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Conceptual Severance and Takings in the Federal Circuit

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NOTE

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INTRODUCTION

In modern property jurisprudence, one frequently comes across references to the "bundle of rights." Though by no means the only property metaphor available, jurists and scholars have employed the bundle-of-rights picture for over a century.[1] The metaphor has frequently found its way into judicial opinions,[2] and it is almost trite today to note that property, properly understood, is nothing more than the ownership of a bundle of rights.[3] However, to state clearly and analytically what that metaphor means, let alone to explain how it should guide judicial decision making, is much more difficult.[4] In the

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1 *See, e.g.*, JOHN LEWIS, A TREATISE ON THE LAW OF EMINENT DOMAIN IN THE UNITED STATES § 55, at 43 (1888). As Lewis commented in his 1888 treatise, "[t]he dullest individual among the *people* knows and understands that his *property* in anything is a bundle of rights." *Id.*

2 *See, e.g.*, Dolan v. City of Tigard, 512 U.S. 374, 393 (1994) ("The difference to petitioner, of course, is the loss of her ability to exclude others. As we have noted, this right to exclude others is 'one of the most essential sticks in the bundle of rights that are commonly characterized as property.'"); Compton v. Wabash, St. L. & P. Ry. Co., 16 N.E. 110, 117 (Ohio 1888) (using the bundle-of-rights metaphor).

3 *See* J.E. Penner, *The "Bundle of Rights" Picture of Property*, 43 UCLA L. REV. 711, 713 (1996) ("The prevalence of the [bundle-of-rights] paradigm is undeniable.").

4 Indeed, commentators have made few attempts to provide a thoroughgoing theoretical analysis of the bundle-of-rights metaphor. *See* Penner, *supra* note 3, at 733 ("If there

absence of a normative theory underpinning the understanding of property as a bundle of rights, the use of the metaphor in any given case will not aid in the decision-making process. In other words, the very metaphorical nature of the bundle of rights renders it indeterminate when applied in actual cases. Because the metaphor is fundamentally indeterminate, its use in judicial opinions often reflects the subjective impressions of the judges on the bench more than the application of a well-constructed legal doctrine.

The bundle-of-rights picture[5] probably began as an intuitively appealing description of certain practical legal effects deriving from something being someone's "property." A.M. Honoré[6] and Wesley Hohfeld[7] elaborated this idea, but scholarly exegesis generally has had little impact on its use in the courts. Yet the metaphor persists and has increasingly been the subject of intense analysis by legal scholars and judges in the latter part of this century.[8] Perhaps this scrutiny reflects the perceived need for an objective and systematic schema to apply in the proliferating Takings Clause cases.[9] Or perhaps scholars feel that the bundle-of-rights metaphor superimposes too much formalism on the judicial process, creating the belief that one must parse out all of the "sticks" from the disputed property right.[10] Whatever the reason, in the past few decades important scholarly works have

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was ever any real possibility that a radical Hohfeldian version of the bundle of rights would serve as a new basis for understanding property, it has not materialized."). Indeed, Penner's article is devoted in part to demonstrating that the bundle-of-rights metaphor, far from being a model of property, "is really no explanatory model at all, but represents the absence of one." *Id.* at 714.

5 It is inappropriate to label the bundle-of-rights conception of property a theory, given its failure to coherently explain the bundle's structure and the dearth of mechanisms to apply to actual cases. Professor Penner suggested that it "is little more than a slogan." Penner, *supra* note 3, at 714.

6 *See* A.M. Honoré, *Ownership, in* OXFORD ESSAYS IN JURISPRUDENCE 107, 112-24 (A.G. Guest ed., 1961).

7 *See* WESLEY NEWCOMB HOHFELD, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning I, in* FUNDAMENTAL LEGAL CONCEPTIONS 23, 28-31 (Walter Wheeler Cook ed., 1923).

8 *See, e.g.*, Thomas C. Grey, *The Disintegration of Property, in* NOMOS XXII: PROPERTY 69, 69-73 (J. Roland Pennock & John W. Chapman eds., 1980) [hereinafter NOMOS]. Grey argued that property today no longer functions as a unitary legal concept, in part due to the bundle-of-rights metaphor and its gradual infiltration into legal analysis. *See id.* at 81-82.

9 The Takings Clause states: "[N]or sball private property be taken for public use, without just compensation." U.S. CONST. amend. V.

10 I believe this observation is an essential ingredient in Professor Margaret Jane Radin's personhood conception of property. *See* Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 959-61 (1982) (arguing that property is defined by what is essential to personhood, not by analytic rules).

attempted to sort out the meaning of the bundle-of-rights metaphor and how best to incorporate it into (or out of) property law.[11]

The concept of property has been the subject of heated debate in the context of takings law within these scholarly works. Moreover, in the last five years the Supreme Court has declined to clarify its confused precedents concerning what constitutes property under the Takings Clause.[12] The development of takings law by the Federal Circuit thus provides an appropriate introduction.[13]

This Note examines how the Court of Appeals for the Federal Circuit has explicitly or implicitly handled the bundle-of-rights metaphor in the context of its Takings Clause cases. In particular, the Note makes two points. First, it argues that the Federal Circuit has attempted to give normative meaning to the bundle-of-rights metaphor by making the weight and nature of each right in the bundle, as well as the size and scope of the bundle itself, dependent on objective

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11 *See, e.g.*, Grey, *supra* note 8 (exploring how the bundle-of-rights metaphor contributes to the disaggregation of the legal concept of property); Penner *supra* note 3, at 711 (critiquing the very possibility of a bundle-of-rights theory of property); Jeanne L. Schroeder, *Chix Nix Bundle-o-Stix: A Feminist Critique of the Disaggregation of Property*, 93 MICH. L. REV. 239 (1994) (employing a neo-Hegelian reading of property and eschewing the bundle-of-rights theory).

12 The most recent Supreme Court decision concerning Fifth Amendment takings jurisprudence is *City of Monterey v. Del Monte Dunes, Ltd.*, 119 S. Ct. 1624, 1638 (1999) (deciding, inter alia, that the issue of liability under 42 U.S.C. § 1983 is one coming under the Seventh Amendment right to a jury trial). The most recent Supreme Court case examining the issue of what constitutes property for Fifth Amendment purposes is *Dolan v. City of Ligard*, 512 U.S. 374 (1994).

13 Congress created the United States Court of Appeals for the Federal Circuit in 1982, *see* 28 U.S.C. § 1295 (1994), pursuant to its power under Articles I and III of the Constitution to establish "inferior Courts," U.S. CONST. art. III, § 1; *see also* U.S. CONST. art. I, § 8, cl. 9. In creating the Federal Circuit, Congress desired in part to give greater uniformity to certain areas of law. Thus, the Federal Circuit is a court of exclusive subject matter jurisdiction, serving as the sole court of appeals within certain statutorily defined subject-matter areas. *See generally* Hon. S. Jay Plager, *The United States Courts of Appeals, the Federal Circuit, and the Non-Regional Subject Matter Concept: Reflections on the Search for a Model*, 39 AM. U. L. REV. 853 (1990) (reflecting on the history of and the policies behind the Federal Circuit); Hon. Randall R. Rader, *Specialized Courts: The Legislative Process*, 40 AM. U. L. REV. 1003 (1991) (critiquing legislative debate over the establishment of the Federal Circuit). Similarly, the Court of Appeals for the District of Columbia has exclusive jurisdiction over a limited number of designated subject-matter areas. *See* Plager, *supra*, at 854 n.2. The Federal Circuit is also a nongeographical court; like the United States Supreme Court, it does not need to consider the regional origins of the cases it hears to pass on its jurisdiction. *See* 15A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE JURISDICTION § 3903.1 (2d ed. 1992) (explaining the jurisdictional scope of the Federal Circuit).

One of the subject-matter areas over which the Federal Circuit has exclusive appellate jurisdiction is Fifth Amendment takings claims against the United States. *See* 28 U.S.C. § 1295(a)(2) (1994) (granting exclusive appellate jurisdiction to the Federal Circuit over certain cases wherein the United States is defendant); *see also id.* § 1295(a)(3) (1994) (granting exclusive jurisdiction to the Federal Circuit over appeals from the Court of Federal Claims). Therefore, since the passage of its enabling legislation, the Federal Circuit has become the principal forum for appeals from the district courts on federal takings claims.

factors such as state and common law. Second, this Note asserts that, by articulating the controversial doctrine of "partial takings," the court has thwarted that attempt.

Part I of this Note briefly discusses the origins of the bundle-of-rights metaphor, including Professor Hohfeld's attempt to transform it from metaphor to full-fledged theory. Part II asserts that the theoretical inadequacies of the bundle-of-rights metaphor have rendered it of little use to judges in their considerations of Takings Clause cases. Part III then discusses the Federal Circuit's takings opinions; it argues that the Federal Circuit has begun to formulate a means by which courts can objectively identify the bundles at issue in specific cases, as well as the individual rights contained therein. This Note concludes by demonstrating how the Federal Circuit's creation of the partial-takings doctrine has severely undermined these efforts.

I
THE "BUNDLE OF RIGHTS" AS METAPHOR AND NORMATIVE "THEORY"

The origins of the bundle-of-rights metaphor are cloudy. Yet at least as far back as 1888, commentators could remark that "[t]he dullest individual among the *people* knows and understands that his *property* in anything is a bundle of rights."[14] The early understanding of property, however, did not approach academic sophistication. Rather, the phrase "bundle of rights" denoted the common acknowledgment of the practical ramifications accompanying the legal moniker "property." Thus, according to John Lewis, the bundle-of-rights metaphor was rooted in the layperson's instinctive sense that ownership of a thing meant, in practical terms, "the right to dispose of a thing in this way or that, the right to use a thing in this way or that, the right to compel a neighbor to desist from doing this or that" and so forth.[15] Lewis further noted that laypersons "constantly *act* upon this understanding [of property as a bundle of rights], although they may never have formulated a definition of the word and would be at a loss to do so."[16] To excessively speculate as to the characteristics of the bundle-of-rights conception this early in its history would be ill-advised. Suffice it to say, Lewis understood the rights which comprised the bundle to be the classic property rights of use, exclusion, and disposition.[17]

Wesley Hohfeld first attempted to construct a theory of property out of the bundle-of-rights metaphor.[18] Property, according to

14 LEWIS, *supra* note 1, § 55, at 43.
15 *Id.* at 44.
16 *Id.*
17 *See id.* § 54, at 41.
18 *See* HOHFELD, *supra* note 7, at 28-31.

Hohfeld, is properly understood neither as things nor as particular relations to a thing, but rather as an essentially abstract set of legal rights—usually with respect to tangible things.[19] Crudely put, the bundle-of-rights metaphor expresses the sense that when one owns a thing, the essential property relationship is not between the owner and the thing, but between the owner and non-owners.[20] For example, my cup is "my property," not because some special relationship exists between the cup and me, but because others have duties to me regarding the cup and I do not have corresponding duties to them. In other words, the metaphor suggests that one can delineate a property interest solely by reference to the owner's rights vis-à-vis other people and their rights and duties towards the owner, usually though not always with respect to some tangible thing.[21] This view contradicts the Blackstonian notion of property as something over which an individual has "sole and despotic dominion,"[22] for Blackstone's definition does not acknowledge that the dominion itself is a function of interpersonal relationships.

Ownership under the bundle-of-rights metaphor represents rights that one is entitled to vis-à-vis other people.[23] Property, then, consists of abstract legal rights and interests.[24] Thinking of property in this way accommodates some of the complexities of modern property law: multiple ownership of a single thing, ownership of future interests such as reversions and remainders, and the endlessly varied

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19 *See id.*; *see also* Leif Wenar, *The Concept of Property and the Takings Clause*, 97 COLUM. L. REV. 1923, 1926 (1997) ("According to Hohfeld, property cannot be *things*, like land or breweries; property can only be *property rights*—the rights over things."). Penner suggested:

> [I]t is a refusal, which we may tentatively attribute to Hohfeld, to consider property in the old way, as a right to a thing, which provides the basis for the bundle of rights picture. . . . [H]enceforth, property will be characterized as a complex aggregate of jural [(i.e., interpersonal)] relations, not as a particular relation between owner and object. Henceforth, property is to float free from any anchorage to the concept of a "right to a thing."

Penner, *supra* note 3, at 731.

20 *See* Penner, *supra* note 3, at 724-34 (surveying Hohfeld's and Honoré's visions of the bundle-of-rights conception of property ownership).

21 Although Hohfeld attempted to unmoor property from its dependence on a "thing" by articulating interpersonal rights and duties, he did not articulate how to do this, so a notion of thinghood still attaches to our use of the term "property." *See id.* at 733 (noting that the bundle-of-rights picture has not led, as Hohfeld believed it would, to a thing-free approach to property).

22 2 SIR WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 2 (11th ed. 1791). Blackstone famously characterized property as "that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe." *Id.*

23 *See* Penner, *supra* note 3, at 712-13.

24 Throughout this Note I refer to the understanding of property in the constitutional sense. *See* Margaret Jane Radin, *The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings*, 88 COLUM. L. REV. 1667, 1668 (1988) (defining "'constitutional property'" as "either the set of property rights that are thought to be of constitutional status, or the practice by which the Supreme Court attempts to protect those rights").

ways of splitting up things into rights capable of market transfer. Hohfeld's rigorous abstraction of the concept of property thus had the pleasing consequence of accommodating the ever-progressing splintering of property into finer and finer rights and interests.[25]

While Hohfeld,[26] and Honoré following him,[27] articulated the view that abstract legal rights constitute the correct understanding of property, they did not provide a blueprint for exactly which legal rights comprised the essential rights in the bundle. In other words, any possible *subdivision* of the classic property rights of exclusion, disposition, and use are arguably individual legal rights of the owner as well and thus are properly considered "property." The nearly infinite subdivision of ownership rights[28] means, in turn, that those interested in doing so can whittle down the property itself into smaller and smaller interests, because no theoretical basis exists to justify distinguishing one legal interest from another.[29] In short, while Hohfeld severed property from its mooring in the concrete and unifying notion of property-as-thing ownership, he did not sufficiently articulate the internal structure of the bundle of rights so as to prevent individuals from viewing the most marginal legal right as full-fledged property. This theoretical lacuna enabled the doctrine of conceptual severance, like that voiced by Richard Epstein, to arise.[30]

Viewing property metaphorically as a bundle of rights does not in itself carry ramifications for practical jurisprudence. Only when coupled with a normative mechanism for application to actual law does the bundle-of-rights picture of property begin to yield practical legal effects. We may picture property ownership as possession of a bundle of rights, but this picture does not inform us of what sticks are in the bundle or what their interrelationship is with one another, let alone whether fragments of them amount to property in the constitutional sense. This ambiguity renders application of the bundle-of-rights picture in actual cases very difficult.

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25 *See generally* BRUCE A. ACKERMAN, PRIVATE PROPERTY AND THE CONSTITUTION (1977) (detailing the benefits and drawbacks of an Hohfeldian "scientific" conception of property).

26 *See* HOHFELD, *supra* note 7, at 28-31.

27 *See* Honoré, *supra* note 6, at 112-24.

28 The creativity of buyers and sellers of property in the marketplace is the only limiting factor on the number and nature of transferable legal interests in property. *See* Florida Rock Indus., Inc. v. United States, 18 F.3d 1560, 1572 n.32 (Fed. Cir. 1994) ("Property interests are about as diverse as the human mind can conceive.").

29 *See* Wenar, *supra* note 19, at 1928 ("[B]ecause there is no 'essence' to property, every stick in a property bundle itself counts as property."). Furthermore, the difficulty of defining what constitutes a stick in the bundle prevents exclusion of certain legal interests not on par with other sticks in the bundle.

30 *See* RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 57-62 (1985).

According to the Fifth Amendment, a taking is compensable only if the taking is of "property."[31] If property is defined as a bundle of rights, one must determine what rights are essential to that bundle, what minimum rights standing together constitute property, and what rights the government can abrogate without such action constituting a taking of property. How one views the internal structure of the bundle thus becomes essential to identifying when a compensable taking has occurred. But the raw metaphor itself does not provide clues for this analysis. A conception of the bundle of rights that prescribes how the law will treat a particular legal interest in a particular situation and how the impairment of one interest affects the others in the bundle is necessary.[32] This observation is nothing new. In fact, it has been the focus of much debate and reflection over the past thirty-plus years during which takings jurisprudence has exploded.[33]

Professor Radin's influential 1988 article touching on the relation of the bundle-of-rights metaphor to takings jurisprudence identifies a normative version of the bundle-of-rights metaphor that carries serious legal implications.[34] Conceptual severance for the purposes of Takings Clause cases[35] views any conceptually distinct aspect of a person's property as a separate strand within the bundle of rights—as property itself.[36] Following this reasoning, the taking of a strand constitutes a compensable taking of property under the Fifth Amendment of the Constitution. Of course, this assertion is true only if one first

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31 U.S. CONST. amend. V.

32 It is critical to keep in mind that conceptual severance describes a jurisprudential technique, a way of applying the bundle-of-rights metaphor so as to yield a determinate outcome in Takings Clause cases. *See* Radin, *supra* note 24, at 1674-80. To suggest that the bundle-of-rights metaphor itself provides such an algorithm would be a mistake. Conceptual severance, on the other hand, is capable of directing how a judge should rule in takings cases. Unless one follows Richard Epstein and treats as property every conceptually distinct aspect of a larger whole, one will have to specify conditions which determine what strands of the bundles qualify. *See* EPSTEIN, *supra* note 30, at 57-62. Professor Radin has argued—at least in the case of temporal takings—that drawing such boundary lines is impossible and that the only choices are either to apply a multifactored balancing test or to accept the radical version of conceptual severance. *See* Radin, *supra* note 24, at 1675-76.

33 Federal Circuit Judge Nies wrote that "[n]o legal subject has received the attention of scholars more than 'takings' jurisprudence in recent years" and that "[a] flood of literature has been produced advocating various theories of property and social responsibilities." *Florida Rock*, 18 F.3d at 1574 (Nies, C.J., dissenting). Although takings law provides most of today's cases on the legal nature of property, this phenomenon is an historical contingency that the growing number of takings cases has caused. Substantive due process law, Contract Clause cases, and perhaps intellectual property cases all might come to refine the legal definition of property.

34 *See* Radin, *supra* note 24, at 1674-78.

35 Although Professor Radin discusses conceptual severance in the context of takings cases only, I do not see any reason why conceptual severance is not applicable to other property-related matters. So far, most conceptual-severance discussions have focused on takings exclusively.

36 *See* Radin, *supra* note 24, at 1676.

accepts the view that any conceptually severable aspect of property is itself property in the constitutional sense.[37]

Richard Epstein most dramatically articulated this "strong" version of conceptual severance in his influential book, *Takings: Private Property and the Power of Eminent Domain.*[38] This book prompted Professor Radin to coin the term "conceptual severance."[39] Although Professor Epstein never expressly used the term conceptual severance, his work clearly espouses that technique.[40] Professor Epstein recognized that the Hohfeldian bundle-of-rights picture of property could logically require compensation for any alteration of any of the incidents of property within the bundle.[41] Professor Epstein wrote that "[n]o matter how the basic entitlements contained within the bundle of ownership rights are divided and no matter how many times the division takes place, all of the pieces together, and each of them individually, fall within the scope of the eminent domain clause."[42] Professor Epstein could conclude this because, in neglecting to articulate an internal structure of property rights within the bundle, Hohfeld implied that all property rights were equally property, whether considered separately, together, or in part, and no matter how marginal the value of the right.[43] This view meant that the government would have to compensate many, if not most, individuals adversely impacted by governmental regulations; such government responsibility was not a drawback for Professor Epstein.[44] To him, conceptual severance is the proper technique to apply when evaluating regulatory takings claims; he assumed that the underlying purpose of the Takings Clause is to produce maximum utility and efficiency of property and that requiring compensation for the most marginal property value diminutions leads to greater efficiency.

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37 Professor Radin attributes this strong view to Professor Epstein. *See id.* at 1677-78 ("[A]s soon as one adopts conceptual severance, . . . there is an easy slippery slope to the radical Epstein position. Every curtailment . . . of property, every regulation of any portion of an owner's 'bundle of sticks,' is a taking of the whole of that particular portion considered separately.").

38 EPSTEIN, *supra* note 30.

39 *See* Radin, *supra* note 24, at 1667.

40 *See* Frank Michelman, *Takings, 1987,* 88 COLUM. L. REV. 1600, 1615 (1988) ("To appreciate the implications of conceptual severance, one need only recall that it is exactly the approach for which Richard Epstein argues . . . .").

41 *See* EPSTEIN, *supra* note 30, at 57-58.

42 *Id.* at 57.

43 *See* Wenar, *supra* note 19, at 1928 ("[B]ecause there is no 'essence' to property, every stick in a property bundle itself counts as property. . . . [Furthermore,] if each stick is property, then removing a stick from someone's bundle must be a taking regardless of what other sticks remain in the person's bundle (if any)."). Professor Epstein wholeheartedly embraces this neo-Hohfeldian conception. *See id.* at 1935-36.

44 *See* EPSTEIN, *supra* note 30, at 281-82.

While the debate over conceptual severance continues in academic circles, government institutions have grappled with the bundle-of-rights legacy, apparently without arriving at a definite position on the matter. For instance, in 1995 the United States Senate considered the passage of a bill that would have, among other things, partially codified a conceptual-severance view of property.[45] The aim of the bill was to afford greater protection to property owners in the face of expanding federal regulations.[46] Title V of the bill required compensation for statutory use restrictions on land or interests in land[47] arising from the mandate of either the Endangered Species Act[48] or section 404 of the Federal Water Pollution Control Act.[49]

Title II of the bill even more closely paralleled Professor Epstein's version of conceptual severance. Title II required compensation for reductions caused by a federal act of one-third or more of the market value of "any interest defined as property under State law; or . . . understood to be property based on custom, usage, common law, or mutually reinforcing understandings sufficiently well-grounded in law to back a claim of interest."[50] As Professor Michelman remarked, "[t]his expression . . . potentially encompasses sundry interests in all forms of personal property (tangible goods, securities, intellectual property, commercial contract rights, and other intangibles) as well as real property (land and various claims related to land)."[51]

Although Title V applied to only two acts and Title II applied to many, both potentially could be interpreted as voicing the doctrine of conceptual severance. Under Title V, "any interest in land"[52] could include easements, servitudes, air rights, and so forth, but the terms of the bill did not limit the provision to these traditional categories of property interests.[53] In fact, any aspect of land ownership that one could conceivably sell is potentially a land interest and thus potentially compensable. This result is even more obvious under the language of

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45 *See* Omnibus Property Rights Act of 1995, S. 605, 104th Cong. § 204(a) (1995). The bill was reported to the Senate by Senator Orrin Hatch on December 22, 1995. The Senate Judiciary Committee filed a floor report on March 11, 1996. S. Rept. 104-239. The bill was not called for a vote.

46 *See* Frank I. Michelman, *Testimony Before the Senate Committee on Environment and Public Works, June 27, 1995*, 49 WASH. U. J. URB. & CONTEMP. L. 1, 5 (1996) ("The bill, then, is precisely aimed at granting certain property owners anti-regulatory protections in excess of those allowed them by courts applying the Constitution.").

47 *See* S. 605, 104th Cong. §§ 501-510.

48 16 U.S.C. §§ 1531-1544 (1994).

49 33 U.S.C. §§ 1251-1387 (1994).

50 *Id.* § 203(5)(E)-(F).

51 Michelman, *supra* note 46, at 3.

52 S. 605, 104th Cong. § 502(5)(B).

53 *See* Michelman, *supra* note 46, at 6 n.13 ("By making a sufficiently aggressive use of these definitions, *any* application whatsoever of *any* sort of land regulation could easily be held compensable.").

Title II, which relies on the amorphous term "mutually reinforcing understanding" to define property interests. Accordingly the bill seemed to apply to any land regulation or other regulation that devalues by one-third or more any aspect of property, no matter how slender the interest, "on the theory that it totally devalues a conceptually severed 'portion' of property."[54] Although this bill was a radical application of the technique of conceptual severance, it was arguably not the most radical.[55]

The Supreme Court had not fully embraced conceptual severance at the time Professor Radin wrote her seminal paper.[56] In recent years, the Supreme Court has seized few opportunities to clarify its position on conceptual severance and takings law.[57] Many commentators feel that the Court's definition of property is ill-defined.[58] Should the Court ever choose to refine its position, it would almost certainly look to the line of takings cases in the Court of Appeals for the Federal Circuit. Because of the Federal Circuit's unique jurisdictional mandate, it hears more Takings Clause cases than any other court of appeals.[59] Thus, more than any other federal appellate court, the Federal Circuit has had to grapple with the Supreme Court's concept of property in the context of takings jurisprudence. In particular, it implicitly has had to decide to what extent it must employ the technique of conceptual severance in determining whether or not a taking has occurred.

II

THE SUPREME COURT AND CONCEPTUAL SEVERANCE

This Part suggests only the limited proposition that, if the Supreme Court has used conceptual severance to decide certain tak-

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54 *Id.*

55 One could imagine, for example, a compensable claim for a devaluation of less than one-third under a rigorous conceptual-severance view.

56 For instance, the Court in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), found a taking of property when a municipal government required a public-access easement as a condition of development of plaintiff's lot, but in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978), declined to find a taking of property when a municipal statute precluded development of plaintiff's air rights. As these cases show, the Supreme Court will sometimes, but not always, find a taking when regulations remove one stick from the bundle. As Part II demonstrates, little has changed in that respect. *See* Radin, *supra* note 24, at 1676 ("The Court as a whole so far has been less willing than Rehnquist to find takings by conceptual severance.").

57 The Court's most recent Fifth Amendment takings case did not directly address what constitutes property, but rather focused upon defining a public purpose. *See* Dolan v. City of Tigard, 512 U.S. 374, 383-86 (1994).

58 *See, e.g.*, D. Benjamin Barros, Note, *Defining "Property" in the Just Compensation Clause*, 63 FORDHAM L. REV. 1853, 1853-55 (1995) (arguing that this lack of a definition of property is "serious" and advancing a libertarian argument for a definition of property grounded in state law).

59 *See supra* note 13.

ings cases, it has done so neither consistently nor explicitly. Perhaps realizing the severe practical ramifications on government should it consistently apply conceptual severance,[60] the Court has employed the doctrine in a limited fashion.[61] To illustrate the Court's inconsistency, this Part will briefly review certain of its pivotal holdings to demonstrate that however the Federal Circuit uses conceptual severance, the jurisprudence is not necessarily derivative of the equivocal Supreme Court precedents.

One can describe the history of twentieth-century Supreme Court takings jurisprudence as an uneasy tension between the perceived need for public regulation of property in accordance with the states' police powers and the new Takings Clause conception of property as abstract legal rights.[62] While the states' police power and private property interests arguably have always been the source of fundamental tension in Takings Clause cases, the uneasy balancing efforts began in earnest with the seminal case of *Pennsylvania Coal Co. v. Mahon*.[63] Prior to *Mahon*, the Court generally construed takings as the outright physical occupation of the whole unit of property—usually land—by the government.[64] Some pre-*Mahon* cases, such as *Pumpelly v. Green*

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60 As Justice Holmes famously remarked in his landmark opinion, *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922), "[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law."

61 Some might say that the Court has employed the doctrine in a haphazard fashion. Scholars attempting to make sense of the Court's precedent in this area call it "a conceptual muddle," Daniel R. Mandelker, *New Property Rights Under the Taking Clause*, 81 MARQ. L. REV. 9, 10 (1997); "a top contender for the dubious title of 'most incoherent area of American law,'" Jeanne L. Schroeder, *Never Jam To-day: On the Impossibility of Takings Jurisprudence*, 84 GEO. L.J. 1531, 1531 (1996); and a "convoluted doctrine," Jed Rubenfeld, *Usings*, 102 YALE L.J. 1077, 1080 (1993). Indeed, Bruce Ackerman remarked that "in many conversations on the [Takings Clause], I have not encountered a single lawyer, judge, or scholar who views existing case-law as anything but a chaos of confused argument which ought to be set right if one only knew how." ACKERMAN, *supra* note 25, at 8.

62 *See, e.g.*, Douglas W. Kmiec, *At Last, the Supreme Court Solves the Takings Puzzle*, 19 HARV. J.L. & PUB. POL'Y 147, 147 (1995) (stating that the Takings Clause is the "fulcrum upon which private property interests are balanced against the State's police power" and that *Dolan* accurately calibrated this balance); Michelman, *supra* note 46, at 8-9 (arguing that the Takings Clause requires a "sensitive mediation" between "respect for private property" and "respect for representative government's responsibility to discern and secure important interests" of the public as a whole).

63 260 U.S. 393 (1922).

64 *See* William Michael Treanor, *Jam for Justice Holmes: Reassessing the Significance of* Mahon, 86 GEO. L.J. 813, 814 (1998) ("[T]he Takings Clause was originally understood to apply only to physical seizures of property . . . ."); Hon. John M. Walker, Jr., *Common Law Rules and Land-Use Regulations:* Lucas *and Future Takings Jurisprudence*, 3 SETON HALL CONST. L.J. 3, 4-12 (1993) (summarizing early takings law). Modern case law has affirmed that "a permanent physical occupation of property," no matter how trivial, effects a compensable taking. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 434-35 (1982).

Bay Co.,[65] acknowledged that indirect government action can physically occupy private property, resulting in a taking. Yet historically, the Supreme Court has distinguished outright physical takings from the more problematic regulatory takings.[66] Early on, pre-*Mahon* case law did not classify regulatory restrictions of property rights as takings.[67] Likewise, the Court did not view mere economic diminution of value as an outright occupation giving rise to a physical takings claim.[68] It was not until *Mahon* that the Court recognized government regulations of use resulting in serious economic harm as takings of property.

In *Mahon*, the Court enigmatically stated that a regulation's adverse effects on property interests only constitute a taking if the regulation "goes too far."[69] *Mahon* involved a mining statute that required that enough coal be left in the mine so as to provide subsurface support for a single, privately owned house.[70] Even though the coal that the statute affected was less than the total fee simple in subsurface coal,[71] the Court found that the regulation destroyed the value of the entire support estate as defined by Pennsylvania law.[72] Thus, one reading of *Mahon* is that when a regulation causes a near-total diminution in value of a particular property interest, the regulation has gone "too far" absent an overwhelming public interest concomitant to the economic deprivation. Of course, the meaning of "too far" is the subject of dispute;[73] one could argue that this disagreement is at the heart of the regulatory takings debate.

The *Mahon* decision is seminal for recognizing a taking of a portion or aspect of one's whole fee simple. As a physical occupations

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65 80 U.S. 166, 180-81 (1871) (holding that a state-authorized dam which entirely flooded plaintiff's property constituted a compensable taking).

66 *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 506 (1997).

67 *See* Mugler v. Kansas, 123 U.S. 623, 668-69 (1887) (holding that a statute prohibiting the production of liquor was not a taking of property, even though the statute destroyed 90% of plaintiff's economic interest in the land); Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of 'Just Compensation' Law*, 80 HARV. L. REV. 1165, 1184 (1967) (stating that "[a]t one time it was commonly held that in the absence of explicit expropriation, a compensable 'taking' could occur *only* through physical encroachment and occupation").

68 *See* Treanor, *supra* note 64, at 814 ("[I]t is generally accepted that the Takings Clause was originally understood to apply only to physical seizures of property . . . .").

69 *Mahon*, 260 U.S. at 415.

70 *See id.* at 412-13.

71 *See id.* at 412, 419 (Brandeis, J., dissenting).

72 *See id.* at 414.

73 *See, e.g.*, Richard A. Epstein, Pennsylvania Coal v. Mahon: *The Erratic Takings Jurisprudence of Justice Holmes*, 86 GEO. L.J. 875, 899-902 (1998) (exploring various interpretations of Holmes's decision in *Mahon*); Carol M. Rose, Mahon *Reconstructed: Why the Takings Issue Is Still a Muddle*, 57 S. CAL. L. REV. 561, 563-71 (1984) (interpreting *Mahon*); Treanor, *supra* note 64, at 822-31 (offering an interpretation of *Mahon*'s significance).

case,[74] *Mahon* suggests that a regulation goes "too far" when it interferes with or physically occupies so much of the whole that it becomes objectionable.[75] "Too far" implicitly indicates that the determination of a regulatory taking is therefore a matter of degree,[76] a measuring unit of the interference with the whole property interest.

But degrees of what? Scholars have long debated the nature of Justice Holmes's rationale. Generally, commentators have interpreted *Mahon* to require either a balancing test or a raw diminution-in-value test in these cases.[77] Clearly, Holmes relied heavily upon the fact that Pennsylvania law recognized the support estate as a separate identifiable estate.[78] He also noted that the public interest in protecting the subsidence of land under a "single private house" pales relative to the great value of the support estate.[79] The most critical factor, however, appears to have been the complete devaluation of the support estate, given that no alternative uses existed.

Mahon thus opened the door to conceptual severance. First, it treated the support estate as a separate constitutionally protected property interest, despite the fact that the coal company owned the support estate as a part of the entire subsurface estate. In treating the support estate as the property taken by the regulation, the Court tacitly acknowledged that in the future, it might conclude that regulations affecting a particular right in a bundle constitute a taking of property. However, the fact that the Court relied upon Pennsylvania's prior recognition of the support estate as a separate estate entirely mollifies the notion that the Court was engaging in conceptual severance.[80] Second, the Court left open the possibility that a countervailing public interest of significant weight could preclude the finding of a compensable taking.[81]

Ultimately, Holmes's rationale in *Mahon* cannot provide an unambiguous basis for the employment of conceptual severance in cases in which government regulations have totally diminished the value of some legal property interest.[82] *Mahon* neither adopts nor rejects con-

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74 *See* CHEMERINSKY, *supra* note 66, at 510.

75 *See id.* at 511.

76 *See Mahon*, 260 U.S. at 416 ("[T]his [determination] is a question of degree—and therefore cannot be disposed of by general propositions.").

77 *See* Treanor, *supra* note 64, at 823-26.

78 *See Mahon*, 260 U.S. at 414.

79 *Id.* at 413-14 ("The extent of the public interest is shown by the statute to be limited . . . . On the other hand, the extent of the taking is great.").

80 *See id.* at 414.

81 *See id.* at 413 (stating that "usually" the public interest is insufficient to justify such a great diminution of a particular private estate).

82 Note that conceptual severance holds that one can characterize any diminution in value as a total diminution of a whole property interest, depending on how we define the interest.

ceptual severance; rather, it provides fodder for both camps. The Court has not settled on the exact nature of the test espoused in *Mahon*. Following the *Mahon* decision, the Court has attempted to hammer out a test for regulations, but these efforts have not resulted in a clearer takings test, let alone a more definite stance on conceptual severance.[83]

Today, the Supreme Court recognizes several loose[84] classes of takings.[85] Regulations that require a permanent physical occupation of land, no matter how minor, effect a per se taking and the government must compensate for any impairment.[86] When no physical occupation occurs, the Court is most likely to find a taking when the government effects a total deprivation of the reasonably expected economic use of property. The Court has consistently held that regulations that reduce the economic value of a certain unit of property to zero constitute compensable takings.[87] However, the Court makes its decisions on an ad hoc, factual basis when regulations only marginally reduce the value of a unit of property.[88]

The application of the diminution-in-value test will yield varying results, depending on whether one employs conceptual severance. These differing perspectives are apparent in the majority and dissenting opinions in *Keystone Bituminous Coal Ass'n v. DeBenedictis*.[89] In *Keystone*, a statute prohibited mining that would cause subsidence.[90] The plaintiff, a mining company association, facially challenged the statute by asserting that it constituted a taking.[91] On facts essentially identical to those in *Mahon*, the majority stated that "[t]he 27 million tons of

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83 *See, e.g.*, Mandelker, *supra* note 61, at 18-19 (noting that the Supreme Court often decides land-use takings cases on a five-to-four split and noting the underlying "greater confusion" in takings law).

84 I use the term "loose" because scholars have not adequately defined the categories of takings. *See, e.g.*, CHEMERINSKY, *supra* note 66, at 509 ("At the very least, these cases illustrate that the distinction between a possessory taking and a regulatory interference is often unclear.").

85 *See generally id.* at 506-13 (outlining the basic contemporary framework of Supreme Court takings jurisprudence).

86 *See, e.g.*, Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 441 (1982) (finding a compensable taking when a New York law required a landlord to allow a cable company to attach cable equipment to its building, the effect of which the Court termed a "permanent physical occupation"); Pumpelly v. Green Bay Co., 80 U.S. 166, 180-81 (1871) (finding a state-authorized dam which flooded plaintiff's entire property to constitute a taking).

87 *See, e.g.*, Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1015 (1992) (holding that a denial of "all economically beneficial or productive use of land" is a compensable taking).

88 *See* CHEMERINSKY, *supra* note 66, at 519 ("There is no formula; the cases concerning regulatory takings reflect ad hoc balancing and the inevitable discretion in deciding what is 'too much' regulation.").

89 480 U.S. 470 (1987).

90 *See id.* at 474.

91 *See id.*

[support] coal do not constitute a separate segment of property for takings law purposes . . . [and therefore t]here is no basis for treating . . . petitioners' coal as a separate parcel of property."[92] On this analysis, the economic value of the legal interest in the affected coal is de minimus relative to the whole. Clearly, conceptual severance would have demanded compensation, for the regulation completely devalued the whole legal interest in the support estate. The Court, however, refused to conceptually separate the support estate from the rest of the bundle of rights in the subsurface estate.[93] It stated that, despite the contrary finding in *Mahon*, "in practical terms, [in Pennsylvania] the support estate has value only insofar as it protects or enhances the value of the estate with which it is associated."[94] In other words, the Court refused to consider the affected legal interest on its own, severed from the bundle, and instead viewed it in the context of the entire bundle.[95] The dissent, taking a conceptual-severance approach, remarked that "petitioners' interests in particular coal deposits have been completely destroyed."[96]

Contemporary Supreme Court takings cases have wrestled with, but not resolved, how *Mahon* applies in modern cases. Both the majority and the dissent in *Keystone*, for instance, read *Mahon* as employing conceptual severance to some degree, but only the dissent found this portion of *Mahon* controlling. The majority strived to limit the application of *Mahon* through its dicta in *Keystone*. The tug of war apparently continued in the Supreme Court's recent case, *Lucas v. South Carolina Coastal Council*.[97]

In *Lucas*, a developer purchased a fee simple in beachfront land intending to build single-family homes.[98] Subsequently, the South Carolina legislature adopted a coastal protection plan which effec-

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92 *Id.* at 498.

93 *See id.* at 501.

94 *Id.*

95 The Court relied heavily upon *Andrus v. Allard*, 444 U.S. 51 (1979), in which it "viewed the right to sell property[, bald eagle feathers,] as just one element of the owner's property interest." *Keystone*, 480 U.S. at 500 (referring to the *Andrus* case). *But see* Hodel v. Irving, 481 U.S. 704, 716-17 (1987) (holding unanimously that the right to devise property is an essential stick in the bundle of rights, for which the government must compensate when its regulations impinge that right). The inconsistency between *Hodel* and *Andrus* is clear evidence of the uncertainty with which the Supreme Court approaches conceptual severance.

96 *Keystone*, 480 U.S. at 514 (Rehnquist, C.J., dissenting). Yet even the dissent does not endorse a full-blown conceptual severance view. The dissent would find a taking only if the regulation "would allow the State not merely to forbid one 'particular use' of property with many uses but to extinguish *all* beneficial use of petitioners' property." *Id.* The thoroughgoing conceptual-severance view would require compensation for the elimination of any legal interest, regardless of whether an alternative beneficial use exists.

97 505 U.S. 1003 (1992).

98 *See id.* at 1006-07.

tively blocked any development of the property.[99] Writing for the majority, Justice Scalia found that any regulation that "denies all economically beneficial or productive use of land" constitutes a taking.[100] Because the state trial court had decided that the property was "valueless,"[101] the Court held that the statute was a regulatory taking.[102] Technically, Justice Scalia applied the diminution-in-value test, because the relative economic worth of the property before and after the regulation was the sole factor in deciding whether a taking occurred. The holding, however, throws little light on whether the Court employed conceptual severance, because *Lucas* dealt with the devaluation of the whole fee simple estate, and not with the devaluation of a conceptually distinct portion of it.[103] Therefore, the Court did not need to ask whether a distinct legal interest within the bundle constitutes the whole unit of property for purposes of the Takings Clause. Justice Scalia's dicta in *Lucas*, however, seems to imply that the Court might apply conceptual severance in the future.[104] The dicta—fast approaching the fame of Holmes's *Mahon* opinion—leave open the door to future uses of conceptual severance.

In sum, the Supreme Court clearly regards any regulations that totally destroy all economic or productive uses of the entire fee simple, or bundle (for lack of a better word), as takings.[105] In the more ambiguous cases involving a partial economic diminution of the bundle, a total deprivation of a discrete right in the bundle, or a weak public interest, the "ad hoc, factual inquir[y]" visible in the case of *Penn Central Transportation Co. v. New York City*[106] remains. The Court supplements this inquiry with a tripartite set of factors: (1) "the economic impact of regulation" on the plaintiff, (2) the interference with "investment-backed expectations," and (3) "the character of the governmental action."[107] As Professor Radin explained,[108] the battle is now over whether to retain the ad-hoc, factual-inquiry model, or to adopt a more determinate, rule-like scheme premised upon concep-

99 *See id.* at 1007.

100 *Id.* at 1015.

101 *Id.* at 1007.

102 *See id.* at 1019.

103 Justice Scalia candidly recognized this limitation of the decision. *See id.* at 1016 n.7.

104 *See id.*

105 Note that, even in this categorical regulatory takings case, a governmental defense for regulations which curb public nuisances exists.

106 438 U.S. 104, 124 (1978).

107 *Id.*; *see also* Connolly v. Pension Benefit Guar. Corp., 475 U.S. 211, 225 (1986) (reaffirming the three *Penn Central* factors).

108 *See* Radin, *supra* note 24, at 1681 ("[T]he dialectic in takings jurisprudence . . . between the per se rule of *Loretto* and the balancing test of *Penn Central* . . . is simply an instance of what has been called the dialectic of rules and standards.").

tual severance or some other definition of property. As I have indicated, this question remains very much open after *Lucas*.[109]

III
THE FEDERAL CIRCUIT'S VISION OF TAKINGS LAW

At the outset, I should note that I am not claiming that the Federal Circuit has created a new theory of takings law. Nor do I argue that it has fully clarified the status of the bundle-of-rights metaphor or of conceptual severance. The Federal Circuit, though, has tentatively elaborated a view of takings which the Supreme Court has yet to either definitively accept or reject.[110] In doing so, the Federal Circuit has flirted with conceptual severance, thereby affecting how we view the bundle of rights.[111] Specifically, the Federal Circuit has (1) followed the Supreme Court's lead in *Lucas* by correlating the bundle to common law understandings, and (2) created the partial-takings doctrine.

Initially, the Federal Circuit attempted to give an internal, jurisprudential meaning to the bundle-of-rights metaphor by defining, case by case, the internal structure of the bundle in terms of common law understandings and historical conceptions of the interests at issue.[112] In so doing, the court has tried to provide a means of deciding whether a particular stick in the bundle of rights constitutes a separate piece of protected property for the purpose of takings law.[113] As this Note demonstrates, this effort by the Federal Circuit to correlate the internal structure of the bundle of rights with common law rules and historical vagaries actually operates to restrict and demarcate the use of conceptual severance.[114]

The Federal Circuit has, furthermore, attempted to articulate a novel theory: the partial-takings doctrine.[115] The partial-takings doctrine holds that even if a regulation does not completely abridge or

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109 The Federal Circuit has noted that, under the *Lucas* principle, regulatory takings are compensable, but "the Court's decisions to date have not provided an answer" to the question of whether *partial* regulatory takings are compensable. Florida Rock Indus., Inc. v. United States, 18 F.3d 1560, 1568 (Fed. Cir. 1994).

110 Owing to the Rorschach test-like nature of Supreme Court precedent in this area, courts have advanced competing conceptions of the "correct" interpretation of the Court's precedent, each with significant textual support in the opinions. Therefore, I withhold judgment as to whether the Federal Circuit's version actually diverges from the Supreme Court's precedent. Such a determination undoubtedly will come only from the Supreme Court itself, if it comes at all.

111 *See* Douglas T. Kendall & Charles P. Lord, *The Takings Project: A Critical Analysis and Assessment of the Progress So Far*, 25 B.C. ENVTL. AFF. L. REV. 509, 568-69 (1998).

112 *See infra* notes 156-96 and accompanying text.

113 *See id.*

114 *See infra* Part III.B.2.

115 *See* Florida Rock Indus., Inc. v. United States, 18 F.3d 1560, 1568-69 (Fed. Cir. 1994); *see also* Kendall & Lord, *supra* note 111, at 566 ("Judges Plager and Rader of the

take a particular property right—a strand in the bundle—just compensation may nevertheless be due.[116] The partial-takings doctrine in many ways recreates the problems that the original failure to articulate an internal structure in the bundle of rights caused. That is, the partial-takings doctrine eradicates the benefits of tying the structure of the bundle of rights to common law understandings and historical factors; it thereby leads down a slippery slope to Professor Epstein's radical conceptual severance position, creating the negative consequences widely noted by commentators.[117] Thus, the two Federal Circuit innovations effectively cancel each other out, leaving the Supreme Court to contemplate the straightforward, if somewhat more sophisticated, version of Professor Epstein's conceptual-severance position looming in the Federal Circuit.

The Federal Circuit has cautiously attempted to extract a coherent meaning from the Fifth Amendment's Takings Clause, primarily through its two most important regulatory takings cases, *Florida Rock Industries, Inc. v. United States*[118] and *Loveladies Harbor, Inc. v. United States*.[119] Although both cases presented facts that offered the court an opportunity to either positively accept or definitely reject conceptual severance, intentionally or by miscalculation, the court declined the invitation.

A. Physical Takings: The Right to Exclude

Before discussing regulatory takings cases in which the Federal Circuit has asserted its position on takings law most distinctly, a review of a few of its physical takings cases would be helpful. These cases, though not groundbreaking, indicate the Federal Circuit's overall strategy vis-à-vis takings jurisprudence:[120] an embrace of property both as comprising a bundle of rights and as conceptually severable. Finally, these cases show that although the Federal Circuit tacitly recognizes that full-blown conceptual severance is undesirable, it fails to provide a doctrinal means for preventing such an outcome, given its embrace of conceptual severance with respect to the right to exclude.

Federal Circuit made a version of Professor Epstein's partial takings doctrine the law of the land.").

116 *See* Kendall & Lord, *supra* note 111, at 568 ("[A]ccording to Judge Plager, the Takings Clause treats [physical and regulatory takings] the same: whenever government action impinges in any way on an owner's property, a court must look further to find whether a taking has occurred."). This Note discusses the arguments for and against this doctrine, and the rationale underlying it. *See infra* Part III.B.3.

117 Commentators have attacked Professor Epstein's position on many fronts. *See* Kendall & Lord, *supra* note 111, at 520 nn.44-46.

118 18 F.3d 1560 (Fed. Cir. 1994).

119 28 F.3d 1171 (Fed. Cir. 1994).

120 In a sense, the Federal Circuit attempts to use the physical takings cases as a model for all takings cases.

The easiest case in which an asserted interest is conceptually severable from the bundle is the case of physical occupation. In the bundle of rights, the right to exclude others—including the government—is generally preeminent and certainly one of the oldest and most respected.[121] As discussed above, for most of this nation's earlier years, courts defined a taking as an outright physical occupation by the government.[122] Accordingly, the Federal Circuit in *Hendler v. United States*[123] reasserted that the right to exclude is "fundamental" to the very notion of property and "to our theory of social organization."[124] In *Hendler*, the EPA, together with the State of California, had installed groundwater monitoring wells on the plaintiffs' property without their consent, pursuant to a plan to clean up contaminated groundwater.[125] The plaintiffs sued on a Fifth Amendment takings claim[126] and the Federal Circuit found that the government action amounted to a permanent physical taking of property.[127]

The court based its holding upon precedential loyalty to the right to exclude[128] and doctrinal expositions of the bundle of rights.[129] The Federal Circuit reaffirmed that all physical occupations, no matter how economically insignificant, are compensable.[130] This view of the right to exclude is a version of the partial-takings doctrine, because it divides the supposedly monolithic property right (the right to exclude) into ever smaller units. However, the Federal Circuit inserted a qualification at this point: a physical occupation of a short enough duration may not be compensable.[131] Ultimately, the court hypothesized, a point exists at which the length of time of a physical

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121 *See, e.g.*, Charles Donahue, Jr., *The Future of the Concept of Property Predicted from Its Past*, *in* NOMOS, *supra* note 8, at 28, 30-34 (stating that occupancy with the right to exclude others was one of the first conceptions of property).

122 *See supra* notes 64-68 and accompanying text.

123 952 F.2d 1364 (Fed. Cir. 1991). *Hendler* involved an EPA order authorizing the placement of pollution-monitoring wells on plaintiff's property. *See id.* at 1367. Under the court's analysis, the wells themselves constituted a permanent physical taking. *See id.* at 1375-78.

124 *Id.* at 1375.

125 *See id.* at 1367.

126 *See id.* at 1367-68.

127 *See id.* at 1376-77.

128 *See id.* at 1374-75 (citing, inter alia, Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 426 (1982)).

129 *See id.* at 1374 (citing Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890)).

130 *See id.* at 1375 ("A physical occupation of private property by the government which is adjudged to be of a permanent nature is a taking, and that is true without regard to whether the action . . . has only minimal economic impact on the owner.").

131 *See id.* at 1377 ("If the term 'temporary' has any real world reference in takings jurisprudence, it logically refers to those governmental activities which involve an occupancy that is transient and relatively inconsequential, and thus properly can be viewed as no more than a common law trespass *quare clausum fregit*.").

occupation is insignificant;[132] at this point the violation of the right to exclude no longer constitutes a compensable taking.[133] This qualification, however, is problematic.

The inherent difficulty in distingnishing an insignificant infringement on the right to exclude from a significant one is that, to distinguish on anything but an ad hoc basis, one needs another doctrine to articulate a principled basis for drawing the significant-insignificant boundary, because the physical occupation is either (1) an infringement on the right to exclude or (2) something categorically different from an infringement on one's rights. If physical occupation is so different, if the character of the action fundamentally transforms solely because of a difference in the length of time involved, what exactly is the nature of the action? And why has it changed? Needless to say, the Federal Circuit did not offer answers to these questions in *Hendler*. Indeed, the court barely acknowledged a line-drawing problem created by the significant-insignificant physical-takings distinction. Instead, it noted only that the facts in *Hendler* rested "comfortably within the degree necessary to make out a taking."[134]

What is one to make of the Federal Circuit's two-steps-forward-and-three-steps-backward equivocation in *Hendler*? Perhaps abstracting the Federal Circuit's analytical strategy, which the court developed in three phases, might be helpful. First, the court identified a supposed stick in the bundle of rights and indicated that the government could not remove the stick (presumably as a whole) without just compensation.[135] This move seemingly indicates a resistance to the notion of conceptual severance; the theory of strong conceptual severance entirely bypasses the discussion of which "sticks" in the bundle are removable, because an abridgement of any property interest constitutes an uncompensated taking under the doctrine.[136] Second, the court allowed for the possibility of compensation when the government has partially abridged a property right in the concrete sense.[137] Thus, the court seemingly reversed its first position, quietly allowing a degree of conceptual severance to take root. Finally, the court held that some minimalistic subdivisions of the property right are noncompensable, but failed to explain its reasoning.[138] This final

132 *See id.*

133 *See id.* (noting that a "truckdriver parking on someone's vacant land to eat lunch is an example").

134 *Id.*

135 *See id.* at 1374 (identifying the right to exclude in the bundle of rights).

136 *See supra* notes 34-44 and accompanying text.

137 *See Hendler*, 952 F.2d at 1376-77 (finding that physical takings that are temporary and less than total are possible).

138 *See id.* at 1377 (noting that an infringement on the right to exclude, if short enough in duration, would not be compensable).

move thus restates the original problem with bundle-of-rights takings analysis: a lack of a doctrinal basis for denying compensation for some fragments of a property right, but not others. This analytical sequence is characteristic of the Federal Circuit's analysis in takings cases and is one that it exported to the regulatory takings context: identify a property right, allow certain fragments of that right to be compensable, deny that all fragments are compensable, but fail to articulate a way to distinguish between the two types of fragments.

Hendler is illustrative, particularly because it involved a strand of the bundle of rights that the court considered more inviolable than any other. *Hendler* is a clear case of a permanent physical occupation in that the wells were built to last[139] and were therefore overtly permanent.[140] The court's willingness, however, to speculate that some physical occupations may be so short in duration as to be noncompensable demonstrates that the right-to-exclude touchstone for the Federal Circuit must be something other than raw physical occupation. In other words, the court will find a taking of the right-to-exclude stick in the property bundle only upon a showing of a governmental physical occupation *plus something.* However, the Federal Circuit left this plus factor undefined.[141]

The Federal Circuit's opinion in *Hendler* dimly indicates its early stance towards conceptual severance; one can barely discern the two takings moves mentioned above. First, the court strongly endorsed one stick in the bundle of rights based upon precedent and traditional understandings of property. Second, it adopted such a flexible view of this stick that it included virtually every instance of physical occupation imaginable and only vaguely gestured at some doctrinal cutoff point. These two moves indicate a desire to at least partially articulate the internal structure of the bundle of rights, while at the same time demolishing any potential jurisprudential benefit that might emerge by adopting the partial-takings doctrine.

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139 *See id.* at 1376 ("There is nothing 'temporary' about the wells that the Government installed on plaintiffs' property . . . . The wells are some 100 feet deep, lined with plastic and stainless steel, and surrounded by gravel and cement.").

140 *See id.* The fact that the government could have removed the offending well was not sufficient to persuade the court that the occupation was not permanent. *See id.*

141 *See id.* at 1377 ("We need not decide here what physical occupancy, of what kind, for what duration, constitutes a [physical] taking."). The Federal Circuit had an opportunity to clarify the issue in *Skip Kirchdorfer, Inc. v. United States*, 6 F.3d 1573 (Fed. Cir. 1993). *Kirchdorfer* involved a military seizure of a privately owned warehouse. *See id.* at 1576-77. Although a contract controlled the military's access to the warehouse and the occupation was "intermittent" and for a "limited duration," the court invoked *Hendler* and *Loretto* for its finding of a permanent physical taking. *Id.* at 1582-83.

B. Regulatory Takings: The Right to Beneficial Economic Use

While in the context of a physical-occupation takings case one can see the quagmire that this strategy will eventually cause, one is already *in* the quagmire in regulatory-takings cases. Two fundamental difficulties arise in the context of regulatory-takings cases with respect to the bundle of rights. First, how does one define the size of the bundle at issue? This is the so-called "denominator problem." Second, how does one identify the specific nature and weight of each right contained within that bundle? The court must answer both questions before a regulatory taking may be found.

Chief Judge Nies noted the denominator problem in *Tabb Lakes, Ltd. v. United States.*[142] *Tabb Lakes* involved a 167-acre tract of land which, after initial purchase as a unit, the plaintiffs divided into five sections for development.[143] Plaintiffs developed sections one and two and were in the process of selling them when the Army Corps of Engineers learned that sections three, four, and five contained protected wetlands, which the plaintiffs were filling for future development without the required permits.[144] The Corps issued a cease-and-desist order, which was to remain in effect until the plaintiffs obtained the proper permits.[145] Eventually, the plaintiffs developed the three wetlands sections and sued the government, alleging a taking of those sections during the period of the cease-and-desist order.[146] Setting aside the question of temporary regulatory takings, Judge Nies noted that the plaintiffs' claim of the loss of all economically viable use of sections three, four, and five did not necessarily mean that the government owed them compensation.[147] In dicta, Judge Nies wrote:

> While in some cases it may be difficult to determine whether all economic viable use of the 'property' has been destroyed [by the regulation], that is not a serious problem here. Clearly, the quantum of land to be considered is not each *individual* lot containing wetlands or even the combined area of wetlands. If that were true, the Corps' protection of wetlands via a permit system would, *ipso facto,* constitute a taking in every case where it exercises its statutory authority.[148]

In other words, Judge Nies believed that even if the alleged taking had drained all of the value from the disputed three sections of property, residual economic value existed in the other two sections. Thus, be-

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142 10 F.3d 796 (Fed. Cir. 1993).

143 *See id.* at 798.

144 *See id.*

145 *See id.*

146 *See id.* at 798-99.

147 *See id.* at 802.

148 *Id.* (citing Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 130-31 (1978)).

cause no complete taking of economic value from the "whole" property had occurred, there was no taking.[149]

Tabb Lakes, like most regulatory-takings cases, concerns the right to use a strand of the bundle of rights. The plaintiff claimed that the development of property for sale, which is one facet of the right to use, was the only "economically viable use" of the land under dispute.[150] Therefore, a regulation precluding the right to develop a portion of the land constituted both an alteration of the right to use and a diminution of the economic value of the land to the owner.[151]

The denominator problem arises when one questions the extent to which the government may abridge the right to use through regulation, causing diminution of value without paying just compensation. Scholars have noted that much depends on how one defines the size of the bundle to which the affected right, or interest, belongs.[152] Accepting Judge Nies's reading of the facts in *Tabb Lakes*, for instance, forbidding the development of three of five sections of the parcel did not constitute a taking of the right to use, because the order did not completely destroy the right to use; rather, the plaintiffs could still develop and sell the other two sections.[153] However, if one argues as the plaintiffs in *Tabb Lakes* did that the right to develop pertained only to the third, fourth, and fifth sections, then the order entirely destroyed the right to use and government compensation was due.[154] Although Judge Nies believed that the bundle encompassed all five

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149 Judge Nies's remarks were dicta, because Supreme Court precedent clearly stated that "preliminary regulatory activity," like time spent applying for a permit, could not give rise to a takings claim. *Id.* at 801 (emphasis omitted).

150 *Id.* at 799. Justice Holmes's opinion in *Mahon* originated the total-deprivation-of-any-viable-economic-use test. *See supra* notes 69-83 and accompanying text. To my knowledge, no court has drawn a sound theoretical connection between the abstract right to use and the concrete viable-economic-use standard. Of course, Richard Epstein attempted to draw a rigorous connection. *See* EPSTEIN, *supra* note 30, at 57-62.

151 Economic devaluation and the abstract right to use are really flipsides of the same coin. When someone complains that a regulation has drained all or most economic value from his land, he is really complaining about an uncompensated taking of his right to use his land. While, practically speaking, some use value might persist in a completely economically devalued parcel of land, such as birding or some other recreational use, courts have inextricably intertwined the right to use with the right to cultivate financial value from one's land. *See generally* CHEMERINSKY, *supra* note 66, at 511 (stating that the traditional balancing test articulated by the Supreme Court for regulatory takings looks to "(1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation has interfered with investment-backed expectations; and (3) the character of the governmental action").

152 *See, e.g.*, John E. Fee, Comment, *Unearthing the Denominator in Regulatory Taking Claims*, 61 U. CHI. L. REV. 1535, 1550-57 (1994) (exploring the denominator problem in regulatory takings cases).

153 *See Tabb Lakes*, 10 F.3d at 800-02.

154 *See id.* at 801-02.

sections, later Federal Circuit opinions[155] reflect a much more sophisticated method for defining the so-called parcel-as-a-whole, which provides the denominator for the fraction.

California Housing Securities, Inc. v. United States[156] addressed the second problem mentioned above: defining the nature and weight of rights contained within the bundle. *California Housing* involved a regulation which provided the placement in receivership and eventual liquidation of savings-and-loan institutions under designated circumstances.[157] The plaintiff, California Housing Securities (CHS), had purchased a savings-and-loan institution subject to these regulations.[158] Subsequently, Congress substantially altered the savings-and-loan regulations,[159] creating the Office of Thrift Supervision (OTS) and the Resolution Trust Company (RTC).[160] Shortly thereafter, and pursuant to its mandates, the RTC liquidated CHS's newly purchased savings and loan.[161] The plaintiff then sued under a Fifth Amendment regulatory-takings claim.[162]

In its disposition, the Federal Circuit held that, because banking has traditionally been a heavily regulated industry, ownership of the savings and loan included the "historically rooted expectation" that regulations might provide for the seizure of the savings and loan upon a finding of "unsafe or unsound . . . practices."[163] That expectation affected the court's view of the bundle of rights associated with the savings and loan, as well as its perception of the individual property rights contained therein. The court believed that, although the regulations at issue were not in effect when the plaintiffs first purchased the savings and loan, the owners knew or should have known that the original regulations were likely to change.[164] In particular, the plaintiffs should have anticipated the prohibition of certain banking practices, which might in turn result in the seizure and liquidation of the savings and loan.[165] In a sense, the plaintiffs' imputed awareness of

155 *See, e.g.*, Loveladies Harbor, Inc. v. United States, 28 F.3d 1171 (Fed. Cir. 1994); Florida Rock Indus., Inc. v. United States, 18 F.3d 1560 (Fed. Cir. 1994). Both were authored by Judge Plager, who has received widespread notoriety for his "revolutionary" approach towards regulatory takings. *See, e.g.*, James L. Huffman, *Judge Plager's "Sea Change" in Regulatory Takings Law*, 6 FORDHAM ENVTL. L.J. 597, 600-15 (1995) (favorably reviewing Judge Plager's opinions in *Loveladies* and *Florida Rock* as a revival of the Takings Clause's ability to protect private property interests).

156 959 F.2d 955 (Fed. Cir. 1992).

157 *See id.* at 955-56.

158 *See id.*

159 *See id.* at 956.

160 *See id.*

161 *See id.*

162 *See id.* at 956-57.

163 *Id.* at 958 (internal quotation marks omitted).

164 *See id.* at 958-59.

165 *See id.*

the regulatory context shaped the rights that attached to the savings and loan's title. Thus, the revised regulations were not a taking, because the plaintiff's bundle of rights did not include the right to exemption from this regulation of its business practices in the first place.[166]

The Federal Circuit's reliance on historically rooted expectations based on regulatory practices is more than a mere restatement of the nuisance exception.[167] In *California Housing*, the Federal Circuit latched onto Supreme Court dicta under which courts were to determine property interests by reference to "existing rules or understandings that stem from an independent source such as state law."[168] In turu, the questions of size and content of the bundle of rights in each case were dependent upon such rules or understandings.[169] Historical expectations, particularly with respect to rules and understandings of state property law at the time of the creation of the legal interest, have blossomed into the Federal Circuit's touchstone for determining the size of the bundle, as well as the weight and nature of the individual sticks within that bundle.[170] *Loveladies Harbor, Inc. v. United States*[171] most thoroughly developed this strategy for conceptualizing and defining the bundle of rights. *Loveladies* presented facts which allowed Judge Plager, writing for the Federal Circuit, to draw upon rules or understandings to ascertain the nature of the bundle of rights at issue.

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166 *See id.*

167 Under the nuisance exception, regulations are not a taking if the regulated activity constitutes a common-law nuisance. *See generally* John A. Humbach, *Evolving Thresholds of Nuisance and the Takings Clause*, 18 COLUM. J. ENVTL. L. 1, 1-2 (1993) (examining the implications of the Supreme Court's holding in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), that legislatures may not augment nuisance restrictions and that the only noncompensable nuisance restrictions are those that "'inhere in the title itself'" (quoting *Lucas*, 505 U.S. at 1029)).

168 Board of Regents of State Colleges v. Roth, 408 U.S. 564, 577 (1972); *see also* Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1001 (1984) (same).

169 *See California Hous.*, 959 F.2d at 958.

170 George W. Miller and Jonathan L. Abram first noted this trend in 1993. *See* George W. Miller & Jonathan L. Abram, *A Survey of Recent Takings Cases in the Court of Federal Claims and the Court of Appeals for the Federal Circuit*, 42 CATH. U. L. REV. 863, 863 (1993) (noting that the Federal Circuit was "focusing on the regulatory scheme that governed the property at the time it was acquired"). The authors rightly noted that the Supreme Court's *Lucas* decision opened the door to defining takings by property owners' historical expectations. *See id.* at 864-65. The *Lucas* Court held that, in cases of regulations leading to total economic devaluation, courts may deny compensation "only if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with." Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1027 (1992). Thus, a court must delve into the various rules and understandings that make up the "title to begin with" to determine whether the proscribed use interest was in the bundle that came with the land.

171 28 F.3d 1171 (Fed. Cir. 1994).

1. Loveladies

In *Loveladies*, the Federal Circuit confronted two key issues. First, the court had to determine the size of parcel of land that can serve as the denominator to the takings fraction: the affected parcel, a slightly larger parcel, or a much larger parcel.[172] Further, the court addressed whether the bundle of rights, via the state's common law of property, contained a governmental power to destroy use value.[173] *Loveladies* relied on a permutation of the ad hoc balancing test developed in *Penn Central Transportation Co. v. New York City*,[174] which effectively disallowed conceptual severance, because it required the court to quasi-objectively identify the property interests contained within the bundle with respect to state property law.[175] Therefore, although the *Loveladies* court selected the affected parcel for the denominator and thereby applied the per se rule, the court did not expressly endorse conceptual severance. To view this as a mild victory for conceptual severance would be a mistake, for the facts appear closer to those of *Lucas*, requiring the invocation of a per se taking rule.

The property at issue in *Loveladies* was a 12.5-acre parcel of land which the plaintiff, Loveladies Harbor ("Loveladies"), purchased in 1958 as part of a 250-acre lot for development purposes.[176] Of the original 250 acres, Loveladies had fully developed and sold 199 prior to 1972, while fifty-one acres were yet undeveloped, including the 12.5 acres in dispute.[177] The dispute arose after Loveladies applied to the New Jersey Department of Environmental Conservation (NJDEC) for fill permits for fifty acres containing wetlands.[178] After lengthy and contentious wrangling between Loveladies and state officials, the parties reached a settlement whereby the NJDEC granted Loveladies a permit to fill and develop 12.5 acres.[179] In return, *Loveladies* agreed to leave the remaining 38.5 acres undeveloped and unfilled.[180] Loveladies subsequently applied to the Army Corps of Engineers for a permit to fill.[181] Following the advice of the NJDEC, that permit was denied, prompting Loveladies to file suit in the Court of Federal Claims.[182]

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172 *See id.* at 1179-82.

173 *See id.* at 1182-83.

174 438 U.S. 104, 123-24 (1978).

175 *See Loveladies*, 28 F.3d at 1180-82.

176 *See id.* at 1173-74.

177 *See id.* at 1174.

178 *See id.*

179 *See id.*

180 *See id.*

181 *See id.*

182 *See id.* at 1174-75 (detailing the procedural history of *Loveladies*).

The most relevant portion of the Federal Circuit's opinion is the court's characterization of the Loveladies' property interest. Notably, the court spent a fair amount of time at the outset comparing the pre-*Lucas* (*Penn Central*) and post-*Lucas* balancing factors.[183] Recall that in *Connolly v. Pension Benefit Guaranty Corp.*,[184] the Supreme Court indicated that the balancing factors aid decision making in takings cases when the taking constitutes a partial, rather than a total, deprivation of economic value.[185] In light of the fact that the court felt it necessary to detail the differences between the pre- and post-*Lucas* factors, the court likely viewed the *Loveladies* scenario as a partial taking. Nevertheless, the court first addressed the issue of the nature and weight of the right to beneficial economic use at stake before determining whether the regulation accomplished a total or partial taking.

The court noted several factors to consider in ascertaining the weight and nature of the affected property right. Generally, the burdened use right must have been part of reasonable "investment-backed expectations" on the part of the owner.[186] That is, the plaintiffs must have "purchased the land involved with the reasonable expectation and intention of developing it over time for sale to purchasers of the improved lots."[187] The regulatory environment, historically rooted expectations of potential prohibitions on certain property uses, and other considerations are relevant to this factor. Because the property at issue in *Loveladies* was clearly of the sort that owners often develop for sale, the court had little difficulty finding that the bundle of rights contained the right to use.[188]

Turning to its own precedent in *Florida Rock Industries, Inc. v. United States*,[189] the court noted that it had drawn a distinction between regulations with shared effects and regulations which did not dispense the detriments and benefits so as to secure "'an average reciprocity of advantage to everyone concerned.'"[190] In *Florida Rock*, the court suggested that a regulation may negatively impact the right to

183 *See id.* at 1175-79.

184 475 U.S. 211 (1986).

185 *See id.* at 224-26. The Supreme Court termed total deprivation a "categorical" taking in *Lucas*, 505 U.S. at 1015. The *Loveladies* court expressly discussed the relevant considerations in differentiating partial from categorical takings. *See Loveladies*, 28 F.3d at 1179-82. The court first noted that the Supreme Court in *Lucas* did not provide guidance as to how to adjudicate the issue. *See id.* at 1179.

186 *Loveladies*, 28 F.3d at 1179.

187 *Id.*

188 *See id.*

189 18 F.3d 1560, 1570-71 (Fed. Cir. 1994).

190 *Loveladies*, 28 F.3d at 1180 (quoting *Lucas*, 505 U.S. at 1018) (internal quotation marks omitted). It is unclear from the opinion how exactly the court determined whether the statute obtained reciprocity of advantage. The court apparently viewed this as a de minimus devaluation concomitant with any viable regulation of land use that affects us all and thus does not amount to a compensable taking.

use only if the regulation is for the benefit of the common good, including the plaintiff, and if the negative impact is equitably spread across all beneficiaries of the regulation.[191] The court in *Loveladies* did not evaluate whether the challenged regulations spread burdens equitably, perhaps deeming it obvious that the burdens were not evenly dispersed.

Finally, the court added that ultimately "state property law, incorporating common law nuisance doctrine, controls."[192] The regulatory environment at the time of the plaintiffs' original purchase of the property at issue partially determines the nature and weight of a particular right in the bundle—here, the right to use. Unlike *California Housing*, however, the actual regulatory scheme must be in place for the state to regulate the use right. Therefore, the court must evaluate law at the time of the purchase to determine whether invocation of the state common law could have halted the proposed use.[193] That is, the state can only find that the intended use constitutes a nuisance and subsequently regulate it, if the state has already expressly done so by statute or at common law.[194] As the court stated, "[t]he question of whether . . . the state retained the power to impose a particular regulatory framework upon private property owners, as a matter of state property law . . . is a somewhat different question from the 'nuisance exception.'"[195] Pursuant to these three factors, the court determined that the title to the plaintiffs' property included a right to develop the land and to sell it and that neither state regulatory framework, nor nuisance limitation, nor reciprocal advantage qualified that right.[196]

However, the court's inquiry did not end after it determined that the plaintiffs had a right to use and that the regulation effectuated a taking of that right. The court still had to determine whether the regulation affected the "whole" right to use of a particular piece of property. Addressing the denominator problem,[197] the court noted that its "precedent displays a flexible approach, designed to account for factual nuances."[198] Part of the flexibility referenced by the court emanated from *Deltona Corp. v. United States*,[199] a case in which a devel-

191 *See Florida Rock*, 18 F.3d at 1570-71.

192 *Loveladies*, 28 F.3d at 1179.

193 *See id.* at 1183. How this factor interacts with the first factor—the owner's reasonable expectations for use—is unclear. In other words, could the court have found that the owner should have expected the wetlands to come under a regulatory framework prohibiting development, despite the fact that no such framework was in place at the time of purchase?

194 *See id.* at 1182-83.

195 *Id.* at 1182.

196 *See id.* at 1183.

197 *See supra* notes 142-55 and accompanying text.

198 *Loveladies*, 28 F.3d at 1181.

199 657 F.2d 1184 (Ct. Cl. 1981).

oper owned a large tract of land, only some of which governmental regulations blocked from development.[200] The Court of Claims in *Deltona* held that the regulations did not constitute a taking because of evidence that a large portion of the tract was still amenable to development and could fetch a higher price than the blocked portions.[201] In contrast, in *Whitney Benefits, Inc. v. United States*,[202] the Surface Mining and Protection Act of 1977 precluded a mining company from mining any portion of a deposit.[203] According to *Loveladies*, the *Whitney* court found that the Act had effected a taking of all economically viable uses of the property based on extensive hearings on the "purpose of the imposition, the nature of the property, its alternative uses, and the extent to which all or only a portion of plaintiff's property was so limited."[204] Finally, the court remarked that "factual nuances" under consideration included "the timing of transfers in light of the developing regulatory environment."[205]

The *Loveladies* court held that the proper denominator was the disputed 12.5 acres that the plaintiff wished to develop.[206] The court noted that the owner had already developed and sold off the 199 acres years earlier, prior to the effective date of the regulation and that the state of New Jersey received the 38.5 acres pursuant to the settlement. Thus, according to the court, the unit of property was the disputed 12.5 acres, rather than a parcel conceptually severed from a larger portion. After laying out the precedent and considering a partial-takings claim, the court calmly stated, "This is not . . . a case of a partial taking."[207]

2. Loveladies *Analyzed*

What is one to make of the *Loveladies* case's flexible and factually nuanced approach? Is it just an application of the trend in favor of ad hoc, factual inquiries to situations involving partial takings? One can deduce a number of factors from the case and its citations. The court placed a great deal of emphasis on whether the affected property was part of a larger, valuable whole unaffected by the regulation.[208] The court's discussion of *Deltona* implies that if the owner could still make valuable use of most of the unaffected property, then the regulation's impact on the whole of the owner's holding is minimal. However, if

200 *See id.* at 1192.
201 *See id.* at 1192-93.
202 926 F.2d 1169 (Fed. Cir. 1991).
203 *See id.* at 1172-73.
204 *Loveladies*, 28 F.3d at 1181.
205 *Id.*
206 *See id.*
207 *Id.*
208 *See supra* notes 197-206 and accompanying text.

the owner divides and disperses the whole prior to being subject to the regulation, then for purposes of litigation the court would ignore the original whole and the smaller portion would be the relevant denominator.[209] Likewise, the court was sensitive to subtle strategic manipulations by both sides of the table. The court noted that always terming the disputed parcel the "denominator" might "encourage strategic behavior on the part of developers."[210] Thus, the fact that the NJDEC chose to wait "until after the initial project had been approved for development, and until 199 acres had been developed" to impose restrictions on development raised the question of whether the government was behaving strategically.

This innovation in takings law is a modest one, building upon Justice Scalia's *Lucas* dicta suggesting that "how the owner's reasonable expectations have been shaped by the State's law of property" determines the size of the property to which the affected interest belongs.[211] The conceptual-severance adherent would have simply declared the 12.5 acres the relevant property unit, the beneficial economic use the regulation had impugned, effecting a taking. The court would not have considered the possibility of a larger denominator, because the conceptual-severance doctrine disregards the denominator problem and automatically treats the severed use interest as an entire, free-standing unit of property.[212] By leaving open the possibility of a larger denominator under different facts, the court avoided aligning itself with the conceptual-severance camp. Conversely, the Federal Circuit recognized that sometimes the facts of the case coupled with fairness considerations[213] dictate a court to find that the denominator is less than the original parcel.

The Federal Circuit's approach, dictated by nuanced facts, state property law, and the owner's reasonable expectations, is still an ad hoc, case-by-case inquiry. There is, however, reason to suspect, even

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209 Note that this result is consistent with *Mahon* to the extent that the coal already sold is not relevant, and it concurs with *Keystone* to the extent that it includes all unmined coal (including those unaffected by the statute) in the denominator.

210 *Loveladies*, 28 F.3d at 1181. Actually, the government made this argument, asserting that the developers could "'convey[ ] away the non-wetlands portions of their parcels prior to applying'" for permits. *Id.* (quoting the government).

211 Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1016 n.7 (1992).

212 This approach is the crux of Professor Radin's now-famous definition of conceptual severance. *See* Radin, *supra* note 24, at 1676 (stating that conceptual severance "consists of delineating a property interest consisting of just what the government action bas removed from the owner, and then asserting that that particular whole thing has been permanently taken").

213 *See Loveladies*, 28 F.3d at 1181 ("It would seem ungrateful in the extreme to require Loveladies to convey to the public the rights in the 38.5 acres in exchange for the right to develop 12.5 acres, and then to include the value of the grant as a charge against the givers.").

from this one case, that in future cases the court will ascertain a lading-list of factors further objectifying the factual inquiry.[214]

Even so, the *Loveladies* reasoning was a departure from the highly rational and abstract definitions of property that scholars previously espoused.[215] Both conceptual severance and the Blackstonian version of property rely on highly abstract, theoretical notions of the composition of property in the constitutional sense, presuming it to be the same at all times for all people. To Blackstone, natural law dictated the nature and legal extent of an individual's property interest.[216] For conceptual-severance adherents like Professor Epstein,[217] the terms of the Constitution itself define property[218] and this definition should guide the courts' identification of an owner's property interest. *Loveladies*, in which Judge Plager tied the size of the bundle to contextual and factual inquiries, expressed a different rationale. In *Loveladies*, the Federal Circuit embarked on a new direction, espousing that the size and content of the bundle of rights in question are a function of both the facts and the history of regulation and ownership. Previously, courts had only employed ad hoc, factual inquiries in cases involving partial takings. At least superficially, then, *Loveladies* embraces Professor Radin's admonition that courts openly engage in pragmatism and reject conceptual severance,[219] even though the court viewed the 12.5-acres as the denominator of a fifty-acre parcel.

How does this case help explicate the bundle-of-rights metaphor? It apparently moves the bundle-of-rights paradigm a step closer to a true normative theory and signals a retreat from its metaphoric status. The Federal Circuit indicated that by buying property, selling portions of it, and using it over time—all within the context of state and federal laws recognizing certain interests and not others—one is defining the size and set of rights of that property.

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214 The court in *Florida Rock Industries, Inc. v. United States*, 18 F.3d 1560 (Fed. Cir. 1994), shared this optimism. *See id.* at 1571 ("Over time, however, enough cases will be decided with sufficient care and clarity that the line will more clearly emerge.").

215 *See, e.g.*, EPSTEIN, *supra* note 30, at 20-22.

216 *See supra* note 22 and accompanying text.

217 *See* EPSTEIN, *supra* note 30, at 57-62. Professor Radin labels Professor Epstein's approach "Platonic," Radin, *supra* note 24, at 1670, but the Blackstonian view of natural law is perhaps even more aptly denoted as such. Blackstone's view, after all, was founded on the idea of a pure owner-thing relationship underwritten by natural law. *See supra* note 22 and accompanying text. Professor Epstein's view, on the other hand, does not rest on any such overt metaphysical platform, but allows property to change to accommodate the social norm of efficiency. *See* EPSTEIN, *supra* note 30, at 20-24. Nevertheless, conceptual severance is a contemporary legacy of Blackstone as Professor Epstein suggests. *See id.*

218 *See* EPSTEIN, *supra* note 30, at 22-25.

219 *See* Radin, *supra* note 24, at 1680-81 (extolling the virtues of pragmatism in decision making).

3. Florida Rock

Florida Rock Industries, Inc. v. United States[220] is another of the Federal Circuit's central cases on federal regulatory-takings claims. In *Florida Rock*, the Federal Circuit did not have difficulty defining the portion of the parcel to which the bundle of rights pertained; a denominator problem did not exist as it did in *Loveladies*.[221] Nor did the court struggle with the nature of the property right affected; the property right was a protected interest within the meaning of the Takings Clause.[222] Rather, the court faced a subsidiary problem: What if the regulation had only a negative impact on the property right, but did not actually destroy it? The Federal Circuit ultimately remanded this issue to the Court of Federal Claims, authorizing it to find a so-called partial taking should the facts warrant.[223] *Florida Rock* represents both a solo foray into partial-takings law and a subterfuge of whatever structure resided within the bundle-of-rights metaphor as adumbrated in *Loveladies*.

The plaintiff, Florida Rock Industries ("Florida Rock"), had purchased 1560 acres of wetlands west of suburban Miami in 1972.[224] Shortly thereafter, Congress enacted the Clean Water Act.[225] Florida Rock began to mine the subsurface limestone, but without the relevant permit required by the Clean Water Act.[226] After the issuance of a cease-and-desist order by the Army Corps of Engineers, Florida Rock stopped mining and proceeded under section 404 of the Clean Water Act to apply for a permit to mine the entire 1560-acre parcel.[227] Under the relevant regulations, the Corps only issued a permit for a length of time sufficient to allow three years of mining.[228] Thus, the permit sought covered only ninety-eight acres.[229] The Corps subsequently denied the permit, prompting Florida Rock to sue the United States in the United States Claims Court on the ground of an uncompensated regulatory taking of ninety-eight acres of its land.[230] The Claims Court found that the permit denial amounted to a total deprivation of economic value and, as such, constituted a compensable taking of the ninety-eight acres of wetlands.[231]

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220 18 F.3d 1560 (Fed. Cir. 1994).
221 *See id.* at 1562-63.
222 *See id.* at 1563.
223 *See id.* at 1572-73.
224 *See id.* at 1562.
225 *See id.*
226 *See id.*
227 *See id.*
228 *See id.* at 1562-63.
229 *See id.*
230 *See id.* at 1563.
231 *See* Florida Rock Indus., Inc. v. United States, 8 Cl. Ct. 160, 164-65 (1985), *aff'd in part and vacated in part*, 791 F.2d 893 (Fed. Cir. 1986).

On appeal, the Federal Circuit vacated the Claims Court's decision.[232] In vacating the decision, the Federal Circuit stated that the Claims Court had erred in failing to consider the "fair market value" of the entire 1560 acres of wetlands after the permit denial.[233] The Claims Court, according to the Federal Circuit, had failed to consider the residual economic value of the ninety-eight acres as a part of the greater 1560-acre tract.[234] Under the Claims Court's analysis, the permit denial drained the ninety-eight-acre parcel of all its economic value (and hence the right to use).[235] Disagreeing with this reasoning, the Federal Circuit remanded the case for proceedings to determine the fair market value of the 1560-acre parcel and to see whether that value was so far below the pre-regulation value as to constitute a taking.[236]

On remand, the Claims Court heard evidence on both sides. The government attempted to demonstrate that an existing market would value each acre at around $4000, while the plaintiff argued that these market estimates were unreliable.[237] The Claims Court sided with the plaintiff and declared the market value of the postregulation lands relatively negligible.[238] Therefore, pursuant to the total-economic-deprivation theory, the Claims Court found a regulatory taking of the plaintiff's 1560 acres.[239]

The government appealed and once again the Federal Circuit vacated the decision and remanded.[240] The Federal Circuit held that, based on the evidence before the trial court, a significant residual market value of the whole 1560-acre tract might have remained.[241] Therefore, the court could not find a regulatory taking on a total-economic-deprivation theory.[242] Should the permit denial diminish the value of the 1560-acre tract to only a limited degree, per se takings analysis would fail.

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232 *See* Florida Rock Indus., Inc. v. United States, 791 F.2d 893, 905 (Fed. Cir. 1986).

233 *Id.* at 903.

234 *See id.* at 903-05.

235 *See Florida Rock*, 8 Cl. Ct. at 166.

236 *See Florida Rock*, 791 F.2d at 905.

237 *See* Florida Rock Indus., Inc. v. United States, 21 Cl. Ct. 161, 172 (1990), *judgment entered*, 23 Cl. Ct. 653 (1991), *vacated*, 18 F.3d 1560 (Fed. Cir. 1994).

238 *See id.* at 175.

239 *See id.* at 176.

240 *See* Florida Rock Indus., Inc. v. United States, 18 F.3d 1560, 1562 (Fed. Cir. 1994).

241 *See id.* at 1567 ("The Court of Federal Claims' analysis was correct in theory, but started from an incorrect premise—that the value of the parcel after denial of the permit was a nominal $500 per acre.").

242 *See id.* (determining that a fair market price precludes a finding that the regulation "denies all economically beneficial or productive use of land" (internal quotation marks omitted) (citation omitted)). The Federal Circuit treats the right to alienate one's property in the market for value as a part of the right to use, not the right to dispossess. *See id.*

The Federal Circuit then proceeded to elaborate its views on partial regulatory takings. Initially, the court voiced the tripartite test used by the Supreme Court in regulatory-takings cases: (1) "the economic impact of the regulation on the claimant," (2) "the extent to which the regulation interferes with investment-backed expectations," and (3) "the character of the Government action."[243] But, in the present case, the court insisted that the issue was primarily one of economic impact.[244] In doing so, the court found that *Lucas* stood for the proposition that, in cases of total economic deprivation, no balancing of factors is necessary to determine if a taking has occurred.[245]

The facts of *Florida Rock* thus raised the question of whether and when a raw diminution of value constitutes a compensable taking.[246] In *Mahon*, the Supreme Court held that a taking had occurred, because the regulation had deprived the plaintiff of all the economic value of a discrete property interest, namely the mining rights of the subsurface support coal.[247] Building on this seminal case, the Court has found regulatory takings only when a regulation has destroyed a whole discrete property interest.[248] The definition of the property interest at stake is thus all-important. The trend in Supreme Court takings jurisprudence was to not recognize marginal economic devaluation as a compensable taking.[249] Nevertheless, Justice Scalia's opinion for the majority in *Lucas* seems to hint that mere diminution of overall value might be compensable.[250] Coming as it did after Justice Scalia's *Lucas* dicta, *Florida Rock* was arguably an attempt by the Federal Circuit to make sense of the Justice's overture in favor of partial takings. Although prior to Justice Scalia's *Lucas* dicta, no precedent recognized partial takings, the Court had long grappled with the question of how to approach regulations that diminished the overall

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243 *Id.* at 1564.

244 *See id.* at 1567.

245 *See id.* at 1564.

246 *See id.* at 1564-65.

247 *See supra* notes 74-82 and accompanying text.

248 This observation excludes physical takings caused by regulations, such as the taking in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), which technically involved a per se physical taking and not a regulatory taking. *See id.* at 421. More representative regulatory takings cases demonstrate the truth of this proposition. *See, e.g.*, Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 138 (1978) (holding that the denial of a building permit did not destroy all the beneficial economic use of the plaintiffs' parcel as a whole).

249 *See, e.g.*, Concrete Pipe & Prods. Inc. v. Construction Laborers Pension Trust, 508 U.S. 602, 644 (1993) ("To the extent that any portion of property is taken, that portion is always taken in its entirety; the relevant question, however, is whether the property taken is all, or only a portion of, the parcel in question."). This opinion came after the Court's opinion in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).

250 *See Lucas*, 505 U.S. at 1016 n.7. However, this conclusion was unnecessary, because the taking in *Lucas* involved a complete confiscation of all the land in the suit, and thus amounted to a per se physical taking. *See id.*

market value of property without completely destroying any traditionally recognized discrete property interest. The Federal Circuit squarely confronted this very issue in *Florida Rock*.

In *Florida Rock*, the court approached the partial-takings question by dividing it into two sequential questions.[251] First, the court asked "whether a regnlation must destroy a certain proportion of a property's economic use or value in order for a compensable taking of property to occur."[252] Second, the court would decide, "in any given case, what that proportion is."[253] Despite Justice Scalia's *Lucas* dicta, the Federal Circuit found that the Supreme Court had not yet decided the first question and therefore had no opportunity to consider the second.[254] The court began by analogizing partial regulatory takings to physical takings claims[255] and asserted that courts have always held physical takings—no matter how functionally insignificant—to be compensable takings.[256] The Supreme Court has found, for instance, that government action resulting in a "relatively minor physical occupation[ ]" constitutes a compensable taking.[257] Economic harm in those cases was minimal, but the Supreme Court does not consider the economic stakes if a takings claim involves an outright physical occupation.[258]

Given this liberal attitude, Judge Plager suggested in *Florida Rock* that regulatory takings are not theoretically different from physical takings and that the judicial reticence in recognizing partial-regulatory-takings claims stems from the fear of "the difficult line that has to be drawn between a partial regulatory taking and the mere 'diminution in value' that often accompanies otherwise valid regulatory impositions."[259] Judge Plager noted that in *Mahon*, Justice Holmes foreclosed future arguments that all regulatory diminutions in value constitute compensable takings.[260] Conversely, Judge Plager noted that to hold that none are compensable would conflict with consistent post-*Mahon* Supreme Court precedent.[261] Thus, when faced with a set of facts indicating that a federal regulation had somewhat diminished

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251 *See Florida Rock*, 18 F.3d at 1568.

252 *Id.*

253 *Id.*

254 *See id.* (noting that on the partial-regulatory-takings issue, "the Court's decisions to date have not provided an answer").

255 *See id.* at 1569.

256 *See id.*

257 *Id.* (citing, inter alia, Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982)).

258 *See, e.g., Loretto*, 458 U.S. at 426 (noting that "permanent physical occupation . . . is a taking without regard to the public interests that it may serve").

259 *Florida Rock*, 18 F.3d at 1569.

260 *See id.*

261 *See id.* at 1569-70 (citing First English Evangelical Lutheran Church v. Los Angeles County, 482 U.S. 304 (1987)).

the economic use value of the claimant's land, Judge Plager decreed that the court must determine whether the diminution "has crossed the line from a noncompensable 'mere diminution' to a compensable 'partial taking.'"[262] To answer the first question, the court must determine whether the regulation has destroyed a certain proportion of the property's value so as to constitute a partial taking. By adopting this conclusion, Judge Plager plainly followed Justice Scalia's suggestion in *Lucas* that a partial destruction in economic value may constitute a compensable taking.[263]

With regard to the second question in *Florida Rock* regarding what proportion effected a compensable taking, the court implicitly assumed that no bright-line percentage point triggered full compensation in every case.[264] Thus, the court rejected an absolutist approach and instead decreed that the courts resolve each case using an "essentially ad hoc factual inquir[y]."[265] Judge Plager had no concerns about courts engaging in future "ad-hocery."[266] Just as moderate diminutions in value might trigger compensation, substantial ones may be noncompensable. But how is one to draw the line? Judge Plager gave scant guidance as to what factors are relevant to this determination. His guidance to the Claims Court included: whether the regulation has benefited the claimant to such a degree as to offset the loss of value (a reciprocity of advantage);[267] whether the social benefits of the regulations are borne by the many, and the economic loss felt by the few;[268] and whether an alternative economic use could reasonably mitigate the economic use lost.[269] Ultimately, Judge Plager resorted to a vague standard of fairness, asking whether "the Government acted in a responsible way, limiting the constraints on property ownership to those necessary to achieve the public purpose, and not allocating to some number of individuals, less than all, a burden that should be borne by all."[270]

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262 *Id.* at 1570.

263 *See* Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1016 n.7 (1992).

264 *See Florida Rock*, 18 F.3d at 1570.

265 *Id.* (internal quotation marks omitted) (citation omitted). Elsewhere, Judge Plager said that "there simply is no bright line dividing compensable from noncompensable exercises of the Government's power when a regulatory imposition causes a partial loss to the property owner." *Id.*

266 *Id.* at 1571 ("[O]ur decision today continues the tradition of *ad hoc* judicial decisionmaking in this area.").

267 *See id.* ("[W]hen Government acts as the intermediary between private interests to provide a mutually beneficial environment from which all benefit and in which all can thrive, the shared diminution of free choice that results may not rise to the level of constitutionally required compensation.").

268 *See id.*

269 *See id.*

270 *Id.*

The Federal Circuit, as we have seen, had little difficulty identifying the 1560-acre parcel as the "bundle" that contained all of the pendant rights. Nor did the Federal Circuit hesitate to identify the affected right as the right to beneficial economic use. A consistent application of this reasoning should have led to the conclusion that, because the regulators had not drained all beneficial economic use from the bundle, there was not a taking, but rather a mere alteration.[271] Such a position would have articulated the doctrine that to constitute a taking, a property right—the right to exclude or the right to economically beneficial use—must be "significant" and the regulation must take that right in its entirety.[272] Instead, Judge Plager decreed that the "task" is to "resolv[e] when a partial loss of economic use of the property has crossed the line from a noncompensable 'mere diminution' to a compensable 'partial taking.'"[273] In other words, Judge Plager suggested that the abridgement of a particular right to use does not have to result in the taking of that entire right to be compensable.

However, focusing on this threshold obscures the fact that the Fifth Amendment requires the taking of "property," not a portion or part of property.[274] Yet the Federal Circuit barely addressed the question of whether the denial of a permit to mine the ninety-eight acres constituted a taking of property in its entirety. The court glibly disposed of this question in a footnote. The court wrote:

> Identification of a specific property interest to be transferred to the Government should pose little problem for property lawyers. Property interests are about as diverse as the human mind can conceive. Property interests may be real and personal, tangible and intangible, possessory and nonpossessory. They can be defined in terms of sequential rights to possession . . . and in terms of shared interests . . . . There are specially structured property interests . . . and there are interests in special kinds of things . . . .[275]

The phrase "as diverse as the human mind can conceive" is particularly revealing, for it indicates a willingness to accept seemingly any aspect of any owned thing as property for the purposes of the Takings Clause. The Federal Circuit thus appears open to novel property interests, limited only by the ability of the human mind to conceptually

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271 Judge Nies adopted this position in her dissent. *See id.* at 1573-81 (Nies, C.J., dissenting).

272 I do not endorse any particular right that I consider to be part of the bundle of rights. I only argue that the partial takings doctrine eviscerates any doctrinal utility from the bundle-of-rights picture, because it represents a judicial refusal to give a consistent and coherent meaning to that picture.

273 *Florida Rock*, 18 F.3d at 1570.

274 U.S. CONST. amend. V.

275 *Florida Rock*, 18 F.3d at 1572 n.32.

distinguish them. Apparently, the court believes that whatever the claimant has lost constitutes property; thus, the need to speculate as to the nature of the reduction in value or the importance of the impinged stick in the bundle should not exist.

In other words, in *Florida Rock*, the Federal Circuit seemed to adopt a conceptual-severance definition of property. Indeed, the identification of a particular property right that the regulation has abridged is somewhat irrelevant under Judge Plager's analysis. To Judge Plager, any increment of economic value can and should be characterized as property in the constitutional sense.[276] But if every increment of economic value is constitutional property, then why bother with the denominator problem at all? Indeed, why analyze the rights at issue in the bundle in the first place? Courts need only focus on compensating reciprocal benefits and determining the market value of the property. Moreover, because all value is property, a diminution of one dollar is as much a taking as a diminution of one million dollars, absent some additional doctrinal distinction.

The paradox of *Florida Rock*, however, is that the finding of a taking of a property interest, as defined by the diminution, does not automatically guarantee compensation, as it would have for a true conceptual-severance adherent. Following *Florida Rock*, a claimant could lose an entire stick out of the bundle of rights, yet that stick might not justify compensation.[277] Ironically, the crux of the *Florida Rock* analysis is the economic relationship of the stick to the bundle and the economic relationship of the regulation to the claimant.[278] Thus, the case transformed the constitutional question of property takings into a cost-benefit analysis.

Ultimately, the Federal Circuit's decision lessens the import of a finding of a taking of a discrete property interest, for it states that abstract property interests do not necessarily deserve protection from government interference. The finding of a taking in *Florida Rock* did not depend on whether the property interest at issue was wholly taken, for the court could rationalize any loss of marginal value under the principle of reciprocal advantage. If the court determines that a reasonable economic alternative exists, then even the taking of all the mining rights of a whole parcel of land will not constitute a taking, because the denial of one economic use of land is not unjust when

276 *See id.* at 1572 ("The dissent is concerned that what is being taken is 'value,' not property. In fact, in a regulatory context such as this it is both.").

277 This result squares with the Supreme Court's decision in *Andrus v. Allard*, 444 U.S. 51 (1979), in which the Court found that a government prohibition of the sale of bald eagle parts did not constitute a taking, because it represented only one stick in the bundle. *See id.* at 65.

278 *See Florida Rock*, 18 F.3d at 1567-71.

others are available. The Federal Circuit thus seems to have only partially accepted conceptual severance.

Clearly, the Federal Circuit believed that any adverse economic effects of federal regulation could legitimately constitute the total loss of a property interest.[279] But the court also implicitly held that this rule does not reflect the meaning of the constitutional mandate: "nor shall private property be taken for public use."[280] Professor Radin feared that courts might couple the clear language of the Fifth Amendment with the conceptual-severance doctrine so that all regulations with adverse economic impacts would be compensable.[281] This approach would seem to be the logical outcome of characterizing all economic losses as total deprivations of property. By forgoing this result, however, Judge Plager adopted an uncertain approach to the Takings Clause. The Federal Circuit apparently reads the Takings Clause as protecting citizens from arbitrary and capricious deprivations of property allowing them to pursue their private interests without the fear of unreasonable governmental interference.[282] Eschewing formal criteria for the terms "property" and "takings," the court looked to the foundational justifications of the Takings Clause in fairness and economic equity.

Finally, the *Florida Rock* court interpreted the constitutional requirement of compensation for regulatory takings of property as simply one of economic equity. The central inquiry is not whether a regulation has impugned a property interest (let alone which property interest), but rather whether the regulation has threatened private economic expectations. Therefore, the property that the Fifth Amendment protects is not property in the classic Blackstonian sense—the taking of a whole thing—or even the Hohfeldian sense of abstract property rights, but rather raw economic use value as determined by pre- and postregulation market value. The upshot is less of a redefinition of property in terms of conceptual severance, but more of a redefinition as economic expectancy interests. Thus, one can always formally find a property interest in the historical sense of, say, a negative easement in land, but such a finding is not legally essential,

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279 *See id.* at 1568-70.

280 U.S. CONST. amend. V.

281 *See* Radin, *supra* note 24, at 1677-78.

282 *See Florida Rock*, 18 F.3d at 1571 ("The Government, in a word, must act fairly and reasonably, so that private parties can pursue their interests."). Many commentators have noted that the approach of the court after *Lucas* has been to examine the fairness of imposing burdens on a few property owners for benefits that accrue to society as a whole. *See, e.g.*, Roger J. Marzulla & Nancie G. Marzulla, *Regulatory Takings in the United States Claims Court: Adjusting the Burdens That in Fairness and Equity Ought to Be Borne by Society as a Whole*, 40 CATH. U. L. REV. 549, 563-66 (1991) (arguing that the Claims Court looks to factually specific equity issues in determining if a taking has occurred).

for the Fifth Amendment contemplates property as a quantum of economic value.

CONCLUSION

The Federal Circuit opinions in *Loveladies* and *Florida Rock* present conflicting approaches towards determining what constitutes property for the purposes of the Takings Clause. *Loveladies* provides concrete and objective factors to consider when identifying both the size of the bundle of rights and the specific rights within the bundle. *Florida Rock*, on the other hand, undermines those efforts by characterizing all economic value as constitutional property through the doctrine of partial takings. This property-as-value theory is, in effect, an abandonment of the conception of property as a bundle of rights. It renders the size of the bundle irrelevant to a determination of a taking and bypasses the need to identify whether the offending government regulation has completely taken a particular right. While the Federal Circuit apparently believes that it can give more objective meaning to the bundle-of-rights metaphor by recourse to state law and reasonable expectations, such criteria provide little help to judges when drawing the line between those partial takings that are compensable and those that are not. The result may be a conception of constitutional property more radical than conceptual severance, one wherein any diminution in value is a compensable taking.

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