The Expanding Importance of Temporary Physical Takings: Some Unresolved Issues and an Opportnnity for New Directions in Takiugs Law

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"Most people know a taking when they see one, or at least they think they do."[1]

INTRODUCTION

The Takings Clause of the United States Constitution neither enlarges nor restricts the powers of government. It does, however, under certain circumstances, require that compensation be paid to owners when governments seize or physically occupy property, or when they institute laws or regulations which substantially interfere with full use or economic benefit from property.

Recent contradictory decisions reached by lower federal courts in the area of temporary physical takings law have highlighted a major area of uncertainty and ambiguity in takings jurisprudence. Historically, temporary physical takings have played a minor role in comparison to the much more numerous and more controversial cases involving permanent physical takings and regulatory takings.

For reasons based more on historical evolution than on logic or legal theory, takings law has developed into two distinct branches which resolve seemingly similar cases using very different legal rules and judicial tests. In the more ancient branch, permanent seizure or permanent physical occupation of land by government is treated as a per se taking and must be compensated no matter how slight the deprivation, no matter how small the economic harm, and no matter how important the public benefit of the government action. In contrast, when the alleged takmg consists of a limitation on use of property resulting from a statute or regulation without physical entry, the rules are much different. Here, the courts engage in a very detailed and fact-sensitive balancing process to determine whether or not a taking[2] has occurred. In this balancing procedure, courts compare the nature of the government action, its benefits to society, the economic impact on the landowner, and even the reasonable expectations of the landowner to profit from and enjoy the use of her land. In practice, courts have

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1. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 592 (2d ed. 1988).

2. In accordance with common usage, the word "deprivation" will be used in this Note to describe any injury to property caused by any level of government. The word "taking" will be used to describe only those deprivations which actually violate the Takings Clause and must be compensated. A deprivation becomes a taking whenever a court recognizes it as such. A "taking claim" is a claim that a deprivation is, in fact, a taking.

been very pro-property owner in permanent physical takings cases, but very deferential to government in regulatory takings cases.

Lying between these two main branches is the separate, less well-defined, and heretofore insignificant category of temporary physical takings. The Supreme Court has provided limited guidance, in dicta, for dealing with cases in this area. Although the government action is of the same nature as permanent physical takings, the Court has ruled that the balancing tests developed for regulatory takings will be applied to the temporary physical category.

The major unresolved issue facing the federal courts, however, is the definition of "temporary" (in the sense of a defining or threshold duration) in the physical takings context. When this definition is eventually formulated it will determine whether the per se rule or the balancing rule will be applied to a potentially large number of future takings claims. The result could be of very significant impact not only to the rights of property owners but to the ability of budget-limited governments to meet public needs especially in the areas of environmental monitoring, inspection, and remediation. Moreover, the current issue provokes a wide-ranging and thoughtful reexamination of the utility and desirability of continuing the dual takings law structure itself.

This Note will focus on the development of temporary physical takings law and the nature of the related current issues facing the federal courts. Part I summarizes the historical development of the dual structure of takings jurisprudence from the adoption of the Bill of Rights to the present day. Part II focuses on the development of the temporary physical takings subcategory. Part III describes the background, procedural history, and holding of the Federal Court of Claims in *Preseault v. United States* ("*Preseault 2*"),[3] in which temporary physical takings were defined to include deprivations of up to thirty years duration. Part IV describes the Federal Circuit's contrasting holding in *Hendler v. United States*[4] in which only transient and inconsequential physical deprivations were considered to be temporary. Part V compares the merits of the two holdings on the bases of precedent and public policy. Part VI addresses the wider implications of the *Preseault-Hendler* contrast for the future development of takings law.

I. THE DUAL STRUCTURE OF TAKINGS LAW

All takings law and adjudication is based on the Takings Clause of the Fifth Amendment of the United States Constitution which reads, in pertinent part, "nor

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3. 27 Fed. Cl. 69 (1992), *rev'd*, 100 F.3d 1525 (Fed. Cir. 1996). The Preseaults' action in the federal courts has resulted in five separate reported opinions from 1988 to the present. This Note will adopt the convention of the Federal Circuit, 100 F.3d 1525, 1530 n.5 (Fed. Cir. 1996), for short form reference to each of these opinions by chronologically applying Arabic numerals to the trial court opinions and Roman numerals to the appellate opinions: Preseault v. I.C.C., 853 F.2d 145 (2d Cir. 1988) ("*Preseault I*"); Preseault v. I.C.C., 494 U.S. 1 (1990) ("*Preseault II*"); Preseault v. United States, 24 Cl. Ct. 818 (1992) ("*Preseault I*"); Preseault v. United States, 27 Fed. Cl. 69 (1992) ("*Preseault 2*"); Preseault v. United States, 100 F.3d 1525 (Fed. Cir. 1996) ("*Preseault III*").

4. 952 F.2d 1364 (Fed. Cir. 1991).

shall private property be taken for public use without just compensation."[5] The Clause reflected a strong respect for the sanctity of property rights among the revolutionary generation.[6] This respect for property was one of the few matters upon which the various political factions of that era seemed to agree.[7] One faction, the Lockean liberals, typified by James Madison, saw the protection of private property as a bulwark to protect each individual's intrinsic liberties from the intrusion of state power.[8] At the same time, the civic republicans, such as Thomas Jefferson, supported property rights for different reasons. They were less concerned with individual rights but felt every citizen should securely hold property as a stake or share in society, which would promote active and "virtuous" participation in government.[9] Jefferson specifically saw property as protecting citizens from dependence on government. As one commentator described Jefferson's viewpoint, "[w]ithout having property and a will of his own—without having independence—a man could have no public spirit; and there could be no republic."[10] Thus many of the Founders, for differing reasons, saw the wisdom of including in the Bill of Rights a clause restraining the government's ability to seize a citizen's property.

The authors and adopters of the Takings Clause probably had in mind only one type of taking: the formal exercise of the power of eminent domain by government to take land for public projects.[11] As a legal issue, the Clause received very little attention for over eighty years. There were relatively few federal projects[12] and the Clause was not considered applicable to the states until 1896.[13] As importantly, there were few disputes surrounding the projects which

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5. U.S. CONST. amend. V.

6. JAMES W. ELY, JR., THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS 55 (1992).

7. *Id.*

8. ISAAC KRAMNICK, REPUBLICANISM AND BOURGEOIS RADICALISM: POLITICAL IDEOLOGY IN LATE EIGHTEENTH-CENTURY ENGLAND AND AMERICA 263-64 (1990).

9. *Id.* at 267-68.

10. GORDON S. WOOD, THE RADICALISM OF THE AMERICAN REVOLUTION 19 (1992).

11. ELY, *supra* note 6, at 55. The immediate motivation for including the Clause in the Bill of Rights may have included dissatisfaction with the practice of some states of taking land without compensation for road projects.

> Perhaps still more surprising is that the principle that the state should compensate individuals for property taken for public use was not widely established in America at the time of the Revolution. Only colonial Massachusetts seems rigidly to have followed the principle of just compensation in roadbuilding. . . . Despite the efforts of Thomas Jefferson to establish the principle . . . in postrevolutionary Virginia, no law providing compensation for land . . . was enacted until 1785 . . . . Of the first postrevolutionary state constitutions, only those of Vermont and Massachusetts contained provisions requiring compensation.

MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780-1860, at 63-64 (1992).

12. ELY, *supra* note 6, at 76.

13. TRIBE, *supra* note 1, at 589 n.3 (citing Missouri Pac. Ry. v. Nebraska, 164 U.S. 403 (1896)).

did exist because the principle of just compensation in the exercise of eminent domain was universally accepted and observed.[14]

A. Physical Takings

The first major expansion of takings law occurred in 1871 in *Pumpelly v. Green Bay Co.*[15] In *Pumpelly*, the state government of Wisconsin had constructed a dam which was not on Pumpelly's property but which caused his land to be permanently flooded. The Court ruled that the Takings Clause of the Wisconsin State Constitution (which was virtually identical to the Takings Clause of the United States Constitution) demanded just compensation for such a permanent physical deprivation, even though the government did not take title to the property under the power of eminent domain.[16] This decision marks the true beginning of the physical takings branch of the dual structure.[17] For the first time government was held to have taken property by action distinct from formal exercise of eminent domain. The rule laid down was that such a permanent occupation was a per se taking requiring compensation no matter how great the public benefit.[18]

From *Pumpelly* forward the Court has held steadfastly to the rule that a permanent physical occupation by government is a per se taking and requires compensation to the owner without further inquiry. The Court's adherence to this rule has been summarized by Professor Michelman in these words:

> The modern significance of physical occupation is that courts, while they sometimes do hold nontrespassory injuries compensable, *never* deny compensation for a physical takeover. The one incontestable case for compensation (short of formal expropriation) seems to occur when the government deliberately brings it about that its agents, or the public at large, "regularly" use, or "permanently" occupy, space or a thing which theretofore was understood to be under private ownership.[19]

The modern paradigm case of permanent physical takings is the 1982 Supreme Court decision in *Loretto v. Teleprompter Manhattan CATV Corp.*[20] In *Loretto*, the City of New York enacted an ordinance requiring apartment building owners to allow installation of cable television lines in return for a payment of one dollar per apartment. Loretto, an apartment landlord, claimed a physical taking. The Court agreed that the city had committed a permanent physical taking, despite the fact that the entire space occupied was less than one and one-half cubic feet and

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14. ELY, *supra* note 6, at 76.

15. 80 U.S. 166 (1871).

16. *Id.* at 176-77.

17. Although *Pumpelly* concerned a case arising under a state constitution, the ruling was treated as a precedent applying to the Takings Clause of the U.S. Constitution because of the similarity of wording.

18. *Pumpelly*, 80 U.S. at 181.

19. Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1184 (1967) (emphasis in original).

20. 458 U.S. 419 (1982).

despite the fact that there was no showing of economic harm.[21] The Court's support of property rights against permanent physical deprivation is virtually absolute, and *Loretto* continues to enjoy support by the Court. Most recently Justice Scalia, writing in the 1992 opinion *Lucas v. South Carolina Coastal Council*,[22] cited *Loretto* as the primary authority in support of the proposition that "[i]n general (at least with regard to permanent invasions), no matter how minute the intrusion, and no matter how weighty the public purpose behind it, we have required compensation."[23]

B. Regulatory Takings

This absolute application of the per se rule contrasts sharply with the Court's treatment of regulatory takings. The very idea of taking as a result of regulation (without actual physical entry) took many years to develop. In the thinly populated and rural early America, statutes (and particularly federal statutes) had little power to affect the value or free use of land.[24] Two developments caused that insulation to change. The first was the recognition by the Court that the Takings Clause applied to state and local governments as a result of the Fourteenth Amendment.[25] Indeed, the majority of landmark takings decisions since 1900 have arisen from state and local, rather than federal, actions. The second more gradual development was urbanization and the related increase in population density. Local governments and their citizens, concerned about wise land use and the segregation of noxious nuisances from residential neighborhoods, developed the technique of zoning.[26] It was in this zoning context that the first takings claims were raised which involved regulations rather than physical intrusion.[27] However, the Court did not consider zoning to be a taking even when the result was a loss in value to property owners. The Court chose to see zoning, in most instances, as a mutual benefit to all including the supposedly injured property owner.[28]

In 1922, however, the Court had recognized that a regulation or statute, without physical invasion, can indeed work a taking. In *Pennsylvania Coal Co. v. Mahon*,[29] the State of Pennsylvania had passed a law which prohibited coal companies from removing the coal beneath land which contained homes or public buildings even when the coal company owned the mineral estate.[30] The prohibition applied even when the owner of the surface estate had purchased with

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21. *Id.* at 434-38.
22. 505 U.S. 1003 (1992).
23. *Id.* at 1015.
24. ELY, *supra* note 6, at 91.
25. *Id.*
26. *Id.* at 112.
27. *See* Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926) (holding a comprehensive zoning ordinance separating commercial, industrial, and residential uses into prescribed districts not to be a taking); Welch v. Swasey, 214 U.S. 91 (1909) (holding constitutional a Boston, Massachusetts statute limiting height of buildings).
28. *Euclid*, 272 U.S. at 387.
29. 260 U.S. 393 (1922).
30. *Id.* at 412-13.

notice that the surface was subject to destruction through mining.[31] The coal company's claim of a taking was rejected by the district court and the court of appeals, but was accepted by the Supreme Court. Justice Holmes, writing for the majority, held that, "[t]he general rule at least is, that while property may be regulated to a certain extent, *if regulation goes too far* it will be recognized as a taking."[32] By far, the principal effort in takings jurisprudence since *Mahon* has been to define what it means for a regulation to go "too far."

For the most part, the Supreme Court retreated from the regulatory takings fray for the next fifty years, leaving the field to the state courts.[33] The Supreme Court's 1978 decision in *Penn Central Transportation Co. v. New York City*,[34] however, signaled renewed activity of the Supreme Court in the takings arena.[35] Penn Central, the owner of Grand Central Station in New York City, planned to build a fifty-three story office building above the station while leaving the station itself intact and unaltered. When Penn Central sought city approval it was denied. The denial was not based on zoning ordinances, but on a statute permitting the city to preserve the character of historic structures. Penn Central claimed a regulatory taking, but the Court disagreed. Justice Brennan, writing for a majority of six Justices, formulated in this opinion the three-pronged *Penn Central* test for determining when a regulation crosses Justice Holmes's line of "too far." Under this test the Court focuses on three areas of factual inquiry: (1) the character of the governmental action, (2) the economic impact of the action on the claimant, and (3) the extent to which the regulation interferes with the claimant's distinct investment-backed expectations.[36]

In practice the test has become a framework for judicial balancing which has been very deferential to governments.[37] This deferential tone was set by *Penn Central* itself. In refusing to find a taking in New York's action, the Court ruled (1) that the historic landmark ordinance as a governmental action was analogous to zoning as a legitimate exercise of the state's police power, (2) that the denial

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31. *Id.* at 412.

32. *Id.* at 415 (emphasis added).

33. Hendler v. United States, 952 F.2d 1364, 1372 (Fed. Cir. 1991); *see also* James W. Ely, Jr., *A Breather on the Takings Clause*, A.B.A. J., Jan. 1996, at 42, 44.

34. 438 U.S. 104 (1978).

35. *Hendler*, 952 F.2d at 1372.

36. *Penn Central*, 438 U.S. at 124. The first factor, "character of the government action," has been described as follows:

> When the Court considers the "character" of the law which is affecting the private property interest, it is usually considering the justification for the law. If the law is not meant to merely bring about a private benefit, but instead is designed to further a broader public purpose, it is more likely to be upheld [as not working a taking]. Two kinds of public purposes tend to immunize regulatory laws from takings challenges. First, government actions [which] are intended to regulate the "nuisance-like" qualities of prohibited conduct. Second, government actions [which] despite their impact on property rights . . . "arise from a public program that adjusts the benefits and burdens of economic life to promote the common good."

Jan G. Laitos, *The Takings Clause in America's Industrial States After* Lucas, 24 U. TOL. L. REV. 281, 296 (1993) (citation omitted).

37. ELY, *supra* note 6, at 146-47.

did not entail significant economic impact because Penn Central was still able to profit from the existing facility, and (3) that the denial did not violate Penn Central's legitimate expectations for a reasonable return on its investment.[38]

The *Penn Central* test remains the prescribed rule for adjudicating regulatory takings claims, most recently affirmed by the Supreme Court in *Lucas*.[39]

C. The Branches Compared

Together the Supreme Court's decisions in *Loretto* and *Penn Central* superbly illuminate the inconsistencies and contradictions of present-day takings law. Two New York City property owners challenged two New York City ordinances under the Takings Clause. Loretto, who suffered a minute physical intrusion but demonstrated no economic loss, received the full support and protection of the Constitution and was compensated. Penn Central, which sustained no actual intrusion but suffered a presumably large economic loss, received no compensation at all and was essentially told that the sacrifice was the cost of living in an ordered society.

Such a contrasting and contradictory system is not easy to justify. It has developed and continues to exist for a number of complexly related historical, economic, and practical reasons. The *Loretto* branch traces its lineage to the early days of the nation when all the political theories agreed that private property was a good in itself which government should protect.[40] So long as takings law only dealt with eminent domain and permanent physical occupation, the per se rule was probably supportable because it reinforced popular conceptions of property and was financially manageable for government.

However, as the nation urbanized and expanded, government grew to affect property and its economic value more frequently and more directly through regulation than by physical takings. The traditional sense of the sanctity of private property urged that takings rules should be expanded to require compensation here as well. But there were very serious practical problems in compensating for regulatory takings. To require such compensation was to risk the paralysis of government.

This risk of paralysis arises from the fact that virtually all statutes and regulations benefit some citizens and deprive others. Not all such deprivations can be compensated. The cost of the compensation and the cost of administering the compensation system could become prohibitive. To make matters worse the liability of government would be unpredictable and unlimited. Only after legislation was enacted and the takings claims filed would government know how much it owed in compensation. As a result, governments faced with large and unpredictable compensation liability would be induced to timidly avoid legislating.[41]

To avoid this result a method was needed which would compensate the truly deserving cases of regulatory deprivation but weed out those which were merely

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38. *Penn Central*, 438 U.S. at 133-38.

39. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1019-20 n.8 (1992).

40. *See supra* notes 5-10 and accompanying text.

41. *See* BRUCE A. ACKERMAN, PRIVATE PROPERTY AND THE CONSTITUTION 148-49 (1977).

the normal cost of living in an ordered society. This is the problem which Justice Holmes was seeking to solve in laying down the "too far" standard of *Mahon*[42] and which Justice Brennan was seeking to structure with the balancing test in *Penn Central*.[43]

While the balancing approach became accepted in regulatory cases, it has not been extended to permanent physical takings. It is true that in at least two physical takings cases arising at the end of the decade of the 1970s, the Court discussed the balancing issues of the *Penn Central* test in reaching decisions.[44] At that time, there may have been cause to expect the demise of the per se rule. However, those expectations were extinguished by *Loretto*, which firmly established the traditional rule.[45] It is possible to engage in conjecture concerning the Court's reluctance to abandon the per se rule. Abandoning the rule would inevitably be seen as degrading the strength of the Takings Clause and a reduction in the force of property rights in general. In contrast, establishing the balancing approach for regulatory takings did not run the same risk because such claims had never before been recognized prior to *Mahon*. The Court's reluctance may also stem from the fact that in all of the evolving history of takings law, every change has favored property owners. Replacing the per se rule with a balancing test would be the first change made by the Supreme Court to favor government deprivation. The Court is probably unwilling to make such a change, and that reluctance has insured the continuance of the dual structure.

D. The Continued Acceptance of the Dual Structure

As if to dispel any suspicion that the dual structure is withering, the Supreme Court took the opportunity to restate its general support of both branches in 1992 in *Lucas v. South Carolina Coastal Council*.[46] In *Lucas*, Justice Scalia, writing for a divided Court, not only confirmed the dual structure but added a bridge between the two. That bridge consisted of a new rule that a regulatory deprivation would be treated as a per se taking in the extreme case in which a regulation destroyed one hundred percent of the economic value of land.[47] *Lucas* is not only significant as a ratification of the dual structure, but as an indicator that the Court (as then constituted) supported minor expansion (rather than narrowing) of the per se branch.

What has evolved, then, is a structure with two distinct branches which purport to protect the same right but which do so using tests which share virtually no common or consistent definitions or rules.[48] The two branches owe more to the

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42. "Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law." Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413 (1922) (Holmes, J.).

43. *See* TRIBE, *supra* note 1, at 595-96.

44. Pruneyard Shopping Ctr. v. Robins, 447 U.S. 74 (1980); Kaiser Aetna v. United States, 444 U.S. 164 (1979).

45. Loretto v. Teleprompter Manhatten CATV Corp., 458 U.S. 419, 438-39, 441 (1982).

46. 505 U.S. 1003 (1992).

47. *Id.* at 1027.

48. For a current comprehensive summary of the state of takings law see David S. Favre, *A Framework for Analysis of the "Takings" Issue*, 1995 DET. C.L. REV. 3.

eras of their historical origin than to legal principle. However, recent developments in the area of temporary physical takings may provide an opportunity or a requirement for the courts to reexamine and begin a modification of this structure.

II. TEMPORARY PHYSICAL TAKINGS

The dual structure described in Part I establishes two principal categories of takings: regulatory (non-physical) takings and permanent physical takings. This leaves the logical implication that there may be a third category: *temporary* physical takings. This third category has been recognized to exist but it has received far less attention and has suffered from inconsistent and contradictory treatment from the federal courts. There are considerable grounds for confusion over the definitions of this category and its appropriate rules of adjudication.[49]

The history and development of temporary physical takings is difficult to trace. The earliest physical occupation case, *Pumpelly*, limited its ruling to permanent physical occupation. In subsequent flooding cases the Court found takings to exist only where the frequency and persistence of inundation became constructively permanent.[50] These cases appeared to assume that a physical deprivation which was not permanent was, for that reason, not a taking.[51]

The first favorable consideration of apparently-temporary[52] physical takings may be traced to a line of cases in which the War Department seized warehouses and factories during World War II.[53] The power to effect the seizures was not questioned, rather the issue was the amount of compensation due the owners. In each of these decisions the Supreme Court ruled that the amount of compensation was to be determined based on the Takings Clause. In one of these seizure opinions, the Court reasoned that although the deprivation was not perpetual, it was nonetheless permanent and subject to the per se rule.[54] In the eyes of the Court, the government had in effect permanently taken an "estate or tenancy for years[]"[55] from the owners. These seizure decisions seemed to establish that some, if not all, apparently-temporary physical takings are in fact compensable under the per se rule. It remained (and still remains) unclear, however, whether there is some threshold of duration below which the deprivation ceased to be

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49. One of the leading treatises on eminent domain and takings devotes a section of eight pages to the subject of temporary physical takings. It acknowledges they exist and provides examples but does not define "temporary" or describe judicial rules or tests, saying "[t]he variety of factual situations in temporary takings cases does not allow formulation of a single standard or readily identifiable set of rules." 2A JULIUS L. SACKMAN, NICHOLS ON EMINENT DOMAIN § 6.05[3] (rev. 3d ed. 1995).

50. *E.g.*, United States v. Cress, 243 U.S. 316 (1917).

51. *See, e.g.*, Sanguinetti v. United States, 264 U.S. 146 (1924).

52. The term "apparently-temporary" will be used here to describe deprivations and takings of *finite duration.* As will be seen, some courts consider some takings and deprivations of finite duration to be nonetheless permanent.

53. Kimball Laundry Co. v. United States, 338 U.S. 1 (1949); United States v. Petty Motor Co., 327 U.S. 372 (1946); United States v. General Motors Corp., 323 U.S. 373 (1945).

54. *See General Motors*, 323 U.S. at 378.

55. *Id.* (quoting general legal usage or terminology).

permanent and became temporary. The shortest period of seizure adjudged to be a taking in these cases was twelve months.[56]

A precedent for an even shorter duration per se taking was established in another wartime seizure case, *United States v. Pewee Coal Co.*,[57] in which the Court found a per se taking, when the federal government seized a coal mine for a period of five and one-half months. Together these cases appear to establish that apparently-temporary deprivations as brief as the Pewee Coal seizure receive the same per se treatment as permanent occupations.

However, no explicit statement of the law of temporary physical takings appeared until the Supreme Court's 1982 opinion in *Loretto*. This statement is at least partially dicta since *Loretto* was decided as a per se permanent physical taking. However, the *Loretto* Court devoted several pages of the opinion to considering and overcoming the government's argument that the cable installation was not a permanent intrusion.[58]

Loretto does not use the term "temporary physical taking" but rather refers to "physical invasions," which it distinguishes from "physical occupations." The latter are classic per se physical takings. Physical invasions appear to include an assortment of deprivations which include temporary physical deprivation as well as intermittent physical deprivations.[59] No definition of "temporary" is provided and the issue of duration is not addressed.

In the most significant passage of this section of *Loretto*, the Court, somewhat surprisingly, declares that all (temporary) physical invasions (as distinct from (permanent) physical occupations) are to be subjected not to the per se test but rather to the *Penn Central* balancing test.[60] This single judicial pronouncement is a principal source of the current uncertainty in the temporary physical takings jurisprudence.

To say the least, *Loretto* is difficult to interpret with respect to the law of temporary physical takings. If the application of the *Penn Central* test applies to all apparently-temporary deprivations of any finite duration, then *Loretto* must overrule the War Department seizure cases and *Pewee Coal* without explicitly declaring to do so. Such an overruling seems to be very unlikely since the *Loretto* Court cites *Pewee Coal* as instructive with respect to another issue in the case and even notes that the taking in *Pewee Coal* was of finite duration.[61] Alternatively, the Court in *Loretto* may be recognizing the seizure case holdings and prescribing the balancing test for a class of temporary takings claims in which the duration is less than some as yet unspecified threshold. The actual meaning remains uncertain.

The *Loretto* doctrine with respect to temporary physical takings has been of little practical effect and has figured in no federal appellate decisions until quite recently. However, a 1992 decision of the U.S. Federal Court of Claims (subsequently reversed on other grounds by the Federal Circuit) suggests that the

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56. *Id.* at 376.
57. 341 U.S. 114 (1951).
58. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 428-35 (1982).
59. *Id.* at 432-35.
60. *Id.* at 435 n.12.
61. *Id.* at 431.

Loretto doctrine and the category of temporary physical takings may become more prominent features of the takings landscape.

III. *PRESEAULT*

Preseault v. United States[62] is one of many cases in the last decade challenging the "Rails to Trails" program, in which the federal government has promoted the use of unused railroad routes as recreational trails as part of a policy of preserving the right-of-way network for a future restoration of the national rail system.[63] The Preseaults, who were typical of the claimants in many similar cases, are owners of land in Vermont through which a railroad owned a long-standing easement for its tracks.[64] As part of the decline of the rail industry, the owning rail company ceased to run trains over the Preseaults' property in 1970 and removed all of its equipment and rails in 1975. Under Vermont property law, this action by the railroad constituted abandonment and should have effected a reversion of the easement to the Preseaults.[65] The Preseaults presumably believed they had regained ownership of their property unencumbered by the prior easement. However, they were to learn that federal statutes had preempted Vermont property law. Ten years later in 1985, the federal Interstate Commerce Commission ("ICC") authorized the lease of the easement as a hiking trail to a neighboring town.[66] This action by the ICC was within its power under a combination of two federal statutes.[67]

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62. 27 Fed. Cl. 69 (1992), *rev'd*, 100 F.3d 1525 (Fed. Cir. 1996). For the numbering convention applied to the various *Preseault* opinions, see *supra* note 3.

63. *See* Fritsch v. Interstate Commerce Comm'n, 59 F.3d 248 (D.C. Cir. 1995); Goos v. Interstate Commerce Comm'n, 911 F.2d 1283 (8th Cir. 1990); Vieux v. East Bay Reg'l Park Dist., 906 F.2d 1330 (9th Cir. 1990); Schneider v. Union Pac. R.R. Co., 864 F. Supp. 120 (D. Neb. 1994); Dave v. Rails to Trails Conservancy, 863 F. Supp. 1285 (E.D. Wash. 1994). The overall *Preseault* claim is the first of the challenges to recreational transfers to state a taking claim. Other challenges have been based on the Commerce Clause of the U.S. Constitution or on interpretation of statutes.

64. The easement was acquired by the original owner railroad in 1899. It was transferred to the State of Vermont which leased it to a successor railroad in 1964. It was the successor railroad which ceased to use the easement. *Preseault 2*, 27 Fed. Cl. at 73-75, 87.

65. *Preseault 1*, 24 Cl. Ct. 818, 833 (1992). In this somewhat curious opinion the United States Claims Court (later redesignated the Federal Court of Claims) rendered an opinion on the Preseaults' takings claim under the assumption that federal statutes had not preempted Vermont property law. *Id.* at 832 n.6. Under this artificial assumption the court concluded that the easement had reverted when the railroad company removed its equipment and that the transfer to trail use was a physical taking. *See id.* at 832-33. The same court then reheard the case considering the full effect of federal law and found no taking. *Preseault 2*, 27 Fed. Cl. at 71.

66. *Preseault 2*, 27 Fed. Cl. at 75-81.

67. Transportation Act of 1920, § 402, 49 U.S.C. § 10903 (1994) (prohibiting abandonment or discontinuance of service over any rail route without permission of the ICC); National Trails System Act Amendments of 1983, § 8(d), 16 U.S.C. § 1247(d) (1994) (permitting the Secretary of Transportation to allow lease of rail bank easements to recreational trail operators rather than allowing reversion to owners of servient estates).

For a full explanation of the legal and regulatory procedures implementing the abandonment

The Preseaults unsuccessfully appealed the decision in ICC administrative channels and then appealed directly to the United States Court of Appeals on grounds which included a claim for an uncompensated permanent physical taking. The case reached the Supreme Court but was remanded on ripeness grounds without decision. The Court held that a taking complaint could not be heard until a claim for compensation under the Tucker Act[68] had been submitted to and adjudicated by the Federal Court of Claims.[69] The Preseaults then filed such a claim.

It is the resulting ruling of the Federal Court of Claims in *Preseault 2*[70] which poses the possibility that temporary physical takings may become a much more prominent arena of takings law, with far ranging impact on government at every level. The court first ruled that the deprivation was a "physical occupation."[71] Had the court then followed the War Department seizure cases and *Pewee Coal*, the case would have been decided as a per se taking of a term of years estate. However, the court followed different reasoning and ruled that the deprivation was temporary and not permanent because federal statutes limited the trail lease to a maximum of thirty years.[72] The impact of this characterization, based on the dicta of *Loretto*, was to take the case out of the per se takings branch and place it under the *Penn Central* balancing test instead.[73]

Not unexpectedly, the court then found no taking on the grounds that the Preseaults purchased the land after the Railroad Revitalization and Regulatory Reform Act of 1976[74] was enacted. Since this statute gave the ICC the power to deny abandonment and transfer easements to trail operators, the court reasoned that the Preseaults had no reasonable investment-backed expectations of reversion of the easement and thus failed one of the three prongs of the *Penn Central* test.[75]

Preseault 2 overflows with legal issues, but the one of most significance here is the ruling that a thirty year deprivation is temporary. The impact of this ruling, had it been upheld on appeal, would have been to defeat all "Rails to Trails" takings claims for owners who purchased after 1976. And even for owners holding their property prior to 1976, takings claims would have enjoyed questionable prospects for success under the deferential *Penn Central* balancing test.

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of rail rights of way and their transfer to recreational trail operators see National Ass'n of Reversionary Property Owners v. Interstate Commerce Comm'n, No. 94-1581, 1995 WL 687741 (D.C. Cir. Nov. 3, 1995).

68. 28 U.S.C. 1491(a)(1) (1994) (giving to the Federal Court of Claims jurisdiction over all claims founded upon the Constitution).

69. Preseault v. Interstate Commerce Comm'n, *494 U.S. 1, 11-12 (1990).*

70. 27 Fed. Cl. 69 (1992), *rev'd*, 100 F.3d 1525 (Fed. Cir. 1996).

71. *Id.* at 95 ("The character of the government action would be a *physical occupation* authorized by federal law . . . .") (emphasis added).

72. *Id.* By the terms of the federal statute, the lease was for an initial term of five years, with an option to renew for additional five year increments for a total duration not to exceed 30 years. *Id.*

73. *See* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 435 n.12 (1982).

74. Pub. L. No. 94-210, § 810, 90 Stat. 146 (1976) (repealed 1978).

75. *Preseault 2*, 27 Fed. Cl. at 95.

However, the potential impact of the creation of a large category of temporary deprivations goes far beyond the "Rails to Trails" claims. More dramatic effects would be seen if governments at any level were to exploit the *Preseault 2* doctrine to take property without compensation. It is not difficult to envision that budget-strapped cities, counties, states, and even the federal government could be tempted to circumvent eminent domain by appropriating property under a pretense that deprivation is for only a fixed term of years. This would not be a difficult pretense to claim and even to believe when the *Preseault* doctrine allows a thirty year deprivation to be temporary. Of course, the *Penn Central* test remains as a safeguard, but one which has proven in practice to be weighted in favor of governments.[76]

Unfortunately, the Federal Circuit's action (*Preseault III*) on the Preseault's appeal of the Federal Court of Claims decision (*Preseault 2*) did little to clarify the uncertainty surrounding temporary physical takings.[77] After vacating its initial panel decision affirming the *Preseault 2* judgment,[78] the Federal Circuit reheard the appeal en banc and then consumed almost a year in preparing its opinion, which reversed the lower court and found a compensable taking.[79] *Preseault III* is disappointing in that it apparently ignores the temporary physical taking issue altogether. The opinion simply presumes that per se takings analysis applies and proceeds to find a compensible taking. No reference is made at all to the lower court's assumption that the deprivation was temporary and that the *Penn Central* test was appropriate. As a result, it is impossible to tell whether per se analysis was applied (1) because the deprivation of the Preseault's interest was too long to be considered temporary, or (2) because all physical deprivations, however brief, are to be treated as per se takings. If the first alternative is the correct one, then the question, "What is temporary?" still, significantly, awaits an answer.

However, even if *Preseault III* had been more explicit, it would still have left this area of the law in great uncertainty, because the court provides no majority opinion with its decision. Only four of the nine judges hearing the case joined the plurality opinion recognizing a compensible taking.[80] Two others joined in a separate concurrence which also ignored the temporary takings issue raised by the court below.[81] The three remaining judges joined in a strongly worded dissent, which also ignored the temporary physical takings issue, and rejected the takings claim based on an analysis of the interaction of the federal statutes with Vermont property law.[82]

As a result of this missed opportunity, the principal questions surrounding temporary physical takings law remain in doubt. How long must a temporary physical deprivation go on to become permanent? What rule is applied to

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76. *See supra* note 37 and accompanying text.

77. *Preseault III*, 100 F.3d 1525 (Fed. Cir. 1996).

78. Preseault v. United States, 66 F.3d 1167 (Fed. Cir. 1995), *vacated en banc*, 100 F.3d 1525 (Fed. Cir. 1996).

79. *Preseault III*, 100 F.3d at 1552.

80. *Id.* at 1528, 1529-52.

81. *Id.* at 1552-54.

82. *Id.* at 1554-76.

determine if a temporary physical deprivation is a taking? The only firm conclusion from *Preseault III* is that a thirty year physical deprivation is a per se taking. Otherwise, the Federal Court of Claims' *Preseault 2* theory stands unrejected and an apparent contender for acceptance as the standard rule.

The alternative contrasting contender was formulated by the Federal Circuit in the 1991 case, *Hendler v. United States*.[83] The Federal Circuit's holding in *Hendler* regarding the durational definition of temporary physical takings is almost diametrically opposed to the *Preseault 2* holding.

IV. *HENDLER*

Hendler is an environmental monitoring case.[84] It arose when the U.S. Environmental Protection Agency ("EPA") discovered a toxic waste site which endangered the surrounding water supply. As part of its action plan, the EPA determined that a series of sampling wells was required to monitor the toxic levels in the ground water. The plan required that some of the wells be drilled on Hendler's land. When the EPA requested Hendler's approval, he refused. The EPA within its authorized powers entered the property and drilled the wells without approval.[85] Hendler entered a takings claim before the Federal Court of Claims. That court denied Hendler's motion for summary judgment, ruling that a trial would be necessary to determine the nature of the EPA action and the EPA's "intentions."[86] The court apparently intended to apply the *Penn Central* test to the specific facts of the case. Eventually, the Federal Court of Claims dismissed Hendler's claim on a procedural issue.[87] Hendler appealed to the Federal Circuit citing as error both the dismissal and the earlier denial of summary judgment on the takings claim.[88]

The Federal Circuit reversed the Federal Court of Claims and directed that summary judgment be granted to Hendler on his takings claim. The key holding of the Federal Circuit addresses the EPA's argument that its intrusion, invasion, or deprivation was only temporary. Judge Plager, writing for a unanimous panel, expressed a very different definition of "temporary physical taking" than the *Preseault* court. Plager first quoted a passage from the Supreme Court's *Loretto* opinion:

> 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 achieves an important public benefit or has only minimal economic impact on the owner. . . . "[W]hen the physical intrusion reaches the extreme form of a permanent physical occupation, a taking has occurred. In such a case, 'the character of the government action' not only is

83. 952 F.2d 1364 (Fed. Cir. 1991).

84. *See* William E. Remphrey, Jr., Hendler v. United States*: Preserving Private Property Rights in the Face of Environmental Regulation*, 4 VILL. ENVTL. L.J. 465 (1993).

85. *Hendler v. United States*, 952 F.2d 1364, 1369 (Fed. Cir. 1991).

86. *Id.* at 1370.

87. *Id.*

88. *Id.* at 1367.

> an important factor in resolving whether the action works a taking but also is determinative."[89]

Then Plager explained why the passage from *Loretto* applied in *Hendler*:

> In [the physical takings] context, "permanent" does not mean forever, or anything like it. A taking can be for a limited term . . . what is "taken" is, in the language of real property law, an estate for years, that is, a term of finite duration as distinct from the infinite term of an estate in fee simple absolute.
>
> . . . .
>
> 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 . . . .[90]

Thus, the Federal Circuit appears to be applying the precedent laid down in the War Department seizure cases and in *Pewee Coal*[91] that a physical deprivation of a finite duration is treated as permanent. Unfortunately, the opinion does not take the opportunity to reconcile this result with the physical invasion dicta of *Loretto*.

Clearly, this position of the Federal Circuit is at wide variance with the Federal Court of Claims position in *Preseault 2* that a thirty year occupation is temporary. Furthermore, the language of *Hendler* indicates that the two courts would split on deprivations of almost any shorter duration. For instance, it appears to be a near certainty that *Preseault 2* would have been decided differently using the *Hendler* rule. The physical occupation of the easement for thirty years (or even the initial lease term of five years) would not have met the *Hendler* court's very narrow definition of temporary as no more than a common law trespass. The Preseaults' deprivation would, probably, have been ruled a per se taking. Likewise, *Hendler* would almost certainly have been decided differently under the *Preseault 2* rule. *Hendler* does not state the length of time the EPA intended to continue its activities on the Hendler property, but any finite number of years would appear to qualify as temporary. As a temporary deprivation, the taking determination would employ the *Penn Central* test, where the EPA would have had a good chance of success on grounds that their action provided significant benefit to the public *including Hendler himself*, that the action inflicted no economic injury, and that Hendler retained as a residual substantially all of the economic benefit of his property.

As this comparison of the outcomes of *Preseault 2* and *Hendler* reveals, the two rules defining temporary physical takings cannot both prevail. The Federal Circuit and, perhaps ultimately, the Supreme Court will have to select one of the rules (or announce a wholly different rule) to restore consistency. The combined *Preseault III* opinions strongly suggest that the ultimate position on temporary

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89. *Id.* at 1375-76 (quoting Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982), in which Justice Marshall referred to the "character of the government action," one of the three factors in the regulatory takings test contained in Penn Central Transp. Co. v. New York City, 488 U.S. 104, 123 (1978)).

90. *Id.* at 1376-77.

91. United States v. Pewee Coal Co., 341 U.S. 114 (1951).

physical takings remains a matter in contention among the judges of the Federal Circuit. One indicator of this situation is related to the fact that both *Hendler* and *Preseault III* were authored by Judge Plager. It is difficult to explain why, after writing so explicitly on temporary physical takings in *Hendler*, he should totally ignore the issue in *Preseault III*, especially when the temporary characterization was central to the lower court's holding in *Preseault 2*.[92] One possible explanation is that the issue of temporary physical takings is contentious and unsettled among the judges of the Federal Circuit. This theory is supported by the very long delay from the ordering of en banc consideration (November 1995) to the announcement of a decision (November 1996), and also by the lack of a majority opinion. In any event, it seems that precise rules for adjudicating temporary physical takings claims must await an ultimate ruling of the United States Supreme Court extending and explaining (or rejecting) the dicta of *Loretto*.[93]

The Court would seem to have a choice between two generic rules for adjudicating temporary physical takings claims. The rule of *Preseault 2* would hold that any deprivation which is clearly finite is a temporary deprivation subject to the *Penn Central* balancing test in any takings claim. The rule of *Hendler* would hold that any physical deprivation, even if finite and very brief in duration, is a per se compensable taking. Under the rule of *Hendler*, the only deprivations or intrusions which would be considered temporary are those which are virtually insignificant.

V. THE CHOICE BETWEEN THE *PRESEAULT* AND *HENDLER* RULES

In determining which of the two rules will prevail, the courts should examine precedent but should also consider which rule better satisfies the public's need for protection of individual rights and protection of their health, safety, and welfare.

A. Analysis of Prior Judicial Precedent

An examination of cited precedents suggests that the *Preseault 2* court's very broad definition of "temporary" stands in contradiction of Supreme Court holdings. However, the *Hendler* definition is far narrower than any of these existing precedents require.

The *Preseault 2* court draws solely on the *Loretto* opinion, which devotes several pages to defining and comparing permanent physical occupations (which are per se takings) and temporary physical invasions (which are subject to *Penn Central* balancing analysis). However, the Federal Court of Claims seems to ignore the occupation-invasion comparison and instead relies entirely on a footnote appearing later in *Loretto* to support its rule:

> The permanence and absolute exclusivity of a physical occupation distinguish it from temporary limitations on the right to exclude. Not every

92. *See supra* notes 72-75 and accompanying text.

93. *See supra* notes 58-61 and accompanying text.

> physical invasion is a taking. As Pruneyard Shopping Center v. Robins,[94] Kaiser Aetna v. United States[95] and the intermittent flooding cases reveal, such temporary limitations are subject to a more complex balancing process to determine whether they are a taking. The rationale is evident; they do not absolutely dispossess the owner of his rights to use, and exclude others from, his property.[96]

This excerpt from *Loretto* appears at first examination to provide very solid support for the *Preseault* decision. However, that support relies on acceptance of the term "temporary" to mean any deprivation of finite duration. An examination of existing precedent weakens this support to a considerable degree.

The most serious weakness is that *Loretto* recognizes *Pewee Coal* as instructive in the very same section in which the quoted footnote occurs.[97] *Pewee Coal* is not addressed on the matter of distinguishing between temporary and permanent. However, its mention indicates that the Court was aware of it, considered it on point and felt no necessity to overrule it. In *Pewee Coal*, the Court had treated the five-and-one-half month federal seizure of a coal mine as a per se taking.[98] It is difficult to believe that the Court would have changed an entire class of takings claims from the per se branch to the balancing branch without noting its departure from prior precedent established in a case it cited as applicable law.

On the other hand, it is very reasonable to read the entire footnote in a context consistent with *Hendler*—that only the briefest of deprivations are temporary and subject to balancing, leaving deprivations of months and years in the permanent category.

The references in the footnote to *Pruneyard* and *Kaiser Aetna* are not helpful in resolving the definition issue. In both of these cases, duration of deprivation was perpetual and not an issue. In *Pruneyard*, a shopping center owner was forced by California law to admit to his premises any and all persons soliciting petition signatures. The claimed deprivation (of the right to exclude) was presumably infinite in duration since it derived from the California Constitution. The Court engaged in balancing using the *Penn Central* test and found no taking, without providing an explanation for rejecting per se analysis.[99] In *Kaiser Aetna*, the federal government forced a developer to admit the public to a previously private lagoon because its improvements had made the lagoon a navigable water of the United States. Again the forced deprivation was infinite in duration but the Court still went through the *Penn Central* test, this time finding a taking.[100] Both of these cases appear to represent permanent physical takings to which the balancing test has been applied. At least one commentator has described *Pruneyard* and *Kaiser Aetna* as applications of an ad hoc approach to physical

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94. 447 U.S. 74 (1980).

95. 444 U.S. 164 (1979).

96. *Preseault 2*, 27 Fed. Cl. at 95 (quoting Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 435 n.12 (1982)) (citations omitted).

97. *Loretto*, 458 U.S. at 431.

98. United States v. Pewee Coal Co., 341 U.S. 114 (1951).

99. Pruneyard Shopping Ctr. v. Robins, 447 U.S. 74, 82-84 (1980).

100. Kaiser Aetna v. United States, 444 U.S. 164, 174-80 (1979).

takings, which was repudiated by the Court in *Loretto*'s ultimate holding.[101] If these two cases have any bearing on *Preseault*, it cannot be that duration influences the takings test.

The intermittent flooding cases referred to in the footnote are similarly unsupportive of the *Preseault 2* holding. The cited flooding cases[102] are a line of five decisions beginning in 1903 and culminating in 1950, which refined the *Pumpelly* holding for situations in which the flooding was not perpetual or not constant. Representative of these cases is the 1924 opinion in *Sanguinetti v. United States*.[103] In *Sanguinetti*, the federal government had constructed a dam which caused occasional flooding of Sanguinetti's farm in most years. The Court found that there was no taking because the land was not permanently flooded nor was it flooded for such a length of time in any year as to prevent its use as agricultural land.[104] The Court stated its rnle as follows:

> [I]n order to create an enforceable liability against the government, it is at least necessary that the overflow be the direct result of the structure, and constitute an actual, permanent invasion of the land, amounting to an appropriation of and not merely an injury to the property. . . . Appellant was not ousted, nor was his customary use of the land prevented, unless for short periods of time.[105]

Although this rule requires permanence to support a taking, it is not clear how much permanence is required. As the quoted passage suggests permanence may not mean forever. In the intermittent flooding cases where a taking was not found, the flooding was occasional, of brief duration, and did not significantly interfere with the prior use of the land. The overall relevance of these cases to the *Preseault 2* ruling is not totally clear, but it is difficult to find support here for expanding the scope of temporary physical takings to periods of months or years especially when the effect is more than a mere injury to property, and especially in view of the precedents of the War Department seizure cases and *Pewee Coal.*

In contrast to the *Preseault* rule, the *Hendler* rule appears to be grounded more firmly on precedent but its definition of "temporary" is far narrower and more pro-property owner than any cited precedent. The *Hendler* definition does not violate any precedent but it is more extreme than any prior opinion requires.

The *Hendler* court relies primarily on the War Department seizure cases described in Part IV, above. These cases are very similar to *Pewee Coal* and seem to confirm that an occupation can be legally permanent with a duration of as little as twelve months (the shortest duration of the cited cases). The *Pewee Coal* precedent would support per se treatment for deprivations as short as five and one half months. The court however cites no precedent for its formulation

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101. TRIBE, *supra* note 1, at 599.

102. United States v. Kansas City Life Ins. Co., 339 U.S. 799 (1950); Sanguinetti v. United States, 264 U.S. 146 (1924); United States v. Cress, 243 U.S. 316 (1917); Bedford v. United States, 192 U.S. 217 (1904); United States v. Lynah, 188 U.S. 445 (1903).

103. 264 U.S. 146 (1924).

104. *Id.* at 147.

105. *Id.* at 149.

of temporary as "transient and relatively inconsequential, and thus . . . no more than a common law trespass."[106] Here the court appears to be on new ground.

Based purely on precedent, the federal courts would seem to be compelled eventually to reject the rule announced in *Preseault 2* and to apply per se analysis to all physical deprivations except those which are briefer than some arbitrary interval. In selecting the length of this defining interval, the courts may well wish to consider what is best from the viewpoint of public policy.

B. Public Policy Considerations

It is apparent that the *Hendler* rule is much more consistent with the traditional values of protection of private property than the *Preseault 2* rule. It puts government on notice that any temporary physical deprivation, except the most minimal and momentary, will work a per se taking. As noted in Part III above, the *Preseault 2* rule could be a temptation to government to circumvent the Takings Clause under the pretense of temporary action.[107] Indeed, in 1993, the federal government employed the temporary physical taking argument in defending a taking claim in a case where it had seized a warehouse and its contents and had then extended access to a third party for a period of nine months.[108] The Federal Circuit did not accept that argument and instead found a permanent taking, citing the rule of *Hendler*.[109]

However, the desirability of the *Preseault 2* rule should not be dismissed out of hand. It may well be that while the law of temporary physical takings is still unsettled, the common good will be better served by settling it under the regulatory branch and the *Penn Central* test.

The facts of *Hendler* suggest a strong public policy justification for something like the *Preseault 2* rule. The government's action to monitor ground water in order to protect the public does not seem to be the sort of evil that the Takings Clause was written to prevent. And indeed, it is difficult in a case like *Hendler* to justify a rule which requires courts to ignore the benefits of the water quality monitoring (including benefits to the complaining owner) and to ignore the insignificance of the economic impact.

Furthermore, we should expect *Hendler*-type situations to become more common as our understanding of environmental problems develops. The growing appreciation that endangered ecosystems respect no property boundaries may lead to more needs for government to enter land temporarily to monitor, inspect, and remediate.[110]

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106. Hendler v. United States, 952 F.2d 1364, 1377 (Fed. Cir. 1991).

107. *See supra* note 73-76 and accompanying text.

108. Skip Kirchdorfer, Inc. v. United States, 6 F.3d 1573 (Fed. Cir. 1993).

109. *Id.* at 1582-83.

110. *See, e.g.*, Joseph L. Sax, *The Constitutional Dimensions of Property: A Debate*, 26 LOY. L.A. L. REV. 23, 32-33 (1992):

> The ecological truism that everything is connected to everything else may be the most profound challenge ever presented to established notions of property. . . . The real difficulty is that modern ecological theory has eroded the notion of a bounded domain, often almost to the vanishing point. . . . Many things that a short time ago were thought entirely the business of a landowner within the confines

In many ways, the need to have physical access to the environment in the 1980s and 1990s is analogous to government's need to regulate land use beginning in the early twentieth century. Just as the balancing test eventually met the need to permit judicial flexibility in dealing with regulatory deprivation, the same test may be the appropriate way to deal today with temporary physical deprivation. If on the other hand, *Hendler* stands, then we can expect reaction to environmental threats to be suppressed by the cost of compensation.

Based on this limited assessment of the two rules, it appears that existing precedent more strongly supports the *Hendler* rule but a further examination of public policy considerations suggests that the courts should give careful consideration to the *Preseault 2* rule as a beneficial "next step" in the development of takings jurisprudence.

VI. THE FUTURE OF THE DUAL STRUCTURE

While the court of appeals and, perhaps the Supreme Court, weigh the applicable precedents and the immediate public policy dimensions of *Preseault*, they must also acknowledge that the case sharply illuminates the question of retaining or abandoning the entire dual branch system of takings law. The final *Preseault* decision offers an opportunity for a new beginning in this area. The *Preseault-Hendler* collision appears to be unprecedented as the first opportunity in which the courts were called upon to decide into which of the two branches a potentially large proportion of future takings claims would fall. Rarely before had the courts faced a legitimate opportunity to compare the merits of the two takings branches in the context of an issue clearly before them. That opportunity was presented here.

It is, of course, highly unlikely that the final ruling in a further appeal of *Preseault* would announce a sweeping revision of takings law. It could, however, serve as the *beginning* of a shift to a more consistent and uniform set of rules and the eventual elimination of the dual structure. Support for the *Hendler* rule might be seen by the nation at large as a harbinger of expansion of the per se rule even into regulatory deprivation cases, while endorsement of the *Preseault 2* rule would similarly be seen as heralding the expansion of balancing into the physical takings realm.

In selecting either of these two directions the courts should consider not only existing precedents, and the historical roots of the Takings Clause, but also the evolving role of property and property rights in American society. Contemporary thought in this area covers a very wide spectrum, from those who see property as an absolute and inviolable right, to those who see it as a malleable creation of the state which can and should be changed from time to time as the conditions of society evolve.

Typical of the first viewpoint, Professor Epstein takes an absolutist and traditional position on takings, seeing little change since 1789 in the role of private property. Epstein traces much of his argument to the Lockean liberal

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of his or her own land are now revealed to be intimately interconnected with other lands and with public resources that have never been thought to belong to the owner of a given tract.

views of James Madison. In fact, he bases much of his takings commentary on the writings of Locke himself:

> The supreme power cannot take away from any man any part of his property without his own consent. For the preservation of property being the end of government, and that for which men enter into society, it necessarily supposes and requires that the people should have property, without which they must be supposed to lose that by entering into society, which was the end for which they entered into it, too gross an absurdity for any man to own.[111]

Arguing Locke's influence on the Framers of the Constitution, Epstein insists that government deprivation is a taking whenever the same action by a private citizen would be a taking. Using this test, he endorses Justice Holmes's decision in *Mahon* (though he notes Holmes's later regret over limiting future compensation only to cases in which regulation "goes too far").[112] He then quickly dismisses as incorrect the Court's rulings in *Penn Central* and *Pruneyard*, where the Court found no taking. Epstein would have decided both cases on absolute property right grounds. In addressing *Pruneyard* Epstein writes:

> The Rehnquist opinion reveals its intellectual weakness at every turn. Nowhere does the Court offer a coherent account of the incidents of ownership including exclusive possession. In private cases, no injunction against entry is dependent upon a showing of actual damages. The entry itself is the violation of the right. . . . It therefore follows that any demonstration about negligible impairment of the [owner's] rights is wholly beside the point as it would be in a private dispute.[113]

It is quite significant that, in attacking *Penn Central*, Epstein necessarily argues for the extension of per se analysis to regulatory takings claims. This introduces a familiar problem: since almost every law and regulation deprives someone of some previously available prerogative, there is no clear limit to prevent paralyzing or impoverishing the government.[114] If a claimant need only show a deprivation and that deprivation is per se a taking, then every regulatory deprivation will require payment of compensation. While some devout libertarians may desire such an extreme handicapping of government, most Americans probably would reject an outcome this extreme.

However, even if some bright line limit could be found to limit the expansion of the per se branch, there is considerable reason to believe that this branch is no longer consistent with the modern evolution of the nature of property. Professor Epstein is the intellectual heir of the liberal belief that property was an essential barrier protecting the individual and his freedoms from the potential tyranny of government. In 1789 and even in 1889, this concept may have held much truth. Within his own farm, a citizen might make a living, produce sufficient resources to feed and clothe his family and be beyond the reach of the state. No matter how

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111. RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 14 (1985) (quoting JOHN LOCKE, OF CIVIL GOVERNMENT ¶ 138 (1690)).

112. *Id.* at 63.

113. *Id.* at 65.

114. *See supra* note 42 and accompanying text.

arbitrary and capricious government might become, it could not, without violating the Takings Clause, confiscate this island of personal liberty unless it paid the cost of procuring another. The modern viability of this traditional view of property is very questionable.

One challenge to it comes from the concept of "The New Property," initially conceived in 1964 by Professor Reich.[115] Reich's proposition is that land and chattels are no longer the primary tools by which citizens insure their livelihood and are no longer the focus of citizens' vulnerability to government tyranny. The place of land and goods has been taken by the many entitlements and controls which link people to the state. Citizens no longer rely on soil for their livelihoods, but rather upon government indulgences such as welfare benefits, unemployment insurance, Medicaid, government jobs, government contracts, driver's licenses, business licenses, professional credentials, and building permits, to name only a few examples.[116] Reich argues persuasively that this "New Property" has displaced the old property but must be protected for precisely the same reason—to preserve the freedom of each individual. However, this "New Property" is better protected by application of the Due Process Clause than the Takings Clause. Indeed a line of cases resting on the Due Process Clause has established that the elements of the "New Property" are indeed rights, not privileges, and cannot be taken without benefit of a hearing in most cases.[117] It might be argued persuasively that even Locke might redirect the focus of his concerns away from physical property if he were presented with the modern relationship between citizen and state.

Opposition to the extension of the per se branch seems then to be formidably opposed both on pragmatic cost grounds and by the modern erosion of its philosophical foundation. This erosion is furthered by those who argue that classic concepts of property no longer work. These arguments hold that the nature and role of property rights has evolved over the long life of the Republic and has reached a point that the purposes of the Takings Clause are no longer served by the judicial rules which seek to enforce it. This view is expressed by Professor Sax in seeking to defend *Penn Central*. Not surprisingly, Sax begins his defense with a distinctly different assumption (from Professor Epstein's) of the role and purpose or private property rights. He sees property as a creation of the state and society, whose primary purpose is to insure that resources will be devoted to socially desirable uses through market forces.[118] However, when society begins to recognize that the system no longer consistently produces socially desirable results a change becomes necessary:

> Put as bluntly as possible my thesis is this: We have endowed individuals and enterprises with property because we assume that the private ownership system will allocate and reallocate the property resource to socially desirable uses. Any such allocational system will, of course, fail from time to time. But

115. Charles A. Reich, *The New Property*, 73 YALE L.J. 733 (1964).

116. *Id.*

117. Mathews v. Eldridge, 424 U.S. 319 (1976); Board of Regents v. Roth, 408 U.S. 564 (1972); Goldberg v. Kelly, 397 U.S. 254 (1970).

118. Joseph L. Sax, *Some Thoughts on the Decline of Private Property*, 58 WASH. L. REV. 481, 484 (1983).

> when the system fails to allocate property to "correct" uses, we begin to lose faith in the system itself. Just as older systems of property, like feudal tenures, declined as they became nonfunctional, so our own system is declining to the extent it is perceived as a functional failure. Since such failures are becoming increasingly common, the property rights that lead to such failures are increasingly ceasing to be recognized . . . . [I]n cases like *Penn Central* and many other modern situations such as open space preservation or coastal protection, there is widespread agreement that nondevelopment is the correct result, and widespread recognition that conventional bargaining . . . is not bringing about that result.[119]

Sax's conclusion is that owners do not actually possess property rights which fail to serve society's intended goals and in such cases the right is not taken but is simply not possessed in the first instance.[120] Using nuisance law as a paradigm, he asserts that no owner has a property right to use his property in a manner contrary to the common good. Sax's immediate goal is to justify the denial of compensation in *Penn Central*, a regulatory takings case. But his arguments strike as directly at the concept of per se analysis of physical takings. If property rights serve to block or financially hamper toxic monitoring or even recreational hiking trails, then those rights are arguably not present because they would fail to allocate the land to its best socially acceptable use. It follows that this view of property rights can be supported only where every claim is subjected to a balancing test. Per se tests will not work because the per se ruling presumes the validity of the right interfered with and never inquires into background facts supporting its continued recognition.

Sax's view appears to be a modern descendent of the Jeffersonian civic republican concept of property as a right granted by the state to individuals as a tool for promoting common good. The civic republicans saw the direct effect of ownership to be a stake in the community leading to dedicated involvement in local democracy. Sax updates the model only to the extent that the common good consists here of nearly optimal allocation of resources.

Should the courts, then, discard the dual structure and adopt one or the other view? To date the Supreme Court has shown no indication of doing so. In *Lucas v. South Carolina Coastal Council,*[121] the Court kept the two branches distinct but established a link between them and extended the per se rule to the extreme case of total regulatory deprivation.

In the end, it appears that Epstein's may be the weaker argument based more in political and legal history than in modern political and legal reality. The proposition that land and other physical property serves as the protection of the individual from the intrusion of the state has waned in validity with national growth, urbanization, and the interdependence of persons with each other and with the government. As Professor Reich has pointed out the "New Property" in the sense of a fortress against the state is less land and goods and more bound up in government entitlements and benefits. As such it is easier to see Locke's concerns being satisfied by the Due Process Clause and by the judicial review provisions of the Administrative Procedure Act than by the Takings Clause.

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119. *Id.*
120. *Id.* at 486.
121. 505 U.S. 1003, 1030 (1992).

Furthermore, as previously stated, the extension of per se analysis to regulation eventually paralyzes government. Except for a small minority of devout libertarians, that is simply not a result any conceivable Supreme Court could embrace.

It is somewhat more likely that the Court could see its way to extend balancing analysis to all takings claims. At first consideration, this seems not to be a revolutionary departure from precedent. After all, takings law has evolved repeatedly, if not continuously, throughout the nation's history. The Takings Clause which originally addressed only eminent domain, was extended first to physical occupation, and then to regulatory deprivation, with evolving tests throughout the process. It is somewhat difficult, however, to characterize the application of balancing to permanent physical deprivations as a logical continuation this expansion of the scope of the Takings Clause. It is more a retreat and revision than an expansion. This would be the first time in the development of takings law that a step in development would favor government over the individual. For this reason alone, the Court may be reluctant to take the step.

In the end it would take something like Sax's arguments to make the logical leap. What unifies the recognition of regulatory takings and the changing of the test for physical takings is an acceptance by society and the courts that the nature of the community has changed and the impact of property rights on the welfare of the community has changed. From its support of zoning early in this century down to its denial of *Penn Central*'s takings claim, the Court has been willing to forge new law to meet the evolving need. This time, however, the Court would have to be prepared to turn its back on long standing precedents guarding possession and the right to exclude.

At the same time, it is almost certainly not an acceptable long-term answer to retain the dual structure. As *Preseault 2* and *Hendler* illustrate, the system is likely to produce cases at the boundaries which are fugitives from either branch, which will confuse lower courts and produce conflicting decisions. The Court needs to fashion a system which is logical, consistent, and judicially workable. That system is almost certainly a balancing system fashioned on the *Penn Central* model.

Changes in the law are better digested slowly. In the end the best action by the Court may be to support the Federal Court of Claims' decision in *Preseault 2* holding that all temporary takings of any duration fall under the *Penn Central* rule. This may be an interim position for eventual expansion of balancing to all takings claims.

CONCLUSION

It appears that takings law well deserves its frequent characterization as a "muddle."[122] Its two branches—physical takings and regulatory takings—are

122. *See* Louise A. Halper, *Why the Nuisance Knot Can't Undo the Takings Muddle*, 28 IND. L. REV. 329 (1995); Carol M. Rose, *Mahon Reconstructed: Why the Takings Issue Is Still a Muddle*, 57 S. CAL. L. REV. 561 (1984); *see also* JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 430 (1991) ("The Supreme Court's decisions in 'taking' issues may

governed by different rules which often produce results which are contradictory and inconsistent.

Although the special category of temporary physical takings has received little attention compared to the two main branches, it may become more prominent as a result of the needs of government to enter land to monitor, inspect, and remediate damage to the human environment. At present, two contradictory rules for defining and resolving temporary physical takings claims have been announced by different federal courts. One of these rules, the *Hendler* rule, almost defines the category out of existence, and would result in virtually all governmental physical deprivations being declared takings. The other rule, the *Preseault 2* rule, defines the category very broadly to include even physical occupation for many (but a finite number of) years. Under this rule, courts would be permitted to engage in balancing the public benefits and the private harm in determining whether each deprivation is a taking.

The *Hendler* rule is better supported by prior judicial precedent and is more consistent with traditional values of the sanctity of private property. However, the *Hendler* rule may not best serve the public good. It could be expected to raise the cost and thus reduce the amount of effort in environmental quality programs.

The *Preseault 2* rule is not supported by most existing precedents and is largely inconsistent with American traditions of protection of private property. However, adoption of the *Preseault 2* rule may be an appropriate "next step" in the developmental progression of takings law from per se physical takings to a balancing test for regulatory takings.

In deciding between the two rules, the courts should give full consideration not only to precedent and immediate public policy concerns, but also to the evolving nature of private property rights in American society, and to the need for logical coherence in the structure of takings jurisprudence.

A full consideration of all these factors strongly supports the extension of balancing rules to all finite duration physical takings claims, despite apparent conflict with precedent.

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properly be viewed as a 'crazy quilt pattern' of rulings.").