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COMMENTS

REGULATORY TAKINGS: THE SEARCH FOR A DEFINITIVE STANDARD

Page Carroccia Dringman

Freedom and property rights are inseparable, you cannot have one without the other.

George Washington

I. INTRODUCTION

Few areas of property law engender as much confusion and controversy as takings law.\(^1\) Takings jurisprudence involves the attempts of courts and legislatures to reconcile the competing interests of individual property rights and government police powers. Both the United States and Montana Constitutions contain Takings Clauses which essentially state that private property cannot be taken for the benefit of the public unless compensation is paid.\(^2\) Despite the constitutions’ seemingly straightforward language, courts have been unable to formulate fundamental principles to govern takings cases. Statements by the United States Supreme Court that Takings Clause analysis is admittedly “ad hoc” and inconsistent illustrate this difficulty.\(^3\) However, the Supreme Court has, in part, identified factors that provide a clear standard for takings analysis.\(^4\) Courts must definitively determine and consist-

\(^1\) “‘Taking’ is a term of art with respect to the constitutional right to just compensation and does not necessarily mean the actual and total conversion of the property.” See David A. Goldman, Inverse Condemnation: A Remedy for Unreasonable Zoning of Property, 70 Mich. B.J. 313, 315 (1991).


\(^4\) See infra text accompanying notes 54-76.
ently apply these factors as part of a coherent takings analysis.

Until state and federal courts clearly define and rigorously apply takings guidelines, conflicts between property owners and government entities will continue to mount. Increased land-use regulations, a result of a growing population and increasing environmental activity, contribute to the conflict between property owners and government entities. Many of these land-use regulations constrain private use and diminish private ownership of property.

The direction of state land-use regulation is important because the United States Supreme Court recently stated that the Court will look toward state law for the protection of property owners' rights. Montana courts and the Montana Legislature should clarify the protection of property owners' rights. In fact, many states now are heightening their focus on individual rights, including property owners' rights. Montana, among other states, has unique language in its Takings Clause that conceivably gives greater protection to the rights of property owners than does the federal constitution.

This Comment explores and compares the relationship between Montana and federal takings law and proposes that Montana adopt a stricter takings standard. The proposed standard is based on a compilation of recent United States and Montana Su-

5. In early 1993, approximately 120 to 150 takings cases were pending before the United States Court of Federal Claims, compared to 52 in 1991. Florence Williams, Landowners Turn the Fifth into Sharp-pointed Sword, HIGH COUNTRY NEWS, Feb. 8, 1993, at 11.

6. "In 1990 alone, the federal government issued more than 63,000 pages of new, revised, and proposed administrative regulations." Mark L. Pollot, The Forgotten Civil Right, STEWARDS OF THE RANGE, Jan. 1993, at 4. This figure does not take into account state and local ordinances and regulations. Id.

7. Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2894 n.7 (1992). In the discussion of property rights, people often forget that the takings issue actually involves a constitutionally guaranteed individual liberty.


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preme Court decisions,\textsuperscript{11} the Montana Constitution,\textsuperscript{12} and state and federal legislation.\textsuperscript{13} This Comment is divided into five parts. Part II provides an historical background of the federal Takings Clause and federal takings law. Part III discusses how Montana courts have interpreted the federal and Montana Takings Clauses and illustrates the difficulties raised by the lack of a definitive standard. Part IV suggests that a logical three-part standard derives from takings cases, as evidenced by the recent United States Supreme Court case, \textit{Lucas v. South Carolina Coastal Council}.\textsuperscript{14} The development of a coherent federal takings analysis likely will not occur in the near future. Part V, therefore, looks at state efforts to increase the protection of property owners' rights through existing doctrines, state constitutional clauses, and legislation. This Comment concludes by suggesting that Montana employ similar efforts to develop concise takings guidelines that protect and clarify the rights of property owners.

II. BACKGROUND OF THE FEDERAL TAKINGS CLAUSE AND FEDERAL TAKINGS LAW

The original intent of the Framers of the United States Constitution when drafting the Takings Clause remains elusive.\textsuperscript{18} Courts frequently fail to address the original meaning of the Takings Clause and the principles that should govern its interpretation. A brief review of the history of the Takings Clause and the United States Supreme Court's application of the clause supports this contention.


\textsuperscript{12} MONT. CONST, art II, § 29.


\textsuperscript{14} 112 S. Ct. 2886.

\textsuperscript{15} Compare Frank Michelman, \textit{Takings}, 1987, 88 COLUM. L. REV. 1600, 1627-29 (1988) (arguing that classical notions of property are tokens or formalities that cannot be reconciled with dynamic, modern notions of property) \textit{with Richard A. Epstein, Takings: Private Property and the Power of Eminent Domain} 108-12 (1985) (arguing that the United States Supreme Court's interpretation of the public use requirement in takings law negates one of the key structural requirements envisioned in the Takings Clause) and Douglas W. Kmiec, \textit{The Original Understanding of the Takings Clause is Neither Weak nor Obtuse}, 88 COLUM. L REV. 1630, 1666 (1988) (disputing Michelman’s reasoning and arguing that the fact that the Takings Clause does not "supply a remedy for every legislative redefinition of property hardly can be seen as a constitutional failure").

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Property rights historically have been accorded great protection and have been a cornerstone in the development of this nation. The traditional principle at common law was that one could freely enjoy one's property unless the use injured or damaged one's neighbor. Blackstone defined an individual's property right as including "the free use, enjoyment and disposition of all his acquisitions without any control or diminution, save only by the laws of the land."17

The Framers incorporated common law, the English doctrine of eminent domain, and their fears of a strong central government in the Fifth Amendment of the United States Constitution. Even before the Constitution, American government promoted natural rights, limitations on government, and an inherent right to due process and compensation. James Madison incorporated these concepts into the Constitution when drafting the Takings Clause. However, Madison also incorporated Blackstone's definition of an individual's property right and specifically excluded uses


A second [fallacy] is "human rights, not property rights." Are these rights in any way inconsistent or mutually destructive? Is not the right to have and be protected in property a valuable "human right"? Are not those rights mutually consistent and even dependent? Any thoughtful observation of history will reveal that, where private property rights have not been respected and protected, there has not been what we call "human rights." Private-property rights are the soil in which our concept of human rights grows and matures. As long as private-property rights are secure, human rights will be respected and will endure and evolve.

Id. at 12 (citing Justice Charles E. Whittaker, Return to Law, or Face Anarchy (1966)).

"Next to the right of liberty, the right of property is the most important individual right guaranteed by the Constitution and the one which, united with that of personal liberty, has contributed more to the growth of civilization than any other institution established by the human race." Id. at 11 (citing William H. Taft, 27th President of the United States (1906)).

"That government can scarcely be deemed to be free where the rights of property are left solely dependent upon the will of a legislative body without any restraint." Id. at 12 (citing Wilkinson v. Leland, 27 U.S. (2 Pet.) 627, 657 (1829) (Story, J.)).

"The moment the idea is admitted into society that property is not as sacred as the laws of God, and there is not force of law and public justice to protect it, anarchy and tyranny commence." Id. at 11 (citing John Adams, 2d President of the United States (1821)).

17. 2 William Blackstone, Commentaries *134.

18. "Eminent domain" is the power of the state to take private property for certain limited public purposes provided, however, that the property owner receives compensation. See Black's Law Dictionary 523 (6th ed. 1990).

19. See, e.g., The Federalist No. 84 (Alexander Hamilton).

of property that harmed others. Thus, Madison's original bill of rights recognized the concept of eminent domain and its limitations. Eighty years later, the drafter of section 1 of the Fourteenth Amendment, John Bingham, reflected the prevalent view of the times:

[T]he absolute equality of all, and the equal protection of each, are principles of our Constitution. . . . It protects not only life and liberty, but also property, the product of labor. It contemplates that no man shall be wrongfully deprived of the fruit of his toil any more than of his life.

Historical precedent supports the argument that the Framers had great regard for individual property rights and sought to protect those rights when drafting the Fifth and Fourteenth Amendments. However, the Framers obviously could not address all the specific questions and issues that would result from varying interpretations of the Takings Clause. Courts were left to resolve those questions.

B. Federal Takings Law

Under the aegis of police power, the government may regulate its people’s property for the protection of the public’s health, safety, and welfare. If regulations are so restrictive as to constitute a “taking,” the property owner may bring suit under the theory of inverse condemnation. Inverse condemnation is a taking of private property for a public use without the commencement of a condemnation proceeding, but title does not pass to the government. When analyzing inverse condemnation cases, courts use a

22. “No person shall be obliged to relinquish his property, where it may be necessary for public use, without a just compensation.” 1 ANNALS OF CONG. 433-36.
23. Pollock, supra note 20, at 48 (citation omitted).
26. See United States v. Clarke, 445 U.S. 253, 257 (1980) (defining inverse condemnation as “a ‘cause of action against a governmental defendant to recover the value of property which has been taken in fact by the governmental defendant, even though no formal exercise of the power of eminent domain has been attempted by the taking agency’”) (quoting D. Hagman, URBAN PLANNING AND LAND DEVELOPMENT CONTROL LAW 328 (1971)). The Court in Clarke went on to state that: “A landowner is entitled to bring such an action as a result of ‘the self-executing character of the constitutional provision with respect to compensation.’” Id. (citation omitted).
two-pronged takings analysis: (1) whether government regulation exceeds police power limitations and (2) whether the regulation, even if a valid exercise of police power, constitutes a taking.27 Courts, however, have been unable to develop consistent tests to address this analysis.

This two-pronged takings analysis stems from a confusing and complex background of federal takings law. Although the notion of eminent domain pre-dates the United States Constitution,28 takings law actually evolved from due process and natural law.29 While pre-1920 cases discussed the taking of private property, they did so in light of due process and natural law theories.30

The late 1800s saw the gradual decline of the protection of property rights. The courts began to shift their focus from individual rights to states' rights which contributed to the confusion over takings law.31 Until 1872, the courts extended significant protection to property rights and distrusted legislative power.32 As the United States Supreme Court observed in Wilkinson v. Leland:

[F]undamental maxims of a free government seem to require, that the rights of personal liberty and private property should be held sacred. At least no court of justice in this country would be warranted in assuming, that the power to violate and disregard them; a power so repugnant to the common principles of justice and civil liberty; lurked under any general grant of legislative authority, or ought to be implied from any general expression of the will of the people. The people ought not to be presumed to part with rights so vital to their security and well being.33

Beginning with the Slaughter-House Cases, in 1872, the judi-
ciary began to afford substantially less protection to individual rights, including property rights, in favor of states' rights. Although property owners still enjoyed some protection, the *Slaughter-House Cases* initiated the era of "substantive due process," which in theory gave greater protection to private property. Ultimately, however, the era resulted in the decline of personal property rights and the rise of states' rights.

Regulatory takings—inverse condemnation—gained recognition only after 1920. The application of the Fifth Amendment's Takings Clause, as a fundamental precept governing inverse condemnation, dates back to *Pennsylvania Coal Co. v. Mahon.* The Mahons originally brought suit against Pennsylvania Coal Company (the Company) to prevent the Company from mining under the Mahons' property causing the surface of Mahons' land to cave in. The Company originally had deeded the property to the Mahons but reserved the right to remove the coal. The Mahons argued that the Kohler Act, which purported to protect the lives and safety of the public by regulating the mining of coal, prohibited the Company from mining under the Mahons' property. The Supreme Court of Pennsylvania found that the Kohler Act was a valid exercise of police power. Justice Holmes, in delivering the opinion of the United States Supreme Court, however, reversed and held that "the right to coal consists in the right to mine it." The Court found that the Kohler Act made it commercially impractical to mine coal, which effectively resulted in the appropriation of private property. The general rule from *Mahon* states that "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." After *Mahon,* courts have attempted to clarify regulatory takings by defining regulations that go "too far." The attempt to de-

34. 83 U.S. (16 Wall.) 36 (1872) (upholding an act of the Louisiana Legislature that granted a 25-year monopoly over the slaughter-house industry to a state-created corporation).

35. The *Slaughter-House Cases* marked the beginning of the Lochner era. This era provided the foundation for a determination of rights, known as "tiering," based upon whether they were deserving of strict protection (fundamental rights) or only minimum protection (non-fundamental rights). POLLOT, supra note 20, at 51.

36. 260 U.S. 393 (1922).


38. Id.

39. Id.

40. Id.

41. Id. at 414.

42. Id. at 414-15.

43. Id. at 415 (emphasis added).
fine what is "too far" has led to the second prong of the takings analysis: Whether the regulation, even if a valid exercise of police power, constitutes a taking.44

Courts have identified, but inconsistently applied, two tests to assist in takings analysis: (1) the rational basis (also called means-ends) test for the first prong of the takings analysis45 and (2) a multi-factor balancing test for the second prong of the takings analysis.46 These tests derive from United States Supreme Court decisions, but are haphazardly applied.

1. The Rational Basis Test

The rational basis test arose during the turn of the century, the era of substantive due process.47 This era provided the foundation for a determination of rights known as "tiering." The rational basis test requires only that a government regulation reasonably advance a legitimate state interest.48

44. *Id.* Mahon is the leading case for this proposition.
45. See infra text accompanying notes 47-60.
46. See infra text accompanying notes 61-70.
48. Agins v. City of Tiburon, 447 U.S. 255, 260 (1980) (setting forth a two-pronged test that a land use regulation effects a taking if it fails to substantially advance a legitimate state interest or "denies an owner economically viable use of his land"). Note that the Court used "substantially advance" but merely applied a reasonable or rational basis test. A number of commentators refer to this test as the "means-ends" test. See, e.g., Kmiec, supra note 15. However, all tests are means-ends tests. "Tiering" is a form of definitional balancing used in constitutional adjudication that "directs a review of government purposes and describes the corresponding burden of persuasion" for certain rights. David L. Faigman, Reconciling Individual Rights and Government Interests: Madisonian Principles Versus Supreme Court Practice, 78 VA. L. REV. 1521, 1521 (1992). Rights at the core of a constitutional clause require a court to strictly scrutinize the regulation to determine if the regulation is necessary to accomplish a compelling government interest. Rights at the "periphery" of a constitutional clause require only that the regulation is rationally related to a legitimate government interest. Certain rights that fall between the core and the periphery of a constitutional clause require an intermediate level of scrutiny: that the regulation substantially advance an important government interest. *Id.* at 1522-23. Property rights are recognized in the Constitution as fundamental rights. Thus, the application of a rational basis test to property rights is contrary to the tier scheme. Courts, however, consistently misapply or misconstrue the tier scheme with relation to property rights. See the Montana Supreme Court's enunciation of a takings test discussed *supra* at text accompanying note 146. Although incorrect, the courts' application of this test generally requires a rational basis for government action; therefore, this Comment refers (unwillingly) to the test as a rational basis test. In a recent case claiming equal protection under the Fifth Amendment, Justice Thomas's majority opinion demonstrates just how minimal the requirements are for the rational basis test: "[*A*] statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection
Consistent with the rise of states' rights, courts almost without exception have favored governmental regulation over property rights. The majority of cases decided under the rational basis test during this period addressed zoning laws and public nuisance prevention. Not only were most regulations upheld as a valid exercise of police power, but the Supreme Court also refused to compensate the landowners. In fact, the application of a rational basis test resulted in a "rubber stamp of approval" for governmental police power regulations.

_Nollan v. California Coastal Commission_ signaled the United States Supreme Court's movement away from a "rubber stamp" or superficial application of the rational basis test to a more rigorous standard of review. The Supreme Court made clear that the mere assertion of a public purpose would not justify a governmental taking. Rather, the Court closely reviewed both the means used and whether the regulation bore a substantial relation...
to a legitimate state interest. Moreover, the Court held that a nexus must exist between the declared governmental purpose and the regulation's impact upon the individual.

In holding that the Coastal Commission did not prove the existence of a nexus between the regulation and a legitimate governmental purpose, the Court demonstrated its willingness to strictly apply the rational basis test. In *Nollan*, the Court struck down a regulation requiring the owner of a lot along the California coast to grant the public an easement to walk along the shore as a condition to obtaining a permit to construct a house on the lot. Important in the *Nollan* decision was the Court's refusal to uphold the Coastal Commission's conclusion that the regulation was sufficiently related to its goal of allowing the public easy access to beaches. This decision marks the first time, in takings law, that the Court imposed any actual burden of proof on a government agency. Justice Scalia, writing for the majority, stated "[w]e view the Fifth Amendment's Property Clause to be more than a pleading requirement, and compliance with it to be more than an exercise in cleverness and imagination."

2. The Multi-factor Balancing Test

The second level of the analysis, the determination of when a regulation has gone so far that it constitutes a taking, requires a court to employ the multi-factor balancing test. The multi-factor balancing test requires that courts evaluate the effect of regulations on private property. Even if a court determines a regulation to be a valid exercise of police power, the regulation may still result in a taking of private property. The multi-factor balancing test derives from *Penn Central Transportation Co. v. City of New York*. In *Penn Central*, the Court recognized that no set formula existed for determining when a taking occurred. However, the Court did identify a number of significant factors, drawn from

56. *Id.* at 840-41. Note that the Court employed the mid-level tier of constitutional analysis. *See supra* text accompanying note 48.

57. *Id.* at 841 (holding that "[t]he Commission may well be right that [the easement] is a good idea, but that does not establish that the Nollans (and other coastal residents) alone can be compelled to contribute to its realization").

58. *Id.* at 838-41.

59. *Id.* at 838-39. Justices Brennan, Blackmun, and Marshall decried the majority's decision, with Justice Blackmun stating that a "[s]tate's exercise of its police power need be no more than rationally based." *Id.* at 865.

60. *Id.* at 841.

other cases.\textsuperscript{62} The factors include: (1) economic impact of the regulation, (2) character of the government action, (3) investment-backed expectations, and (4) offsetting reciprocal benefits.\textsuperscript{63} Applying these factors, the Court sustained New York City's Landmarks Preservations Law against a takings challenge, and the multi-factor balancing test became the focus of takings jurisprudence.\textsuperscript{64}

A few years later, the Court used the \textit{Penn Central} multi-factor balancing test in \textit{Keystone Bituminous Coal Ass'n v. DeBenedictis},\textsuperscript{65} a case factually similar to \textit{Pennsylvania Coal v. Mahon}. At issue was whether the Subsidence Act, which prevented the mining of coal under certain properties, was a legitimate advancement of the state's interest in protecting the public health, safety, and welfare.\textsuperscript{66} In applying \textit{Penn Central}'s balancing factors and upholding the Act, the Court said that: (a) "the character of the governmental action . . . leans heavily against finding a taking," (b) petitioners present no evidence that the regulations "make[] it impossible . . . to profitably engage in their business," and (c) the Act does not result in "undue interference with their investment-backed expectations."\textsuperscript{67} Nevertheless, the Court carefully avoided overruling \textit{Mahon}.\textsuperscript{68} Instead, the Court found the Subsidence Act affected only "one strand in the bundle of property rights" and was narrower in application than the Kohler Act.\textsuperscript{69}

The \textit{Penn Central} factors have been the basis of takings analysis in other recent Supreme Court cases.\textsuperscript{70} Unfortunately, however, the Court's application of these factors is often quite superficial.\textsuperscript{71} In fact, the Supreme Court has been reluctant to protect

\textsuperscript{62} \textit{Penn Central}, 438 U.S. at 123-28.
\textsuperscript{63} Id. at 124; see also \textit{Loretto v. Teleprompter Manhattan CATV Corp.}, 458 U.S. 419, 426 (1982).
\textsuperscript{64} \textit{Penn Central}, 438 U.S. at 128-38.
\textsuperscript{65} 480 U.S. 470, 485 (1987).
\textsuperscript{66} \textit{Keystone}, 480 U.S. at 486.
\textsuperscript{67} Id. at 485.
\textsuperscript{68} Id. at 484.
\textsuperscript{69} Id. at 497 (citing \textit{Andrus v. Allard}, 444 U.S. 51, 65-66 (1979)). See supra text accompanying notes 39-42 (discussing the Kohler Act).
\textsuperscript{71} \textit{See Mahon}, 260 U.S. at 417 (Brandeis, J., dissenting); see also \textit{Williamson Co. Regional Planning Comm'n v. Hamilton Bank}, 473 U.S. 172, 191-200 (1985) (declining to address whether land use regulations constitute a taking even though the jury concluded that the property owner was denied any economically viable use of his land). But see \textit{Loretto v. Teleprompter Manhattan CATV Corp}, 458 U.S. 419, 441 (1982) (holding that physical installation of television cables on an apartment building is a taking because a permanent physical occupation occurred). See generally \textit{Agins v. City of Tiburon}, 447 U.S. 255 (1980) (concluding that a change in a zoning ordinance which prohibited high-density development and injured property owners' investment-backed expectations by two million
property rights beyond bare physical possession. Although often phrased differently, the factors set forth in *Penn Central* remain the principal considerations in regulatory takings analysis.

Even after seventy years of regulatory takings law, cases are still decided on an ad hoc factual inquiry. Although no definitive standard has emerged, a few rules exist. A regulation is not a taking if the regulation prevents a nuisance or a public danger. A regulation is not a taking unless the regulation (a) requires a physical invasion or occupation of the property, (b) leaves the owner with no economically viable use, or (c) entirely divests the owner of the right to dispose of the owner's property. In most other instances, the courts will employ a *Penn Central* analysis.

A recent Supreme Court decision, *Lucas v. South Carolina Coastal Council*, focused renewed attention on the takings law debate. Since 1987, the Supreme Court has moved toward a return to a rigorous review of governmental regulation and demonstr-
strated a willingness to shift the burden of proof in the first prong of the takings analysis to the government. With *Lucas*, the Court accentuates the precedential value of both *Nollan* and *Penn Central*.

### III. MONTANA TAKINGS LAW

Until recently Montana has analyzed the taking of private property under either due process or the Takings Clause. Like their federal counterparts, Montana courts seldom resolve claims brought under due process in favor of the property owner. More recently, federal and Montana courts have used both the rational basis and multi-factor balancing tests in takings analysis. Occasionally, the Montana Supreme Court has recognized the "or damaged" language in Montana's constitution when analyzing takings cases.

#### A. Due Process

The Montana Supreme Court uses a rational basis test in most claims brought under the Due Process Clause. Like the United States Supreme Court, the Montana Supreme Court has upheld legislative enactments if any rational basis for them exists. In *Billings Properties, Inc. v. Yellowstone County*, the court stated that "[a]n act of the legislature is presumed to be valid; every intendment is in favor of upholding its constitutionality; it will not be condemned unless its invalidity is shown beyond a reasonable doubt." However, in the same case, the court also found that laws enacted under the guise of police power are subject to review under both the state and federal constitutions and are "always subject to judicial scrutiny."

79. See * supra text accompanying notes 54-60.*
80. See * infra text accompanying notes 84-97.*
81. See * infra text accompanying notes 84-89.*
82. See * infra text accompanying notes 113-32.*
83. See *Knight v. City of Billings, 197 Mont. 165, 172, 642 P.2d 141, 145 (1982); Less v. City of Butte, 28 Mont. 27, 32, 72 P. 140, 141 (1903).*
84. See, e.g., *Yellowstone Valley Elec. Coop., Inc. v. Ostermiller, 187 Mont. 8, 16, 608 P.2d 491, 496 (1980); Billings Properties, Inc. v. Yellowstone County, 144 Mont. 25, 28-33, 394 P.2d 182, 184-87 (1964); Gas Prods. Co. v. Rankin, 63 Mont. 372, 392-95, 207 P. 993, 998-99 (1922).*
86. *Id. at 31, 394 P.2d at 186* (citations omitted) (holding that a statutory requirement that a developer dedicate land for a school and park does not contravene the provisions of art. III, § 14 of the 1889 Montana Constitution or the Fourteenth Amendment of the United States Constitution).
When addressing a due process claim brought under the Fourteenth Amendment in a case more appropriately analyzed as an easement issue than a takings issue, the Montana Supreme Court, nevertheless, indicated that the validity of the regulation was determinative. In *Yellowstone Valley Electric Cooperative, Inc. v. Ostermiller*, the Cooperative brought suit alleging that a statute requiring utilities to raise or remove their transmission lines for the moving of heavy equipment and oversized loads resulted in a taking of their property. The court held that the statute was a valid exercise of police power, aimed at protecting the public health, safety, and welfare, and not a taking in any traditional sense. The court further held that when exercising police power, Fourteenth Amendment due process requirements do not require just compensation.

### B. The Takings Clause

Although Montana courts engaging in Takings Clause analysis employ both the rational basis and multi-factor tests of federal takings law, the distinction between the two tests is not as well-defined in Montana takings case law. The Montana Constitution's Takings Clause is more protective of property rights than federal takings law because of the "or damaged" language. In cases where regulation is excessive or an appropriation of property amounts to a taking or deprivation of property for public use, the Montana Supreme Court has stated that compensation is due. Claims brought under the Takings Clauses alleging inverse condemnation have more often resulted in favorable decisions for property owners. For example, in 1971 the City of Three Forks brought an inverse condemnation action against the Highway Commission alleging that the Highway Commission took property belonging to the City. The State contended that either the prop-

87. *Yellowstone Valley Elec.*, 187 Mont. at 10, 608 P.2d at 491.
88. *Id.* at 14, 608 P.2d at 495.
89. *Id.* at 13, 608 P.2d at 494.
90. MONT. CONST. art. II, § 29.
92. U.S. CONST. amend. V; MONT. CONST. art. II, § 29. The plaintiff brings suit under either or both of these constitutional amendments as opposed to a due process claim under the Fourteenth Amendment. See, e.g., *City of Three Forks v. Montana State Hwy. Comm’n*, 156 Mont. 392, 480 P.2d 826 (1971).
93. See infra text accompanying notes 94-112.
94. *City of Three Forks*, 156 Mont. 392, 480 P.2d 826. Three Forks had slated the property for a sewage disposal site, and the Highway Commission appropriated the land for the construction of an interstate highway. The construction of the highway resulted in the taking of 2.05 acres of a 2.66-acre site. *Id.* at 393-94, 480 P.2d at 827.
Property was public property and therefore no compensation was required or, alternatively, that the State's action sounded in eminent domain, and the City was only entitled to the fair market value of the acreage. 95

The court held that Article III, Section 14 of the Montana Constitution applied because the City of Three Forks and its citizens owned the land, not the State of Montana or the federal government. 96 Further, in discussing whether the State's action sounded in eminent domain, the court held:

When the State takes private property for a public use without just compensation having first been paid, the State has exercised its governmental power without proceeding in accordance with the procedure required by law. "The effect of (Article III, § 14) is to waive immunity of the state where private property is taken or damaged for public purposes." 97

1. "Or Damaged" Language

Montana's Takings Clause differs from the Takings Clause in the United States Constitution. The Montana Constitution provides that property shall not be taken or damaged for public use without just compensation. 98

Although the United States Supreme Court still struggles with the theory of inverse condemnation without physical invasion of the property or total elimination of its economic value, Montana courts recognized that such a claim could be brought as early as 1903. 99 In Less v. City of Butte, the Montana Supreme Court recognized the significance of the words "or damaged" in the Montana Constitution 100 and held:

[T]his section was drafted in the broad language stated for the express purpose of preventing an unjust or arbitrary exercise of the power of eminent domain. . . . Constitutions which provide that "private property shall not be taken for public use without just compensation" are but declaratory of the common law. . . . Under constitutions which provide that property shall not be

95. Id. at 395-98, 480 P.2d at 828-29. The State assessed the value at $532, while the mayor of the City testified that the value of the land was $85,000—the value the land had as a sewage plant. Id. at 394, 480 P.2d at 827.
96. Id. at 395-96, 480 P.2d at 828.
97. Id. at 399, 480 P.2d at 830 (citing 3 Nichols' on Eminent Domain 11, n.15.1). Eminent domain is a subset of, and one of the foundations for, takings law. See supra notes 18-19 and accompanying text.
99. See Less v. City of Butte, 28 Mont. 27, 72 P. 140 (1903).
"taken or damaged" it is universally held that "it is not necessary that there be any physical invasion of the individual's property for public use to entitle him to compensation."\footnote{101}

While no federal court has explicitly held that a partial (not temporary) loss in value is compensable, the Montana Supreme Court recently reaffirmed the \textit{Less} opinion.\footnote{102} \textit{Knight v. City of Billings} stands for the proposition that the court will compensate for a partial loss in value.\footnote{103} The Knights represented a group of property owners whose properties were subject to a zoning ordinance classifying their properties as residential.\footnote{104} After the City condemned property on the east side of the street to add a fifth lane and other improvements, the Knights petitioned the City council for a zoning change which would enable plaintiffs' properties to be classified "residential professional."\footnote{105} When the City denied their petition, the Knights brought suit alleging inverse condemnation of their properties.\footnote{106}

The City claimed that it was adapting to growth in making the improvements, and, therefore, it acted within its police power.\footnote{107} The district court found for the City and agreed that the ordinance and the denial of rezoning were valid exercises of police power.\footnote{108} The Montana Supreme Court, however, reversed the district court, holding that even a valid exercise of police power is not a complete defense to an inverse condemnation suit.\footnote{109} Furthermore, the court held that although no physical taking had occurred, the Knights and other plaintiffs suffered a twenty to thirty percent reduction in their property values, and "the result of the City's action had been to impose a servitude, a limitation upon the use and marketability

\footnotetext{101}{Less, 28 Mont. at 31-32, 72 P. at 141 (citation omitted).}\
\footnotetext{102}{Knight v. City of Billings, 197 Mont. 165, 172-73, 642 P.2d 141, 145 (1982).}\
\footnotetext{103}{Id. at 173-74, 642 P.2d at 145-46.}\
\footnotetext{104}{Id. at 166-67, 642 P.2d at 141-42.}\
\footnotetext{105}{Id. at 168, 642 P.2d at 142.}\
\footnotetext{106}{Id. at 168, 642 P.2d at 143. The plaintiffs' houses were no longer suitable for residential use because they had no free access into driveways, traffic accidents had occurred upon their properties, the sidewalks and front yards were not safe for children and pets, traffic noise was loud all night long, and the houses could not be ventilated from the east side because of dust and exhaust fumes. Id. at 169, 642 P.2d at 143.}\
\footnotetext{107}{Id. at 170, 642 P.2d at 144.}\
\footnotetext{108}{Id. at 170, 642 P.2d at 143.}\
\footnotetext{109}{Id. at 171, 642 P.2d at 144-45 (adopting the rule from Mattoon v. City of Norman, 617 P.2d 1347 (Okla. 1980), where an Oklahoma court said: "The defendant claims that the ordinance is a valid exercise of its police powers through zoning and cannot constitute a governmental 'taking' of property. This is not the law in Oklahoma. We have never held that a finding that the exercise of police power is valid absolutely precludes compensation for property taken or damaged by such exercise.").}
of plaintiffs' properties as residential."

In *Knight*, the Montana Supreme Court recognized that the theory of inverse condemnation could apply to a partial taking based upon the "or damaged" language of Montana's Constitution. The court cited *Less v. City of Butte* for the proposition that constitutional tests may differ depending upon whether the words "private property shall not be taken or damaged" or "private property shall not be taken" appear. The court further recognized the limits on governmental power, stating:

> It is a universal principle that wherever an individual's right of ownership of property is recognized in a free government, other rights become worthless if the government possesses uncontrollable power over the property of the individual. The constitutional guaranty of the right to own and use property is unquestioned. Thus the claim that particular action is taken under the police power cannot justify disregard of constitutional inhibitions.

Although the court infrequently invokes the "or damaged" language, this particular language could play a role in formulating a state interpretation of takings law. The Montana Supreme Court, however, has applied the "or damaged" language inconsistently, apparently preferring to concentrate its takings analysis on federal tests.

2. **Multi-Factor and Rational Basis Test**

Montana courts have experienced no more success than federal courts at formulating a definitive takings standard. However, in 1987 the Montana Supreme Court addressed the takings analysis in *Western Energy Co. v. Genie Land Co.* by combining both the rational basis test and the multi-factor balancing test. Although this case was decided immediately after the United States Supreme Court decision, *Keystone Bituminous Coal Ass'n v. DeBenedictis*, the Montana Supreme Court found *Pennsylvania Coal Co. v. Mahon* to control.

The regulation at issue in *Western Energy* was a statutory owner consent provision requiring the owner of the surface lands to consent to the entry onto the property and commencement of

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110. Id. at 173, 642 P.2d at 145.
111. Id. at 172-73, 642 P.2d at 145.
112. Id. at 172, 642 P.2d at 144 (quoting *Mattoon*, 617 P.2d at 1349).
115. *Western Energy*, 227 Mont. at 79, 737 P.2d at 481. *Keystone* and *Mahon* are factually similar yet the holdings are contrary.
strip mining operations by the owner of the mineral estate.\textsuperscript{116} Western Energy was the owner of the mineral rights, and Genie Land owned the surface rights. Genie Land denied Western Energy the right to enter the land, thus preventing Western from obtaining a permit to mine. Western Energy brought suit requesting that Genie Land and the Department of State Lands be enjoined from denying Western Energy the right to obtain a coal strip-mining permit and the right to enter lands to strip mine coal without further consent or waiver.\textsuperscript{117} Further, Western Energy requested that the court declare the owner consent provision unconstitutional.\textsuperscript{118}

First, the Montana Supreme Court questioned the validity of the regulation under the rational basis test. In analyzing this case, the court cited the prohibitions of both the Montana and United States Constitutions on the taking of property without due process.\textsuperscript{119} The court also said that "a police power regulation must injure or impair property rights only to the extent reasonably necessary to preserve the public welfare."\textsuperscript{120}

In applying the rational basis test, the court found that the owner consent statute did not bear a "substantial relation to the public health, safety, morals, or general welfare."\textsuperscript{121} The court said that the statute did not address any policy goal, did not prevent strip-mining operations, did not regulate reclamation, and did not conserve agricultural land.\textsuperscript{122} In short, the statute accomplished none of the goals supposedly necessary for preservation of the public welfare.

Second, the court applied part of the multi-factor balancing test to determine if a taking occurred. The court focused on the character of the action and the extent of interference with the

\textsuperscript{116} Id. at 75-76, 737 P.2d at 479-80; see also MONT. CODE ANN. § 82-4-224 (1991) (repealed 1993).
\textsuperscript{117} Western Energy, 227 Mont. at 75, 737 P.2d at 479.
\textsuperscript{118} Id. at 77, 737 P.2d at 480.
\textsuperscript{119} Id. In Western Energy the court looked at the following constitutional provisions: U.S. CONST. amend. V: "No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."; MONT. CONST. art. II, § 17: "No person shall be deprived of life, liberty, or property without due process of law."; MONT. CONST. art. II, § 29: "Private property shall not be taken or damaged for public use without just compensation to the full extent of the loss having been first made to or paid into court for the owner." Id.
\textsuperscript{120} Western Energy, 227 Mont. at 78, 737 P.2d at 481 (citing its adoption of the rational basis test from Lawton v. Steele, 152 U.S. 133, 137 (1894)).
\textsuperscript{121} Id. (citing Euclid v. Ambler Realty Co., 272 U.S. 365, 395 (1926)).
\textsuperscript{122} Id. at 79, 737 P.2d at 481 (finding, at most, a limited public interest protected by the statute).
rights in the entire property. Comparing Western Energy to Mahon, the court found that the owner consent provision, like the Kohler Act, deprived Western Energy of the right to mine coal.

Although Genie Land contended that Keystone Bituminous Coal Ass’n v. DeBenedictis controlled, the court distinguished Keystone on three grounds. First, Keystone found that coal mining, in certain circumstances, constituted a public nuisance. Yet, Montana does not characterize strip mining as a nuisance. Second, Keystone’s Subsidence Act applied to all minerals whether or not they had been severed from the surface estate. Montana’s owner consent provision, however, applied only to severed mineral rights. Finally, the plaintiffs in Keystone tried to define certain segments of their property and argued that the Subsidence Act appropriated coal in those segments. In Keystone, the United States Supreme Court held that the coal required to be left in place by the Subsidence Act was simply one strand in petitioners’ bundle of rights. Conversely, the Montana court refused to divide an individual’s property rights into segments for the purpose of determining whether a government action effected a taking.

The Montana Supreme Court recognizes the same general takings rules as the United States Supreme Court. Yet, the decisions in Knight and Western Energy indicate that the court would be more willing than the United States Supreme Court to declare regulations invalid or award compensation if a regulation should go “too far.” Therefore, the 1991 decision in McElwain v. County of

123. Id. at 81, 737 P.2d at 483 (quoting Penn Central, 438 U.S. at 130-31).
124. Id. at 79, 737 P.2d at 482. “What makes the right to mine coal valuable is that it can be exercised with profit. To make it commercially impracticable to mine certain coal has very nearly the same effect for constitutional purposes as appropriating or destroying it.” Mahon, 260 U.S. at 414.
125. Western Energy, 227 Mont. at 80, 737 P.2d at 482.
126. Id.
127. Id.
128. Id. at 81, 737 P.2d at 482-83.
129. Id. at 81, 737 P.2d at 482.
130. Keystone, 480 U.S. at 496.
131. Id. at 497 (citing Andrus v. Allard, 444 U.S. 51, 65-66 (1979)) (holding that where an owner possesses a full bundle of property rights, the destruction of one strand of the bundle is not a taking).
133. See the United States Supreme Court’s takings rules at supra notes 75-76 and accompanying notes.
Flathead\textsuperscript{134} was especially surprising because the court ignored its own prior decisions as well as recent federal precedent.

In 1979 Mary McElwain purchased fourteen acres along the Flathead River for the purpose of building a home in which to retire.\textsuperscript{136} Mrs. McElwain purchased property free and clear of restrictions which would have prevented its use for residential purposes. At the time of purchase, however, the property was subject to 1975 sanitation regulations requiring a 100-foot setback from the Flathead River, with no mention of a setback requirement from the 100-year floodplain.\textsuperscript{138} Neither Flathead County regulations nor state regulations would have prevented Mrs. McElwain from building her home on the site as originally contemplated.\textsuperscript{137}

Flathead County then subjected Mrs. McElwain’s property to a restriction which significantly impaired or eliminated the parcel’s value. In 1984 Flathead County adopted the Flathead County Flood Plain Regulations and Federal Emergency Management Area (FEMA) flood plain maps.\textsuperscript{138} Later that year, Mrs. McElwain applied for a permit to install a below-ground septic system to begin construction of her home, but the County denied her permit claiming that all of her property lay in or within 100 feet of the 100-year floodplain.\textsuperscript{139} The County later determined that her property suffered a reduction in value of $50,000. She then reapplied for the permit with a proposed drain field eighty feet from the floodplain and requested a twenty-foot variance, which the County subsequently denied.\textsuperscript{140} After appealing the denial of her variance request through the administrative process, she initiated a suit for inverse condemnation and requested compensation for a taking of her property.\textsuperscript{141}

The district court entered findings of fact that county regulations reduced Mrs. McElwain’s market value from $75,000 to $25,000, yet denied her claim for inverse condemnation.\textsuperscript{142} The dis-
strict court held that the regulations served a legitimate state interest, and, therefore, she was not entitled to compensation. Mrs. McElwain appealed to the Montana Supreme Court.

The Montana Supreme Court affirmed the district court's ruling. The court attempted to justify its claim that "reasonable" and "substantial" are interchangeable in the first prong of the takings analysis. The court, however, stated its intention to clarify the takings standard and enunciated the following test to determine whether a land use regulation is proper:

[W]hether the regulation is substantially related to the legitimate State interest of protecting the health, safety, morals, or general welfare of the public, and utilizes the least restrictive means necessary to achieve this end without denying the owner economically viable use of his or her land.

Although Mrs. McElwain did not contest the validity of the regulation, the Montana court predicated its decision, in large part, on the rule that legislative enactments are presumed to be valid. Additionally, the court found the County's testimony sufficient evi-
dence to find the regulations met the "substantial relation" prong of the test.148 Flathead County claimed that the floodplain regulations adopted after Mary McElwain purchased her lot advanced the legitimate state interest in public health.149 However, as stated in Justice Sheehy's dissent, the County could not point to a single scientific study that supported the setbacks, nor did EPA regulations mention floodplains in their setback requirements.150

Under a rigorous application of the rational basis test, as used in Western Energy151 or Nollan,152 the County would have the burden of proving the validity of the setback requirement. The Montana Supreme Court, then, should have strictly reviewed whether the setback requirement substantially advanced a legitimate state interest. The court neither required proof nor questioned the County's asserted means, instead reverting to "rubber stamp" notions of legitimacy.

Mrs. McElwain did not challenge the validity of the regulation; rather, she claimed that the regulation, even if a valid exercise of police power, still constituted a taking requiring compensation.153 However, the Montana Supreme Court did not satisfactorily address this question. Instead, the court concentrated on the validity of the regulation.154 In fact, the court summarily reviewed the question of compensation and effectively ignored cases recognizing that a valid regulation may still constitute a taking of private property requiring compensation.155

Apparently, the court decided McElwain on the basis of the legitimacy of the regulation because the multi-factor balancing test, applied by the court in previous cases, received little attention. The regulation's economic impact and interference with Mrs. McElwain's investment-backed expectations were substantial. She purchased the property intending to build a house for her retirement. Her property was not subject to regulations at the time of purchase. The district court found that the highest and best use of her property was for residential purposes. She suffered a 66.6 percent diminution in value.156 Mrs. McElwain had agreed to move

148. Id. at 237, 811 P.2d at 1271.
149. Id.
150. Id. at 240, 811 P.2d at 1273 (Sheehy, J., dissenting).
151. See supra text accompanying notes 119-22.
152. See supra text accompanying notes 54-60. This test is actually an intermediate level test. See supra text accompanying note 48.
154. Id. at 236-37, 811 P.2d at 1271.
155. Id.; see, e.g., First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304 (1987); Knight v. City of Billings, 197 Mont. 165, 642 P.2d 141 (1982).
156. See supra note 142 and accompanying text.

https://scholarship.law.umt.edu/mlr/vol55/iss1/9
her house much further back from the river if the county would be willing to grant a twenty-foot variance.\textsuperscript{157} Admittedly, the regulation may have resulted in greater benefits to the public; however, only Mrs. McElwain suffered the loss.

These cases demonstrate the haphazard application of the current takings analysis. The application of definitive standards or guidelines would prevent the type of debate engaged in by the Montana Supreme Court in \textit{McElwain} over the proper standard. Courts seem to arbitrarily decide when to demand substantial, minimal, or no justification for a regulation, when to defer to regulatory agencies, when to look at economic impact, and when to apply a balancing test. Although the fact-intensive nature of takings cases will always require some "ad-hoc" analysis, the lack of consistent guidelines results in severely disparate treatment.

IV. DEVELOPING AND APPLYING A DEFINITIVE TAKINGS STANDARD

A well-defined takings standard should answer three questions. Case law and considerations of constitutional review form the basis of all three questions as well as delineating the tests used in answering the questions. This section explores each in turn.

A. \textit{Does the Regulation Substantially Advance a Legitimate State Interest Through the Least Restrictive Means Necessary?}\textsuperscript{158}

This question is answered by applying an intermediate level test and requiring the government to bear the burden of proof.\textsuperscript{159} If the regulation does not substantially advance a legitimate state interest, then the regulation should be declared invalid and no takings issue exists. If the court determines that the regulation accomplishes its stated purpose through the least restrictive means necessary, then the court should proceed to the second question.

\textsuperscript{157} See supra text accompanying note 140.

\textsuperscript{158} This question derives, in part, from Agins v. Tiburon, 447 U.S. 255, 260 (1980). The question is actually a hybridization of the intermediate level (substantial relation) and the high level (compelling government interest through least restrictive means) standards of constitutional review. See supra text accompanying note 48. Property rights, as fundamental rights, should be reviewed only under the highest standard. However, that test would depart significantly from case law, and the author is advocating a stricter standard, while attempting to build on existing case law and history.

\textsuperscript{159} See Nollan v. California Coastal Comm'n, 483 U.S. 825, 838-39 (1987). In \textit{Nollan}, the Court employed this intermediate level of review.
B. Does the Regulation Deny an Owner All Economically Viable Use?\textsuperscript{160}

The answer to this question lies in the interpretation of "all economical use." For the sake of simplification, assume that "all" means ninety percent or more\textsuperscript{161} and "economical use" means the use which an owner currently makes of property or the purpose for which the owner purchased the property.\textsuperscript{162} If a court determines that the regulation deprives the property owner of all economic value, then compensation must be paid. If the economic deprivation is less than total, as it will be in most cases, then the court should proceed to the third question.

C. To What Degree Does the Regulation Interfere with the Property Owner’s Use or Interest?\textsuperscript{163}

This question is the most difficult to assess, and if the recent United Supreme Court decision in \textit{Lucas v. South Carolina Coastal Council}\textsuperscript{164} bears any weight, a series of questions are derived from this third inquiry. What is the property right impaired? Does state law afford particular protection to that property right? To what extent is the relevant property right burdened by existing common law? Once these issues are determined, courts must apply the balancing factors set out in \textit{Penn Central}.\textsuperscript{165} As discussed in Part V, Montana and other states with constitutional language setting forth an "or damaged" requirement could greatly simplify this question by relying on their particular constitutional provisions. Some commentators believe the recent United States Supreme Court decisions indicate a trend toward greater recognition of private property rights and a return to more traditional takings analysis.\textsuperscript{166} \textit{Lucas v. South Carolina Coastal Council} lends credence to this view, but also elicits a great deal of criticism.\textsuperscript{167} Because of the

\textsuperscript{160.} \textit{Agins}, 447 U.S. at 260.
\textsuperscript{161.} The author chose 90 percent because cases discussing "all economic use" diminution generally require 90 percent or greater.
\textsuperscript{162.} The notion of economical use is hotly debated. See, \textit{e.g.}, infra text accompanying note 186. However, this author disputes that reasoning. "Economical use" cannot mean any use that the property is susceptible of, because such a definition would imply that a taking never occurs.
\textsuperscript{165.} \textit{See supra} note 63 and accompanying text.
\textsuperscript{167.} \textit{See, e.g.}, Huffman, \textit{supra} note 132; Ann T. Kadlecek, \textit{The Effect of Lucas v.
importance Lucas may have in takings analysis, the case is set forth in some detail.

1. Background and Holding of Lucas v. South Carolina Coastal Council

In 1986 developer David Lucas bought two residential lots on the Isle of Palms in South Carolina. At that time, neither of his lots were in a so-called “critical area,” which meant he did not have to obtain a permit from the South Carolina Coastal Council (SCCC). However, in 1988 the South Carolina Legislature enacted the Beachfront Management Act (Act) which expanded the critical area, thereby prohibiting the construction of any habitable improvements on Lucas’s lots. Lucas brought suit for inverse condemnation, seeking compensation for the taking of his property.

Lucas did not take issue with the Act’s validity, but contended that the Act’s extinguishment of his property’s value entitled him to compensation. The trial court, in awarding Lucas $1.2 million, stated that “at the time Lucas purchased the two lots, both were zoned for single-family residential construction and . . . there were no restrictions imposed upon such use of the property.”

The South Carolina Supreme Court reversed, finding dispositive Lucas’s failure to contest the validity of the Act. The court held that regardless of the effect on property’s value, regulations designed to prevent serious public harm do not require compensation under the federal Takings Clause. The United States Supreme Court granted certiorari.

Justice Scalia, writing for the majority, said that regulations


168. Lucas, 112 S. Ct. at 2889.
169. Id.
170. Id.
171. Id. at 2890.
172. Id. Lucas argued that the question of justification or validity was not important because the net effect was to take all economic use of his land. Id. However, such an argument would not hold up if his land were taken under a common law nuisance theory. Thus, one can make the argument that Lucas is entitled to compensation for total taking and would be equally justified in seeking compensation for a partial taking because the State produced no evidence to demonstrate that the prohibition on development of his two lots served an anti-nuisance justification. Amicus Curiae Brief of Institute for Justice at 23, Lucas (No. 91-453).
174. Id.
175. Id.
which require land to be left predominantly in its natural state "carry with them a heightened risk that private property is being pressed into some form of public service under the guise of mitigating serious public harm."176 Addressing the merits of Lucas's claim, the Court stated that at least two categories of regulatory action were compensable without the usual inquiry into the public interest. The categories are regulations that cause a physical invasion of property or deny an owner all economically beneficial or productive use of the owner's land.177

Dispensing with the "noxious use" theory that governed takings analysis during the heyday of substantive due process,178 the majority stressed that the distinction between a regulation which prevents harm and one that secures a benefit is "in the eye of the beholder."179 Because a harm/benefit determination cannot be made on a value-free basis, "the legislature's recitation of a noxious-use justification cannot be the basis for departing from our categorical rule that total regulatory takings must be compensated."180

The Court indicated that a balancing of the loss to the owner and the benefit to the community must occur. Furthermore, the Court emphasized that in the case of land, the idea that property rights are subject to an implied limitation that the state, through regulation, may eliminate economically viable use of one's land is inconsistent with the interpretation of the Takings Clause and historical intent.181

Although remanding the case to the South Carolina Supreme Court, the majority said that the state can avoid compensation

176. Id. at 2894-95.

177. Id. at 2893. The Court reiterated its takings analysis and said that "[t]he Fifth Amendment is violated when land-use regulation 'does not substantially advance legitimate state interests or denies an owner economically viable use of his land.'" Id. at 2893-94 (citation omitted). The Court then admitted that "the rhetorical force of our 'deprivation of all economically feasible use' rule is greater than its precision," resulting in inconsistent holdings. Id. at 2894 n.7.

178. See supra text accompanying notes 50-51.

179. Lucas, 112 S. Ct. at 2897.

180. Id. at 2899. The majority briefly discussed Justice Blackmun's dissent that the test for compensation is whether there is a harm-preventing justification. "Since such a justification can be formulated in practically every case, this amounts to a test of whether the legislature has a stupid staff. We think the Takings Clause requires courts to do more than insist upon artful harm-preventing characterizations." Id. at 2898 n.12.

181. Id. at 2900 n.15. Justice Blackmun, dissenting, argues that the Framers did not intend the Takings Clause to address regulatory actions or economic values. Id. at 2915 n.23. While perhaps correct in his views, the Framers of the Constitution likely did not see the tremendous potential for conflict. Furthermore, history clearly indicates the role private property has played in shaping this nation. See Simms, supra note 16.
only if inquiry into the nature of the owner’s estate shows that the proscribed use was never a part of Lucas’s title. The regulation must do no more than what it could have done under the common law and the background principles of nuisance and property law.

Both Justices Blackmun and Stevens, in vigorous dissents, questioned the majority’s newly enunciated rule that the government’s power to act without paying compensation is based on whether the prohibited activity is a common-law nuisance. Further, Justice Blackmun cited Lucas’s failure to contest the legislative finding of serious public harm and protested the majority’s assertion that “the State must do more than merely proffer its legislative judgments to avoid invalidating its law.” Justice Blackmun also took exception to the trial court’s ruling that petitioner has lost all economic value of his property:

This finding is almost certainly erroneous. Petitioner can still enjoy other attributes of ownership, such as the right to exclude others . . . . Petitioner can picnic, swim, camp in a tent, or live on the property in a movable trailer. State courts frequently have recognized that land has economic value where the only residual economic uses are recreation or camping.

Finally, Justice Blackmun questioned the “historical compact” notion supported by the majority by restating the narrow interpretation of the Takings Clause as protecting possession only and not value.

2. The Impact of Lucas

Whether Lucas actually represents a turning point in takings jurisprudence is debatable. Commentators have described the decision as “anticlimactic” and “promising more than it delivers.”

182. Lucas, 112 S. Ct. at 2901-02.
183. Id.
184. Id. at 2912-13, 2920-21 (Blackmun, J. & Stevens, J., dissenting).
185. Id. at 2909. Justice Blackmun’s concern is the elimination of the presumption of validity given to legislative enactments and the shifting of the burden of proof. Id.
186. Id. at 2908. But see Laurence H. Tribe, American Constitutional Law § 9-3, at 593 (2d ed. 1988). “[F]orcing someone to stop doing things with his property—telling him ‘you can keep it but you can’t use it’—is at times indistinguishable, in ordinary terms, from grabbing it and handing it over to someone else.” Id.
187. Lucas, 112 S. Ct. at 2915 (citing Stephen A. Siegel, Understanding the Nineteenth Century Contract Clause: The Role of the Property-Privilege Distinction and “Takings” Clause Jurisprudence, 60 S. Cal. L. Rev. 1, 76 (1986)). See supra text accompanying notes 16 and 181 for more discussion on the debate over the interpretation and historical meaning of the takings clause.
Nevertheless, the decision in *Lucas* has two potentially significant impacts.

The first impact arises from Justice Scalia’s discussion of regulations which require land to be left predominantly in its natural state as “carry[ing] with them a heightened risk that private property is being pressed into some form of public service under the guise of mitigating serious public harm.” This language effectively curbs environmental regulation, not regulation directed at pollution and other industrial environmental concerns, but regulation requiring property owners to leave property in a natural state. Undoubtedly, *Lucas* will provide fodder for the debate over which view of property should prevail: historically bounded traditional views of property or the ecological view of property. The second potential impact of *Lucas* is the court’s stated concern with nuisance law to define property rights.

The Court also struggled with the issue of what percent deprivation is necessary to create a compensable taking, but avoided the more important inquiry: Why create separate standards for partial and total takings? Is a regulation any less a taking when it affects only one tract of land, when it impacts only the severed estate, or when it results in a fifty-percent deprivation instead of ninety-percent? A taking still occurs, and when the taking occurs in the advancement of a legitimate state interest, to benefit the public, what rationale compels the landowner to bear the burden? Rather, the benefited party should pay compensation when a regulation effects a taking. *Lucas* did not answer many of the questions surrounding takings law, but *Lucas* did reinforce the United States Supreme Court’s movement toward a stricter interpretation of takings law.
and the protection of private property. Unfortunately, without specific takings guidelines, further litigation will have to provide the answers.

While Lucas only addressed those situations in which the property owner suffered loss of all economically viable use, the Court explicitly recognized the role states play in determining when a taking requires compensation. Commentators Richard Epstein and James Huffman advocate an elimination of the distinction between partial and total takings. While the United States Supreme Court is unlikely to adopt their views, states can move, and arguably are moving, in that direction.

The previous sections of this Comment discussed the historical background and court interpretations of the Takings Clauses which are the underpinnings of constitutional jurisprudence. State law and legislative efforts can supplement these underpinnings by clarifying takings guidelines.

V. TOWARD A DEFINITIVE STANDARD IN MONTANA

Four rationales exist for arguing that states, and specifically Montana, should adopt stricter guidelines in formulating a takings standard: (1) a "new federalism" movement, (2) the "or damaged" language of the Montana Takings Clause, (3) the "adequate and independent state grounds" doctrine, and (4) legislation. The first three rationales are interrelated and interdependent.

A. New Federalism

Since 1977 much has been written advocating the development of state constitutional law. Courts, historically, have been inconsistent when addressing the conflict between police powers and property rights. Until the late 1800's federal courts were primarily responsible for the protection of individual rights. For the next half-century, states' police powers often prevailed over individual rights. Since the 1950's the federal courts have returned to a more protective view of individual rights, but often to the exclusion of contract and property rights. In recent years, however, state

193. Lucas, 112 S. Ct. at 2894.
194. See Huffman, supra note 132; Epstein, supra note 15.
197. See Brennan, supra note 196, at 502-04.
courts have increasingly relied on state constitutional provisions to increase the protection of individuals beyond the level of protection afforded by the federal constitution. This expanded protection encompasses a broad range of individual rights, including privacy, freedom of expression, and search and seizure laws. 198

The Montana Supreme Court also has relied on state constitutional provisions in giving greater protection to individuals than provided by the federal constitution. 199 Considering Montana’s unique constitutional provisions, however, the Montana Supreme Court seldom has exercised the opportunity to provide greater individual protections. Thus far, the new federalism movement infrequently has encompassed property rights in this enhanced protection. 200 However, the Montana Supreme Court has specifically relied on Montana’s Takings Clause in Less v. City of Butte 201 and Knight v. City of Billings. 202 Other states have afforded greater protection to private property when tied to due process concerns. 203 Generally, the new federalism movement depends on a state constitutional provision that differs from the federal provision by providing enhanced protection to the right at issue. Arguably, this movement could extend to a state constitutional provision that parallels the federal provision, because the state court’s interpretation of its own language is not bound by federal interpretation.

B. Montana Constitution, Article Two, Section 29

Arguably, Montana’s constitution affords more protection to the rights of private property owners because of the “or damaging” language in Article II, Section 29. 204 In fact, as previously discussed, the Montana Supreme Court made this argument in Less v. City of Butte and Knight v. City of Billings. Seventeen states have “or damaging” language in their corresponding state constitu-


201. 28 Mont. 27, 31-32, 72 P. 140, 141 (1903).


203. See Tinkle, supra note 8.

204. See supra notes 98-112 and accompanying text.
tional provisions.\textsuperscript{205} The doctrine allowing a state court to premise its decision on the state constitutional provision instead of the federal provision is known as "adequate and independent state grounds."

C. Adequate and Independent State Grounds

The federal constitution sets a required minimum level of protection for individual rights below which state courts cannot fall. Under the adequate and independent state grounds doctrine, state constitutions may provide expanded protection to individual rights. An adequate state ground is itself constitutionally permissible.\textsuperscript{206} The Montana constitutional provision is adequate because, arguably, Article II, Section 29 is more protective of property rights than the corresponding provision in the United States Constitution.\textsuperscript{207} An independent state ground is one that does not depend on federal standards for the result.\textsuperscript{208} Rather, the decision must rely on the expanded state right.\textsuperscript{209} Thus, the Montana constitutional provision is independent if the justification for an award of compensation is based on the "or damaging" language.

Although the Montana courts rarely invoke this language, one could argue that the independent and adequate state grounds doctrine allows Montana to develop its own takings law with the "or damaged" language as a fundamental tenet. This language provides an adequate and independent state ground to allow Montana to develop its own takings law, free from federal oversight, as long as it protects the minimum rights guaranteed by the United States Constitution.

The assertion of the "or damaging" language as an adequate and independent state ground has two results. First, it eliminates some of the distinction between partial and total takings because "or damaging" encompasses partial interferences with the use of property. Second, it allows Montana to develop more definitive takings guidelines based on the state's view of property rights.

\textsuperscript{205} See supra note 9 and accompanying text.

\textsuperscript{206} See Tribe, supra note 186, § 3-24, at 164 n.12.

\textsuperscript{207} Compare the text of U.S. Const. amend. V with the text of Mont. Const. art. II, § 29. In fact, some commentators argue that adequate and independent state grounds exist even if the state constitutional language parallels the federal constitution. See Larry M. Elison and Dennis Natlik Simmons, Federalism and State Constitutions: The New Doctrine of Independent and Adequate State Grounds, 45 Mont. L. Rev. 178 (1984).

\textsuperscript{208} Tribe, supra note 186.

\textsuperscript{209} Tribe, supra note 186.
D. Legislation

Legislation adopting the rational basis and multi-factor tests may serve to alleviate unnecessary litigation, but the legislation's primary purpose is to set forth concisely a standard of review in the conflict between property owners' rights and state police powers. Because state and federal takings laws have been ad hoc and inconsistent, various interest groups and state legislators have encouraged and sponsored new legislation. Legislation adopting the rational basis and multi-factor tests may serve to alleviate unnecessary litigation, but the legislation's primary purpose is to set forth concisely a standard of review in the conflict between property owners' rights and state police powers. Because state and federal takings laws have been ad hoc and inconsistent, various interest groups and state legislators have encouraged and sponsored new legislation. Landmark 1987 United States Supreme Court decisions triggered much debate on the takings issue. That debate has manifested itself in a number of efforts to control and protect property rights.

As population grows, environmental, zoning, and land-use concerns increasingly conflict with the rights of private property ownership. Most takings cases arise from these conflicts. States must take an active role in balancing these concerns and agendas, thus clarifying a takings standard. With these considerations in mind, twenty-seven states introduced property rights bills in 1992. Although only four states succeeded in passing those bills, states have introduced fourteen versions of property rights bills in 1993. Two additional examples of efforts to codify property rights protection are a 1988 Executive Order signed by President Reagan and House Bill 570, a bill proposed in Montana's 1993 legislative session. House Bill 570 was tabled by a 25-25 vote in the Senate.


212. See Williams, supra note 5, at 11 (citing Ann Corcoran, publisher of the Land Rights Letter, who lists 54 property rights groups in her 1992 directory).

213. See Williams, supra note 5, at 12.


1. The Foundation of Takings Legislation—Executive Order No. 12,630

Current legislative efforts arise from a 1988 Executive Order, signed by President Reagan, entitled “Governmental Actions and Interference with Constitutionally Protected Property Rights.” The order requires the executive branch to determine, before the enactment of a proposed agency regulation, if the regulation presents a Fifth Amendment takings threat. The order applies to most restrictions on private property and specifically requires a Takings Implication Analysis (TIA) when an agency regulation focuses on public health and safety issues. The TIA must: (1) identify, as specifically as possible, the public health and safety risk that the proposed property use creates; (2) establish that the proposed government action “substantially advances the purpose of protecting public health and safety” against the specifically identified risk; (3) establish that the proposed restrictions are not disproportionate to the landowner’s contribution to the overall risk; and (4) “estimate the potential cost to the government in the event that a court later determines that the action constituted a taking.” A comparison of these factors with the rational basis and multi-factor balancing test indicates how future legislation may codify the United States Supreme Court rational basis and multi-factor tests set forth in Nollan and Penn Central.

2. Recent Montana Legislation

Continuing the precedent set forth in the Reagan Executive Order, a bill introduced in the 1993 Montana legislative session proposed to further strengthen property owners’ rights and to codify holdings in recent takings decisions. The proposed “Montana

218. Exec. Order No. 12,630. Many commentators have maligned the Executive Order; however, a surprising number of states have considered its language in proposing property rights bills. See supra notes 214-15.
221. See supra note 216, § 4(d)(2).
222. See supra note 216, § 4(d)(3).
226. H.B. 570, 53d Mont. Leg. (1993). This bill was tabled by a 25-25 vote in the senate. Telephone Interview with Lorna Frank, Director of Legislative Affairs for Montana Farm Bureau Federation (Dec. 8, 1993).
Private Property Assessment Act,” modeled after Executive Order 12,630, incorporated the tests and language of Nollan and Penn Central. The stated purposes of House Bill 570 were to “require the assessment of governmental actions that affect the use and value of private property, to require an assessment of the effect of governmental actions on constitutionally protected private property interests, and to avoid unnecessary burdens on the public treasury.”

Montana, historically, has been more likely to award compensation for the taking of private property than many jurisdictions, but Montana’s citizens should take a more active role in shaping takings law. Recent United States Supreme Court decisions have underscored the need for states to take an active role in determining the balance between property rights and governmental regulations. The United States Supreme Court in Lucas recognized the role states will play in determining what constitutes a deprivation of property significant enough to warrant compensation:

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

VI. CONCLUSION

The lack of definitive guidelines in the takings debate ensures that conflicts between regulations and property rights will result in an enormous increase in litigation. Property rights, especially the right of use, naturally conflict with regulation. The develop-
ment of a standard based on case law, Montana's Takings Clause, adequate and independent state grounds, and legislation can resolve, in part, these inherent conflicts. Sound takings principles do not jeopardize valid police power regulation. If the means used to implement a regulation substantially advance a legitimate state interest through the least restrictive means necessary, then the regulation still will be upheld. When that regulation imposes a disproportionate burden on the landowner and significantly impairs the landowner's use of or economic value in the land, the government entity should compensate the landowner. In the words of Justice Holmes in *Pennsylvania Coal Co. v. Mahon*:

> When this seemingly absolute protection is found to be qualified by the police power, the natural tendency of human nature is to extend the qualification more and more until at last private property disappears.

... We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change.\(^{233}\)

The historic import of property rights and the constitutional purpose of the Takings Clause have little value without clear guidelines upon which both government and property owners can rely. Guidelines based on historical intent, case law, Montana's Takings Clause, and legislation provide one method of departure from the courts' essentially "ad hoc" takings analyses and inconsistent constructions of the Takings Clauses.

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of the individual, then that power, if it is to be exercised legitimately, can be no more broad than those original rights.

