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The Diminishing Equivalence Between Regulatory Takings and Physical Takings

Andrew S. Gold*

I. Introduction

Regulatory takings doctrine has been inconsistent and confused for some time now, drawing fire from a broad range of critics.¹ For decades the Supreme Court has applied an “ad hoc” balancing test to determine when a regulation’s effect on property triggers the just compensation requirement of the Fifth Amendment Takings Clause.² The recent decision in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*,³ however, is a major development in takings law. *Tahoe-Sierra* held that a three-year moratorium on all development of land was not a per se taking of property.⁴ The *Tahoe-Sierra* reasoning indicates that the Court is rejecting the proposal in *Lucas v. South Carolina Coastal Council*⁵ that regulatory takings are compensable based on a sufficient “practical equivalence” to physical takings of property. This reluctance to equate regulatory and physical governmental acts

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1. See, e.g., Steven J. Eagle, *Substantive Due Process and Regulatory Takings: A Reappraisal*, 51 ALA. L. REV. 977, 979 (2000) (“[O]utsiders have pronounced the Court’s property jurisprudence incoherent, and some of the Justices have been kinder only in form.”); Susan Rose-Ackerman, *Against Ad Hocery: A Comment on Michelman*, 88 COLUM. L. REV. 1697, 1711 (1988) (“[A] comprehensive answer [to the takings question] is sorely needed.”); Carol M. Rose, Mahon *Reconstructed: Why the Takings Issue Is Still a Muddle*, 57 S. CAL. L. REV. 561, 562 (1984) (“[C]ourts continue to reach ad hoc determinations rather than principled resolutions.”); John A. Humbach, *A Unifying Theory for the Just Compensation Cases: Takings, Regulation and Public Use*, 34 RUTGERS L. REV. 243, 244 (1982) (describing takings as “a farrago of fumbings which have suffered too long from a surfeit of deficient theories”).

2. U.S. CONST. amend. V (“[N]or shall private property be taken for public use without just compensation.”).

3. 122 S. Ct. 1465 (2002).

4. *Id.*

5. 505 U.S. 1003 (1992).

ensures continued uncertainty in takings jurisprudence.

Current regulatory takings jurisprudence originated in an opinion penned by Justice Holmes in the early twentieth century.⁶ In *Pennsylvania Coal Co. v. Mahon*,⁷ Justice Holmes noted that a use of the police power could diminish "to some extent the values incident to property" without the government having to compensate the owner because, otherwise, "[g]overnment could hardly go on."⁸ However, he also noted that there are constitutional limits to the police power. "One fact for consideration in determining such limits is the extent of the diminution. When it reaches a certain magnitude, in most if not in all cases there must be an exercise of eminent domain and compensation to sustain the act."⁹ Justice Holmes famously concluded: "[W]hile property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."¹⁰

The Supreme Court has since struggled, with varying degrees of success, to define when a regulation "goes too far." In *Penn Central Transportation Co. v. City of New York*,¹¹ the Court set forth the ad hoc balancing test, which it now applies to most regulatory takings cases. Under the "fairness and justice" balancing test of *Penn Central*, courts look at the unique facts of each case, paying special attention to three factors: the economic impact of the regulation, the property owner's reasonable investment-backed expectations, and the character of the government action.¹² In propounding this test, the Court conceded its

6. See *Tahoe*, 122 S. Ct. at 1480 (describing *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), as the case "that gave birth to our regulatory takings jurisprudence"). But see Kris W. Kobach, *The Origins of Regulatory Takings: Setting the Record Straight*, 1996 UTAH L. REV. 1211, 1267-72 (1996) (arguing that the Supreme Court's regulatory takings jurisprudence began in the nineteenth century, with the Court's decision in *Yates v. Milwaukee*, 77 U.S. (10 Wall.) 497 (1870)). There are numerous early state court decisions recognizing the appropriateness of just compensation for regulations that effectively deprive owners of their property. See, e.g., *Gardner v. Trustees of the Vill. of Newburgh*, 2 Johns. Ch. 162 (N.Y. Ch. 1816). Further, there is an interpretation of *Pennsylvania Coal* as a due process decision. See, e.g., Robert Brauneis, "The Foundation of Our 'Regulatory Takings' Jurisprudence": The Myth and Meaning of Justice Holmes's Opinion in *Pennsylvania Coal Co. v. Mahon*, 106 YALE L.J. 613 (1996).

7. 260 U.S. 393 (1922).

8. *Id.* at 413.

9. *Id.*

10. *Id.* at 415.

11. 438 U.S. 104 (1978).

12. See *id.* at 124 ("In engaging in these essentially ad hoc, factual inquiries, the Court's decisions have identified several factors that have particular significance. The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations. So, too, is the character of the governmental action.") (citation omitted). The Court's inquiry owes much to the analysis of regulatory takings principles set forth in Frank I. Michelman, *Property, Utility and Fairness: Comments on the Ethical*

difficulty in refining the definition of a regulatory taking: "[T]his Court, quite simply, has been unable to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons."¹³

The *Lucas* decision presents a notable exception to the *Penn Central* test when government regulations have a severe enough impact on the use of property, amounting to a permanent physical occupation of land. The Court has long recognized that permanent physical occupations of land mandate compensation.¹⁴ In *Lucas*, a state law prevented an owner of a beachfront property from developing his land, and a state court held that the regulation destroyed all value in the property.¹⁵ The *Lucas* Court rejected a *Penn Central* analysis in this context, noting the similarity of the regulation's effect to a permanent physical occupation of land.¹⁶ The Court concluded that a regulation that destroys all economically beneficial use of property is a categorical taking.¹⁷ This holding is known as the *Lucas* "per se" rule.

The *Lucas* Court also concluded that certain types of regulation

Foundations of "Just Compensation" Law, 80 HARV. L. REV. 1165 (1967).

13. *Penn Central*, 438 U.S. at 124. It is a subject of debate whether the Court has felt unease with its inability to find a test more precise than the ad hoc *Penn Central* test, or whether the Court to the contrary has celebrated this uncertainty. Compare Rose-Ackerman, *supra* note 1, at 1699 ("[T]he Court seems to be inordinately proud of the ad hoc nature of its takings opinions."), with Frank Michelman, *Takings*, 1987, 88 COLUM. L. REV. 1600, 1621-22 (1988) ("[T]he Court could perhaps be heard confessing a sense of unease about the lack of definition and rigor in its regulatory-takings doctrine."); Regardless, the Court has evinced uncertainty over when a regulatory taking occurs in several post-*Penn Central* decisions. See, e.g., *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 495 (1987) ("[T]his Court has generally 'been unable to develop any set formula for determining when justice and fairness require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons.'") (quoting *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979)); *Id.* at 508 (Rehnquist, C.J., dissenting) ("Admittedly, questions arising under the Just Compensation Clause rest on ad hoc factual inquiries, and must be decided on the facts and circumstances in each case."); *Andrus v. Allard*, 444 U.S. 51, 65 (1979) ("There is no abstract or fixed point at which judicial intervention under the Takings Clause becomes appropriate. Formulas and factors have been developed in a variety of settings. Resolution of each case, however, ultimately calls as much for the exercise of judgment as for the application of logic.").

14. See *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) (announcing per se compensation rule for permanent physical invasions of real property).

15. See *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1020 (1992).

16. See *id.* at 1017 ("We have never set forth the justification for this rule. Perhaps it is simply, as Justice Brennan suggested, that total deprivation of beneficial use is, from the landowner's point of view, the equivalent of a physical appropriation.").

17. See *id.* at 1015 ("The second situation in which we have found categorical treatment appropriate is where regulation denies all economically beneficial or productive use of land.").

inherently do not merit compensation, so long as background principles of state law indicate that the property rights at issue never belonged to the property owner in the first place.¹⁸ Regulations that prevent uses of property that constitute a nuisance are a typical example of a noncompensable act of this type.¹⁹ This limitation through background principles of state law is a narrow exception to the *Lucas* per se rule and, once again, the Court's reasoning was supported by a comparison to physical takings law.²⁰

Although the outcome in *Lucas* was foreshadowed by prior decisions,²¹ the Court's holding represented a significant step in clarifying when regulatory takings do and do not occur. The Supreme Court recognized in *Lucas* that, from the landowner's perspective, a regulation of property can be the equivalent of a permanent physical taking.²² This article will refer to this theory of compensation as the "practical equivalence" doctrine. After *Lucas*, it remained to be seen whether the practical equivalence doctrine would apply in other contexts, such as the temporary destruction of all economically beneficial uses of land.²³

Prior to *Tahoe-Sierra*, temporary regulation appeared to be a natural context for an extension of the *Lucas* practical equivalence doctrine. The Supreme Court's decision in *First English Evangelical Lutheran Church v. County of Los Angeles*,²⁴ a predecessor to *Lucas*, recognized that temporary regulations may require just compensation, but it did not answer the question of when such compensation would be due. In that case, the California Court of Appeal barred a taking claim based on the

18. See *id.* at 1027 ("Where the State seeks to sustain a regulation that deprives land of all economically beneficial use, we think it may resist compensation only if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with.").

19. See *id.* at 1029-30 (referring to principles of state nuisance law as an example of relevant background principles of state law).

20. See *id.* at 1028 (noting that weight of public interests is not relevant to a compensation determination in the physical taking context).

21. See, e.g., *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980) (recognizing compensation requirement where a regulation "denies an owner economically viable use of his land").

22. See *Lucas*, 505 U.S. at 1017-19.

23. An additional ramification of the *Lucas* decision, suggested by the Federal Circuit, is the possibility that the *Lucas* decision effectively revised the three-part balancing test of *Penn Central*. See *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171, 1179 (Fed. Cir. 1994) (stating that, after *Lucas*, the third factor under *Penn Central*—the nature of the government act—would address the question whether the state had the power to regulate under background principles of state law such as common law nuisance doctrine). For a helpful discussion of this theory, see James L. Huffman, *Judge Plager's "Sea Change" in Regulatory Takings Law*, 6 FORDHAM ENVTL. L.J. 597, 613-14 (1995).

24. 482 U.S. 304 (1987).

regulatory destruction of all use of land, in light of the California Supreme Court's prior holding that the only remedy for what it referred to as "excessive regulation" was invalidation of the law rather than just compensation.²⁵ The United States Supreme Court vacated and remanded for further proceedings.²⁶

Under the California Court of Appeal's understanding, where a regulation was held to violate the Takings Clause, the property owner would receive no compensation for the time during which the regulation had been in effect.²⁷ The United States Supreme Court, however, had previously recognized that the condemnation of leasehold interests requires compensation,²⁸ and it accordingly held in *First English* that, if a temporary regulatory taking had occurred, just compensation would be due.²⁹ Notably, the *First English* Court stated: "'[T]emporary' takings which, as here, deny a landowner all use of his property, are not different in kind from permanent takings, for which the Constitution clearly requires compensation."³⁰

Although the *First English* Court exempted normal delays during the zoning process from its holding,³¹ the Court's language regarding destruction of use paralleled the per se rule in *Lucas*. *First English* did not determine if there was a taking on its facts, but one could infer from the opinion that the temporary destruction of all economically beneficial use of property triggers the Takings Clause. The *Tahoe-Sierra* Court held otherwise.³²

The opinion in *Tahoe-Sierra* restricts the further development of takings doctrine in a categorical direction, returning to the *Penn Central* model. In *Tahoe-Sierra*, the Court addressed a three-year moratorium on development which destroyed all economically beneficial use of the regulated land during its operation. The *Tahoe Sierra* Court determined that *Lucas* did not apply on these facts, and rejected the extension of a

25. *Id.* at 308-09 (citing *Agins v. City of Tiburon*, 598 P.2d 25 (Cal. 1979), *aff'd on other grounds*, 447 U.S. 255 (1980)).

26. *Id.* at 322.

27. *See id.* at 312.

28. *Id.* at 318-19 (citing *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. Gen. Motors Corp.*, 323 U.S. 373 (1945)).

29. *Id.*

30. *Id.* at 318.

31. *See id.* at 321 ("We limit our holding to the facts presented, and of course do not deal with the quite different questions that would arise in the case of normal delays in obtaining building permits, changes in zoning ordinances, variances, and the like which are not before us.").

32. *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 122 S. Ct. 1465 (2002).

Lucas-type rule to temporary regulatory takings.³³ In de-emphasizing the link between regulations and their physical effect, the Court instead viewed the case through the lens of “fairness and justice,”³⁴ an analysis that in this case was largely concerned with the costs to regulators that might result from a per se rule.³⁵

Borrowing language from Justice O’Connor’s recent one-Justice concurrence in *Palazzolo v. Rhode Island*,³⁶ the *Tahoe-Sierra* Court concluded that the “temptation to adopt what amount to per se rules in either direction must be resisted.”³⁷ The decision of six Justices that such temptations ought to be resisted is more than symbolic, as the only way to resist such per se rules with any coherence is to reject their rationale. In support of its decision, the Court concluded that the concepts underlying regulatory takings are indeterminate.³⁸ *Tahoe-Sierra*, as a result, is one of the Court’s strongest endorsements yet of an ad hoc jurisprudence.

In addition, *Tahoe-Sierra* effectively amended the holding in *Lucas*. The Court subtly revised the test in *Lucas* to one that emphasizes the destruction of all value, rather than the destruction of all economically beneficial use, thus limiting both the scope of that decision and its applicability to similar cases.³⁹ In so doing, the *Tahoe-Sierra* decision also reaffirmed the “parcel as a whole” doctrine, which had come into question just one year before in *Palazzolo*.⁴⁰ Under that doctrine, courts are precluded from considering less than an entire parcel of property for purposes of deciding whether all value of the property was destroyed by regulation. Together, these two developments indicate that the *Lucas* per se taking rule will almost never be directly on point in regulatory takings

33. See *id.* at 1482-84 (“[O]ur decision in *Lucas* is not dispositive of the question presented.”).

34. See generally *id.* at 1485-86 (“With respect to these theories [supporting a categorical rule], the ultimate constitutional question is whether the concepts of ‘fairness and justice’ that underlie the Takings Clause will be better served by one of these categorical rules or by a *Penn Central* inquiry into all of the relevant circumstances in particular cases.”). Despite a sparse historical record, there are theories that the Takings Clause was intended to ensure “justice and fairness”—that is, that some individuals would not be forced to bear burdens that should be born by the public as a whole. See, e.g., William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782 (1995) [hereinafter Treanor, *Takings Clause*].

35. See *Tahoe-Sierra*, 122 S. Ct. at 1487-89.

36. 533 U.S. 606 (2001).

37. See *Tahoe-Sierra*, 122 S. Ct. at 1489 (quoting *Palazzolo*, 533 U.S. at 636 (O’Connor, J., concurring)).

38. See *id.* at 1486 (“The concepts of ‘fairness and justice’ that underlie the Takings Clause, of course, are less than fully determinate.”).

39. *Id.* at 1483; see also *infra* Part III.B.1.

40. See *Tahoe-Sierra*, 122 S. Ct. at 1484.

cases, as the likelihood that an entire parcel of property will have *no* remaining value due to regulation is exceedingly low.⁴¹

Further, the Chief Justice's *Tahoe-Sierra* dissent, as well as the Court's *Palazzolo* decision, suggest that the Court is rethinking the scope of the exception to the *per se* rule enunciated in *Lucas*—that compensation is not due if the regulated use was already barred under background principles of state nuisance and property law.⁴² These opinions imply that a majority of the Court is willing to expand or narrow its definition of a relevant background principle based on considerations other than pre-existing state law, creating an exception to the *Lucas per se* rule of uncertain breadth. If this is so, then very little of the clarity effected by *Lucas* remains, and it appears that the uncertainty of "background principles of state law" will impact both property owners and regulators.⁴³

As this article will show, *Tahoe-Sierra* will have a profound effect on the future path of regulatory takings doctrine. More precisely, the Court's desire for judicial discretion guarantees that regulatory takings doctrine will not develop any clarity in the foreseeable future. Part II of this article sets forth the background and justification for the *Lucas* "practical equivalence" doctrine in regulatory takings. Part III describes the holding in *Tahoe-Sierra*, and Part IV analyzes the doctrinal significance of that holding. Part V concludes that the Court has adopted *Penn Central* as its standard, and will seek to avoid categorical rules in future regulatory taking cases.

II. *Lucas* and the Practical Equivalence Doctrine

Cases such as *Lucas* do not involve compensation for a direct taking of property rights, but rather they recognize an indirect taking of physical

41. Cf. Richard A. Epstein, *Lucas v. South Carolina Coastal Council: A Tangled Web of Expectations*, 45 STAN. L. REV. 1369, 1377 (1993) ("[O]nce the Court lets it be known that a value deprivation of 95 percent requires no compensation, what legislature will be foolish enough to take an entire plot of land? Consequently, the Court has provided an effective blueprint for confiscation that budget-conscious state legislators will be eager to follow to the letter. His 'occasional result' will become the constitutional norm: Partial takings, such as those effected by the 'special permit provisions' of the 1990 Amendments to the BMA [the Act at issue in *Lucas*], though virtually total in their form, will remain uncompensated.") [hereinafter Epstein, *A Tangled Web*]. Professor Epstein's argument applies more strongly after *Tahoe-Sierra*, since *Lucas* left the question open whether a ninety-five percent diminution would fall under the *per se* rule.

42. See *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1029-30 (1992).

43. In *Palazzolo*, discussed at length below, the Court held that background principles of state law did not prohibit a taking claim by a property owner who acquired the property after enactment of the relevant regulation. *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001). This holding suggests that the uncertainties of takings law will impact regulators as well as property owners.

property that results from the regulation of that property.⁴⁴ The regulation of property rights, viewed in functional terms, is understood in this context as an equivalent of taking the physical property in which those rights inhere. The government must accordingly compensate for taking a fee simple, despite the fact that the owner did not actually lose the fee simple in its entirety as a formal matter—some rights usually remain in the property even where it retains no economically beneficial uses.⁴⁵ It is the practical effect on the physical property—the effective ouster of possession—that is dispositive in such instances.

This connection to physical property is doctrinally significant. Defining “property” in the takings context is crucial to applying the clause, but doing so is an increasingly muddled effort.⁴⁶ Intangible property rights are sometimes treated as property and sometimes not treated as property. For example, the courts have found a taking where regulations destroy the right to devise property, but not where regulations destroy the right to sell property.⁴⁷ The uncertain meaning of takings “property” in the regulatory context is a primary reason why the holding in *Lucas* is so important to regulatory takings doctrine, as *Lucas* links the Takings Clause to property that is indisputably covered—the fee simple

44. This should not be interpreted to mean that the taking is “indirect” in the sense that regulation directed at other subject matter has an incidental effect on the property’s value. Such consequences are generally not compensable. See, e.g., *The Legal Tender Cases*, 79 U.S. (12 Wall.) 457, 551-52 (1870) (“[The Takings Clause] has always been understood as referring to only a direct appropriation, and not to consequential injuries resulting from the exercise of lawful power. It has never been supposed to have any bearing upon, or to inhibit laws that indirectly work harm and loss to individuals.”).

45. See Huffman, *supra* note 23, at 603 n.46 (“The distinction between regulatory impact and physical occupation is real if, under the regulation in question, the property owner retains the right to exclude third parties (including the government).”).

46. For a valuable discussion of the need to define property for purposes of applying the Takings Clause, see D. Benjamin Barros, Note, *Defining ‘Property’ in the Just Compensation Clause*, 63 *FORDHAM L. REV.* 1853 (1995). Although property rights are frequently defined by state common law, a federal element is necessarily present when applying a federal text. See, e.g., Thomas W. Merrill, *The Landscape of Constitutional Property*, 86 *V.A. L. REV.* 885, 934-35 (2000); Jeremy Paul, *The Hidden Structure of Takings Law*, 64 *S. CAL. L. REV.* 1393, 1412-13 (1991); Henry Paul Monaghan, *Of “Liberty” and “Property,”* 62 *CORNELL L. REV.* 405, 435-38 (1977).

47. Compare *Hodel v. Irving*, 481 U.S. 704 (1987) (holding that a regulation of the right of tribe members to pass on property to heirs was a taking), and *Babbitt v. Youpee*, 519 U.S. 234 (1997) (same), with *Andrus v. Allard*, 444 U.S. 51, 65-66 (1979) (“[T]he denial of one traditional property right [the right of sale] does not always amount to a taking. At least where an owner possesses a full ‘bundle’ of property rights, the destruction of one ‘strand’ of the bundle is not a taking, because the aggregate must be viewed in its entirety.”). Justice Scalia, concurring in *Hodel v. Irving*, 481 U.S. 704 (1987), argued that the Court’s opinion limited *Andrus* to its facts. See *id.* at 719 (Scalia, J., concurring). Whether or not this is so, the Court’s holdings regarding the destruction of a single strand from the property rights bundle are clearly inconsistent.

in land.⁴⁸

In order to appreciate the role that a functional analysis holds, a brief review of the historical background is necessary. Some commentators argue that the original understanding of the Takings Clause extended only to direct, physical takings.⁴⁹ The basis for this claim is dubious.⁵⁰ Although the original understanding of the Takings Clause is open to debate, there were nevertheless broad understandings of property during the founding era,⁵¹ and there is historical evidence to support a broad reading of the Takings Clause that would cover regulatory takings.⁵² The modern legal understanding of "property" under the Takings Clause views property as a collection of rights.⁵³

48. See *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992).

49. See, e.g., John F. Hart, *Colonial Land Use Law and Its Significance for Modern Takings Doctrine*, 109 HARV. L. REV. 1252, 1253 (1996) (arguing against modern regulatory takings doctrine on the basis of colonial land use regulation); Treanor, *Takings Clause*, *supra* note 34, at 783 ("While the evidence of original intent is limited, it clearly indicates that the Takings Clause was intended to apply only to physical takings . . ."); Bernard Schwartz, *Takings Clause—"Poor Relation" No More?*, 47 OKLA. L. REV. 417, 420 (1994) (finding that James Madison's choice of words supports the notion that the clause was only intended to cover direct, physical takings); William Michael Treanor, Note, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 YALE L.J. 694, 711 (1985) [hereinafter Treanor, *Just Compensation Clause*]; see also *Lucas*, 505 U.S. at 1057 n.23 (Blackmun, J., dissenting).

50. See Andrew S. Gold, *Regulatory Takings and Original Intent: The Direct, Physical Takings Thesis "Goes too Far,"* 49 AM. U. L. REV. 181 (1999) (arguing that sparse historical record is inconclusive, but that founding era thinkers and early judicial holdings support compensation for regulatory takings); Kobach, *supra* note 6; see also BERNARD SIEGAN, *PROPERTY AND FREEDOM: THE CONSTITUTION, THE COURTS AND LAND-USE REGULATIONS* 21 (1997) (arguing that Madison's revision of draft of the Takings Clause indicates broad interpretation.); JAMES W. ELY, JR., *THE GUARDIAN OF EVERY OTHER RIGHT* 56 (1992) (arguing that Madison had a broad view of the Takings Clause.).

51. See, e.g., David Schultz, *Political Theory and Legal History: Conflicting Depictions of Property in the American Political Founding*, 37 AM. J. LEGAL HIST. 464 (1993); Gregory S. Alexander, *Time and Property in the American Republican Legal Culture*, 66 N.Y.U. L. REV. 273, 276-78 (1991).

52. One of the more persuasive arguments in this regard is the extremely broad understanding of property exemplified in James Madison's *Property*. According to Madison:

[T]hat is not a just government, nor is property secure under it, where arbitrary restrictions, exemptions, and monopolies deny part of its citizens that free use of their faculties, and free choice of occupations, which not only constitute their property in the general sense of the word; but are the means of acquiring property strictly so called.

James Madison, *Property*, NAT'L GAZETTE, Mar. 27, 1792, reprinted in 14 PAPERS OF JAMES MADISON 266 (Robert A. Rutland et al. eds., 1983). For a more in-depth analysis of this essay in the context of the Takings Clause, see Gold, *supra* note 50, at 200-04 (discussing different interpretations of Madison's writing). See also ELY, *supra* note 50, at 56; Laura S. Underkuffler, *On Property: An Essay*, 100 YALE L.J. 127, 136 (1990).

53. See, e.g., *United States v. Gen. Motors Corp.*, 323 U.S. 373, 377-78 (1945) (noting that the word "property" in the Takings Clause "may have been employed in a more accurate sense to denote the group of rights inhering in the citizen's relation to the

Despite the modern conception of property as a "bundle of sticks," a regulatory taking of one stick from the bundle is not automatically viewed by the courts as a taking of property.⁵⁴ Regulatory takings are frequently viewed in terms of their similarity to physical takings, and the property at issue is often characterized as physical property.⁵⁵ A regulation that permits physical invasion of property is more likely to require compensation,⁵⁶ and dissimilarity to a physical taking is often an effective bar to a claim for just compensation.

Originalism concerns might animate this emphasis on physical property to some degree.⁵⁷ However, arguments that the original understanding of the Takings Clause extended only to physical takings are beside the point when a "taking" is understood in functional terms,

particular thing, as the right to possess, use and dispose of it").

54. See, e.g., *Andrus v. Allard*, 444 U.S. 51 (1979) (denying compensation where one "stick," the right to sell, was removed).

55. Cf. Paul, *supra* note 46, at 1404-05 ("The physicalist model is appealing because it holds out hope for simultaneously resolving private law controversies and constitutional disputes. In short, if courts could take their cues concerning the essence of ownership from a designated set of physically owned things, these things could form the core of the individualized property right protected against both citizen intrusion and government interference."); see also *id.* at 1418-23 (discussing strengths and weaknesses of the physicalist model).

56. See, e.g., *Kaiser Aetna v. United States*, 444 U.S. 164, 179-80 (1979) ("In this case, we hold that the 'right to exclude,' so universally held to be a fundamental element of the property right, falls within this category of interests that the Government cannot take without just compensation. This is not a case in which the Government is exercising its regulatory power in a manner that will cause an insubstantial devaluation of petitioners' private property; rather, the imposition of the navigational servitude in this context will result in an actual physical invasion of the privately owned marina."); *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 832 (1987) ("We think a 'permanent physical occupation' has occurred, for purposes of that rule, where individuals are given a permanent and continuous right to pass to and fro, so that the real property may continuously be traversed, even though no particular individual is permitted to station himself permanently on the premises."). Professor Frank Michelman has interpreted *Nollan* as a case involving physical takings, rather than regulatory takings. See Michelman, *supra* note 12, at 1608 ("*Nollan* holds that when state regulatory action imposes permanent physical occupation conditionally rather than unconditionally, the aggrieved owner can challenge state regulatory action 'as' a 'taking,' and thereby obtain a certain form of intensified judicial scrutiny of the condition's instrumental merit or urgency."). But see Douglas W. Kmiec, *The Original Understanding of the Takings Clause Is Neither Weak nor Obtuse*, 88 COLUM. L. REV. 1630, 1651-52 (1988) (suggesting the heightened scrutiny of regulations applied in *Nollan* may apply more generally to regulatory takings cases) [hereinafter Kmiec, *The Original Understanding*].

57. See *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1028 n.15 (1992) ("Justice Blackmun is correct that early constitutional theorists did not believe the Takings Clause embraced regulations of property at all, but even he does not suggest (explicitly at least) that we renounce the Court's contrary concern in *Mahon*. Since the text of the Clause can be read to encompass regulatory as well as physical deprivations . . . we decline to do so as well."); see also Treanor, *Takings Clause*, *supra* note 34; Treanor, *Just Compensation Clause*, *supra* note 49.

since a functional reading of the Takings Clause understands certain regulations as effective *physical* takings. It is probable that a primary impetus for modern courts to address physical property, rather than the intangible property rights that inhere in that property, has been Justice Holmes's warning that not every diminution in property value should be considered a regulatory taking.⁵⁸ Yet this caution does not provide a conceptual justification for failing to compensate a *de facto* physical taking that occurs via regulation.

As the *Lucas* Court emphasized, compensation for regulatory takings can be justified by the functional similarity between the effect of a regulation and a direct, physical taking of property.⁵⁹ This practical equivalence doctrine can also be traced to *Pennsylvania Coal*.⁶⁰ Although *Pennsylvania Coal* is frequently cited as the beginning of the Supreme Court's regulatory takings jurisprudence,⁶¹ the idea that government acts should be viewed functionally for takings purposes long predates that decision and is rooted in the nineteenth century.

The seminal Supreme Court case to recognize the functional effect of government action for takings purposes is *Pumpelly v. Green Bay Co.*⁶² *Pumpelly*, decided in 1871, involved the Wisconsin takings clause, which the Court found was equivalent to the Federal Takings Clause.⁶³ The Green Bay Company, pursuant to a state statute, built a dam that flooded Pumpelly's property.⁶⁴ The Court concluded that this destruction of Pumpelly's land constituted a compensable taking.⁶⁵ Its explanation for this holding has cropped up repeatedly in later decisions:

It would be a very curious and unsatisfactory result, if in construing a provision of constitutional law, always understood to have been

58. *But cf.* RICHARD A. EPSTEIN, *TAKINGS* (1985) (arguing that all regulations that take property rights are takings of property).

59. *See Lucas*, 505 U.S. at 1017; *see also* John A. Humbach, "Taking" the Imperial Judiciary Seriously: Segmenting Property Interests and Judicial Revision of Legislative Judgments, 42 CATH. U. L. REV. 771, 812 (1993) ("[W]hat Justice Holmes did was simply to treat as the generic equivalent of a physical taking that which had, in function and effect, exactly the same result as a physical taking."). Professor John A. Humbach notes that, in *Lucas*, the Court took the equivalence doctrine a step further than regulations that remove all use of property, it introduced a "value" component: numerous non-valuable property uses may remain, but so long as there is no valuable use, the Court still recognizes an equivalent to a physical taking. *Id.*

60. *See Pa. Coal Co. v. Mahon*, 260 U.S. 393, 414 (1922) ("To make it commercially impracticable to mine certain coal has very nearly the same effect for constitutional purposes as appropriating or destroying it.").

61. *See, e.g., Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 122 S. Ct. 1465, 1480 (2002); *Lucas*, 505 U.S. at 1014.

62. 80 U.S. (13 Wall.) 166 (1871).

63. *Id.* at 176-77.

64. *Id.* at 171.

65. *Id.* at 182.

adopted for protection and security to the rights of the individual as against the government, . . . it shall be held that if the government refrains from the absolute conversion of real property to the uses of the public it can destroy its value entirely, can inflict irreparable and permanent injury to any extent, can, in effect, subject it to total destruction without making any compensation, because, in the narrowest sense of the word, it is not *taken* for public use.⁶⁶

This reasoning, involving a government action that left the owner in technical possession of the property but without any remaining value in it, has provided a strong basis for the award of just compensation for regulatory takings.

This functional reasoning is just as applicable when the source of the destruction of property value is the government's regulatory power.⁶⁷ In a famous dissent in *San Diego Gas & Electric Co. v. City of San Diego*,⁶⁸ Justice Brennan cited *Pumpelly* for the principle that there is an "essential similarity of regulatory 'takings' and other 'takings,'"⁶⁹ and noted that, "[f]rom the property owner's point of view, it may matter little whether his land is condemned or flooded, or whether it is restricted by regulation to use in its natural state, if the effect in both cases is to deprive him of all beneficial use of it."⁷⁰

Justice Scalia's majority opinion in *Lucas* looked to Justice Brennan's argument for support: "We have never set forth the justification for this rule [that destruction of all economically beneficial use is a per se taking]. Perhaps it is simply, as Justice Brennan suggested, that total deprivation of beneficial use is, from the landowner's point of view, the equivalent of physical appropriation."⁷¹ The *Lucas* Court added that there were other reasons for the rule. The Court noted that it would be less realistic to assume that such a regulation secures an "average reciprocity of advantage" to everyone

66. *Id.* at 177-78 (emphasis in original). This language, incidentally, shows a strong similarity in language to the reasoning later expressed in *Pennsylvania Coal* respecting destruction of value. Professor William Michael Treanor contends that *Pumpelly* is an exceptional case in that "the government action in *Pumpelly* gave rise to a compensation requirement because it was a de facto physical taking." See Treanor, *Takings Clause*, *supra* note 34, at 795-96 n.74. The point here, however, is that regulatory takings can also be seen as de facto physical takings.

67. See Gold, *supra* note 50, at 237 ("The logic of *Pumpelly*, however, would also support compensation for any de facto direct taking It does not require a physical invasion for the government to utterly destroy the value of a property, and thus all but take the title to the property by means of regulating the property owner's rights of usage.").

68. 450 U.S. 621 (1981).

69. *Id.* at 651 (Brennan, J., dissenting).

70. *Id.* at 652 (Brennan, J., dissenting).

71. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1017 (1992).

concerned.⁷² The phrase “average reciprocity of advantage,” discussed in greater detail in Part IV, apparently denotes those instances where the property owner is actually benefited by the regulation of his property so as not to require compensation. The Court also stated that the concern that “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” would not apply to “the relatively rare situations” where the government destroyed all economically beneficial use of land.⁷³ The latter two reasons, however, were not affirmative reasons for a per se rule, but rather they were reasons why a per se rule would not be undesirable.⁷⁴

The *Lucas* Court’s substantive justification for a per se rule was the equivalence of such regulations to physical takings.⁷⁵ Justice Scalia noted that regulations that destroy all economically beneficial uses—for example a requirement that land be left in its natural state—“carry with them a heightened risk that private property is being pressed into some form of public service.”⁷⁶ Again, Justice Scalia turned to Justice Brennan for support: “From the government’s point of view, the benefits flowing to the public from preservation of open space through regulation may be equally great as from creating a wildlife refuge though formal condemnation or increasing electricity production through a dam project that floods private property.”⁷⁷ The Court noted that the many state and federal statutes that provide for the use of eminent domain to prevent developmental uses, or to acquire the land altogether, “suggest the practical equivalence in this setting of negative regulation and appropriation.”⁷⁸

Moreover, the practical equivalence doctrine caused the *Lucas* Court to refine the “noxious use” doctrine in regulatory takings law.⁷⁹ A long line of cases prior to *Lucas* had barred compensation where the

72. *Id.* at 1017-18.

73. *See id.* at 1018.

74. This point is partly made in Justice Stevens’s dissent, in which he argued that the Court’s rarity argument “begs the question of why regulations of *this* particular class should always be found to effect takings.” *See id.* at 1066-67 (Stevens, J., dissenting). With respect to the “average reciprocity of advantage argument,” the *Lucas* majority characterized this justification in terms of the absence of a functional basis for denying compensation. *Id.* at 1017. The absence of a functionalist counterargument is not a substantive foundation for a per se rule.

75. *See id.* at 1017.

76. *See id.* at 1018.

77. *See id.*

78. *Id.* at 1018-19. The Court’s analysis from the government’s perspective underlines the similarity of the regulation to an exercise of eminent domain, rather than a physical appropriation. *Id.*

79. *See id.* at 1022-26.

regulation at issue sought to prevent "harmful or noxious uses" of land.⁸⁰ In *Lucas*, the Court clarified the extent of this rule. The Court determined that there was no meaningful distinction between regulations that prevent harmful uses and regulations that confer benefits.⁸¹ The inability to limit the definition of harm-preventing regulations meant that—pursuant to the noxious use doctrine—the police power could swallow the Takings Clause in the regulatory context because a state government could almost always point to a public harm it had sought to prevent.⁸²

Rather than defer to state characterizations of regulations as preventing harmful uses, the *Lucas* Court held that the rule for physical takings must also apply to "confiscatory regulations."⁸³ The rule for physical takings does not permit a police-power exception to compensation based on a harm-preventing characterization of the government act. Where permanent physical occupation is concerned, the rule is that the government's action is a taking without regard to the public interests it may serve.⁸⁴ *Lucas* extended this principle to regulations that destroy all economically beneficial uses of land.⁸⁵

But this did not mean that the "noxious use" precedents would be jettisoned. The Court explained that there was a context in which police-power regulation of harms should go uncompensated: where the restriction on use "inhere[s] in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership."⁸⁶ This reaffirmed the "noxious use" precedent, but in a limited form.⁸⁷ Following *Lucas*, only laws that duplicate the result that could already have been achieved in the courts under the state's law of nuisance (or certain similar safety-related cases)

80. See *id.* at 1022 (citing *Goldblatt v. Hempstead*, 369 U.S. 590 (1962); *Miller v. Schoene*, 276 U.S. 272 (1928); *Hadacheck v. Sebastian*, 239 U.S. 394 (1915); *Mugler v. Kansas*, 123 U.S. 623 (1887)).

81. See *id.* at 1024 ("It is quite possible, for example, to describe in either fashion the ecological, economic, and esthetic concerns that inspired the South Carolina Legislature in the present case.").

82. See *id.* at 1026.

83. *Id.* at 1029.

84. See *id.* at 1028 (quoting *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982)).

85. See *id.* at 1029 ("We believe similar treatment must be accorded to confiscatory regulations, *i.e.*, regulations that prohibit all economically beneficial use of land . . .").

86. See *id.*

87. See *id.* at 1023-27 (describing noxious use precedents as a progenitor of modern statements limiting compensation where a regulation substantially advances state interests and interpreting that requirement in the *Lucas* context). But cf. *id.* at 1068 (Stevens, J., dissenting) (arguing that the nuisance exception as understood by the *Lucas* majority rejects the holding in *Mugler v. Kansas*, 123 U.S. 623 (1887)).

fall under the “noxious use” exception.⁸⁸ This correlation to the common law of nuisance is in accord with the probable original understanding of the Takings Clause.⁸⁹

Thus, the Court’s recognition of practical equivalence produced two bright-line rules in *Lucas*: (1) a destruction of all economically beneficial use of land is categorically a compensable taking, and (2) the strength of the public interests supporting a regulation is irrelevant, except insofar as the property rights at issue were already barred under background principles of state nuisance and property law. These bright-line rules stand in sharp contrast to the judicial balancing favored in *Penn Central*.⁹⁰

The *Tahoe-Sierra* decision challenges the first rule, and the dissenting opinion, combined with the Court’s recent decision in *Palazzolo*, suggests that the clarity of the second rule is in jeopardy. It appears that a majority of the Justices are uncomfortable with the implications of *Lucas*’s categorical reasoning.

III. The *Tahoe-Sierra* Holding

A. Background

In 1968, in an effort to conserve the natural splendor of Lake Tahoe, California and Nevada entered into an interstate compact, the Tahoe Regional Planning Compact.⁹¹ This compact created an agency known as the Tahoe Regional Planning Agency (“TRPA”), which regulated development in the region.⁹² At issue in *Tahoe-Sierra* were two TRPA-enacted moratoria that, for approximately thirty-two months, prohibited virtually all development on a substantial portion of the property subject to the TRPA’s jurisdiction.⁹³ However, following a challenge to the

88. See *id.* at 1029.

89. See Kmiec, *The Original Understanding*, *supra* note 56, at 1635 (“Legal dictionaries at the time of the founding paralleled Blackstone, noting that the law precluded the use of the property in a manner that would ‘injure his neighbor.’ Significantly, the drafter of the taking clause, James Madison, incorporated the Blackstonian definition in his writing on property and specifically excluded uses of property that harmed others by not ‘leav[ing] to every one else the like advantage.’”) (brackets in original).

90. See *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104 (1978).

91. See CAL. GOV’T CODE § 66800 (West 2002); NEV. REV. STAT. 277.190 (2002). Congress approved the Compact in 1969. See Tahoe Regional Planning Compact, Pub. L. No. 91-148, 83 Stat. 360 (1969). For additional background, see *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, 122 S. Ct. 1465, 1471-72 (2002) (describing the history and details of the Compact).

92. See *Tahoe-Sierra*, 122 S. Ct. at 1471.

93. See *id.* at 1472-73.

second moratorium as insufficiently stringent, a federal district court issued a permanent injunction on development, extending the effective prohibition on development to nearly six years.⁹⁴

The plaintiffs brought suit in federal district court alleging a taking without just compensation. The district court held that no taking had occurred under a *Penn Central* analysis,⁹⁵ but concluded that the plaintiffs had been temporarily deprived of all economically beneficial use of their land, thus triggering the categorical analysis set forth in *Lucas*.⁹⁶ The district court concluded that the plaintiffs had been deprived of the use of their property for approximately three years, and that they were accordingly entitled to just compensation.⁹⁷ Both parties appealed, but the plaintiffs did not appeal the *Penn Central* portion of the ruling.

On appeal, the Ninth Circuit reversed.⁹⁸ The panel first concluded that it would be inappropriate to limit the parcel of property at issue to the time period during which the moratorium precluded all use. Citing a series of Supreme Court holdings that precluded dividing the parcel of property into smaller segments,⁹⁹ it determined that the parcel of property could not be severed along the temporal dimension.¹⁰⁰ The panel also noted that the Supreme Court's decision in *First English*, which permitted compensation for temporary regulatory takings, had not actually determined what constitutes a temporary taking.¹⁰¹ The panel then determined that *Lucas* did not apply, both because there was remaining value to the property and because there were future economically beneficial uses after the temporary moratorium came to an end.¹⁰² A motion for rehearing en banc was denied, with Judge Kozinski,

94. See *id.* at 1473.

95. See *id.* at 1475.

96. See *id.*

97. See *id.* at 1476.

98. See *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 216 F.3d 764 (9th Cir. 2000), *aff'd*, 122 S. Ct. 1465 (2002).

99. *Id.* at 774-75 (citing *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 497-99 (1987); *Andrus v. Allard*, 444 U.S. 51, 65-66 (1979); *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 116 (1978)).

100. *Id.* at 779.

101. *Id.* at 777-78 ("First English is not even a case about what constitutes a taking."). This perspective was not shared by Justices Thomas and Scalia. See *Tahoe-Sierra*, 122 S. Ct. at 1496 (Thomas, J., dissenting) (interpreting *First English* as rejecting the idea that the Court must view the parcel as a whole for determining the existence of a temporary regulatory taking).

102. The Court avoided deciding whether economically beneficial use under *Lucas* referred to use of property or its value. See *Tahoe-Sierra*, 216 F.3d at 780-81 ("Clearly, the economic value of property provides strong evidence of the availability of 'economically beneficial or productive uses' of that property. Nevertheless, there are instances in which certain kinds of 'value' may be poor measures of the existence of such

joined by four other judges, strongly dissenting.¹⁰³

Judge Kozinski argued that the panel had effectively adopted Justice Stevens's dissent in *First English*, which rejected the conclusion "that all ordinances which would constitute takings if allowed to remain in effect permanently, necessarily also constitute takings if they are in effect for only a limited period of time."¹⁰⁴ Further, Judge Kozinski claimed that the panel's opinion directly conflicted with *Tabb Lakes, Ltd. v. United States*,¹⁰⁵ in which the Federal Circuit held that "a taking, even for a day, without compensation is prohibited by the Constitution."¹⁰⁶ He noted: "Under the panel's ruling in our case, a taking for a day could *never* require compensation, because despite the temporary deprivation, the property would retain almost all of its value based upon its expected future uses."¹⁰⁷ Judge Kozinski contended that the panel had improperly "view[ed] the regulation's effect on a property's value as the taking itself, rather than a test for whether the government [had] deprived the owner of the benefits of his property."¹⁰⁸ Finally, he concluded that the panel's result conflicted with *First English*, as the *First English* Court held that a temporary regulation is not different in kind from a permanent one.¹⁰⁹

uses. In any event, we need not resolve the sticky issues surrounding the meaning and proof of the existence of 'economically beneficial or productive uses,' because it is clear . . . that the temporary moratorium imposed by these regulations did not deprive the plaintiffs' land in the Lake Tahoe Basin of either all of its 'value' or all of its 'use.'").

103. See *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 228 F.3d 998, 999 (9th Cir. 2000) (Kozinski, J., dissenting), *denying reh'g en banc* to 216 F.3d 764 (9th Cir. 2000), *aff'd*, 122 S. Ct. 1465 (2002).

104. See *id.* at 1000 (Kozinski, J., dissenting) (quoting *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 322 (1987)) (Stevens, J., dissenting)); see also *id.* (Kozinski, J., dissenting) ("While the opinion nowhere cites Justice Stevens's *First English* dissent, the reasoning—and even the wording—bear an uncanny resemblance.").

105. 10 F.3d 796 (Fed. Cir. 1993).

106. See *Tahoe-Sierra*, 228 F.3d at 1001 (Kozinski, J., dissenting) (quoting *Tabb Lakes*, 10 F.3d at 800).

107. See *id.* (Kozinski, J., dissenting).

108. See *id.* (Kozinski, J., dissenting). For more discussion of this issue, see *infra* notes 170-72 and accompanying text.

109. See *Tahoe-Sierra*, 228 F.3d at 1002 (Kozinski, J., dissenting) ("It is true that *First English* did not have to determine whether there was a temporary taking, because it accepted the state court's conclusion that a regulation prohibiting all development was a taking while it was in effect. . . . But *First English* did decide that a temporary regulation is 'not different in kind' from a permanent one: If either deprives the owner of all use of his property, then the owner is entitled to compensation for the taking.") (citing *First English*, 482 U.S. at 318).

B. *The Supreme Court Holding*

The Supreme Court affirmed the Ninth Circuit decision.¹¹⁰ It began its analysis by arguing that “[t]he text of the Fifth Amendment itself provides a basis for drawing a distinction between physical takings and regulatory takings.”¹¹¹ According to the Court, the “plain language” of the Takings Clause requires compensation whenever the government acquires property for a public purpose, “whether the acquisition is the result of a condemnation proceeding or a physical appropriation.”¹¹² However, the Court added: “But the Constitution contains no comparable reference to regulations that prohibit a property owner from making certain uses of her private property.”¹¹³

Notably, the Court did not cite the plain language of the Takings Clause, which refers to neither eminent domain, physical appropriation, nor regulatory takings.¹¹⁴ The text is unspecific. Without more discussion, it is hard to guess to what the *Tahoe-Sierra* Court might have been referring when it claimed that the plain language covered the first two instances (condemnation and physical appropriation), but not the third instance (regulation). Moreover, the Court’s categorical rule that physical invasions of property are compensable no matter how small the invasion is itself based on the similarity between physical invasions and exercises of the eminent domain power,¹¹⁵ suggesting that the “plain language” of the constitutional text does not provide a basis for the proposed distinction.

A footnote indicates that the *Tahoe-Sierra* Court was also

110. *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Planning Agency*, 122 S. Ct. 1465 (2002).

111. *See id.* at 1478.

112. *See id.*

113. *See id.* But cf. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1028 n.15 (1992) (“[T]he text of the clause can be read to encompass regulatory as well as physical deprivations”); Treanor, *Just Compensation Clause*, *supra* note 49, at 711 (noting that “a broader reading would not do violence to the text”). Furthermore, the text is slightly amended from its originally proposed form, which had provided for compensation where a party was “obliged to relinquish his property.” *See* 1 ANNALS OF CONGRESS 434 (Joseph Gales ed., 1834), *reprinted in* BENNETT B. PATTERSON, *THE FORGOTTEN NINTH AMENDMENT* 93-217 (1955). Several commentators have read the change to the word “taken” as an indication that the text supports compensation for regulatory takings. *See, e.g.,* SIEGAN, *supra* note 50, at 21; *see also Lucas*, 505 U.S. at 1028 n.15.

114. *See* U.S. CONST. amend. V.

115. *See Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 427 (1982) (citing *Pumpelly v. Green Bay Co.*, 80 U.S. (13 Wall.) 166 (1872) (standing for the principle that physical invasions are compensable)); *see also id.* at 435 (“Property rights in a physical thing have been described as the rights ‘to possess, use and dispose of it.’ To the extent that the government permanently occupies physical property, it effectively destroys *each* of these rights.”) (citation omitted).

concerned with the pragmatic difficulties in determining when “a law or regulation imposes restrictions so severe that they are tantamount to a condemnation or appropriation,”¹¹⁶ difficulties that are in notable contrast to the simplicity of finding a taking where there is a physical invasion of property. Indeed, there is greater complexity where regulatory takings are involved, at least where the regulatory taking is not obviously akin to a physical ouster of possession. The Court’s reasoning, however, suffers from a logical flaw. The alleged difficulty in determining when a regulation is tantamount to a direct condemnation or appropriation does not conceptually justify a *Penn Central* balancing test. *Penn Central* balances factors that in no way indicate that a regulation is similar or dissimilar to an appropriation or condemnation.¹¹⁷ In a condemnation situation the government must pay just compensation when it exercises its eminent domain power, irrespective of the strength of the government’s interest in the condemnation. *Penn Central*, in contrast, may find support for a denial of compensation if the government interest is especially strong.¹¹⁸ This distinction between regulations and physical appropriations—the degree of complexity in determining when they are functionally equivalent—provides a logical basis for different treatment of regulations only to the extent that distinct treatment reflects the different effect a regulation has on a parcel of property.

The Court then presented an argument that was probably the true motivation for drawing its distinction. According to the *Tahoe-Sierra* majority:

For the same reason that we do not ask whether a physical appropriation advances a substantial government interest or whether it deprives the owner of all economically valuable use, we do not apply our precedent from the physical takings context to regulatory takings claims. Land-use regulations are ubiquitous and most of

116. *Tahoe-Sierra*, 122 S. Ct. at 1478 n.17 (“When the government condemns or physically appropriates the property, the fact of a taking is typically obvious and undisputed. When, however, the owner contends a taking has occurred because a law or regulation imposes restrictions so severe that they are tantamount to a condemnation or appropriation, the predicate of a taking is not self-evident, and the analysis is more complex.”).

117. See *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978). These aspects of *Penn Central* are rooted in questions of “fairness and justice,” and it is hard to see how they might enable a court to resolve the complexities of determining whether a regulation is “tantamount to a condemnation or appropriation.” See *Tahoe-Sierra*, 122 S. Ct. at 1478 n.17. There is no explanation of how a regulation supported by a strong government interest, for example, is somehow more or less like an act of condemnation, and indeed the text of the Takings Clause makes no distinction based on the government’s purposes outside of the “public use” language.

118. *Penn Central*, 438 U.S. at 144-45.

them impact property values in some tangential way—often in completely unanticipated ways. Treating them all as *per se* takings would transform government regulation into a luxury few governments could afford. By contrast, physical appropriations are relatively rare, easily identified, and usually represent a greater affront to individual property rights.¹¹⁹

The argument is an intriguing one, as it suggests that the applicability of constitutional text should depend in part on the degree to which it affects the public fisc.¹²⁰ The Court, however, in no way denied that regulations may amount to physical takings—it simply warned against treating all regulations that affect property as physical takings.¹²¹ But no one argued that all regulations that tangentially impact property values should be treated as *per se* takings, and even the strongest proponents of compensation for regulatory takings distinguish regulations that only indirectly affect property values.¹²² In addition, read broadly, the Court's reasoning implies that, if physical appropriations become frequent enough, it might be appropriate to start weighing the import of the government interest or the extent of the economic impact to determine whether a physical invasion merits compensation,¹²³ a result in tension with current understandings of the Takings Clause.

1. The Court's Interpretation of *Lucas*

Next, the *Tahoe-Sierra* Court turned to the question of whether

119. *Tahoe-Sierra*, 122 S. Ct. at 1479.

120. It is reasonable to argue that an interpretation of the Takings Clause that would have bankrupted the federal government at the time of the founding is not the best understanding of the original meaning of the text, but that is not the argument being made in *Tahoe-Sierra*. Even in light of the various land-use regulations extant at the time of the founding, there is little reason to think the Founders anticipated the present regulatory state. Cf. *Fed. Maritime Comm'n v. S.C. State Ports Auth.*, 122 S. Ct. 1864, 1872 (2002) ("The Framers, who envisioned a limited Federal Government, could not have anticipated the vast growth of the administrative state.").

121. This pragmatism can be found as far back as *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922). But the *Tahoe-Sierra* Court's suggestion that "treating them all" as *per se* takings would be too costly argues against a theory of compensation not presented in *Tahoe-Sierra*. See *Tahoe-Sierra*, 122 S. Ct. at 1479.

122. See, e.g., Epstein, *A Tangled Web*, *supra* note 41, at 1376 ("There is a broad class of actions that are *damnum absque injuria* (harm without legal injury) at common law, of which competition is perhaps the most important illustration. The same idea applies in the law of eminent domain. The reductions in value are thus, by themselves, irrelevant to the overall analysis."). A more detailed analysis is located in EPSTEIN, *supra* note 58, at 198.

123. This result would be similar to the view proposed in Justice Blackmun's dissent in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1992), which would have applied a *Penn Central* balancing test even in cases of permanent physical occupation of real property. See *id.* at 442-56 (Blackmun, J., dissenting).

Lucas applied to temporary regulatory takings, beginning with an analysis of the cases that led up to *Lucas*.¹²⁴ Starting with *Pennsylvania Coal*, the Court worked its way through *Penn Central*, emphasizing the *Penn Central* requirement that courts not “divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated.”¹²⁵

The *Tahoe-Sierra* Court next reviewed *First English*’s holding that temporary takings are compensable, noting that the *First English* decision had expressly disavowed a ruling on whether a taking had actually occurred in that case.¹²⁶ As noted above, Chief Justice Rehnquist held in *First English* that invalidation of the statute would not be a sufficient remedy if a taking were found. The rationale was based on the equivalence to undisputed takings of property. The *First English* Court concluded that “‘temporary’ takings which, as here, deny a landowner all use of his property, are not different in kind from permanent takings, for which the Constitution clearly requires compensation.”¹²⁷

The *Tahoe-Sierra* majority explained that the *First English* Court had identified two situations when a regulation that temporarily denied a property owner of all use of his or her property might *not* be a taking: first, where the denial of all use was part of the state’s authority to enact safety regulations, and, second, where “normal delays in obtaining building permits, changes in zoning ordinances, variances, and the like” are at issue.¹²⁸ The Court accordingly concluded that *First English* did not approve, and implicitly rejected, a categorical rule for regulations that temporarily destroy all economically beneficial uses of property.¹²⁹

The Court finally turned to *Lucas*. Its *Lucas* analysis hinged on the remaining value of future uses of the property. The *Tahoe-Sierra* Court noted *Lucas*’s “deprivation of all economically beneficial uses” rule, and concluded that it does not apply unless there is a “complete elimination of value.”¹³⁰ Further, it concluded, like the Ninth Circuit, that it was

124. *Tahoe-Sierra*, 122 S. Ct. at 1480.

125. See *id.* at 1481 (quoting *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 130-31 (1978)). For additional analysis of this doctrine, see *infra* Part IV.B.

126. See *Tahoe-Sierra*, 122 S. Ct. at 1482 (“In fact, *First English* expressly disavowed any ruling on the merits of the takings issue because the California courts had decided the remedial question on the assumption that a taking had been alleged.”). But cf. *id.* at 1496 (Thomas, J., dissenting) (“I had thought that *First English* put to rest the notion that the ‘relevant denominator’ is land’s infinite life.”).

127. *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 318 (1987).

128. See *Tahoe-Sierra*, 122 S. Ct. at 1482 (quoting *First English*, 482 U.S. at 313, 321).

129. See *id.*

130. See *id.* at 1483 (“Anything less than a ‘complete elimination of value,’ or a ‘total

inappropriate to view the regulation in terms of its effect on the property for the segment of time when it prohibited all use.¹³¹ Instead, the property had to be viewed in its entirety, including along the temporal dimension.¹³² If there was not a total taking of the entire parcel, *Penn Central* balancing would apply.¹³³ In light of this rule, and the Court's value-based reading of *Lucas*, the per se *Lucas* rule would not apply to temporary regulations. "Logically, a fee simple estate cannot be rendered valueless by a temporary prohibition on economic use, because the property will recover value as soon as the prohibition is lifted."¹³⁴

2. The Fairness and Justice Inquiry

Having rejected the application of *Lucas* and *First English*, the Court stated that it would nevertheless "consider whether the interest in protecting individual property owners from bearing public burdens 'which, in all fairness and justice, should be borne by the public as a whole,' justifies creating a new rule for these circumstances."¹³⁵ This reference to burdens that, "in all fairness and justice, should be borne by

loss,' the Court acknowledged, would require the kind of analysis applied in *Penn Central*." (citing *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1019-20 n.8 (1992)).

131. See *id.* ("Of course, defining the property interest taken in terms of the very regulation being challenged is circular. With property so divided, every delay would become a total ban; the moratorium and the normal permit process alike would constitute categorical takings. Petitioners' 'conceptual severance' argument is unavailing because it ignores *Penn Central*'s admonition that in regulatory takings cases we must focus on 'the parcel as a whole.'") (quoting *Penn Central*, 438 U.S. at 130-31). Although the "parcel as a whole" doctrine may apply in this context, it is worth noting that there is no circularity to defining the property interest in terms of the regulation being challenged. One might justify the rejected definition of the property interest by noting that the property regulated is the only interest that arguably would be taken by the regulation as it is the only property affected. Generally, it would make little sense to say that unregulated property had been taken. Cf. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1016 n.7 (1992) ("When, for example, a regulation requires a developer to leave 90% of a rural tract in its natural state, it is unclear whether we would analyze the situation as one in which the owner had been deprived of all economically beneficial use of the burdened portion of the tract, or as one in which the owner has suffered a mere diminution in value of the tract as a whole."). Such an analysis may determine the result under *Lucas*, but that does not make for circular reasoning; it simply mandates a result different from the Court's predilection for balancing.

132. See *Tahoe-Sierra*, 122 S. Ct. at 1483 (stating that the district court erred by viewing property in terms of temporal segments).

133. See *id.* at 1483-84 ("The starting point for the Court's analysis should have been to ask whether there was a total taking of the entire parcel; if not, then *Penn Central* was the proper framework.").

134. See *id.* at 1484. But cf. *id.* at 1497 (Thomas, J., dissenting) ("But the 'logical' assurance that a 'temporary restriction . . . merely causes a diminution in value,' is cold comfort to the property owners in this case or any other. After all, 'in the long run we are all dead.'") (citations omitted).

135. See *id.* at 1484.

the public as a whole” (originally expressed in *Armstrong v. United States*¹³⁶) is frequently cited by the Court as the standard for when regulatory takings merit compensation.

The Court’s use of the *Armstrong* test as a limit on the development of categorical rules is a novel one, however,¹³⁷ and further undermined the foundations of *Lucas*. The *Armstrong* test, emphasizing vague concepts of fairness and justice in takings determinations, is very much a driving force behind the utilitarian *Penn Central* calculus, and was quoted favorably in that opinion.¹³⁸ By applying a *Penn Central*-style balancing of factors to determine whether an exception to *Penn Central* is appropriate, the Court did not necessarily predetermine the outcome of its analysis. But it did turn *Lucas* on its head. The entire point in *Lucas*—the archetypal exception to *Penn Central*—was that balancing of these factors was inappropriate based on circumstances that indicated per se that a taking occurred.¹³⁹ To balance those factors when considering future per se rules is to reject implicitly the idea that regulatory takings may occur without antecedent reference to *Penn Central*.

In applying this “fairness and justice” analysis, the Court gave sufficient weight to an excerpt from Justice O’Connor’s *Palazzolo* concurrence that it bears repeating:

Our polestar . . . remains the principles set forth in *Penn Central* itself and our other cases that govern partial regulatory takings. Under these cases, interference with investment-backed expectations is one of a number of factors that a court must examine. . . . The concepts of “fairness and justice” that underlie the Takings Clause, of course, are less than fully determinate. Accordingly, we have eschewed “any ‘set formula’ for determining when ‘justice and fairness’ require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons.” The outcome instead depends largely “upon the particular circumstances in that case.”¹⁴⁰

136. 364 U.S. 40, 49 (1960).

137. The novelty may stem from the fact that categorical rules were rare in regulatory takings jurisprudence prior to *Lucas*. *Loretto* is an arguable example of such a categorical rule. See *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).

138. See *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 123-24 (1978).

139. See *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015 (1992) (distinguishing *Penn Central* and discussing contexts for per se rules); *id.* at 1019 (“We think, in short, that there are good reasons for our frequently expressed belief that when the owner of real property has been called upon to sacrifice *all* economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking.”).

140. *Tahoe-Sierra*, 122 S. Ct. at 1486 (quoting *Palazzolo v. Rhode Island*, 533 U.S. 606, 633 (2001) (O’Connor, J., concurring)).

As this quotation indicates, the *Tahoe-Sierra* “fairness and justice” inquiry is itself intertwined with *Penn Central*, and is consciously based on indeterminate concepts. The *Tahoe-Sierra* Court effectively applied *Penn Central* factors to determine whether to deviate from *Penn Central*.¹⁴¹

Finally, the Court concluded that a categorical rule regarding moratoria (even a narrow rule), would “impose serious financial constraints on the planning process.”¹⁴² The Court determined, based on an apparent “consensus in the planning community,” that moratoria are an essential element of successful development.¹⁴³ In light of the “interest in protecting the decisional process,”¹⁴⁴ and an alleged average reciprocity of advantage to landowners in the region because they could benefit from the regulation of other landowners,¹⁴⁵ the Court held that a categorical rule was inappropriate.

IV. Significance of the *Tahoe-Sierra* Holding

The true significance of *Tahoe-Sierra* is found by reviewing the dissenting opinions, which set forth alternative understandings of what constitutes a regulatory taking.¹⁴⁶ Both dissenting opinions indicate how far the Court majority has departed from its thinking in *Lucas*. Chief Justice Rehnquist’s dissent demonstrates that a practical equivalence reasoning in *Tahoe-Sierra* would not have to result in an omnipresent compensation requirement for temporary regulations of property.¹⁴⁷ His dissent also suggests, however, that the limited definition of “background principles of state property law” espoused in *Lucas* may be losing adherents on the Court.¹⁴⁸ Instead, an expectations-based definition of “background principles” is prevailing.

Justice Thomas’s dissent, questioning the Court’s affirmation of the “parcel as a whole” doctrine, highlights a problem that the *Lucas* opinion flagged but left unresolved.¹⁴⁹ In the physical taking context, the

141. *Id.* at 1486-87.

142. *Id.* at 1486 (“A narrower rule that excluded normal delays associated with processing permits, or that covered delays of more than a year, would certainly have a less severe impact on prevailing practices, but it would still impose serious financial constraints on the planning process.”).

143. *Id.* at 1487.

144. *Id.* at 1488 (describing the strength of the interest in protecting the decisional process).

145. *Id.* at 1489 (“At least with a moratorium there is a clear ‘reciprocity of advantage.’”) (quoting *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922)).

146. *See id.* at 1490 (Rehnquist, C.J., dissenting); *id.* at 1496 (Thomas, J., dissenting).

147. *Id.* at 1490-96 (Rehnquist, C.J., dissenting).

148. *Id.* at 1494 (Rehnquist, C.J., dissenting).

149. *Id.* at 1496-97 (Thomas, J., dissenting).

relevant parcel of property is the parcel that the government invaded. In contrast, in the regulatory context, the Court has frequently stated that it is the “parcel as a whole” that must be considered when determining the impact of a regulation on property, rather than just the segment of property that is affected by the regulation. This “parcel as a whole” requirement came into question in the Court’s recent *Palazzolo* decision.¹⁵⁰ In *Tahoe-Sierra*, the Court broadly reaffirmed the “parcel as a whole” doctrine, thus ensuring that partial regulatory takings cases entail a very different legal reasoning from partial physical takings cases.¹⁵¹

A. *The Rejection of Practical Equivalence Reasoning*

Chief Justice Rehnquist, dissenting in *Tahoe-Sierra*, proposed a categorical rule for regulations that temporarily destroy all economically beneficial use of property.¹⁵² Under this rule, such regulations would constitute per se takings. The Chief Justice’s dissent argued that the distinction between temporary and permanent destruction of economically beneficial use of property was nowhere to be found in *Lucas*, and that the Court had vitiated the practical equivalence justification for the *Lucas* per se rule.¹⁵³ A review of his argument illustrates the incompatibility of the reasoning in *Tahoe-Sierra* and the reasoning in *Lucas*.

1. The Demise of the Value/Use Distinction

In order to distinguish *Lucas* from *Tahoe-Sierra*, the majority recast the basis of the *Lucas* decision.¹⁵⁴ As the Chief Justice noted, the majority read *Lucas* as “being fundamentally concerned with value rather than with denial of all economically beneficial or productive use of land.”¹⁵⁵ This description of the majority’s argument is essentially right.

150. See *Palazzolo v. Rhode Island*, 533 U.S. 606, 616 (2001) (noting that “we have at times expressed discomfort with this rule,” and adding that this is “a sentiment echoed by some commentators”). In *Palazzolo*, the issue was not properly before the Court, however, and was accordingly left undecided.

151. *Tahoe-Sierra*, 122 S. Ct. at 1481-84.

152. *Id.* at 1490-96 (Rehnquist, C.J., dissenting).

153. *Id.* at 1492 (Rehnquist, C.J., dissenting).

154. See *id.* at 1482-83.

155. *Id.* at 1493 (Rehnquist, C.J., dissenting). The majority’s references to *Lucas* in terms of value are many. See, e.g., *id.* at 1482 (“These lots were rendered ‘valueless’ by a statute enacted two years later.”); *id.* at 1483 (“Anything less than a ‘complete elimination of value,’ or a ‘total loss,’ the [*Lucas*] Court acknowledged, would require the kind of analysis applied in *Penn Central*.”); *id.* (“Certainly our holding [in *Lucas*] that the permanent ‘obliteration of the value’ of a fee simple estate constitutes a categorical taking”); *id.* at 1484 (“Logically, a fee estate cannot be rendered valueless by a

The crucial respect in which the majority distinguished *Lucas* is that a partial taking does not destroy all value of the property.¹⁵⁶

Where the Ninth Circuit was reluctant to decide the "sticky issue" of how value and use interrelate under *Lucas*,¹⁵⁷ the *Tahoe-Sierra* Court felt no such qualms. It defined them as identical.¹⁵⁸ There is some irony in the source of this holding, though. In *Lucas*, Justice Stevens dissented because in his view the "deprivation of all economically beneficial use" rule was "wholly arbitrary," since "[a] landowner whose property is diminished in value 95% recovers nothing, while an owner whose property is diminished 100% recovers the land's full value."¹⁵⁹ Justice Scalia, writing for the *Lucas* majority, explained that Justice Stevens was incorrect, because it is wrong to assume that "the landowner whose deprivation is one step short of complete is not entitled to compensation."¹⁶⁰ Justice Scalia noted that such an owner "might" not be able to claim the benefit of the categorical rule, but could still recover under *Penn Central*.¹⁶¹ He further conceded that a landowner with a ninety-five percent loss might get nothing in "at least *some* cases," but noted that takings law is full of "all or nothing situations."¹⁶²

Justice Stevens had his revenge in *Tahoe-Sierra*, by rewriting *Lucas* so that it truly is a value-based decision.¹⁶³ But a careful reading of the above exchange indicates that the *Lucas* Court never held that a landowner who suffers a ninety-five percent loss in property value

temporary prohibition on economic use . . ."); *id.* ("In fact, these cases make clear that the categorical rule in *Lucas* was carved out for the 'extraordinary case' in which a regulation permanently deprives property of all value . . .").

156. *Id.* at 1483-84 (explaining the value test and noting that value necessarily remains in context of temporary regulations).

157. *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 216 F.3d 764, 780-81 (9th Cir. 2000), *aff'd*, 122 S. Ct. 1465 (2002).

158. *See Tahoe-Sierra*, 122 S. Ct. at 1483-84.

159. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1064 (1992) (Stevens, J., dissenting).

160. *See id.* at 1019 n.8.

161. *See id.* ("Such an owner might not be able to claim the benefit of our categorical formulation, but, as we have acknowledged time and again, 'the economic impact of the regulation on the claimant and . . . the extent to which the regulation has interfered with distinct investment-backed expectations' are keenly relevant to takings analysis generally.") (quoting *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978)).

162. *See id.* ("But that occasional result is no more strange than the gross disparity between the landowner whose premises are taken for a highway (who recovers in full) and the landowner whose property is reduced to 5% of its former value by the highway (who recovers nothing). Takings law is full of these 'all-or-nothing' situations."). Justice Scalia's example is imperfect, since an indirect loss of value, where there is neither government intrusion on nor government regulation of property, is not a taking by almost any theory. Since Justice Stevens's argument would also create all-or-nothing results, however, Justice Scalia's rhetorical point still has some force.

163. *See supra* note 155 and accompanying text.

cannot recover under the *Lucas* per se rule. Justice Stevens mischaracterized *Lucas*, changing the *Lucas* Court's use of the word "might" into a holding that "the categorical rule *would* not apply if the diminution in value were 95% instead of 100%."¹⁶⁴ The *Lucas* footnote did not say this, and Justice Stevens would presumably be aware of this fact, since the footnote was written in response to his own theory that a ninety-five percent loss would not trigger the categorical rule.¹⁶⁵ Justice Stevens created an arbitrary *Lucas* holding, by determining that *Lucas* does not apply where all economically beneficial use is destroyed, but only where all economically beneficial use is destroyed and there is no remaining property value. This holding not only invents an artificial line between per se compensable regulations and potentially non-compensable regulations, but it suggests that the *Lucas* rule might not have applied even on its own facts.¹⁶⁶

As the Chief Justice's *Tahoe-Sierra* dissent noted, in *Lucas* the Court did not base its holding on value, but on the loss of economically

164. *Tahoe-Sierra Pres. Council Inc. v. Tahoe Reg'l Planning Agency*, 122 S. Ct. 1465, 1483 (2002) (emphasis added).

165. In that footnote, the *Lucas* majority emphasized that Justice Stevens's view "errs in its assumption that the landowner whose deprivation is one step short of complete is not entitled to compensation." See *Lucas*, 505 U.S. at 1019 n.8. It is in this context that the Court said that a property owner might not be able to benefit from the categorical rule if only ninety-five percent of value was destroyed. Of course, ninety-five percent of value might be destroyed because the remaining five percent was devoted to an economically beneficial use (as opposed to mere value based on speculation that a permanent regulation would be repealed).

166. Justices Kennedy, Blackmun, Stevens, and Souter all questioned the finding of the South Carolina Court of Common Pleas that the regulation in that case would destroy all property value. See *id.* at 1033-34 (Kennedy, J., concurring); *id.* at 1043-44 (Blackmun, J., dissenting); *id.* at 1065 n.3 (Stevens, J., dissenting); *id.* at 1076-77 (statement of Souter, J.). But the more fundamental issue is that cases like *Lucas* would never present an absolute destruction of value. This point is ably made by Judge Kozinski in his dissent. As he noted: "Even a permanent prohibition can be rescinded and, in the fullness of time, almost certainly will be. The land may retain market value based on speculation that it will someday become usable because the regulation will be revoked." *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 228 F.3d 998, 1001 n.1 (9th Cir. 2000) (Kozinski, J., dissenting), *denying reh'g en banc* to 216 F.3d 764 (9th Cir. 2000), *aff'd*, 122 S. Ct. 1465 (2002); see, e.g., *Fla. Rock Indus., Inc. v. United States*, 791 F.2d 893, 902 (Fed. Cir. 1986) (stating that land might retain value because a buyer could "bet that the prohibition of rock mining, to protect the overlying wetlands, would some day be lifted"). Judge Kozinski's point is similar to the Chief Judge of the United States Claims Court in *Florida Rock Industries, Inc. v. United States*, 8 Cl. Ct. 160 (1985), *aff'd in part and vacated in part*, 791 F.2d 893, 902 (Fed. Cir. 1986). See *id.* at 166 n.6 ("If passively holding land against the possibility that restrictions on its use will be lifted were deemed a productive economic use, property would never be rendered useless by regulation and there could be no such thing as a regulatory taking."). The diminution of *Lucas* is compounded by the fact that the limits of its holding will encourage regulation that falls just short of a complete destruction of all economically beneficial use. See Epstein, *A Tangled Web*, *supra* note 41, at 1377.

beneficial use.¹⁶⁷ The two are not identical. In *Lucas*, there was no remaining economically beneficial use, but, as the Chief Justice noted: "Surely, the land at issue in *Lucas* retained some market value based on the contingency, which soon came to fruition, that the development ban would be amended."¹⁶⁸ The loss of economically beneficial use made it as if the property owner did not "own" the land, and this is the key to the *Lucas* decision. A property without economically beneficial use is very much like a property that has been physically taken. The *Lucas* Court basically said as much, quoting Sir Edward Coke: "For what is the land but the profits thereof?"¹⁶⁹

Value is not directly linked to the practical equivalence between regulatory takings and physical takings, and it is hard to see how it could be. Mere value is not a form of property, and its presence is dictated by market forces rather than state common law.¹⁷⁰ Lost value is simply evidence of lost uses. Economically beneficial uses, on the other hand, are aspects of property ownership. The Court has suggested that property may be subject to the Takings Clause even if it has no economic value.¹⁷¹ Value consistently has played a role in calculations of what is fair, but has not generally been equated with what has been taken.¹⁷²

167. *Tahoe-Sierra*, 122 S. Ct. at 1493-94 (Rehnquist, C.J., dissenting).

168. *Id.* at 1494 (Rehnquist, C.J., dissenting).

169. *Lucas*, 505 U.S. at 1017 (quoting 1 EDWARD COKE, INSTITUTES, ch. 1, § 1 (1st Am. ed. 1812)).

170. This distinction between property and value came to the fore in the Federal Circuit's second *Florida Rock* decision. See *Fla. Rock Indus., Inc. v. United States*, 18 F.3d 1560 (Fed. Cir. 1994). There, the panel majority held that, under *Penn Central*, compensation could be due for a partial taking of property, without dividing the parcel of property prior to applying the *Penn Central* test. The Court explained that the value lost due to the regulation could, under the right circumstances, also equal the property taken. *Id.* at 1572. Chief Judge Nies, dissenting, disagreed: "'Value' is not a property right under Florida law or any state law that I can uncover. While much of takings law is unclear, one principle is not. Rights in land depend on the law of the particular state." *Id.* at 1575 (Nies, C.J., dissenting). Although the author does not think that *Florida Rock* truly implicated Chief Judge Nies's concerns, as the majority was merely recognizing that the lost value reflected the taken property interest, it is hard to argue with the premise that value and property are different things. Cf. *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 131 (1978) ("[Supreme Court precedent] uniformly reject[s] the proposition that diminution in property value, standing alone, can establish a taking."). In addition, the original understanding of the Takings Clause does not implicate diminutions in property value. See Gold, *supra* note 50, at 242 n.377; Joseph L. Sax, *Takings and the Police Power*, 74 YALE L.J. 36 (1964) (arguing the diminution in value theory conflicts with the early natural law theorists' understanding of just compensation).

171. See *Phillips v. Wash. Legal Found.*, 524 U.S. 156, 169 (1998) ("We have never held that a physical item is not 'property' simply because it lacks a positive economic or market value.").

172. See *supra* note 159 and accompanying text.

2. Restricting Practical Equivalence as a Justification for Compensation

A more basic challenge to the practical equivalence theory lies in *Tahoe-Sierra*'s distinction between temporary and permanent deprivations of all economically beneficial use.¹⁷³ The Chief Justice accurately explained that the distinction drawn in *Tahoe-Sierra* would conflict with the underlying justification for the *Lucas* per se rule:

More fundamentally, even if a practical distinction between temporary and permanent deprivations were plausible, to treat the two differently in terms of takings law would be at odds with the justification for the *Lucas* rule. The *Lucas* rule is derived from the fact that a "total deprivation of use is, from the landowner's point of view, the equivalent of a physical appropriation." The regulation in *Lucas* was the "practical equivalence" of a long-term physical appropriation, *i.e.*, a condemnation, so the Fifth Amendment required compensation. The "practical equivalence," from the landowner's point of view, of a "temporary" ban on all economic use is a forced leasehold.¹⁷⁴

Whether or not *Lucas* is directly on point in temporary takings cases is a question on which reasonable minds can differ. If the relevant parcel of property is the temporal segment of property during the moratorium's effective period, then *Lucas* would apply because there would be no economically beneficial uses of the property. But *Lucas* itself did not involve a temporary taking. Therefore, it is possible to argue that *Lucas* does not apply to temporary regulations because finding a destruction of all economically beneficial use necessarily requires severing the parcel of property along its temporal dimension.¹⁷⁵ Even under this latter theory, however, it is the remaining economically beneficial use of the property, and not its remaining value, that should be decisive for the taking inquiry. Thus, even if *Lucas* does not directly cover temporary regulations, the reasoning in *Lucas* is at odds with the reasoning in *Tahoe-Sierra*.

Loss in value plays a very different role in *Penn Central* from its role in *Lucas*. The underlying difference between the two tests is the

173. *Tahoe-Sierra*, 122 S. Ct. 1465.

174. See *id.* at 1492-93 (citations omitted); see also Steven J. Eagle, *Just Compensation for Permanent Takings of Temporal Interests*, 10 FED. CIR. B.J. 485, 502 (2001) (explaining that "temporary takings" may be understood in terms of taking temporal interests, rather than temporary takings of a fee simple); Kmiec, *The Original Understanding*, *supra* note 56, at 1655 ("The answer is no more complicated than the fact that total takings, even those that last for a temporary period, are still total takings.").

175. See *infra* Part IV.B.

degree to which they are concerned with the potential equivalence of regulations to physical takings. *Penn Central* apparently looks to lost value to determine whether the regulation's effect would be unfair without compensation.¹⁷⁶ *Lucas*, on the other hand, looks to lost value to determine if there are remaining economically beneficial uses of the property, and, accordingly, whether the regulation is equivalent to a physical appropriation.¹⁷⁷ The Chief Justice's claim that the *Tahoe-Sierra* regulation was the practical equivalent of a physical taking of a leasehold highlights the fundamental difficulty with the *Tahoe-Sierra* holding in this regard.¹⁷⁸ If a regulation amounts to a physical taking of a leasehold (which is per se compensable), then a decision to apply *Penn Central*'s balancing test must be accompanied by an explanation of why an otherwise compensable taking is different if it occurs via a regulatory act. The *Tahoe-Sierra* majority's outright rejection of practical equivalence as a potentially decisive factor fails to provide this explanation.

The *Tahoe-Sierra* Court attempted to refute the Chief Justice's argument by noting that there is a difference between a temporary taking of all economically beneficial uses and the appropriation of a leasehold interest:

Of course, from both the landowner's and the government's standpoint there are critical differences between a leasehold and moratorium. Condemnation of a leasehold gives the government possession of the property, the right to admit and exclude others, and the right to use it for a public purpose. A regulatory taking, by contrast, does not give the government any right to use the property, nor does it dispossess the owner or affect her right to exclude others.¹⁷⁹

This distinction, however, is a strange one to emphasize in an effort to show the inapplicability of the *Lucas* principle, because the same distinction between regulation and direct appropriation applied in *Lucas* itself.¹⁸⁰ A permanent destruction of all economically beneficial use, as in *Lucas*, would likewise still permit a property owner to admit and exclude others. In fact, even a permanent physical occupation might still permit exclusion of most of the public;¹⁸¹ yet, compensation is mandated

176. See *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104 (1978).

177. See *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992).

178. See *Tahoe-Sierra*, 122 S. Ct. at 1493 (Rehnquist, C.J., dissenting).

179. *Id.* at 1479 n.19.

180. See Huffman, *supra* note 23, at 603 n.46.

181. For example, if the government acquired an easement permitting passage across an individual's property for certain purposes, see *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987), a property owner might still retain the ability to exclude individuals that

in such situations. The question, as emphasized in *Pumpelly*, is whether the government act has effectively dispossessed the owner, despite formal retention of title to the property.¹⁸²

The majority also suggested that the Chief Justice's dissent had stretched the "physical equivalence" argument too far because "even a regulation that constitutes only a minor infringement on property may, from the landowner's perspective, be the functional equivalent of an appropriation."¹⁸³ This argument goes to the heart of Justice Holmes's concern that "government could hardly go on" if every regulation of property that diminished value was compensable.¹⁸⁴ It is not at all clear how a line can be drawn that easily separates minor infringements on property from major ones if the practical equivalence argument is the sole guide in this context.¹⁸⁵ The Chief Justice, as shall be seen, looked to background principles of state law to answer this concern.¹⁸⁶

Finally, the *Tahoe-Sierra* majority added that the rule in *Lucas* was justified not only by reference to the equivalence between the regulation and a physical taking, but also was justified by the fact that it would be "less realistic to assume that the regulation will secure an 'average reciprocity of advantage,' or that government could not go on if required to pay for every such restriction."¹⁸⁷ The *Tahoe-Sierra* majority felt that these secondary justifications were not present for temporary regulations and, accordingly, that there was less reason to apply a per se rule.¹⁸⁸ The *Tahoe-Sierra* Court's rationale for these latter distinctions was far from persuasive in light of the reasoning in *Lucas* and the alternative

do not meet the requirements of the easement taken. Similarly, in *Lucas*, there were certainly worthwhile remaining uses of the property (such as hiking or bird watching), but they were not rights sufficient to overcome the conclusion that the property had been effectively taken. See 505 U.S. at 1015.

182. See *Pumpelly v. Green Bay Co.*, 80 U.S. (13 Wall.) 166 (1871).

183. *Tahoe-Sierra*, 122 S. Ct. at 1479 n.19.

184. See *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922).

185. This is Justice Stevens's argument, dissenting in *Lucas*:

[T]he Court suggests that "total deprivation of feasible use is, from the landowner's point of view, the equivalent of a physical appropriation." This argument proves too much. From the "landowner's point of view," a regulation that diminishes the lot's value by 50% is as well "the equivalent" of the condemnation of half of the lot.

Lucas, 505 U.S. at 1066 (Stevens, J., dissenting) (citations omitted). Justice Stevens's concern is arguably accurate as to deprivations of fifty percent of the property's value, but not as to very slight injuries to property. See *Eagle*, *supra* note 174, at 1655 (suggesting compensation inappropriate for de minimis injuries). Justice Stevens recognized the implication of the practical equivalence theory in *Lucas*, but then cabined that theory within the confines of the *Lucas* facts in his *Tahoe-Sierra* opinion. See *Tahoe-Sierra*, 122 S. Ct. at 1482-84.

186. *Tahoe-Sierra*, 122 S. Ct. at 1490-96 (Rehnquist, C.J., dissenting).

187. *Id.* at 1479 n.19.

188. *Id.*

understanding set forth in the Chief Justice's dissent.

a. Average Reciprocity of Advantage

"Average reciprocity of advantage" is not well defined in Supreme Court jurisprudence, but covers those instances where the regulated property owners are benefited as a result of the regulation of their property such that compensation may not be required.¹⁸⁹ The doctrine has justified determinations that a regulation did not result in a taking.¹⁹⁰ It appears that the Court is willing to presume an average reciprocity of advantage in temporary takings cases even though it rejected such a presumption in cases like *Lucas*.

As Professor Richard A. Epstein has noted, however, it makes no sense to presume an average reciprocity of advantage to property owners in some regulatory taking cases but not in others, since there is no reason to presume that the legislature would act to improve social welfare in partial taking cases, but not in total taking cases.¹⁹¹ If the Court rejects

189. The doctrine was briefly announced in *Pennsylvania Coal*, but without much explanation of its underlying principles. 260 U.S. at 415. Average reciprocity of advantage is often understood in terms of the extent to which the property owner has been singled out to bear the burden of regulation that benefits society generally. For discussion of this interpretation, see Huffman, *supra* note 23, at 608 ("[Average reciprocity of advantage] is a concept that is directly responsive to the constitutional objectives stated in *Agins* and *First English*. The idea is that some regulations impose comparable costs and benefits on the same people, often the population in general, but sometimes particular segments of the population."). See EPSTEIN, *supra* note 58, at 195-99. In some instances, the concept has been linked to statutes that prevent uses of property that constitute nuisances. See, e.g., *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987). It has also been linked to general statutes that broadly affect all property owners. See *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 147 (1978) (Rehnquist, J., dissenting) ("Even where the government prohibits a non-injurious use, the Court has ruled that a taking does not take place if the prohibition applies over a broad cross-section of land and thereby 'secure[s] an average reciprocity of advantage.' It is for this reason that zoning does not constitute a taking. While zoning at times reduces individual property values, the burden is shared relatively evenly and it is reasonable to conclude that on the whole an individual who is harmed by one aspect of the zoning will be benefited by another.") (citation omitted); see also Michelman, *supra* note 12, at 1225.

190. See, e.g., *Keystone*, 480 U.S. at 491 ("The Court's hesitance to find a taking when the State merely restrains uses of property that are tantamount to public nuisances is consistent with the notion of 'reciprocity of advantage' that Justice Holmes referred to in *Pennsylvania Coal*."); cf. *Hodel v. Irving*, 481 U.S. 704, 715 (1987) ("Also weighing weakly in favor of the statute is the fact that there is something of an 'average reciprocity of advantage,' to the extent that owners of escheatable interests maintain a nexus to the tribe. Consolidation of Indian lands in the Tribe benefits the members of the Tribe.") (citation omitted).

191. Epstein, *A Tangled Web*, *supra* note 41, at 1374 ("The obvious rejoinder is to ask why the Court should ever 'indulge' an assumption that this average reciprocity of advantage will apply, in light of the enormous political pressures from both minority

the presumption in the context of a total destruction of all economically beneficial use, as it did in *Lucas*, it is difficult to see why it should generally adopt such a presumption in the temporary taking context. The Court, moreover, had already excepted "normal delays" that are part of the permit process from its compensation holding in *First English*, and they are the category of temporary regulations that fits well into an average reciprocity of advantage analysis.¹⁹² Such delays are different in kind from the moratorium in *Tahoe-Sierra*, which had no chance of resulting in a permit.¹⁹³

The *Tahoe-Sierra* majority held that with a temporary ban, as opposed to a situation in which all economically beneficial use is destroyed, there is less chance that individuals are singled out to bear burdens that should be shared by the public as a whole.¹⁹⁴ The majority stated that "[a]t least with a moratorium there is a clear 'reciprocity of advantage,' because it protects the interests of all affected landowners against immediate construction that might be inconsistent with the provisions of the plan that is ultimately adopted."¹⁹⁵ Although this consequence might be a benefit to property owners in some cases, the existence of a potential benefit does not therefore mean that property was not taken. It is unclear how the Court calculated that a landowner who cannot build for three years is less likely to be singled out to bear a burden that should be shared by the public, simply because other landowners also cannot build.¹⁹⁶ In the case of a physical taking of a leasehold, there presumably would still be a taking even if other owners had their leaseholds appropriated.

factions and determined majorities that so often lead legislatures astray. To the extent that there is average reciprocity of advantage in a given statute, there is greater reason to believe that the legislation will produce improvements in overall social welfare. Even so, the average reciprocity of advantage should be established by the evidence, rather than presumed as a matter of law. Why assume that partial restrictions are motivated by high public purpose but that total restrictions are not?").

192. See *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987).

193. Cf. *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 127 (1985) ("A requirement that a person obtain a permit before engaging in a certain use of his or her property does not itself 'take' the property in any sense: after all, the very existence of a permit system implies that permission may be granted, leaving the landowner free to use the property as desired. Moreover, even if the permit is denied, there may be other viable uses available to the owner.").

194. *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 122 S. Ct. 1465, 1488 (2002).

195. *Id.* at 1489 (citation omitted).

196. Even in the *Lucas* context, this type of benefit would theoretically exist—land speculators might buy properties with no economically beneficial use, and would receive the benefit resulting from other landowners not building, if the regulation were ever rescinded.

The *Tahoe-Sierra* Court then quoted its decision in *Keystone Bituminous Coal Association v. DeBenedictis*¹⁹⁷ for the proposition that, "[w]hile each of us is burdened somewhat by such restrictions, we, in turn, benefit greatly from the restrictions that are placed on others."¹⁹⁸ This language is out of place in *Tahoe-Sierra*, however. The reference to "such restrictions" in *Keystone* referred originally to restrictions that restrain uses that are "tantamount to public nuisances," and are part of an implied obligation of the property owner not to injure the community.¹⁹⁹ If indeed the Court meant to extend this broad concept of reciprocity to all contexts, then it is hard to imagine a case not subject to *Penn Central* balancing.²⁰⁰ Even a total taking under *Lucas* could produce benefits of this type.²⁰¹

If an average reciprocity of advantage is understood simply to describe those cases where an arguable benefit to the property owner results from the regulation,²⁰² such implicit compensation should go to the amount of compensation due as a result of a taking, and not to the question of whether a taking occurred in the first place. After all, the reciprocal benefit might not remotely equal the damages due from the taking, as the reciprocity of advantage could be quite small in value relative to what was lost.²⁰³ This concern does not support a *Penn Central* analysis to determine whether a taking occurred, but rather

197. 480 U.S. 470 (1987).

198. *Tahoe-Sierra*, 122 S. Ct. at 1489.

199. See *Keystone*, 480 U.S. at 491 (describing benefits that result from restrictions on uses that are tantamount to public uses as consistent with the concept of average reciprocity of advantage).

200. Cf. *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 422 (1922) (Brandeis, J., dissenting) (arguing for reciprocity of advantage where a regulation is part of "the advantage of living and doing business in a civilized community"). As Professor Epstein has explained, the mere generality of a regulation in no way indicates that an average reciprocity of advantage exists. See Richard A. Epstein, *The Seven Deadly Sins of Takings Law: The Dissents in Lucas v. South Carolina Coastal Council*, 26 LOY. L.A. L. REV. 955, 969 (1993) (stating that average reciprocity of advantage exists where general regulation provides the same benefits to all those regulated).

201. The *Lucas* Court, however, declined such a presumption and, moreover, expressed doubt that the generality of a regulation should be dispositive. Cf. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1028 n.14 (1992) ("[A] regulation specifically directed to land use no more acquires immunity by plundering landowners generally than does a law specifically directed at religious practice acquire immunity by prohibiting all religions. Justice Stevens's approach renders the Takings Clause little more than a particularized restatement of the Equal Protection Clause.").

202. See EPSTEIN, *supra* note 58, at 195-99 (describing average reciprocity of advantage as "implicit in kind" compensation).

203. See Huffman, *supra* note 23, at 609 ("If a particular regulation results in a taking when there are no reciprocal benefits, it makes no sense to conclude that there is not a taking when reciprocal benefits exist. It does make sense to acknowledge that in both instances there is a taking, but in the latter there is compensation. What remains is to determine only whether the compensation is just.").

supports a careful review of harm during the damages phase of a trial.

b. The Implied Limitation Doctrine

The *Tahoe-Sierra* Court also distinguished *Lucas* in light of the *Lucas* Court's claim that compensation under the per se rule would only be required in rare cases.²⁰⁴ The *Tahoe-Sierra* Court argued that a categorical rule was appropriate in *Lucas* but not elsewhere because of the allegedly high costs of applying a categorical rule in other contexts.²⁰⁵ This theme runs throughout *Tahoe-Sierra*. The potential cost of just compensation to regulators is a fear that pervades the opinion.²⁰⁶

The Chief Justice's dissent responded to this concern with a refinement of the *Lucas* holding that limited the contexts in which the per se rule would apply to temporary regulations.²⁰⁷ In *Pennsylvania Coal*, the Court recognized that property rights "are enjoyed under an implied limitation."²⁰⁸ Certain regulations are not a taking because the property rights at issue were not an attribute of ownership prior to the regulation.²⁰⁹ The same principle was an important aspect of the *Lucas* holding. As the Chief Justice noted in his *Tahoe-Sierra* dissent:

[I]n *Lucas*, after holding that the regulation prohibiting all economically beneficial use of the coastal land came within our categorical takings rule, we nonetheless inquired into whether such a result "inhered in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership."²¹⁰

The Chief Justice argued that normal delays in obtaining building permits, changes in zoning ordinances, and variances were also "a longstanding feature of state property law and part of a landowner's reasonable investment-backed expectations."²¹¹

204. *Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency*, 122 S. Ct. 1465, 1484 (2002).

205. *Id.* at 1487.

206. In particular, see the Court's discussion at the conclusion of the *Tahoe-Sierra* opinion. 122 S. Ct. at 1486-89.

207. *Id.* at 1490-96 (Rehnquist, C.J., dissenting).

208. *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922) ("As long recognized some values are enjoyed under an implied limitation and must yield to the police power.").

209. See *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1027 (1992) ("Where the State seeks to sustain regulation that deprives land of all economically beneficial use, we think it may resist compensation only if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with.").

210. *Tahoe-Sierra*, 122 S. Ct. at 1494 (Rehnquist, C.J., dissenting).

211. *Id.* (citing *Lucas*, 505 U.S. at 1029).

According to the Chief Justice's dissent, courts must determine whether a moratorium on development, which would otherwise be a categorical taking, is nonetheless consistent with an implied limitation under background principles of state property law.²¹² The typical moratorium does not implicate *Lucas* because it does not deprive landowners of all economically beneficial use of their land.²¹³ Usually, moratoria prohibit only a specific use.²¹⁴ As the dissent reasoned, moratoria that prohibit all development do not have a long historical lineage, and "thus it is less certain that property is acquired under the 'implied limitation' of a moratorium prohibiting all development."²¹⁵

However, the Chief Justice argued that it was not necessary in the *Tahoe-Sierra* context to address moratoria generally, because the duration of the moratorium in that case "far exceed[ed] that of ordinary moratoria."²¹⁶ For example, unlike the typical moratorium in California, which is statutorily capped at forty-five days,²¹⁷ the moratorium at issue in *Tahoe-Sierra* arguably lasted six years.²¹⁸ Accordingly, the Chief Justice would have held that just compensation was due.²¹⁹

The *Tahoe-Sierra* majority did not take this argument seriously. In a footnote, the Court grouped the dissent's theory of the case with other proposed and rejected categorical rules:

The Chief Justice offers another alternative, suggesting that delays of six years or more should be treated as *per se* takings. However his dissent offers no explanation for why 6 years should be the cut-off point rather than 10 days, 10 months, or 10 years. It is worth

212. See *id.* at 1494-95 (noting that, "[w]hen a regulation merely delays a final land use decision, we have recognized that there are other background principles of state property law that prevent the delay from being deemed a taking" and that "the short-term delays attendant to zoning and permit regimes are a longstanding feature of state property law and part of a landowner's reasonable investment-backed expectations").

213. *Id.* at 1495.

214. See *id.* (citing examples of moratoria that limit one specific use of property).

215. *Id.* The argument was not directed at the *Lucas* *per se* rule, but, instead, at the "background principles of state law" aspect of *Lucas*.

216. *Id.* This suggestion that the amount of time an implied limitation has been in place could be decisive (its "lineage") is worth comparing to the theory in *Palazzolo* that a mere post-enactment transfer of property will not suffice to establish a statute as a background principle of state law. See *infra* notes 246-75 and accompanying text. It is not clear how the novelty of a particular regulatory action is relevant to whether it is a background principle of state law, so long as the regulation was in place prior to the landowner's acquisition of the property.

217. CAL. GOV'T CODE § 65858(a) (West Supp. 2002).

218. See *Tahoe-Sierra*, 122 S. Ct. at 1496 (Rehnquist, C.J., dissenting). The majority determined that the Chief Justice's conclusion that the moratorium lasted six years required analysis of issues not before the Court on the grant of certiorari. *Id.* at 1474 n.8. This disagreement is not relevant for purposes of this article.

219. *Id.* at 1496 (Rehnquist, C.J., dissenting).

emphasizing that we do not reject a categorical rule in this case because a 32-month moratorium is just not that harsh. Instead, we reject a categorical rule because we conclude that the *Penn Central* framework adequately directs the inquiry to the proper considerations—only one of which is the length of the delay.²²⁰

The Court fundamentally misunderstood the Chief Justice's argument. Certainly a six-year rule would have been an arbitrary cut-off, had one been proposed. But the Chief Justice emphasized that he was not proposing a six-year rule,²²¹ and a fair reading of his argument hardly implies such a proposal. There were indeed proposals for caps beyond which a moratorium would be a categorical taking,²²² but the dissent did not include such a proposal.²²³ What the dissent proposed was an exception, possibly quite broad, to a categorical rule—an exception for temporary regulations that are consistent with background principles of state law.²²⁴ A six-year moratorium would not fall under this exception.

The benefits to be found in the Chief Justice's proposal are many. For one thing, the determination of whether an implied limitation inheres in a background principle of state property law calls for an objective, relatively predictable inquiry.²²⁵ Background principles are capable of illumination by both property owners and regulators, as well as courts. Such principles eliminate originalism concerns by allowing for a parallel between compensation for regulatory takings and direct, physical takings—the practical equivalence doctrine. Both the narrow and broad readings of the original intent should permit compensation in this context. Moreover, background principles of state law provide a substantial limit on the reach of the just compensation requirement, limiting fears that every regulation that diminishes “to some extent the values incident to property” will require compensation.²²⁶

220. *Id.* at 1487 n.34.

221. *See id.* at 1495 n.4 (Rehnquist, C.J., dissenting) (“Six years is not a ‘cut-off point’; it is the length involved in this case. And the ‘explanation’ for the conclusion that there is a taking in this case is the fact that a 6-year moratorium far exceeds any moratorium authorized under background principles of state property law.”).

222. *See, e.g.,* Brief Amicus Curiae of the Institute for Justice in Support of Petitioners at 30, *Tahoe-Sierra*, 122 S. Ct. 1465 (No. 00-1167) (proposing a one-year cut-off).

223. *See Tahoe-Sierra*, 122 S. Ct. at 1490-96 (Rehnquist, C.J., dissenting).

224. *Id.*

225. *Cf.* Douglas W. Kmiec, *Inserting the Last Remaining Pieces into the Takings Puzzle*, 38 WM. & MARY L. REV. 995, 1025 (1997) (“Suggestions in case and commentary that the landowner should assume the burden of regulatory risk stand fundamentally in contradistinction to the Court’s reattachment of takings jurisprudence in *Lucas*, *Nollan*, and *Dolan* to the objective reality of the background principles of state property law.”) [hereinafter Kmiec, *Last Remaining Pieces*].

226. *See Pa. Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922).

The dissenting argument, however, is also a challenge to the explanation of the implied limitation doctrine set forth in *Lucas*.²²⁷ The *Lucas* formulation tracked protections against nuisances and safety regulations.²²⁸ The *Lucas* Court also appeared to preclude compensation where the government action tracked a "pre-existing limitation on the landowner's title."²²⁹ The relevant issue was what sticks of property remained in the bundle. Treating permit requirements and the like as implied limitations on property rights, as the Chief Justice proposes, extends the doctrine beyond "what could have been achieved in the courts."²³⁰ A zoning regulation frequently does not implicate the state's power to abate nuisances, or to "forestall other grave threats to the lives and property of others."²³¹ This is not a situation, as outlined in *Lucas*, where the state may "identify background principles of nuisance and property law that prohibit the uses [the property owner] now intends in the circumstances in which the property is presently found."²³²

Zoning regulations, as the Chief Justice noted, did exist in the colonial era.²³³ They are without question a longstanding feature of state property law. It does not follow that property owners lack property

227. *Tahoe-Sierra*, 122 S. Ct. at 1494-95 (Rehnquist, C.J., dissenting).

228. *See Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1029 (1992).

229. *Id.* at 1028-29. This theory is elaborated in Barros, *supra* note 46, at 1872 n.100. *See also* Kmiec, *Last Remaining Pieces*, *supra* note 225, at 1024 n.143. This aspect of *Lucas* is discussed more fully in the *Palazzolo* context. *See infra* notes 242-71 and accompanying text.

230. *See Lucas*, 505 U.S. at 1029.

231. *See id.* at 1029 n.16.

232. *See id.* at 1031.

233. *See Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 122 S. Ct. 1465, 1494 (2002) (Rehnquist, C.J., dissenting). The Chief Justice may have been suggesting that the Takings Clause did not extend to these delays because the Takings Clause was presumably enacted without the intent of disturbing such colonial zoning regulations. This is a difficult question. A just compensation clause was not proposed by any of the state ratifying conventions, *see Treanor, Takings Clause, supra* note 34, at 834, but appears to be Madison's own contribution. Professor Akhil Reed Amar has argued that Madison sought ratification of the Takings Clause without substantial support for it by bundling it with other clauses of the Fifth Amendment. *See Akhil Reed Amar, The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1181-82 (1991). Furthermore, the Takings Clause was intended to apply to the federal government, and not to the states. Thus states may not have been concerned by a broad reading of the text because their own regulations were not implicated. *See Gold, supra* note 50, at 226-27 ("[T]he scope of the Takings Clause in terms of regulatory acts must follow from the intent of the Framers of the Fifth Amendment, who thought they would limit only the federal government."); Michael W. McConnell, *Contract Rights and Property Rights: A Case Study in the Relationship Between Individual Liberties and Constitutional Structure*, 76 CAL. L. REV. 267, 268 (1988) (discussing founding intent to apply Takings Clause at federal level). As a result of the lack of discussion of the Takings Clause pre-ratification, it is hard to say whether the Takings Clause was intended to address colonial legislative excesses, or whether the typical colonial regulation of property was assumed to be safe under the new just compensation clause.

rights in the first place with respect to the incidents of zoning regulation.²³⁴ The dissent subtly alters the calculus so that the court may identify background principles through the types of regulation that property owners would *expect*.²³⁵ This perspective is different from looking to nuisance-type principles that already prohibit the use that is being regulated. The result is not a minor change in doctrine. Admittedly, the dissent appears to draw a line between its expectations-based theory in the temporary takings context and the nuisance-based theory in the permanent takings context,²³⁶ perhaps recognizing that its reasoning would limit the holding in *Lucas*. But the suggestion that temporary takings are somehow different from permanent takings runs against the tenor of the dissenting argument, and is moreover arbitrary.

In comparison to the majority opinion, the dissenting opinion offers a great deal. By adopting this standard, it would be possible for the Court to avoid a Takings Clause that it might consider overbroad—one that regularly applies to the zoning process—while at the same time applying objective, categorical rules to determine if property was taken. This theory, however, is not truly an “implied limitation” theory, as it does not depend on the idea that prior law impliedly limited the property rights at issue so that they could not have been exercised at the time they were allegedly taken. Instead, it is an expectations-based theory—one that was proposed by Justice Kennedy in his *Lucas* concurrence.²³⁷ Indeed, the dissent points to expectations (and Justice Kennedy’s concurrence) in justifying its new gloss on *Lucas*.²³⁸

234. See *Nectow v. City of Cambridge*, 277 U.S. 183 (1928) (overturning a zoning classification because it did not advance a legitimate governmental purpose).

235. *Tahoe-Sierra*, 122 S. Ct. at 1490-96 (Rehnquist, C.J., dissenting).

236. See *id.* at 1494 (“When a regulation merely delays a final land use decision, we have recognized that there are other background principles of state property law that prevent the delay from being deemed a taking.”). This language suggests that the Chief Justice’s broad understanding of background principles of state property law in *Tahoe-Sierra* may be limited to the zoning delay context, and that the stricter *Lucas* requirements would apply to other partial taking cases.

237. See *Lucas*, 505 U.S. at 1034 (Kennedy, J., concurring). Justice Kennedy proposed the following test:

The finding of no value must be considered under the Takings Clause by reference to the owner’s reasonable, investment-backed expectations. . . . The rights conferred by the Takings Clause and the police power of the State may coexist without conflict. Property is bought and sold, investments are made, subject to the State’s power to regulate. Where a taking is alleged from regulations which deprive the property of all value, the test must be whether the deprivation is contrary to reasonable, investment-backed expectations.

Id. (citations omitted).

238. See *Tahoe-Sierra*, 122 S. Ct. at 1495 (Rehnquist, C.J., dissenting) (“Thus, the short-term delays attendant to zoning and permit regimes are a longstanding feature of state property law and part of a landowner’s reasonable investment-backed expectations.”) (citing *Lucas*, 505 U.S. at 1034 (Kennedy, J., concurring)).

Since the Chief Justice's dissent might become the law as far as interpreting the "implied limitation" doctrine (presumably at least Justice Kennedy agrees with the three dissenting Justices in this regard), it is worth noting the weaknesses of the new interpretation. Given the propensity of courts to find that there is no regulatory taking under *Penn Central*, an expectations-based "implied limitation" doctrine, combined with a regularly applied *Penn Central* analysis, could constitute a one-way ratchet.²³⁹ The open-ended, and possibly expanding, restrictions of property owners' expectations might defeat the property-defined standard, which most recommends the implied limitation doctrine as set forth in *Lucas*. Unless the types of regulations that constitute potential background principles are susceptible to a bright-line rule, this is a potentially limitless loophole in the Takings Clause and may represent one more respect in which regulatory takings differ from physical takings. Perhaps a limiting rule could be found in the dissent's reference to colonial practices.²⁴⁰ Limitations on property rights that were arguably assumed to go uncompensated by the state ratifying conventions might justify an expectations theory on originalism grounds, and would cabin the otherwise expansive role for expectations as a restriction of property rights.

The better path in *Tahoe-Sierra* would have been a distinct exception to the *Lucas* per se rule in the temporary taking context for regulations that comprise normal delays of the permit process. This result could be reached without reliance on the implied limitation doctrine. The Court had already excepted such regulations from its

239. This concern was recognized to some degree by Justice Kennedy in his *Lucas* concurrence:

There is an inherent tendency towards circularity in this synthesis, of course; for if the owner's reasonable expectations are shaped by what courts allow as a proper exercise of governmental authority, property tends to become what courts say it is. Some circularity must be tolerated in these matter, however, as it is in other spheres. The definition, moreover, is not circular in its entirety. The expectations protected by the Constitution are based on objective rules and customs that can be understood as reasonable by all parties involved.

Lucas, 505 U.S. at 1034-35 (Kennedy, J., concurring) (citations omitted). In fact, the ad hoc nature of *Penn Central* accentuates this danger, as it may be less than clear whether courts that deny compensation under that test were swayed by an "objective rule" or some more subjective element of the balancing test. At least under a *Lucas* analysis, it would be possible to identify precisely whether an implied limitation was decisive. It is worth noting, however, that Justice Kennedy clearly thought there were constitutional limits to what is considered a "reasonable expectation" in this context. Justice Kennedy thought that promotion of tourism, for example, could not qualify as the source of an implied limitation under his understanding. See *id.* at 1035 (Kennedy, J., concurring); see also Kmiec, *Last Remaining Pieces*, *supra* note 225, at 1016. Justice Kennedy would apply a means-end test under his analysis. See *Lucas*, 505 U.S. at 1035-36 (Kennedy, J., concurring).

240. See *Tahoe-Sierra*, 122 S. Ct. at 1494 (Rehnquist, C.J., dissenting).

holding in *First English* and, moreover, there is a better argument in that context for recognizing an average reciprocity of advantage—brief delays prior to the receipt of a development permit provide a generalized benefit to all property owners (such as the prevention of nuisances), and cause only a limited injury. The injuries from such delays, theoretically, are de minimis.²⁴¹ This type of reasoning would leave intact the conceptual underpinnings of the implied limitation doctrine in *Lucas*.

In fact, the clarity of the implied limitation doctrine is already fading. Another recent decision, *Palazzolo*, suggests the Court is well on its way to discarding the *Lucas* understanding of background principles of state property law.²⁴² In *Lucas*, the Court explained that its takings jurisprudence “has traditionally been guided by the understandings of our citizens regarding the content of, and the State’s power over, the ‘bundle of rights’ that they acquire when they obtain title to property.”²⁴³ *Palazzolo* suggests this principle is no longer guiding the Court.²⁴⁴ Moreover, the majority opinion in *Palazzolo* was joined by Justices that were part of the *Lucas* majority.

In *Palazzolo*, the Court rejected a categorical rule that appeared to flow naturally from principles of ownership recognized in the physical or direct taking context.²⁴⁵ The petitioner (*Palazzolo*) owned a property that he sought to develop, but his applications were denied by the relevant state agencies.²⁴⁶ However, the regulation that supported the denial of his application had been enacted prior to *Palazzolo*’s ownership.²⁴⁷ The Rhode Island Supreme Court concluded that there could be no taking (under either *Lucas* or *Penn Central*), because the regulation at issue predated the acquisition of the property.²⁴⁸ The Court’s theory was that the right was not possessed by the new property owner in consequence of the pre-transfer regulation.²⁴⁹

The United States Supreme Court disagreed. It concluded that a

241. Professor Steven J. Eagle has argued that such delays are consistent with “the requirement that a permanent physical occupation must be more than transitory, or that injunctive relief in nuisance cases requires more than de minimis injury.” Eagle, *supra* note 174, at 500. This theory would bring the implied limitation in the temporary regulatory taking context in line with the holdings in the physical taking context.

242. See *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001).

243. *Lucas*, 505 U.S. at 1027.

244. See *Palazzolo*, 533 U.S. at 630 (“A law does not become a background principle for subsequent owners by enactment itself.”).

245. See *id.* at 614-30.

246. *Id.* at 614-16 (describing various unsuccessful permit applications to develop the property).

247. See *id.* at 614-15 (describing a 1978 passage of title from corporation to petitioner, subsequent to enactment of state environmental legislation).

248. *Id.* at 616.

249. *Id.*

categorical "notice" rule could have unfair consequences:

Were we to accept the State's rule, the postenactment transfer of title would absolve the State of its obligation to defend any action restricting land use, no matter how extreme or unreasonable. A State would be allowed, in effect, to put an expiration date on the Takings Clause. This ought not to be the rule. Future generations, too, have a right to challenge unreasonable limitations on the use and value of land.²⁵⁰

The *Palazzolo* Court further looked to language in *Nollan v. California Coastal Commission*²⁵¹ for support. In *Nollan*, the Court addressed a state regulatory agency's requirement that oceanfront landowners provide beach access to the public as a condition for a development permit.²⁵² The petitioners in *Nollan* purchased their property after the regulation went into effect.²⁵³ However, the *Nollan* Court rejected a notice rule, reasoning that, "[s]o long as the Commission could not have deprived the prior owners of the easement without compensating them, the prior owners must be understood to have transferred their full property rights in conveying the lot."²⁵⁴

Justice Stevens, dissenting in *Palazzolo*, recognized that the majority's holding was not consistent with a treatment of regulatory takings as practical equivalents of physical takings.²⁵⁵ As he noted, in takings jurisprudence, it is blackletter law that it is "the person who owned the property at the time of the taking that is entitled to the recovery."²⁵⁶ The Court's rule allowed for exceptions in the regulatory takings context. Justice Stevens further argued that the *Nollan* precedent was not on point, as the event that constituted a taking in that case "occurred *after* the petitioners had become the owner of the property and

250. *Id.* at 627. It is difficult to see how this "expiration date" argument would not also apply in cases where physical takings are at issue. Although it may be much easier to bring a claim for a physical taking, ultimately a buyer of a piece of property post-physical taking could also allege that the transfer of property worked as an expiration date for the Takings Clause as well.

251. 483 U.S. 825 (1987).

252. *Id.* at 828-29.

253. *Id.* at 860 (Brennan, J., dissenting).

254. *Id.* at 833 n.2.

255. See *Palazzolo*, 533 U.S. at 639 n.2 (Stevens, J., dissenting) ("The Court argues that a regulatory taking is different from a direct state appropriation of property and that the rules this Court has developed for identifying the time of the latter do not apply to the former. This is something of an odd conclusion, in that the entire rationale for allowing compensation for regulations in the first place is the somewhat dubious proposition that some regulations go so 'far' as to become the functional equivalent of a direct taking.").

256. See *id.* at 639 (Stevens, J., dissenting) (quoting *Danforth v. United States*, 308 U.S. 271, 284 (1939)) ("For the reason that compensation is due at the time of taking, the owner at that time, not the owner at an earlier or later date, receives the payment.").

unquestionably diminished the value of petitioners' property."²⁵⁷

The *Palazzolo* majority explicitly distinguished regulatory takings from physical takings.²⁵⁸ The Court noted that, unlike the physical takings context, regulatory takings are subject to unique prudential ripeness requirements.²⁵⁹ As a result of these principles, which can delay cases for many years, "[i]t would be illogical, and unfair, to bar a regulatory takings claim because of the post-enactment transfer of ownership where the steps necessary to make the claim ripe were not taken, or could not have been taken, by a previous owner."²⁶⁰ In light of its ripeness holdings, the Court chose a special rule for post-enactment transfers.²⁶¹

The Court was also quick to distinguish *Lucas*'s rule that regulations consistent with background principles of state law are not takings.²⁶² Without clarifying when a legislative enactment might be a background principle of state property law, the Court concluded that a law does not become a background principle "by enactment itself."²⁶³ In

257. *Id.* at 642-43 (Stevens, J., dissenting) ("That [taking]—a compelled transfer of an interest in property—occurred after the petitioners had become the owner of the property and unquestionably diminished the value of petitioners' property. Even though they had notice when they bought the property that such a taking might occur, they never contended that any action taken by the State before their purchase gave rise to any right to compensation."). Justice Stevens is not entirely consistent, however. In a footnote thereafter, he adds that a pre-taking event can play a role in precluding a taking. *See id.* at 643 n.6 ("In cases such as *Nollan*—in which landowners have notice of a regulation when they purchase a piece of property but the regulatory event constituting the taking does not occur until after they take title to the property—I would treat the owners' notice as relevant to the evaluation of whether the regulation goes 'too far,' but not necessarily dispositive.") (citing Justice O'Connor's *Palazzolo* concurrence).

258. *Id.* at 628.

259. *Id.* at 618-26. Under the test established in *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985), a plaintiff must establish a final state decision and denial of just compensation when bringing an "as applied" challenge in federal court. Even a denial of a land-use permit is not necessarily final. *See id.* The entities responsible for granting permits frequently deny a permit but allow a more narrow application to be brought, thus postponing "ripeness" under the Court's precedent. Although these ripeness requirements are arguably "prudential," *see* *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725, 733 (1997), they also frequently preclude federal courts from hearing takings claims for many years. *See* *Eagle*, *supra* note 1, at 977-78 ("Under 'prudential ripeness principles,' which the Court devised for application to regulatory takings claims and to no others, landowners must overcome a complex and difficult set of hurdles in order to obtain federal court review. Claims often will not be heard at all. The adjudication of conceptually straightforward regulatory takings claims may take a decade or longer.").

260. *Palazzolo*, 533 U.S. at 628.

261. *Id.* at 629-30.

262. *Id.*

263. *Id.* at 630. In contrast, Professor Daniel R. Mandelker has argued that Justice Scalia's *Lucas* opinion understood recently enacted land-use regulations to limit the just compensation rights of post-enactment property owners. *See* Daniel R. Mandelker,

so holding, it implicitly limited the extent to which states define state property rights for Takings Clause purposes. The *Palazzolo* majority concluded that a rule barring compensation based on post-enactment transfers would create a "relative standard,"²⁶⁴ one that allegedly would be inconsistent with the *Lucas* analysis, which looks to "common, shared understandings of permissible limitations derived from a State's legal tradition."²⁶⁵ As the Court explained: "A regulation or common-law rule cannot be a background principle for some owners but not for others."²⁶⁶

The problem with this analysis, however, is that it actually "freezes" state law (unlike the rule in *Lucas*, which has mistakenly been accused of this effect).²⁶⁷ There is a world of difference between state changes in property law that seek to alter retroactively the legal effect of prior background principles of state law, and state changes in property law that have prospective effect. It is the former that were implicated in *Lucas*, and that implicate the principle that a "State, by *ipse dixit*, may not transform private property into public property without compensation."²⁶⁸ In contrast, a determination that prospective state property law that predates the alleged taking is not a relevant background principle necessarily ignores the evolution of state property law.

The *Palazzolo* majority responded to this issue, conceding that "[p]roperty rights are created by the State."²⁶⁹ The majority's suggestion that a "relative standard" would result from deferring to state definitions does not adequately address the problem, however, especially under the balancing test suggested in Justice O'Connor's concurrence.²⁷⁰

Investment-Backed Expectations in Takings Law, 27 URB. LAW. 215 (1995). The author believes that the opinion is ambiguous on this question, as Justice Scalia's dictum in that case can also be read narrowly to address post-enactment acquisitions where the regulation is consistent with state nuisance law. The language is much broader respecting regulations of personal property. See *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1027-28 (1992); see also Kmiec, *Last Remaining Pieces*, *supra* note 225, at 1002 n.33 (suggesting background principles of state law "may be subject to statutory modifications that refine or sharpen nuisance-like considerations").

264. *Palazzolo*, 533 U.S. at 630.

265. *Id.*

266. *Id.*

267. *But cf. Lucas*, 505 U.S. at 1068-69 (Stevens, J., dissenting) ("The Court's holding today effectively freezes the common law, denying the legislature much of its traditional power to revise the law governing the rights and uses of property."). In *Palazzolo* the state was prevented from revising the bundle of rights for future owners without exposing itself to liability, insofar as the Court's *Penn Central* test might find a taking of future owners' rights based on investment-backed expectations. See *Palazzolo*, 533 U.S. at 629-30.

268. *Lucas*, 505 U.S. at 1031 (quoting *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980)).

269. *Palazzolo*, 533 U.S. at 626.

270. Under Justice Scalia's concurrence, it is at least clear that the encroachment on state definitions of property rights will occur in a specific instance—all occasions where

Palazzolo suggests that takings property in the regulatory context is an inherently nebulous concept that property rights established by state law are subject to reworking via federal common law.²⁷¹

Palazzolo is a harbinger of future revisions to the “implied limitation” doctrine. When read in combination with the Chief Justice’s *Tahoe-Sierra* dissent, it appears that Justice Kennedy’s understanding in his *Lucas* concurrence will prevail. The resultant blurring of the implied limitation doctrine may benefit regulators in some cases, and property owners in other cases such as *Palazzolo*, but it is difficult to square the evolving doctrine with a consistent theory of regulatory takings.

B. *The Reaffirmation of the “Parcel as a Whole” Doctrine*

The “parcel as a whole” doctrine reflects a longstanding distinction between regulatory and physical takings. Theories of just compensation that are concerned with the economic impact of regulations on property, including both *Penn Central* and *Lucas*, depend heavily on the court’s determination of what property is at issue. While the property at issue is relatively obvious to courts for physical takings, the determination of the “relevant parcel” of property has been controversial in the regulatory takings context. The “parcel as a whole” doctrine precludes dividing the relevant parcel of property (whatever it may be) into smaller pieces when analyzing the economic impact of a regulation. The distinction between finding the relevant parcel and dividing it, however, is highly subjective.

the prospective regulation of property would have worked a taking but for the post-enactment transfer of property. Justice O’Connor’s proposal, which is probably now the law, would permit a relative standard—that is, the property owner’s rights would vary depending on the balancing test. See *id.* at 632-36 (O’Conner J., concurring).

271. Cf. *United States v. Craft*, 122 S. Ct. 1414, 1432 (2002) (Thomas, J., dissenting) (“Just as I am unwilling to overturn this Court’s longstanding precedent that States define and create property rights and forms of ownership, I am equally unwilling to redefine or dismiss as fictional forms of property ownership that the State has recognized in favor of an amorphous federal common-law definition of property.”) (citation omitted). For an interesting discussion of the degree to which the Court defers to state definition of property rights in the takings context, see Merrill, *supra* note 46, at 897. See also Kmiec, *The Original Understanding*, *supra* note 56, at 1642-44 (suggesting that some members of the Court may recognize a constitutionally mandated minimum definition of property). *Palazzolo* can arguably be seen as setting forth a limitation on state definitions of property in order to protect property as understood in constitutional terms. Cf. Merrill, *supra* note 46 (proposing federal “patterning” definition of constitutional property). It is hard to figure out exactly what the constitutional understanding of property would be in the *Palazzolo* context, however. A better case for such reasoning could be made in the context of *Phillips v. Washington Legal Foundation*, 524 U.S. 156 (1998), which held that longstanding background principles of state property law did not permit the regulation at issue because the regulation conflicted with the long-recognized state common law understanding that interest follows principle. *Id.* In that case, a particular state common law rule was apparently constitutionalized, inasmuch as conflicting state law was ignored by the Court.

Justice Thomas's dissent, joined by Justice Scalia, questioned the *Tahoe-Sierra* Court's reaffirmation of the "parcel as a whole" doctrine, noting that *First English* rejected the idea that courts should consider land in terms of its infinite life.²⁷² Where the *Tahoe-Sierra* majority saw the relevant parcel as the land over the course of its existence, the dissenting Justices saw the relevant parcel as the "temporal slice" of property affected by the regulation.²⁷³

The difficulty in defining the relevant parcel of property, known as the "denominator problem," is inherent in the divisibility of property.²⁷⁴ When calculating the economic impact of a regulation, courts must compare the loss of value to the affected property against the original value of that property—the "denominator" constitutes the original value of the property at issue. By engaging in "conceptual severance"—considering only part of the bundle of rights owned—a court can interpret the regulation of property so that property was taken.²⁷⁵ By engaging in "conceptual agglomeration,"²⁷⁶ a court can also achieve the

272. See *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 122 S. Ct. 1465, 1496 (2002) (Thomas, J., dissenting) ("While this questionable rule has been applied to various alleged regulatory takings, it was in my view, rejected in the context of temporal deprivations of property I had thought that *First English* put to rest the notion that the 'relevant denominator' is land's infinite life.").

273. See *id.* at 1496-97 (Thomas, J., dissenting).

274. Property may be divided along its spatial, functional, or temporal dimensions. See Marc R. Lisker, *Regulatory Takings and the Denominator Problem*, 27 RUTGERS L.J. 663, 696-706 (1996) (discussing cases that address the severance of property into spatial segments (both vertically and horizontally), severance into functional uses, and severance into temporal segments). This "whole parcel" rule is itself a substantial distinction between regulatory and physical takings, even in the context of rules that look to practical equivalence, as in *Lucas*. As Justice Scalia noted in that case:

Regrettably, the rhetorical force of our "deprivation of all economically feasible use" rule is greater than its precision, since the rule does not make clear the "property interest" against which the loss of value is to be measured. When, for example, a regulation requires a developer to leave 90% of a rural tract in its natural state, it is unclear whether we would analyze the situation as one in which the owner has been deprived of all economically beneficial use of the burdened portion of the tract, or as one in which the owner has suffered a mere diminution in value of the tract as a whole.

Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1016 n.7 (1992). Justice Scalia suggested that the owner's reasonable expectations might answer the question. See *id.*

275. See Margaret Jane Radin, *The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings*, 88 COLUM. L. REV. 1667, 1684 (1988) (coining the phrase "conceptual severance" for instances where courts do not consider the parcel as a whole). For a good overview of the different ways in which courts engage in conceptual severance, see Lisker, *supra* note 274.

276. See STEVEN EAGLE, *REGULATORY TAKINGS* § 8-2(h) (1996). A notable example is the *Keystone Bituminous Coal* decision, which applied this rule to deny compensation in a case nearly identical to *Pennsylvania Coal* because the property owner still owned a substantial quantity of coal that could be mined. See *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 507 (1987) (Rehnquist, C.J., dissenting) (finding the

opposite result, adding unaffected property to the denominator that is not properly considered by the court. The Supreme Court has often held that only the entire parcel of property may be considered, but it has never provided a clear rule for determining the confines of the entire parcel.²⁷⁷

Even *Lucas*, with its categorical rules, ran into trouble in resolving the denominator problem and left the issue unresolved.²⁷⁸ It cannot be clear whether “all economically beneficial use” of property has been destroyed if it is not clear what the relevant parcel of property is.²⁷⁹ In *Palazzolo*, the majority expressed doubt as to whether the Court’s “parcel as a whole” doctrine had merit.²⁸⁰ This dictum, in a case where the issue was not properly raised, suggested a willingness to reconsider one of the more troublesome and subjective distinctions between physical and regulatory takings. One year later, the *Tahoe-Sierra* Court (including two Justices in the *Palazzolo* majority, Justices Kennedy and O’Connor) rejected severance without discussion.²⁸¹

In one sense, the *Tahoe-Sierra* Court’s holding was necessary if it wished to shore the *Penn Central* test. The *Lucas* analysis could readily predominate if plaintiffs or courts are permitted to consider takings cases by means of conceptual severance.²⁸² However, the Court’s refusal to permit conceptual severance is very hard to square with the Court’s strongly worded statement in the physical takings context that the Takings Clause applies with no less power to pieces of property than it

Keystone facts to be essentially the same as in *Pennsylvania Coal*); Kmiec, *The Original Understanding*, *supra* note 56, at 1631 (“As a matter of good faith interpretation, *Keystone* is surely revisionist.”); Michelman, *supra* note 12, at 1600 n.2 (describing the *Keystone* opinion as an “amazing reconstruction”). A more excessive example is the New York Court of Appeals ruling in the *Penn Central* case, which would determine diminution in value based on the property owner’s holdings in the vicinity of the regulated property. See *Penn Cent. Transp. Co. v. City of New York*, 42 N.Y.2d 324, 333-34 (1977), *aff’d*, 438 U.S. 104 (1978); see also *Lucas*, 505 U.S. at 1016 n.7 (describing the New York court’s holding as “extreme” and “unsupportable.”).

277. See, e.g., *Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Trust for S. Cal.*, 508 U.S. 602 (1993); *Keystone*, 480 U.S. 470; *Andrus v. Allard*, 444 U.S. 51 (1979).

278. See *Lucas*, 505 U.S. at 1016 n.7.

279. See *id.* at 1054 (Stevens, J., dissenting) (“The ‘composition of the denominator in our deprivation fraction,’ is the dispositive inquiry. Yet there is no ‘objective’ way to define what that denominator should be.”) (citations omitted).

280. See *Palazzolo v. Rhode Island*, 533 U.S. 606, 631 (2001) (“Some of our cases indicate that the extent of deprivation effected by a regulatory action is measured against the value of the parcel as a whole; but we have at times expressed discomfort with the logic of this rule, a sentiment echoed by some commentators. Whatever the merits of these criticisms, we will not explore the point here.”) (citations omitted).

281. *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Planning Agency*, 122 S. Ct. 1465, 1483 (2002) (“We have consistently rejected [a conceptual severance] approach to the denominator question.”).

282. This consequence was noted by the *Tahoe-Sierra* majority. See *id.*

does to property in its entirety.²⁸³ It seems strange to try to decide if a regulation took a part of a larger property by examining the economic impact of the regulation on the larger parcel, and the Court has already recognized that regulations can "take" part of the bundle of property rights.

Commentators have proposed a broad spectrum of suitable cases for severance, ranging all the way to Professor Epstein's proposal that the "protean forms of regulation all amount to partial takings of private property."²⁸⁴ Other theories would sever the parcel based on common law-grounded investment-backed expectations,²⁸⁵ state-recognized commercial units of property,²⁸⁶ fundamental property rights,²⁸⁷ primary intended uses of the property,²⁸⁸ or existence of a right of use unique to a segment of property identified by the property owner.²⁸⁹ Chief Justice

283. See, e.g., *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 436 (1982) ("[C]onstitutional protection for the rights of private property cannot be made to depend on the size of the area permanently occupied."); see also Douglas W. Kmiec, *At Last, the Supreme Court Solves the Takings Puzzle*, 19 HARV. J.L. & PUB. POL'Y 147 (1995); Douglas W. Kmiec argues that the *Penn Central* anti-severance rule cannot be squared with the common law divisibility of property, and that *Lucas*, *Loretto*, *Nollan*, and *Dolan* are in tension with *Penn Central* in light of their reference to common law understandings of property. *Id.* at 157.

284. See EPSTEIN, *supra* note 58, at 101.

285. See Kmiec, *Last Remaining Pieces*, *supra* note 225, at 1011-23. Kmiec would look to whether an individual had reasonable investment-backed expectations with regard to a segment of the property in light of the totality of state property law at the time of investment. It is crucial under his theory whether the use of the land is causally linked to the harm that the regulation seeks to remedy. *Id.*; cf. *Pennell v. City of San Jose*, 485 U.S. 1, 15-24 (1988) (Scalia, J., concurring in part and dissenting in part) ("Since the owner's use of the property is (or, but for the regulation, would be) the source of the social problem, it cannot be said that he has been singled out unfairly.").

286. See EAGLE, *supra* note 276, at 343 ("The commercial unit allows for the 'partial' taking without allowing the property owner the possibility to custom-tailor as the requisite bundle of rights that constituted the property exactly what the government diminished.").

287. See David C. Buck, Note, "Property" in the Fifth Amendment: A Quest for Common Ground in the Maze of Regulatory Takings, 46 VAND. L. REV. 1283, 1313 (1993) ("A categorical compensation requirement for the destruction of specified elements of an owner's land would provide greater certainty to takings analysis. A narrow delineation of protected property interests would identify a finite set of situations in which courts, planners, and regulators would have to consider seriously objective factors of adequate compensation.").

288. See *Whitney Benefits, Inc. v. United States*, 926 F.2d 1169 (Fed. Cir. 1991); cf. Mandelker, *supra* note 263, at 217.

289. See John E. Fee, Comment, *Unearthing the Denominator in Regulatory Taking Claims*, 61 U. CHI. L. REV. 1535, 1556 (1994) ("Through reliance on the subjective criteria of ownership and actual or intended use, courts have gone astray. The regulatory taking inquiry should instead focus on whether the property interest proposed to have been taken is in fact substantial enough to warrant Fifth Amendment protection as an independent bundle of rights. Although different methods of measuring the substantiality of a property interest could be devised, it seems that the most logical method would

Rehnquist, dissenting in the *Keystone* case, proposed a form of severance based on the destruction of all use of an identifiable segment of property.²⁹⁰

This variety of severance options could enable courts to find a severance rule that would not mandate compensation every time a regulation affects property. Without discussion (beyond a quick recitation of precedents affirming the “parcel as a whole” doctrine), the current Court has rejected all of these proposals, in all contexts. The decision to reject conceptual severance in *any* circumstance is a categorical rule that calls into doubt the *Tahoe-Sierra* majority’s ostensible concern with avoiding categorical rules. Or rather, it suggests a qualification of the Court’s resistance to the “temptation” of categorical rules. Categorical rules that give the Court greater freedom of decision in regulatory takings cases are apparently not the type of rule that gives the Court concern.

Admittedly, the categorical rule against severance has been applied haphazardly. There are some circumstances in which courts place limits on how much property is included in the “parcel as a whole,” and it is something of a fiction to claim that these cases do not involve severance.²⁹¹ (These cases could, on the other hand, be said to show

depend on its economically productive potential as an independent unit.”).

290. See *Keystone Bituminous Coal Ass’n v. DeBenedictis*, 480 U.S. 470, 517 (1987) (Rehnquist, C.J., dissenting) (“[T]here is no need for further analysis where the government by regulation extinguishes the whole bundle of rights in an identifiable segment of property, for the effect of this action on the holder of the property is indistinguishable from the effect of a physical taking.”). The similarity of this proposed rule to the reasoning in *Lucas* is notable. Justice Scalia has also proposed, cryptically, a solution to the problem in a *Lucas* footnote. See *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1016 n.7 (1992) (“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.”).

291. For example, in *Whitney Benefits, Inc. v. United States*, 926 F.2d 1169 (Fed. Cir. 1991), the Federal Circuit addressed an alleged regulatory taking of coal rights, but the property owner also had agricultural surface rights. *Id.* at 1170-74. The property owner, with no intention of farming, had bought the surface land in order to facilitate the mining of coal. The Federal Circuit determined that “coal rights . . . is what, and only what, this suit is about,” and noted that, “[w]hen Congress prohibited that mining of that coal, . . . it took, all the property involved in this case.” *Id.* But saying that the suit was about coal rights, even if true, fails to distinguish clearly decisions like *Keystone Bituminous*, in which the plaintiffs no doubt also thought their case was about coal rights. Although *Whitney Benefits* may be an outlying case, the question of what property is at issue will often be susceptible to a severance characterization. For other examples, see *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171 (Fed. Cir. 1994), *Florida Rock Industries, Inc. v. United States*, 18 F.3d 1560 (Fed. Cir. 1994), and *Palm Beach Isles Associates v. United States*, 208 F.3d 1374 (Fed. Cir. 2000), *aff’d on reh’g*, 231 F.3d 1354 (Fed. Cir. 2000).

courts' reluctance to practice "conceptual agglomeration," the lumping together of properly separate parcels of property owned by the same individual.²⁹²) The Federal Circuit in particular has engaged in severance prior to applying the *Penn Central* test, based on a variety of factors.²⁹³

The Supreme Court has noted the difficulty in some cases of properly determining the relevant parcel, and even the Supreme Court's determinations of the relevant parcel offer examples that are readily described as severance.²⁹⁴ This result suggests an unstated difficulty with strictly applying the "parcel as a whole" rule. But, putting aside the appropriateness of applying conceptual severance in exceptional cases, the typical case has disallowed severance. The rule appears to apply when the Supreme Court wishes to deny compensation, and not to apply when the Court wishes to compensate partial takings.²⁹⁵

As recently as the *Palazzolo* decision, five Justices on the Court felt unease with this situation.²⁹⁶ Thus, the apparent embrace of the "parcel as a whole" doctrine without further comment is a significant development, even though on stare decisis grounds it is uneventful.²⁹⁷ *Tahoe-Sierra*, fitting so neatly into a *Lucas* analysis, is a very strong case for conceptual severance based on practical equivalence.²⁹⁸ The ready denial of conceptual severance suggests that it is unlikely that another takings case would convince the Court to reconsider its "parcel as a

292. See *supra* note 275 and accompanying text.

293. For different perspectives on the Federal Circuit's treatment of the denominator problem, see Lisker, *supra* note 274; Huffman, *supra* note 23; Courtney C. Tedrowe, Note, *Conceptual Severance and Takings in the Federal Circuit*, 85 CORNELL L. REV. 586 (2000).

294. See *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 831 (1987) ("Had California simply required the Nollans to make an easement across their beachfront available to the public on a permanent basis in order to increase public access to the beach, rather than conditioning their permit to rebuild their house on their agreeing to do so, we have no doubt there would have been a taking."); see also *Dolan v. City of Tigard*, 512 U.S. 374 (1994) (stating same principle); cf. *Phillips v. Wash. Legal Found.*, 524 U.S. 156 (1998) (severing interest from principal for purposes of takings analysis).

295. See cases cited *supra* note 47.

296. See *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001).

297. The anti-severance rule was prominent in *Penn Central*. *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104 (1978).

298. It is worth noting that not all severance implicates *Lucas*, if *Lucas* is understood in terms of physical property. For example, a regulation that destroys a single economically beneficial use of land need not render the physical property useless. Many economically beneficial uses might remain. In such a case, physical severance of the property would not trigger *Lucas*'s per se rule, as the impact of the regulation would not be equivalent to a permanent physical invasion. This distinction might reassure those Justices concerned with the costs of the *Lucas* per se rule. Such a regulation would, however, render a portion of the property valueless—the right to the particular use at issue would have no economic benefit. Paradoxically, the Court's emphasis on property in terms of value broadens the potential ambit of *Lucas*, requiring a very broad non-severance rule in order to limit the cases where compensation would be due.

whole” rule, at least based on the practical equivalence between a regulation and a partial physical taking.²⁹⁹

V. Conclusion

In practical terms, the *Lucas* decision did not quite reach its tenth birthday, although technically it is still intact. The bright-line reasoning in *Lucas* is clearly out of favor. A review of *Tahoe-Sierra* shows a rejection of the underlying theory behind *Lucas*—that is, the practical equivalence doctrine, a rewriting of the *Lucas* test into a destruction of all value test, a newly invigorated “parcel as a whole” doctrine, and a probable reworking of the “implied limitation” doctrine into an expectations-based theory. Each clarifying rule in *Lucas* yields in favor of a *Penn Central* rubric.

It remains to be seen what *Tahoe-Sierra* will mean in practice, although it surely increases the likelihood that *Penn Central* will be the basis for decision in any particular regulatory taking case. Also, the nature of “background principles of state law” has not yet been redefined in the *Lucas* context. And a practical equivalence theory could prevail on different facts, as *Tahoe-Sierra* can be distinguished as a case that was closely linked to the desire that zoning delays remain non-compensable.³⁰⁰

But the likelihood is that *Tahoe-Sierra* will enable courts to do what Justice O'Connor has asked them to do—avoid the temptation of categorical rules in either direction.³⁰¹ This is hardly contrary to the desires of many lower courts. Holdings under *Lucas* will almost surely become even more rare, while the inconsistencies that inevitably proliferate under *Penn Central* will continue to generate criticism for the

299. The problem is unlikely to go away, however. *Palazzolo* highlights the practical difficulties of the categorical rule against severance. Property is physically severable, even in cases where the Court steadfastly avoids treating regulations as equivalent to physical takings. Thus, as Justice Breyer noted in his *Palazzolo* dissent, it is entirely possible under the *Palazzolo* rule that a piece of property subject to a potential *Penn Central* regulatory taking analysis could be sold so that the new purchaser would own property subject to a *Lucas* regulatory takings analysis. *Palazzolo*, 533 U.S. at 654-55 (Breyer, J., dissenting). Although Justice Breyer would reject such a result (and possibly Justice O'Connor would as well), the very possibility indicates the incoherence of the non-severance rule insofar as regulatory takings are analogized to physical takings.

300. The *Tahoe-Sierra* opinion also left open the possibility of compensation for temporary regulatory takings on slightly different facts. *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 122 S. Ct. 1465 (2002).

301. Professor Susan Rose-Ackerman has argued for the opposite position. Rose-Ackerman, *supra* note 1, at 1711 (“While the Court should try for a principled resolution, this is one legal area in which almost any consistent, publicly articulated approach is better than none. Clear statement, even if not backed by clear thinking, will do much to preserve the investment-backed expectations the Court talks so much about.”).

next couple of decades.

The anti-severance holding in *Tahoe-Sierra* could have a broad impact in other contexts. In *Lucas*, Justice Scalia noted:

When, for example, a regulation requires a developer to leave 90% of a rural tract in its natural state, it is unclear whether we would analyze the situation as one in which the owner had been deprived of all economically beneficial use of the burdened portion of the tract, or as one in which the owner has suffered a mere diminution in value of the tract as a whole.³⁰²

By refusing to consider the divisibility of the property in *Tahoe-Sierra*, the Court implies an answer to this question—the Court would likely find a mere diminution.

Depending on judicial predilections, there may nevertheless be facts to which a lower court would apply the *Lucas* per se rule. But it is doubtful that the practical equivalence logic of that decision will be extended to any additional context if the current majority holds. It is striking at this late date that the Court feels the concepts underlying its “fairness and justice” inquiry are not “fully determinate,” and that a majority of the Court does not wish to face the implications of a clear regulatory takings doctrine, “in either direction.” *Penn Central* presents an ad hoc doctrine that the Court cannot adequately explain in substantive terms—but rather in terms of the results the Court wishes to avoid. That is the actual significance of *Penn Central* as interpreted by *Tahoe-Sierra*. For the Court finds it very easy to resist the temptation of categorical rules—the true judicial temptation is the freedom to decide takings issues on a case-by-case basis.³⁰³

302. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1016 n.7 (1992).

303. Justice Scalia has identified the likely motivation behind the Court's balancing test:

[W]hen, in writing for the majority of the Court, I adopt a general rule, and say, “This is the basis of our decision,” I not only constrain lower courts, I constrain myself as well. If the next case should have such different facts that my political or policy preferences regarding the outcome are quite the opposite, I will be unable to indulge those preferences; I have committed myself to the governing principle. In the real world of appellate judging, it displays more judicial restraint to adopt such a course than to announce that, “on balance,” we think the law was violated here—leaving ourselves free to say in the next case that, “on balance,” it was not. . . . Only by announcing rules do we hedge ourselves in.

Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1179-80 (1989).