claimant’s remaining ownership interest coincides with the denominator).

Penn Central owned the Terminal in fee simple absolute but attempted to conceptually sever the air rights above the building from the rest of the property, and claimed that the law effectively took away all of its air rights. See *Penn Cent.*, 438 U.S. at 130. The Court rejected this argument by stating:

“Taking” jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole—here, the city tax block designated as the “landmark site.”

Rejecting vertical severance, the Court held the city’s Landmarks Preservation law did not go too far and thus did not effect a taking of Penn Central’s property.

Since *Penn Central*, courts and commentators have occasionally referred to the “parcel as a whole” rule as generally prohibiting conceptual severance. For example, in *Keystone Bituminous Coal Ass’n v. DeBenedictis*, the Court, citing *Penn Central*, rejected vertical sever-

---

33 *See* Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 107 (1978); *see also* Wright, infra note 7, at 203 (noting that the Court has not resolved the situation where a claimant’s remaining ownership interest coincides with the denominator).

34 *See* Penn Cent., 438 U.S. at 130.

35 *Id.* at 130–31 (emphasis added).

36 *See id.* at 137–38.

Despite the striking similarity between the facts of Keystone and Pennsylvania Coal Co. v. Mahon.

In Mahon, Pennsylvania Coal Company had sold land above its coal reserves (i.e., the surface estate) to Mahon, with a promise from Mahon to waive "all claim for damages that may arise from [defendant’s] mining [of] the coal." Unfortunately for Pennsylvania Coal, the Pennsylvania legislature later passed the Kohler Act, which "forbid[ ] the mining of anthracite coal in such way as to cause the subsidence of . . . any structure used as a human habitation." Mahon sued Pennsylvania Coal under the Kohler Act for an injunction to stop further mining under the surface estate. Justice Holmes, writing for the Court, invalidated the Kohler Act as unconstitutionally exceeding the state’s police powers because it effectively destroyed Pennsylvania Coal’s distinct interest in the support estate.

In Keystone, the Court distinguished Mahon by finding that unlike the Kohler Act, the legislation at issue, the Subsidence Act, served a public purpose. In addition, the plaintiffs failed to establish that the Subsidence Act made it commercially impracticable to continue mining coal. The Court also rejected the plaintiffs’ attempt to conceptually sever the restricted coal from the unrestricted coal or, alternatively, to conceptually sever the support estate from the mineral estate. The Court reasoned that the fact that some coal must remain to support the surface is not sufficient to establish a takings claim; the Court analogized the mining restriction to zoning restrictions limiting the square footage of buildings on any particular lot.

And even though Pennsylvania state law recognizes "the support estate as a separate interest in land that can be conveyed apart from either the mineral estate or the surface estate," the Court rejected "such legalistic distinctions" and ruled that the support estate could

38 See Keystone, 480 U.S. at 497.
39 Compare Pa. Coal Co. v. Mahon, 260 U.S. 393, 412 (1922) (holding the Kohler Act, which prohibited mining that caused the subsidence of human residences, to be an exercise of eminent domain requiring compensation), with Keystone, 480 U.S. at 506 (upholding an act which similarly prevented mining that caused damage to buildings).
40 Mahon, 260 U.S. at 412.
41 Id. at 412–13.
42 See id. at 414. The support estate, when held in conjunction with the mineral estate, allows the holder to extract the layer of coal that supports the surface; when held with the surface estate, the support estate gives the holder the right to leave the support layer intact and prevent subsidence. See id. at 412.
43 Keystone, 480 U.S. at 483.
44 See id. at 495–96.
45 See id. at 498–502.
46 See id. at 498 (noting that the Subsidence Act only required plaintiffs to retain two percent of their coal reserves in the ground).
not be vertically severed from the mineral estate held by the plaintiffs.\textsuperscript{47}

Despite the Court's efforts to distinguish \textit{Keystone} from \textit{Mahon}, the decisions remain inconsistent to many observers.\textsuperscript{48} But because \textit{Mahon} was decided in 1922 and the case was not squarely presented as a takings claim,\textsuperscript{49} \textit{Penn Central} and \textit{Keystone}'s rejection of vertical severance is rather uncontested.

2. \textit{Functional Severance}

Unlike other forms of conceptual severance, functional severance has been accepted by the Court to some extent, perhaps because of its strong theoretical foundations. Indeed, conceptual severance in general, but especially functional severance, is grounded in the notion that property is a bundle of rights.\textsuperscript{50} That bundle traditionally includes the rights to use, possess, exclude, and dispose.\textsuperscript{51} To date, certain "functional" rights have been singled out for special treatment—the right to exclude in \textit{Kaiser Aetna v. United States} and the rights to descent and devise in \textit{Hodel v. Irving}.\textsuperscript{52}

In \textit{Kaiser Aetna}, the government sought to impose a right of public access on a private marina that was previously a private pond on the basis that the development made the marina a "navigable water of the United States."\textsuperscript{53} Dismissing the navigability question as one relating to Congress's authority to regulate the marina, the Court declared that "the 'right to exclude,' so universally held to be a fundamental element of the property right," cannot be taken without just compensation.\textsuperscript{54} Consequently, the government could not impose a right of public access to the marina without compensating its owner for taking the right to exclude the public. The importance of the right to ex-

\begin{footnotesize}
\textsuperscript{47} Id. at 500.
\textsuperscript{49} See Pa. Coal Co. v. Mahon, 260 U.S. 393, 413 (1922) ("The question is whether the police power can be stretched so far.").
\textsuperscript{51} See, e.g., RICHARD A. EPSTEIN, \textit{TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN} 59 (1985) (advocating for an extremely liberal and individualistic conception of property where property consists of the rights of "possession, use, and disposition").
\textsuperscript{53} See 444 U.S. at 170 (internal quotation marks omitted).
\textsuperscript{54} Id. at 179–80; see also Radin, supra note 4, at 1671 (discussing \textit{Kaiser Aetna}'s focus on the fundamentality of the right to exclude).
\end{footnotesize}
clude was reiterated three years later in *Loretto*.

There is little doubt that the right to exclude is generally protected from uncompensated government taking.

Aside from the right to exclude, the Court has recognized that the rights to descent and devise can be severed from the property bundle for special protection. In an attempt to reverse the increase of fractional property interests in Indian lands following historical land allotment legislation, Congress enacted section 207 of the Indian Land Consolidation Act, which provides that certain small undivided fractional interests in Indian tribal lands shall escheat back to the tribe rather than pass by will or intestacy to individual heirs. Representatives and heirs of decedents owning interests subject to section 207 claimed that the statute took "their decedents' right to pass the property at death," violating the Takings Clause. Like the *Kaiser Aetna* Court's focus on the right to exclude, the Court in *Hodel* singled out a particular right, "the right to pass property," and held that the total destruction of this right under section 207 constituted a taking of property.

However, no other strand in the property rights bundle has been singled out like the two above. Even the common-law preference for marketability and alienability did not persuade the Court to accept functional severance of the right of disposition. In *Andrus v. Allard*, plaintiffs claimed that the government's prohibition on sale of eagle feathers was a taking of property. The Court employed sweeping language that could be construed as foreclosing functional severance and conceptual severance in general: "At least where an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking, because the aggregate must be viewed in its entirety." *Loretto* and *Hodel*, which come after *Andrus*, clearly limit the breadth of this language. However, for the plaintiffs in *Andrus*, the Court was unsympathetic toward their loss of the right to dispose; instead, the Court noted that plaintiffs retained their "rights to possess

---

55 See *Loretto* v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 433 (1982); *supra* notes 23–25 and accompanying text.

56 But see *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 83–84 (1980) (upholding California's constitutional restriction on shopping center owner's right to exclude the public from exercising free speech and petition rights in the shopping center); cf. *Loretto*, 458 U.S. at 434 (describing the restriction at issue in *PruneYard* as "temporary and limited in nature").

57 See *Hodel*, 481 U.S. at 707–09.

58 See id. at 709–11.

59 See id. at 716–17.


61 Id. at 65–66.
and transport their property, and to donate or devise the protected birds.\(^6\)

_Andrus_ did not involve the sale of real property, and arguably a different result would have emerged if the regulation restricted land sales. But for now, it remains difficult to explain why certain rights are functionally severable and others are not. The Court justified its treatment of the rights to exclude, descent, and devise by declarations of their utmost importance in history and precedent.\(^6\) Perhaps concerns about overstepping the bounds of the particular case or controversy at issue explain the Court’s unwillingness to provide more clarity in this area. In future cases, the text of _Penn Central_ and _Andrus_ may work to limit the scope of functional severance.

3. **Temporal Severance**

One can now safely say that temporal severance is generally prohibited, but prior to 2002, that conclusion was far from clear. Temporal severance may be the most confusing form of conceptual severance because time can be a characteristic of many components in a takings claim. Time is a characteristic of property interests (e.g., leaseholds or defeasible fees).\(^6\) Time also characterizes the nature of the government action (e.g., the duration of the regulation, whether it’s indefinite or effective for a finite period). Lastly, time can also be a characteristic of the takings denominator (e.g., the right to use property from 1991 to 1992).

Three types of takings claims must be outlined and distinguished in this discussion: (1) Takings of temporally defined property interests (e.g., leaseholds); (2) Temporary takings, where an enacted regulation works a taking but is later repealed or rescinded by the government and the regulatory taking becomes temporary rather than permanent; and (3) “Temporary regulations,” which are government regulations with predefined limited duration. The first category of takings is well recognized as requiring just compensation—if government action amounts to a taking (under the categorical rules or _Penn Central_ balancing test), the Takings Clause requires compensation, regardless of whether the claimant holds a leasehold interest or fee simple.\(^6\)

The second and third categories may seem similar, but they are in fact critically different. In contrast to the latter situation, in tempo-

---

\(^6\) _Id._ at 66.

\(^6\) See _Hodel_, 481 U.S. at 716; _Loretto_ v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 435 (1982); see also Wright, _supra_ note 7, at 209 (concluding “[f]unctional severance is quite incoherent” because it appears to be rather arbitrary line drawing).

\(^6\) See Wright, _supra_ note 7, at 214 (“An obvious example of temporal severance is the division of ownership over time with the use of future interests.”).

rary takings, the takings question has already been decided in that the regulation clearly constitutes a taking under existing doctrine. The only question remaining is whether compensation is due in such a case where the offending regulation ceases to exist. This is the question addressed in First English Evangelical Lutheran Church v. County of Los Angeles. First English held that under the Takings Clause, a taking requires just compensation, regardless of whether the offending government regulation is later rescinded and the taking is made merely temporary, not permanent.

Despite some observations that First English was an endorsement of temporal severance, the Court in 2002 clarified that temporal severance is generally prohibited in addressing the third category mentioned above, which I called "temporary regulations." In Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, the Tahoe Regional Planning Agency issued a 32-month development moratorium for certain areas in the Tahoe basin. At the Supreme Court, due to procedural missteps, the plaintiffs were limited to arguing that following Lucas and First English, the development moratoria constituted a taking by denying them all economic use of their property during the 32-month period.

Justice Stevens, writing for the majority, held that First English should not be construed as endorsing conceptual severance but was narrowly focused on a "compensation question" or a "remedial question," never deciding whether a taking had occurred. The Court then distinguished plaintiffs' claim from Lucas: whereas the development moratoria at issue was a temporary regulation, Lucas dealt with a permanent regulation that deprived an individual of all viable economic use of a fee simple estate. Citing Penn Central's "parcel as a whole" rule, Justice Stevens rejected temporal severance, holding that plaintiffs cannot conceptually sever the 32-month segment from the remaining fee simple estate and claim that the moratoria effected a taking of the 32-month segment.

---

67 See id. at 321.
68 Tahoe, 535 U.S. at 328–29, 331; see also Frank Michelman, Takings, 1987, 88 COLUM. L. REV. 1600, 1619–20 (1988) (suggesting that based on the composition of the First English majority, especially the presence of Justices William Brennan, Byron White, and Harry Blackmun, who have all clearly opposed conceptual severance in earlier opinions, First English should not be read as an endorsement of temporal severance).
69 See Tahoe, 535 U.S. at 312.
70 See id. at 320–21.
71 See id. at 328–29 ("[O]ur decision in First English surely did not approve, and implicitly rejected, the categorical submission that petitioners are now advocating.").
72 See id. at 329–30.
73 See id. at 331.
The Court went on to note that its holding does not establish any bright-line rules. Temporary regulations are not categorically exempt from regulatory takings challenges; those that go too far will constitute a regulatory taking, but the proper framework for analysis is the multifactor balancing of Penn Central.\textsuperscript{74} In addition to the duration of the regulation, landowners’ investment-backed expectations and the reasonableness or diligence of land-use planning officials will likely be relevant considerations in evaluating temporary regulations.\textsuperscript{75} One could imagine a scenario where a landowner has concrete expectations for development, but her intentions are frustrated by an unreasonably long moratorium—would such a landowner need temporal severance to successfully challenge the regulation? If attempting to establish a taking under Lucas, temporal severance is essential because Lucas only asks the extent to which the regulation deprives all economically beneficial use.\textsuperscript{76} That inquiry requires definition of “the relevant parcel,” or the denominator of the takings fraction. The Penn Central inquiry, on the other hand, looks beyond the formulaic calculations of the takings fraction and can rest on other factors such as the landowner’s investment-backed expectations and the nature or character of the government action.\textsuperscript{77} The Tahoe majority’s endorsement of Penn Central balancing indicates that while temporal severance does need not be the crux of a temporary regulation takings claim, it could be employed to tip the scale in favor of finding a taking.

4. \textit{Horizontal Severance}

Commentators generally agree that the Supreme Court has not directly spoken on the issue of horizontal severance.\textsuperscript{78} Horizontal severance is the stereotypical form of conceptual severance that comes to mind when one thinks about land-use regulatory takings claims; it is truly the heart of conceptual severance. Recall the hypothetical takings claim at the beginning of this Note. The landowner may attempt to conceptually sever the wetlands from the dry-land portion of the lots to argue that the government has taken 100\% of her property interest in the wetlands. In response, the government would likely argue that the relevant parcel is the two lots combined and because the regulation impairs only 25\% of the relevant parcel, no taking has occurred.

\textsuperscript{74} See id. at 335–37.
\textsuperscript{75} See id. at 333–36; Wright, supra note 7, at 217 (noting that Tahoe “left open the possibility” that temporal severance may be appropriate in certain circumstances where “abnormal delays, especially bad-faith governmental stalling tactics” are present).
\textsuperscript{76} See supra notes 26–28 and accompanying text.
\textsuperscript{77} See supra notes 19–20 and accompanying text.
\textsuperscript{78} See Wright, supra note 7, at 193; Fee, supra note 37, at 1544–45.
Penn Central's "parcel as a whole" rule seems to reject the landowner's attempt at horizontal severance, but does that mean the government wins? Unfortunately, the question here is not simply whether the Supreme Court has rejected or accepted horizontal severance. Even if one assumes that horizontal severance is generally disallowed, the same underlying question still remains: What constitutes the "parcel as a whole"? Further, one should hesitate to read too much from Penn Central. For one, Professor Radin suggests that despite Penn Central, the Court in Nollan v. California Coastal Commission\(^79\) "engaged in [horizontal] severance by construing a public access easement as a complete thing taken, separate from the parcel as a whole."\(^80\) Also, the Court recognized the issue of horizontal severance in \textit{Lucas} but declined to announce any clear rules on the issue.\(^81\)

In the absence of definitive rules for determining the relevant parcel, there are a variety of tests—some used by lower courts, some proposed by commentators. In a footnote in \textit{Lucas}, Justice Scalia suggested looking to state law specifically to see whether state law recognizes or protects the specific property interest at issue, as a factor in the relevant parcel determination.\(^82\) However, state law is unhelpful in the horizontal context because under state law, landowners can freely subdivide larger parcels into smaller ones—there likely would be no limit to horizontal severance if state law alone guided the relevant parcel determination.\(^83\) The denominator problem is often complicated by the fact that the landowner owns multiple parcels in the vicinity, some of which have been purchased and sold over multiple transactions.

Lower courts generally consider a variety of factors to determine the relevant parcel: (1) extent of ownership, (2) contiguity of parcels, (3) date of acquisition, (4) owner treatment of the parcel as a single unit or part of a larger parcel, and (5) the nature of the government action.\(^84\) However, there is no set formula in considering these fac-

\(^{80}\) Radin, \textit{supra} note 4, at 1676–77.
\(^{81}\) \textit{See} Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1016 n.7 (1992) ("Regrettably, the rhetorical force of our 'deprivation of all economically feasible use' rule is greater than its precision, since the rule does not make clear the 'property interest' against which the loss of value is to be measured. When, for example, a regulation requires a developer to leave 90% of a rural tract in its natural state, it is unclear whether we would analyze the situation as one in which the owner has been deprived of all economically beneficial use of the burdened portion of the tract, or as one in which the owner has suffered a mere diminution in value of the tract as a whole.").
\(^{82}\) \textit{See} Lucas, 505 U.S. at 1016 n.7.
\(^{83}\) \textit{See} Fee, \textit{supra} note 37, at 1556.
\(^{84}\) \textit{See}, e.g., Ciampitti v. United States, 22 Cl. Ct. 310, 318 (1991) (noting that "[f]actors such as the degree of contiguity, the dates of acquisition, [and] the extent to which the parcel has been treated as a single unit" should be considered in the relevant parcel inquiry). In \textit{Loveladies Harbor, Inc. v. United States}, the question was whether the relevant
tors; some factors will be more relevant than others depending on the facts of each case.

Professor John Fee, after a thorough analysis of lower court decisions employing the factors above, ultimately rejects a multifactor approach in favor of a single test, one which asks whether the plaintiff's asserted property contains "one economically viable use, independent of the surrounding land."85 Professor Fee argues that instead of examining the owner's subjective plans or investment-backed expectations, courts should focus on whether the asserted parcel is "substantial enough to warrant Fifth Amendment protection as an independent bundle of rights."86 Under Fee's approach, plaintiffs have the burden of proving that "the property in question could profitably be put to use if it were the owner's only parcel."87

Such a "substantiality" requirement for horizontal severance is admirable, even desirable, but why should economic viability and profitability be the only marker for substantiality? Mark Lisker rejects bright-line rules and instead proposes "an analytical framework to guide courts in making the denominator determination."88 Recognizing the wide factual variations in takings claims and practical difficulties in balancing private against governmental interests, Lisker argues that courts should consider a multitude of factors in determining the relevant parcel, including state property law, economic viability, investment-backed expectations, unity of ownership, and contiguity of property.89 In essence, Lisker endorses the multifactor, flexible inquiry employed by many lower courts and rejects any definitive rule on horizontal severance.90 Like Professor Fee, Lisker maintains that courts should start with the plaintiff's proposed denominator and impose additional tests or inquiries to determine the relevant parcel.91

---

85 Fee, supra note 37, at 1557.
86 Id.
87 Id. at 1560.
88 Lisker, supra note 48, at 669.
89 See id. at 719–25.
90 See id. at 723. Under Lisker's approach, the Ciampitti court correctly rejected plaintiff's attempt to sever the regulated wetlands from the upland portion of his property, and the court in Loveladies was also correct to horizontally sever lands previously developed by the plaintiff.
91 See Fee, supra note 37, at 1557; Lisker, supra note 48, at 720.
While these authors recognize the concern that property owners and governments can manipulate conceptual severance to their own ends, both argue that the adversarial system will mitigate such concerns.92

More recently in 2004, Professor Danaya Wright analyzed the Court's reception of conceptual severance in great detail and argued that the Court has missed the boat completely by treating property as a static object fixed in time.93 Professor Wright ultimately suggests that the Court should not uniformly reject or accept conceptual severance but should instead look at a landowner's prior actions to determine if the landowner contributed to the severity of her current deprivation.94 Consistent with common law rules of reciprocity and severance,95 if the landowner voluntarily severed and sold part of his or her property and a regulation now prohibits the landowner from using the remaining parcel in ways injurious to the previously owned property, Wright argues that courts should take into account the fact that the landowner previously owned both properties and voluntarily severed them, thus contributing to the current state.96 Under this regime, large developers will likely be disadvantaged in takings claims because those same developers contributed to their current deprivation in developing and severing their land. Professor Wright contends that when landowners have already profited from the sale of those properties, the Takings Clause should not be twisted to bestow additional benefits.97

The various answers to conceptual severance outlined above have their share of advantages and disadvantages. This Note does not purport to provide a solution to "the problem of conceptual severance." Instead, this Note contends that before proposing a solution to conceptual severance, an understanding of conceptual severance's role in U.S. regulatory takings doctrine is needed—that is, what functions does conceptual severance serve in the current doctrine? Are those functions compatible with our normative emphasis on the rule of law, transparency, and rationality in judicial decision making? We can begin to formulate a response to the "problem" of conceptual severance only after those preliminary questions have been answered.

This Note seeks to answer those basic questions through a comparative approach. Comparisons allow one to separate form from function and to see how different legal systems address the same prob-

92 See Fee, supra note 37, at 1560; Lisker, supra note 48, at 729.
93 See Wright, supra note 7, at 193–218.
94 See id. at 179–80.
95 See id. at 224–28.
96 See id. at 235.
97 See id. at 241.
lem through different rules and institutions. Comparisons also
demonstrate the range of possible solutions for a given problem and
may help in the later stage of formulating a solution to that prob-
lem. Given that conflicts between land-use regulations and private
property interests exist in many (if not all) advanced Western democ-
racies, a comparison of U.S. regulatory takings to the European Court
of Human Rights and Canada will provide insight on how conceptual
severance furthers the goals of the regulatory takings doctrine.

II
EUROPEAN COURT OF HUMAN RIGHTS

A. Protecting Property Through Proportionality

Article 19 of the European Convention on Human Rights (the
Convention) established the European Court of Human Rights
(ECtHR) to ensure member states uphold the Convention's human
rights guarantees. The ECtHR is empowered to hear interstate or in-
dividual complaints against all member states, declare national laws in
breach of the Convention, and award compensation in limited
cases. Like the Framers of the U.S. Constitution, the drafters of the
European Convention disagreed on whether and to what extent prop-
erty rights should be protected. To prevent further delay in establish-
ing a human rights treaty, the Convention was finalized without
mention of property rights. After the Convention was signed in
1950, drafters continued to work on a property clause and within two
years, Protocol 1 to the Convention was signed with Article 1 on the
protection of property rights:

Every natural or legal person is entitled to the peaceful enjoyment
of his possessions. No one shall be deprived of his possessions ex-
cept in the public interest and subject to the conditions provided
for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the
right of a State to enforce such laws as it deems necessary to control

98 See Konrad Zweigert & Hein Kötz, Introduction to Comparative Law 34 (Tony
Weir trans., Oxford University Press 3d rev. ed. 1998) (presenting the functionalist meth-
do...
the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.\textsuperscript{103}

These three sentences of Article 1, Protocol 1 each have their own legal effect, yet at the same time the relationship between the three rules is complex, and they must be read together to understand their full effect. The first sentence (rule 1), which guarantees “peaceful enjoyment of . . . possessions,” is a general guarantee of property rights, requiring all state interference with property to satisfy a general proportionality test.\textsuperscript{104} The latter two sentences (rules 2 and 3) greatly limit the property guarantee of rule 1 by allowing state deprivation\textsuperscript{105} and regulation of property under certain conditions.

In an Article 1 claim, the ECtHR first examines the nature and character of the government action in question to determine which rule applies.\textsuperscript{106} Rule 2 applies in cases of “deprivation” (i.e., where the claimant is deprived of his title and entire property interest either through a formal transfer of title or a government act that effectively expropriates the property).\textsuperscript{107} Rule 3 applies in most cases involving land-use regulations. That said, all government interferences with property rights are evaluated under the same framework: the interference must be (1) lawful, (2) in pursuit of a legitimate public interest, and (3) proportional to the interest to be served.\textsuperscript{108} For an interference to be lawful, the interference must comply with the member state’s laws and comport with the “rule of law” in that the legal basis for the interference should be “accessible, precise and foreseeable.”\textsuperscript{109}

On the public interest element, the Court gives states great deference on whether the interference serves a legitimate public interest.\textsuperscript{110}


\textsuperscript{105} “Deprivation” as used by the ECtHR refers generally to expropriation, the physical appropriation of land by a state, either through formal exercises of eminent domain or de facto possession. See generally Popovae, supra note 102, at 30–41 (detailing the various forms of deprivation or expropriation that have been recognized in ECtHR case law).

\textsuperscript{106} See, e.g., Sporrong, 52 Eur. Ct. H.R. (ser. A) at 24–25 (noting that the court must look at the “realities of the situation” in the absence of formal expropriation).

\textsuperscript{107} See generally Popovae, supra note 102, at 29–41 (discussing the various categories of expropriation that are recognized as “deprivations” by the Court). For further discussion on whether a regulation may amount to a deprivation, see infra Part II.B.

\textsuperscript{108} See Popovae, supra note 102, at 52.


\textsuperscript{110} See James v. United Kingdom, 98 Eur. Ct. H.R. (ser. A) 9, 32 (1986) (“The Court . . . will respect the legislature’s judgment as to what is ‘in the public interest’ unless that judgment be manifestly without reasonable foundation.”); see also Helen Mountfield, Regulatory Expropriations in Europe: The Approach of the European Court of Human Rights, 11 N.Y.U. Envtl. L.J. 136, 140–41 (2002) (noting that the Court has never “rejected a government’s submission that a measure was in the public interest”).
The main limit on a member state's ability to interfere with property rights is the last requirement of proportionality.

When evaluating state actions for proportionality, the Court asks "whether a fair balance was struck between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights."\(^{111}\) Proportionality does not exist where the claimant has to bear "an individual and excessive burden."\(^{112}\) Yet proportionality does not require strict necessity—the interference does not need to be a necessary condition for achieving legislative aims; as long as there is "a reasonable relationship . . . between the means employed and the aim sought to be realized," the interference is proportional and valid.\(^{113}\) If the interference constitutes a rule 2 deprivation, absent "exceptional circumstances," the lack of any compensation will imply that the interference is disproportional.\(^{114}\) But proportionality does not require compensation for regulations falling under rule 3. Proportionality ultimately involves a case-by-case analysis of the facts, including the design of the interference and the availability of domestic processes to challenge the interference.

For example, in the landmark case of Sporrong v. Sweden, the Swedish government, in preparation to acquire plaintiffs' properties, issued expropriation permits and prohibited construction for many years, ranging from eight to twenty-five years.\(^{115}\) Despite the inapplicability of rules 2 and 3, the Court held the expropriation permits were interferences subject to the general proportionality requirement of rule 1.\(^{116}\) The Court found that because the expropriation permit and construction ban were in place for long periods of time, and Swedish law provided no process to petition for relief, the permit and ban, imposing an excessive burden on the plaintiffs, failed proportionality and violated Article 1.\(^{117}\)

\(^{111}\) Sporrong, 52 Eur. Ct. H.R. (ser. A) at 26; see also AJ Van der Walt, Constitutional Property Clauses 118-19 (1999) (noting the balance that must be struck between protecting the right of property and general public interest).


\(^{113}\) James, 98 Eur. Ct. H.R. (ser. A) at 34-35.

\(^{114}\) See id. at 56 (noting that only under exceptional circumstances will deprivation without compensation be deemed proportional). However, compensation less than full market value may be sufficient to satisfy the proportionality requirement. See Allen, supra note 109, at 299-300.


\(^{116}\) See id. at 23-24 (finding the expropriation permits did not constitute regulations on use nor formal or de facto deprivations because plaintiffs retained title to the properties and could "use, sell, [or] devise . . . their properties").

\(^{117}\) See id. at 26-28.
B. An Emerging Regulatory Takings Doctrine?

Although Article 1 divides government actions into deprivations and regulations, the line separating deprivations and regulations is far from clear. The Court has not rejected the notion that a regulation that goes too far may constitute a compensable deprivation under rule 2, but neither has the Court ever found a land-use regulation to constitute a deprivation under rule 2.

In *Fredin v. Sweden*, the Swedish government, pursuant to environmental laws, revoked the Fredins' twenty-year-old gravel exploitation license, even though the Fredins had only started extracting gravel four years earlier. The Fredins argued that the revocation of the license deprived "their property of all its value" and amounted to a de facto deprivation requiring compensation under rule 2. The government, on the other hand, claimed the revocation was merely a regulation on use, a valid exercise of the state's powers under rule 3. The ECtHR acknowledged the interference was not a formal deprivation but nevertheless accepted that the issue was "whether the consequences of the revocation...were so serious as to amount to a de facto deprivation of property."121

Ultimately, the ECtHR rejected the Fredins' deprivation-of-all-value argument by finding that the gravel pit itself was not the appropriate scope of inquiry because the Fredins owned the surrounding land and created the gravel pit lot "from parts of their existing properties for the sole purpose of [operating]...the gravel pit business." Finding that the revocation did not affect the Fredins' property holdings in totality, the ECtHR held that the revocation did not amount to a de facto deprivation in violation of Article 1 and upheld the revocation as a lawful and proportional restriction on use under rule 3. Note that the ECtHR appears to have engaged in a bit of reverse conceptual severance in finding the relevant property to be all of the Fredins' property in the vicinity, rather than the legal parcel proposed by the plaintiffs.

Putting aside the doctrinal distinctions between deprivations, regulations, and the related issue of compensation, the proportionality test allows the ECtHR to invalidate any type of interference, regardless

---

118 See *Van der Walt*, supra note 111, at 108, 112.
120 *Id.* at 14–15.
121 *Id.* at 15.
122 *Id.*
123 See *id.* at 15–18.
124 Cf. *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 130–31 (1978) (rejecting plaintiff's claim to conceptually sever air rights above Grand Central Terminal and instead finding the relevant parcel to be "the city tax block designated as the 'landmark site'").
DEMYSTIFYING CONCEPTUAL SEVERANCE

of whether it is classified as a deprivation under rule 2, a regulation subject to rule 3, or a general interference.\textsuperscript{125} An inflexible regulation that produces little benefit to the public while severely restricting property rights may impose an excessive burden on property owners and fail proportionality. Whether a particular interference fails proportionality will depend on the weight given to the legislative aims promoted by the regulation and the private property interest at stake. In some sense, the proportionality test is quite like \textit{Penn Central} balancing as both require courts to engage in detailed factual inquiries, balance various factors, and arguably pass substantive judgment on national legislation.\textsuperscript{126}

But unlike the American focus on the extent of the owner’s loss, the ECtHR takes into account both the effect of the interference on the property interest and the aim sought to be achieved through the government interference. Implicit in Article 1 is the understanding that property rights are never absolute—they are always limited by legitimate public concerns as manifested in domestic legislation. The main question for the ECtHR is whether the state action is justifiable under the standards announced in rule 2 or 3.\textsuperscript{127} The drafters of the Convention knew that many governmental measures would come to limit and even destroy property rights.\textsuperscript{128} In that sense, the European approach is realistic and honest—realistic in that they acknowledge the ubiquitous nature of governmental interference with private rights and honest because the ECtHR does not purport to have a perfect test to distinguish interferences from noninterferences and instead focuses on striking an appropriate balance between the public interest and the protection of private rights.

III

CANADA

A. Statutory Property Protection

Unlike the ECtHR and the United States, Canada did not enshrine property rights in its Constitution. Fearing that politically unaccountable courts would be empowered to strike down social welfare and redistributive legislation, the drafters of the Constitution Act of 1982 consciously excluded property rights from the Charter of Rights

\textsuperscript{125} See supra text accompanying notes 115–17 (noting that all forms of governmental interference could be held invalid if they fail the proportionality test).

\textsuperscript{126} See Allen, supra note 109, at 302 (noting that decisions are based on broad principles and standards rather than specific rules); Mountfield, supra note 110, at 141–42 (noting that the precise factors taken into account vary from case to case).

\textsuperscript{127} See supra notes 107–08 and accompanying text.

\textsuperscript{128} See Popovic, supra note 102, at 4–7.
There is nothing equivalent to the Takings Clause or Article 1 in Canada's Constitution. \(^\text{129}\) The true protector of property rights in Canada is the political process. \(^\text{130}\) Canada protects property rights by providing compensation under Expropriation Acts at the federal and provincial level. \(^\text{131}\) These Acts may be amended or repealed like any other ordinary piece of legislation. However, just as the United States developed its regulatory takings jurisprudence out of the Takings Clause, Canadian courts, through their interpretation of the Expropriation Acts, have developed doctrines to evaluate whether burdensome regulations may amount to compensable expropriations. \(^\text{132}\)

At Canadian common law, there is no right to compensation aside from statutory protections, \(^\text{133}\) but there is a statutory interpretive rule that favors compensation which says that in the absence of explicit language precluding compensation, legislation will not be construed to authorize expropriations without compensation. \(^\text{134}\)

---


\(^{130}\) Note that Canada has a “statutory” bill of rights, not to be confused with the Charter of Rights and Freedoms, which has constitutional status. The Canadian Bill of Rights, a federal statute enacted in 1960, guarantees the “enjoyment of property, and the right not to be deprived thereof except by due process of law.” Canadian Bill of Rights, S.C. 1960, c. 44 § 1(a) (Can.). However, section 1(a) offers little protection for property owners as it only applies to the federal government and not provincial governments. See Donna R. Christie, A Tale of Three Takings: Takings Analysis in Land Use Regulation in the United States, Australia, and Canada, 32 Brook. J. Int’l L. 345, 372 (2007). Further, section 1(a) has been interpreted to only guarantee basic procedural protections for property owners against expropriations. See Authorson v. Canada (Att’y Gen.), [2003] 2 S.C.R. 40, para. 42 (Can.). Finally, the legislature may declare the Bill of Rights inapplicable to subsequent legislation. See id. at para. 32.

\(^{131}\) See Schwartz & Bueckert, supra note 129, at 491 (noting that property rights are minimally protected by the Canadian Constitution and the Canadian Bill of Rights).

\(^{132}\) See Christie, supra note 130, at 350 & n.66 (“The federal government and all the provinces and territories have, however, enacted land expropriation acts and other statutes to include compensation provisions.”). Other statutes related to specific topics may also specify expropriation and compensation requirements. See infra notes 138–42 and accompanying text.

\(^{133}\) See infra Part III.B.

\(^{134}\) In Authorson v. Canada, the Canadian Supreme Court made clear that Parliament has a well-recognized right to expropriate property without compensation, as long as it makes its intention clear. See 2 S.C.R. at para. 53–55 (citing numerous cases that establish the right of the sovereign to expropriate private property without compensation).

Manitoba Fisheries Ltd. v. The Queen, federal legislation that partially nationalized fish processing companies was silent on whether compensation would be provided to those who, as a result of the Act, were prohibited from operating their businesses.\(^{136}\) The Supreme Court of Canada held that because the Act effectively deprived plaintiff of its goodwill and thus constituted a taking of property, the plaintiff was entitled to compensation for the loss of business under the interpretive presumption in favor of compensation.\(^{137}\) However, this is merely an interpretive rule; if legislation clearly provides for expropriation without compensation, this common law presumption is inapplicable. Further, this interpretive presumption assumes that the government action amounts to an expropriation. On this latter question of whether there has been an expropriation, the Canadian courts have shown a reluctance to construe “expropriation” broadly.

**B. Regulatory Expropriations Based on Public Benefit**

Canadian courts have held government regulations amounted to expropriations (i.e., takings) in a very limited number of cases.\(^{138}\) In the landmark case of The Queen v. Tener, plaintiffs holding mineral rights to certain lands in Wells Gray Provincial Park argued that the government’s refusal to issue park-use permits prohibited plaintiffs from mining the mineral deposits and amounted to an expropriation of their mineral rights.\(^{139}\) The Canadian Supreme Court held that because the refusal to issue a permit amounted to “a recovery by the Crown of a part of the right granted to the [plaintiffs]” and value was thereby transferred from the plaintiffs to the Government, the government had effectively “expropriate[d]” plaintiffs’ mineral interests, requiring compensation pursuant to the Ministry of Highways and Public Works Act.\(^{140}\) Justice Willard Estey, writing for the majority, distinguished the expropriation permit process from zoning or property use regulations because these latter measures “add nothing to the value of public property” and thus are not expropriations requiring compensation.\(^{141}\) Tener has since been cited for the proposition that zoning laws affecting property rights and land values are not compensable.\(^{142}\)

\(^{136}\) See Manitoba Fisheries, 1 S.C.R. at 109 (“There is no express language in the Act providing for the payment of compensation by the federal Crown . . . ”).

\(^{137}\) See id. at 118.

\(^{138}\) See Christie, supra note 130, at 391 n.339 (noting that “[i]n Canada, only five cases have found regulation of property rights a compensable expropriation of property”).

\(^{139}\) 1985] 1 S.C.R. 553, 556–39 (Can.).

\(^{140}\) See id. at 563–64.

\(^{141}\) Id. at 564.

\(^{142}\) See Mariner Real Estate Ltd. v. Nova Scotia (Att’y Gen.) (1999), 177 D.L.R. 4th 696 passim (Can. N.S. C.A.) (referencing Tener’s oft-quoted language of “compensation does not follow zoning either up or down”).
Since Tener, courts have developed a standard two-pronged approach for determining whether a regulation amounts to a "regulatory expropriation": in addition to establishing (1) a loss of the entire property interest, the claimant must show that (2) the government has acquired a beneficial interest through the regulation.\(^{143}\)

The first prong of this inquiry focuses on the claimant's loss. The Canadian Supreme Court in 2006 termed this prong the "removal of all reasonable uses" requirement.\(^ {144}\) A decline in property value is evidence that the regulation removes all reasonable uses, but as the *Mariner* court and other courts have held, economic loss alone is not enough to constitute a regulatory expropriation.\(^ {145}\) The regulation must in effect extinguish the claimant's interest in its entirety, not merely restrict certain strands in the bundle of rights (e.g., the right to develop).\(^ {146}\) Further, this inquiry must be made in "regard to the nature of the land and the range of reasonable uses to which it has actually been put."\(^ {147}\) Residential or commercial development may not be a reasonable use for land that is sensitive to environmental damage, and a regulation that prohibits such development on those lands does not necessarily amount to a removal of all reasonable uses.\(^ {148}\) Further, if the regulation does not prohibit the existing or historical uses of the property, the regulation likely has not removed all reasonable uses of the property.

On the second prong of the regulatory expropriations inquiry, the claimant must establish that the government has effectively acquired an interest in land or a property interest as a result of the regu-

\(^{143}\) See, e.g., Steer Holdings Ltd. v. Manitoba (1992), [1993] 79 Man. R. 2d 169, 174–75 (Can. Man. Q.B.) (endorse the notion of regulatory expropriation but emphasizing that a finding of expropriation must rest on "a resulting enhancement or improvement conferred upon" the public); cf. Christie, *supra* note 130, at 396–98 (noting that "[t]he nature of the enhancement or benefit the government must acquire is . . . far from clear").

\(^{144}\) See Canadian Pac. Ry. Co. v. Vancouver (City), [2006] 1 S.C.R. 227, para. 80 (Can.).

\(^{145}\) See *Mariner*, 177 D.L.R. 4th at 724–27 (accepting the trial court finding that the Beach Act rendered plaintiffs' properties valueless but holding economic loss alone is not enough to establish a regulatory expropriation). The *Mariner* case is factually similar to *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), which both the parties and the court recognized. See *Mariner*, 177 D.L.R. 4th at 732. However, Justice Thomas Cromwell, writing for the court, explicitly distinguished Canadian jurisprudence from U.S. regulatory takings because in Canada, "extensive and restrictive land use regulation is the norm," and such regulations have "almost without exception, been found not to constitute compensable expropriation." *Id.* at 713, 732.

\(^{146}\) See id. at 728 (noting that expropriation requires a "virtual extinction of an identifiable interest in land").

\(^{147}\) Id. at 717.

\(^{148}\) See, e.g., *Mariner*, 177 D.L.R. 4th at 728–29 (rejecting plaintiffs' claim that a refusal to issue development permits for private lots on environmentally-sensitive sand dunes destroys all incidents of ownership because residential development is not the only reasonable use of the property; there were also traditional uses such as camping or gardening).
It is unclear, however, when such an acquisition has occurred. In *Mariner Real Estate Ltd. v. Nova Scotia*, the Court reviewed at length the two landmark cases that found compensable regulatory expropriations—*Tener* and *Manitoba Fisheries*—and concluded that the Court’s decisions were based on the fact that the regulating authorities had effectively acquired, respectively, the claimants’ mineral interests and goodwill. The Court also indicated that regulations freezing development generally do not result in the government acquisition of an interest.

Most recently in *Canadian Pacific Railway Co. v. Vancouver (City)*, Canadian Pacific Railway (CPR) challenged a city bylaw that effectively prohibited CPR from redeveloping an unused railway corridor, confining “CPR to uneconomic uses of the land.” The Supreme Court held that the City of Vancouver did not acquire a beneficial interest in land when “[t]he City has gained nothing more than some assurance that the land will be used or developed in accordance with its vision.” The Court also found the bylaw did not remove all reasonable uses of the property because CPR could continue to use the corridor for rail traffic. Professor Russell Brown suggests that perhaps the beneficial interest acquired must be a “tangible one” and that the interest acquired by the City of Vancouver in *Canadian Pacific Railway* was not concrete enough to satisfy the government acquisition requirement.

On the whole, one can safely say that the current state of Canadian regulatory expropriations law is unfriendly toward property owners as they must satisfy stringent and indefinite standards to establish a regulatory expropriation.

Thus, although Canadian courts have not directly addressed conceptual severance, it can be inferred that the use of conceptual severance would be rejected or very restricted in Canadian law. Because complete loss of economic value alone is insufficient to establish an

---

149 See *Canadian Pac. Ry. Co.*, 1 S.C.R. at 239, para. 30 (“For a *de facto* taking requiring compensation at common law, two requirements must be met: (1) an acquisition of a beneficial interest in the property or flowing from it, and (2) removal of all reasonable uses of the property . . . .”).


151 *Id.* at 734.

152 See *Canadian Pac. Ry. Co.*, 1 S.C.R. at 231–33.

153 See *id.* at 239–40, para. 33.

154 *See id.* at 240.


156 See Michael A. Marion, *Compensation Where No Land Is Taken: Update of the Law in Alberta*, 48 ALTA. L. Rev. 127, 129 (2010) (noting that claims that a government project has impacted property rights “to such an extent that it constitutes a *de facto* expropriation . . . are possible, [but] they are inherently difficult to prove and generally restricted by the courts”).
expropriation (unlike *Lucas*), conceptual severance and especially horizontal severance loses much of its importance. Conceptual severance can only help plaintiffs show that a regulation causes all economic loss or destroys particular strands in the bundle of rights. When plaintiffs must establish that a regulation removes "all reasonable uses" or takes "virtually all incidents of ownership,"" severing a property interest into segments smaller than the entire ownership interest simply makes little sense.

Finally, because there is no established right to compensation in Canada, property owners have little incentive to bring takings challenges. When a regulation adversely affects property rights, owners can (1) do nothing and live with the consequences of a regulation, (2) use the political process to change the regulation or associated laws so that it works for them, or (3) try to challenge the regulation. Since Canada's regulatory expropriations jurisprudence makes it extremely difficult to challenge land-use regulations and receive compensation, options 1 and 2 appear to be better solutions for injured property owners. Putting aside option 1, property owners must resort to the political process to strengthen property rights against encroaching regulations.

IV

**Many Roads to Regulatory Takings**

A. Three Systems, One Common Goal

Parts I through III presented the regulatory takings jurisprudence of the United States, the European Court of Human Rights, and Canada.

In some respects, the United States, the ECtHR, and Canada vary widely in their protection of property rights. In practice, however, all three systems are committed to protecting property rights, seeking to achieve a balance between those rights and advancing the state's interest in regulating property for health, safety, and the common welfare. The ECtHR makes explicit these goals in its enunciation of the proportionality test, which asks "whether a fair balance was struck between the demands of the general interest of the community and the requirements of the protection of [property] rights." In Canada, given the lack of constitutional property protection, the balancing of

---

159 *See Sisters of Charity of Rockingham v. The King*, [1922] 2 A.C. 315, 322 (P.C.) (1922) (appeal taken from Can.).
private property rights against the public interest occurs first and foremost through the political process. Under the provincial and federal Expropriation Acts, which generally prohibit the uncompensated expropriation of property, Canadians have committed to some level of property protection. Canadian courts, in deciding whether a government regulation amounts to an expropriation, also implicitly balance the two competing interests, albeit within the limits set by the legislature. And since the beginning of U.S. regulatory takings jurisprudence, the Supreme Court has recognized this fundamental private versus public tension. In *Mahon*, the Court partly based its decision on finding “the public interest [in the Kohler Act] to be limited,” especially when compared to the “valuable estate” taken from the coal company.

Although all three systems seek to determine when a government regulation has gone too far in impairing property interests, they differ significantly in their mechanics. One critical distinction between the Europeans and the North Americans is the explicit consideration (and lack thereof) of the public interest involved. The ECtHR’s proportionality doctrine involves an explicit consideration of the public interest at stake. On the other hand, the U.S. Supreme Court, when considering whether a regulation amounts to a taking, consistently fails to consider the gravity of the public interest served by the regulation. This distinction may be because the United States and Canada take a definitional approach to regulatory takings: the question for these courts is whether the government action constitutes a taking or expropriation. The focus here is almost exclusively on the governmental action’s effect on the owner. In contrast, rather than trying to determine whether the governmental action should be labeled as a taking, the ECtHR is concerned with determining the validity of that action given its effects on the claimant and its intended benefit to the public.

The U.S. and Canadian approaches are ultimately more formalistic (e.g., is this regulation a taking or an expropriation?) than the ECtHR’s approach. If one thinks this difference in approach can be

---

161 See, e.g., *Mariner*, 177 D.L.R. 4th at 702 (claiming compensation is due under the Nova Scotia Expropriation Act because the Government effectively expropriated plaintiff’s beachfront property).

162 See *Christie*, supra note 130, at 401; supra notes 131–33 and accompanying text.


164 See ALEXANDER, supra note 6, at 205 (citing *Penn Central* as an example of where the Court failed to address the public interest at stake in limiting development of Grand Central Terminal and the “injury to the public welfare” that would result were development allowed). The public interest is arguably considered at the “public use” stage, but public use is interpreted broadly and is more of a binary inquiry (is there a public interest?), as opposed to a thorough consideration of the public interest at stake.

165 *Van der Walt*, supra note 111, at 26.
explained on the basis that the United States and Canada protect property rights more than the ECtHR, consider this: Canada's two-pronged test for regulatory expropriations arguably imposes a higher burden of proof for property owners than the ECtHR's proportionality test, as property owners in Canada must prove that a regulation has effectively removed *all reasonable* uses and that the government has, as a result, acquired a beneficial interest.\textsuperscript{166}

Another distinguishing factor is the institutional structure of the three systems. The ECtHR's explicit consideration of the public interest may be due in part to the institutional context and goals of the ECtHR: part of the ECtHR's mandate is to promote adherence to the rule of law and democracy in its member states.\textsuperscript{167} It cannot credibly fulfill this role if it disregards the democratically expressed interests of member states.\textsuperscript{168} Whereas the ECtHR must play a more deferential role to its member states, the U.S. Supreme Court does not, due to the coequal status of the three branches of government and the Court's power of judicial review. Even so, the United States' majoritarian form of government suggests that some deference is due to the legislature when evaluating duly enacted laws. Ultimately, one must be cautious in drawing conclusions or lessons between jurisdictions, recognizing that the role and relations between each court and the governmental entities under review cannot be ignored in explaining their doctrinal differences.

B. Conceptual Severance: Merely a Path to Regulatory Takings

If one accepts that a key objective of U.S. regulatory takings doctrine is to strike an appropriate balance between private property rights and the legitimate regulation of property for the public welfare, the role of conceptual severance in the doctrine quickly becomes clear. Under U.S. regulatory takings jurisprudence, the public use requirement as announced in *Kelo* is so easily satisfied that courts have little leeway to consider the merits of the government action and the strength of the relevant public interest. The Court thus uses conceptual severance as "code"; it masks the Court's attempt to strike a proper balance between private rights and public interests. For example, the real motivation behind rejecting temporal severance in *Tahoe-Sierra* may have been that the public interest involved in protecting Lake Tahoe, a "national treasure," significantly outweighed the temporary burden on plaintiffs who failed to show concrete plans for de-

\textsuperscript{166} See supra note 143 and accompanying text.

\textsuperscript{167} See Mountfield, supra note 110, at 146.

\textsuperscript{168} See Ratner, supra note 9, at 500-01 (noting that member states' acceptance of the ECtHR's decisions derives in part from the court's willingness to give them latitude in making regulations).
velopment and resulting economic loss. By rejecting temporal severance, the majority found that the moratoria did not go too far and that plaintiffs did not bear an excessive burden requiring compensation.

The argument that conceptual severance is masking an underlying normative weighing of private rights versus public interests is bolstered when one separates an opinion's language from its outcome. A literal reading of the Supreme Court's opinions may lead one to conclude that property rights are more protected in the United States than in the ECtHR since the U.S. doctrine places particular importance on certain rights in the bundle, such as the right to exclude, or otherwise focuses almost exclusively on the owner's economic expectations and loss. But how can that be when in most takings claims, the Supreme Court rules in favor of the government?

On this reading, although U.S. courts have generally focused on defining "the relevant parcel" by metes and bounds, time, and function, it is not clear why the denominator cannot and should not be a landowner's total land holdings, net worth, or, in a temporal case, the owner's remaining life expectancy. The Court's decisions on vertical, functional, and temporal severance look like arbitrary line drawing—because it is in a sense. That arbitrariness is more salient when one recalls that the Court has not articulated a clear standard to determine the appropriateness of the plaintiff's proffered parcel. In each of the cases discussed in Part I.B of this Note, the Court considered the propriety of the plaintiff's asserted parcel and then justified its holding on the specific facts presented before it without attempting to provide a coherent rule that is transferrable from one case to another.

---

170 See supra notes 68–72 and accompanying text.
171 See Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 539 (2005) (noting that the three tests of Loretto, Lucas, and Penn Central "focus[ ] directly upon the severity of the burden that government imposes upon private property rights").
172 See ALEXANDER, supra note 6, at 206 (noting that the Court usually upholds regulations when it employs a balancing test). Additionally, it appears that claimants in lower courts do not fare any better. See F. Patrick Hubbard et al., Do Owners Have a Fair Chance of Prevailing Under the Ad Hoc Regulatory Takings Test of Penn Central Transportation Company?, 14 DUKE ENVT'L. & POL’Y F. 121, 141 (2003) (noting that based on a random sample of regulatory takings claims citing Penn Central, "owners prevailed in 13.4% of the cases where the merits were addressed").
173 See Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1016 n.7 (1992) (noting that the "the rhetorical force" of the Lucas rule "is greater than its precision, since the rule does not make clear the ‘property interest’ against which the loss of value is to be measured").
174 For example, why did the Court in Penn Central hold that the relevant parcel is the "the city tax block designated as the ‘landmark site’"? Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 150–31 (1978).
Is the issue of conceptual severance a hopeless cause? This Note asserts that it is not. Conceptual severance has a place in our regulatory takings jurisprudence; with proper definition, it does not have to be an amorphous issue that masks courts' normative balancing of private property rights and competing public interests. After all, conceptual severance is a necessary question in determining the extent of the property owner's loss and ultimately whether the property owner is entitled to just compensation. Under both the *Lucas* and *Penn Central* tests, the property owner has to demonstrate the economic impact of the regulation and establish that this economic burden is too large for one to bear alone.\(^{175}\)

To avoid the danger of arbitrariness, the relevant parcel inquiry must necessarily be an objective one; whether an owner is entitled to compensation for the "loss" of her property interest should not be based on individual characteristics, such as the owner's total land holdings or net worth, because that has no bearing on whether one is entitled to protection under the Takings Clause. The relevant parcel inquiry and the question of conceptual severance should be resolved based on the reasonable expectations of a local property owner, taking into account the nature of the parcel at the time of purchase, the regulations in place at that time,\(^{176}\) the nature and timing of the government action at issue, and the expectations of the community in regards to property rights and land-use regulations.\(^{177}\) This formulation is not a radical departure from existing doctrine employed by the lower courts,\(^{178}\) but the emphasis here is that as a normative matter, the relevant parcel inquiry should be an objective, reasonableness in-

175 See *Lingle*, 544 U.S. at 539 ("In the *Lucas* context, of course, the complete elimination of a property's value is the determinative factor."); *id.* at 540 ("*[T]he *Penn Central* inquiry turns in large part, albeit not exclusively, upon the magnitude of a regulation's economic impact . . . ."). It may be that a regulation prohibits the owner from mining minerals on the property or restricts development on a portion of the property because it has been designated as a nature preserve area. The plaintiff would have to demonstrate economic impact by measuring the market value of the mineral estate if mining were allowed or of the undeveloped land if development were permitted.

176 See *Palazzolo v. Rhode Island*, 533 U.S. 606, 633 (2001) (O'Connor, J., concurring) ("Today's holding does not mean that the timing of the regulation's enactment relative to the acquisition of title is immaterial to the *Penn Central* analysis. . . . [T]he regulatory regime in place at the time the claimant acquires the property at issue helps to shape the reasonableness of [the plaintiff's] expectations.").

177 This is not an exhaustive list; other facts specific to the case at issue should inform the "reasonable relevant parcel inquiry."

178 See, e.g., *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171, 1181 (Fed. Cir. 1994) (noting that the relevant parcel inquiry is a flexible inquiry "designed to account for factual nuances," including "the purpose of the imposition, the nature of the property, its alternative uses," "the extent to which all or only a portion of plaintiff's property was so limited," and "the timing of transfers in light of the developing regulatory environment"); *Ciampitti v. United States*, 22 Cl. Ct. 910, 918 (1991) (noting that "[f]actors such as the degree of contiguity, the dates of acquisition, [and] the extent to which the parcel has been treated as a single unit" should be considered in the relevant parcel inquiry).
quiry if we are to avoid the arbitrariness that seemingly follows from existing case law on conceptual severance.

Ultimately, this Note contends that conceptual severance is not as problematic as it appears at first glance. Conceptual severance can be seen as an arbitrary tool that determines the outcome of a takings inquiry, but with careful definition of its contours, conceptual severance can be a flexible doctrine, providing the needed agility for courts to deal with fact-intensive regulatory takings claims.

**Conclusion**

As society has become increasingly complex and as new land-use challenges abound, governments have responded with regulations that push the line between private rights and public interests, and courts are increasingly tasked with determining when regulations have pushed that boundary too far against individuals' property rights. Regulatory takings and conceptual severance is the United States' response to that tension between public interests and private property rights. And although U.S. regulatory takings jurisprudence has been criticized as a "muddle," it does not have to be. One can start by recognizing that a key source of confusion—conceptual severance—is merely a technique for answering the question of whether a regulation goes too far.

A review of the ECtHR and Canadian regulatory takings doctrines show that there are various methods of balancing public interests with private property rights. Conceptual severance is a necessary evil under our approach to regulatory takings, one which may be wholly justified given our conception of property as a bundle of rights and our focus on the economic impact of regulations. The challenge is to define the contours of conceptual severance to ensure that it is not used as a back door to slip in overreaching judicial assessments of a regulation's merits or the legitimacy of private property interests. The answer to conceptual severance, therefore, must be based on an objective inquiry and reasonable expectations, keeping in mind that the Takings 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." At the very least, one can acknowledge that conceptual severance is often a reflection of the continual battle to find the right balance between private and public interests, and that answer is not to be found without a careful and transparent consideration of that balance.

---

179 See, e.g., Alexander, supra note 6, at 10 ("It is a commonplace among American legal scholars that American takings law is a 'muddle'.").
