AMONG JUSTICE JOHN PAUL STEVENS’S LANDMARK LEGACIES: TAHOE-SIERRA PRESERVATION COUNCIL, INC. V. TAHOE REGIONAL PLANNING AGENCY

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I. INTRODUCTION

In Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, Justice John Paul Stevens’s majority opinion made the Lucas v. South Carolina Coastal Council decision effectively immaterial because Justice Stevens treated partial, temporal regulatory takings the same as partial, spatial regulatory takings. And, by doing so, Justice Stevens refocused the doctrinal lens of takings law.

Liberal jurists never liked the Lucas categorical test for regulatory takings, anyway. Justice Harry Blackmun’s dissenting opinion in Lucas (“[o]f missiles and mice”) equated Justice Antonin Scalia’s majority opinion to launching a missile to rid a mouse. Blackmun wrote,
“The Court makes sweeping and . . . misguided and unsupported changes in our takings doctrine . . . . Although it limits these changes to the most narrow subset of government regulation—those that eliminate all economic value from land—these changes go far beyond what is necessary . . . .”4 He described the majority’s opinion in *Lucas* as having two components: (1) the Court’s new categorical rule (land use regulations that prohibit all economic uses of property are takings)5 and (2) the exception to it (unless the prohibited uses are common law nuisances).6

Justice Stevens’s dissenting opinion in *Lucas* described the majority’s opinion as “lacking support in past decisions,” 7 and the categorical rule as “wholly arbitrary.” 8 He wrote that the *Lucas* approach to regulatory takings doctrine would “hamper the efforts of local officials and planners who must deal with increasingly complex problems in land-use and environmental regulation.”9

And yet, it was *Lucas’s* very arbitrariness why it has become inconsequential: minimizing the obstacles to urban planning that it initially presented—that is, urban planners may better accomplish narrow scope suggests—not because he can intercept the Court’s missile, or save the targeted mouse, but because he hopes to limit the collateral damage the majority’s opinion causes. *Id.* at 1036–37.

5. *Id.* at 1046–47. “The Court . . . takes the opportunity to create a new scheme for regulations that eliminate all economic value. From now on, there is a categorical rule finding these regulations to be a taking unless the use they prohibit is a background common-law nuisance or property principle.” *Id.*
6. *Id.* at 1036. The Court reasoned:

In determining what is a nuisance at common law, state courts make exactly the decision that the Court finds so troubling when made by the South Carolina General Assembly today: They determine whether the use is harmful. Common-law public and private nuisance law is simply a determination whether a particular use causes harm.

*Id.* Further, the Court explained:

From now on, there is a categorical rule finding these regulations to be a taking unless the use they prohibit is a background common-law nuisance or property principle . . . . Once one abandons the level of generality of *sic utere tuo ut alienum non laedas* (use your own property in such a manner as not to injure that of another), ante . . . . one searches in vain, I think, for anything resembling a principle in the common law of nuisance.

*Id.* at 1046–47.

7. *Id.* at 1063–64. “Although in dicta we have sometimes recited that a law ‘effects a taking if [it] . . . denies an owner economically viable use of his land,’ our rulings have rejected such an absolute position.” *Id.* (quoting *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980)).
8. *Id.* at 1064. “In addition to lacking support in past decisions, the Court’s new rule is wholly arbitrary. 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.” *Id.*
9. *Id.* at 1070. “[T]hese officials face both substantial uncertainty because of the ad hoc nature of takings law and unacceptable penalties if they guess incorrectly about that law.” *Id.*
comprehensive zoning of uses for everyone’s mutual benefit by employing temporary regulations, which by definition will not be a complete destruction of property value.\textsuperscript{10} Lucas often appears as one of the most important cases on regulatory takings law.\textsuperscript{11} But, as Justice Blackmun predicted then, rarely would regulatory programs wipe out all value altogether.\textsuperscript{12} So then, was Lucas actually an insignificant decision, establishing a categorical rule of law that lacked any practical effect, as the reaction to it would be regulatory schemes that take some but not all value?\textsuperscript{13}

At the time, no one could know for sure; however, that question seemed on-target considering the majority opinion in Tahoe directly interpreted Lucas,\textsuperscript{14} and in the years since 2002 local officials and urban planners have avoided Lucas analyses altogether by incorporating non-permanent provisions in any regulatory scheme.\textsuperscript{15} In Tahoe, the

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  \item \textsuperscript{10} Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Planning Agency, 535 U.S. 302, 335 (2002). The Court explained: A permanent deprivation of the owner’s use of the entire area is a taking of ‘the parcel as a whole,’ whereas a temporary restriction that merely causes a diminution in value is not. 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. Tahoe-Sierra, 535 U.S. at 332.
  \item \textsuperscript{11} See James R. Rinehart & Jeffrey J. Pompe, Property Rights and Coastal Protection: Lucas and the U.S. Supreme Court, 8 SOC’Y & NAT. RESOURCES 169, 169-76(2008). (“The case made its way to the U.S. Supreme Court, and became one of the most significant cases in U.S. planning history.”).
  \item \textsuperscript{12} Lucas, 505 U.S. at 1036 (Blackmun, J., dissenting). When the government regulation prevents the owner from any economically valuable use of his property, the private interest is unquestionably substantial, but we have never before held that no public interest can outweigh it. Instead the Court’s prior decisions uniformly reject the proposition that diminution in property value, standing alone, can establish a “taking”. Id. (quoting Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 131 (1978)).
  \item \textsuperscript{13} See e.g., Richard J. Lazarus, Putting the Correct “Spin” on Lucas, 45 STAN. L. REV. 1411, 1427 (1993). “[B]ecause environmental protection laws almost never result in total economic deprivations, that categorical presumption will rarely apply. Instead, the negative implication of the category's non-applicability will dominate the lower courts' takings analyses. These courts will likely apply the opposite presumption that no taking has occurred.” Id. See also Lucas, 505 U.S. at 1051 (Stevens, J., dissenting). The court stated: Ultimately even the Court cannot embrace the full implications of its per se rule: It eventually agrees that there cannot be a categorical rule for a taking based on economic value that wholly disregards the public need asserted. Instead, the Court decides that it will permit a State to regulate all economic value only if the State prohibits uses that would not be permitted under background principles of nuisance and property law. Id.
  \item \textsuperscript{15} See e.g., Medical Marijuana Act, 35 Pa. CONS. STAT. § 10231.1107 stating “In order to facilitate the prompt implementation of this act, the department may promulgate temporary regulations that shall expire not later than two years following the pub-
majority held that under Lucas, for a regulation to be a “taking” (thus necessitating just compensation), the regulation must not only render the property devoid of all economically beneficial uses, but also must render the property valueless, recognizing that property is measured both spatially by metes and bounds, and temporally by duration.16

This study will survey the impact Tahoe has had on regulatory takings doctrine since 2002, and will conclude that after Tahoe, Lucas became immaterial, and all regulatory takings cases now require a Penn Cent. Transp. Co. v. N.Y.C.17 analysis, as a result.18 Moreover, because regulatory takings doctrine highlights a deeply rooted prob-

lication of the temporary regulation.” See also Orangeburg County, S.C. Code of Ordinances § 2-103 (1983), stating:

All temporary or enabling enactments or official actions taken by the council intended to have only temporary, or enabling, or regulatory effect (as rules or directions to carry out the intent of a law of the state or an ordinance of the council) shall be in the form of and entitled a “regulation.” Such regulation shall be in writing, shall have a heading stating its subject and a specific reference to the governing statute or county ordinance pursuant to which it is enacted, shall relate only to matters encompassed by the controlling statute or ordinance, shall be divided into sections with appropriate subtitles, shall be enacted in public session by at least a majority of those members of the council present and voting which vote shall be recorded and no vote by proxy permitted, and shall be signed by the chairman or vice-chairman presiding and attested by the clerk. A regulation shall be effective upon the date of enactment unless otherwise specifically provided in the regulation.

Id. See e.g., Register of Administrative Regulations, State of Nev., https://www.leg.state.nv.us/register/ (last visited Nov. 17, 2019) (showing the Register of Administrative Regulations being separated by permanent and temporary regulations).


[T]he court read our cases involving regulatory taking claims to focus on the impact of a regulation on the parcel as a whole. In its view a “planning regulation that prevents the development of a parcel for a temporary period of time is conceptually no different than a land-use restriction that permanently denies all use on a discrete portion of property, or that permanently restricts a type of use across all of the parcel.” In each situation, a regulation that affects only a portion of the parcel—whether limited by time, use, or space—does not deprive the owner of all economically beneficial use.

Id.


18. See Richard J. Lazarus, Celebrating Tahoe-Sierra, 33 Envtl. L. 1, 13 (2006) (noting Lucas has likely been relegated to a mere incidental footnote in takings law, and the Court’s earlier opinion in Penn Central is again the primary judicial text for adjudicating takings claims); see also, Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 537–39 (2005). The Court determined:

Our precedents stake out two categories of regulatory action that generally will be deemed per se takings for Fifth Amendment purposes. First, where government requires an owner to suffer a permanent physical invasion of her property—however minor—it must provide just compensation. A second categorical rule applies to regulations that completely deprive an owner of “all economically beneficial use[es]” of her property. [The U.S. Supreme Court] held in Lucas that the government must pay just compensation for such “total regulatory takings,” except to the extent that “background principles of nuisance and property law” independently restrict the owner’s intended use of the property.
lem with takings clause analyses, this study goes further and suggests that takings clause analysis throughout its history improperly focuses on whether a governmental action is a “taking,” when what the courts’ really need to determine is what is the constitutionally-required just compensation for the governmental action.19

II. PRIMER ON THE LAW OF REGULATORY TAKINGS

Lucas20 is immaterial after Tahoe21 because the government can totally evade a Lucas-required just compensation by limiting the duration of the regulation, thus making the regulation a taking of less than the complete value of the property and requiring every landowner who seeks just compensation to meet the Penn Central22 balancing test for the regulation to be considered a taking requiring just compensation. The result is that agencies no longer use permanent regulations since Tahoe.23 Therefore, regulatory schemes since 2002 have not rendered land valueless and thus have not been analyzed through the Lucas lens; the categorical test.24

Outside these two relatively narrow categories (and the special context of land-use exactions . . .), regulatory takings challenges are governed by the standards set forth in Penn Central. The Court in Penn Central acknowledged that it had hitherto been “unable to develop any ‘set formula’” for evaluating regulatory takings claims, but identified “several factors that have particular significance.” Primary among those factors are “the economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations.” In addition, the “character of the governmental action”—for instance whether it amounts to a physical invasion or instead merely affects property interests through “some public program adjusting the benefits and burdens of economic life to promote the common good”—may be relevant in discerning whether a taking has occurred. The Penn Central factors—though each has given rise to vexing subsidiary questions—have served as the principal guidelines for resolving regulatory takings claims that do not fall within the physical takings or Lucas rules.

Id. (internal citations omitted).

19. “[N]or shall private property be taken for public use, without just compensation.” U.S. Const, amend. V. This provision is widely known as the “just compensation clause.” Also, widely known is the “takings clause,” which applies to each state through the Fourteenth Amendment. See Chicago, B & Q. R. Co. v. City of Chicago, 166 U.S. 226, 241 (1897).
23. See Lazarus, supra note 18, at 11 (stating, “In the relatively short time period since the Court’s Tahoe-Sierra ruling, its reaffirmance of the ‘parcel as a whole’ rule has had the greatest impact on pending litigation. Lower courts have seized on Tahoe-Sierra language to reject various landowner severance arguments and therefore their takings claims as well.”).
Further, the government ought to pay just compensation for losses accruing from the time a regulation effects a taking until the time the regulation is rescinded or amended.\textsuperscript{25} The U.S. Supreme Court presumably agrees with this notion;\textsuperscript{26} however, the case law has hovered around defining what is a taking, concluding that some regulations that logically are takings are somehow not takings requiring just compensation.\textsuperscript{27} Instead, the debate should focus not on whether a regulation is a taking but rather on what is the constitutionally-required just compensation for the taking. Additionally, the

Neither \textit{Lucas}, nor \textit{First English}, nor any of our other regulatory takings cases compels us to accept petitioners' categorical submission. In fact, these cases make clear that the categorical rule in \textit{Lucas} was carved out for the 'extraordinary case' in which a regulation permanently deprives property of all value; the default rule remains that, in the regulatory taking context, we require a more fact specific inquiry. Nevertheless, we will 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, \textit{Armstrong v. United States}, 364 U.S. at 49, justifies creating a new rule for these circumstances.\textit{Tahoe-Sierra}, 535 U.S. at 332.

25. \textit{See} First English Evangelical Lutheran Church of Glendale \textit{v.} County of Los Angeles, 482 U.S. 304, 321 (1987) ("We merely hold that where the government's activities have already worked a taking of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective.").

26. \textit{See} Ark. Game \& Fish Comm'n \textit{v.} United States, 568 U.S. 23, 33 (2012) ("Ever since, we have rejected the argument that government action must be permanent to qualify as a taking. Once the government's actions have worked a taking of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective.") (quoting \textit{First English}, 482 U.S. at 321); \textit{see also} Nat'l Fuel Gas Distribution Corp. \textit{v.} N.Y. State Energy Research \& Dev. Auth., 265 F. Supp. 3d 286, 292 (W.D.N.Y. 2017) (reasoning "where the government's activities have already worked a taking of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective"); \textit{Knick v. Township of Scott}, 139 S. Ct. 2162, 2171 (2019) ("The government's post-taking actions (there, repeal of the challenged ordinance) cannot nullify the property owner's existing Fifth Amendment right:")(quoting \textit{First English}, 482 U.S. at 321).

27. \textit{See} Lingle \textit{v.} Chevron U.S.A. Inc., 544 U.S. 528, 529 (2005) (finding that when a taking "does not substantially advance legitimate state interests" is not a valid takings test, but rather a substantive due process test); \textit{Covington v. Jefferson County}, 53 P.3d 828 (Idaho 2002) (determining that property owners did not allege they had been permanently deprived of all economic uses of their land to constitute a regulatory taking); \textit{Barefoot v. City of Wilmington}, 306 F.3d 113 (4th Cir. 2002) (discussing how residents did not have a takings claim because they had not shown actual harm or that the annexation went too far); \textit{Concrete Pipe \& Prods. v. Constr. Laborers Pension Tr.}, 508 U.S. 602, 645 (1993) (discussing diminution in the value of property, stating "our cases have long established that mere diminution in the value of property, however serious, is insufficient to demonstrate a taking"); \textit{Village of Euclid v. Ambler Realty Co.}, 272 U.S. 365, 384 (1926) (demonstrating approximately 75\% diminution in value); \textit{Hadacheck v. Sebastian}, 239 U.S. 394, 405 (1915) (involving a 92.5\% diminution in value).
courts should analyze this and all regulatory takings questions under *Penn Central*, where the *ad hoc* balancing test is used to determine what compensation is just, rather than what is a taking.

The Constitution requires just compensation.28 Does that not call for a *Penn Central* analysis for all takings anyway, looking at the economic impact of the property holder and the character of the government action to determine what is “just?” It is a multi-factor test, considering the social value of what the government has done and seeking a result that is fair and substantially just.29 Sure, the courts should liberally interpret what constitutes a taking. Unlike a common law nuisance—wherein the abstraction is that “you should have known that you cannot use your property in a way that will substantially and unreasonably interfere with your neighbor’s use of their property”—a regulatory change or new zoning ordinance that limits the previously-lawful use of your property actually by definition takes away something you would have had the right to do previously. Who can deny that nearly every law takes a stick out of the bundle? More importantly, though: what is the just compensation due when a regulation takes?

It is inconceivable to think that anything less than a regulation that stripped a fee simple of all value is a taking only if it meets the

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28. U.S. Const. amend V. “[N]or shall private property be taken for public use, without just compensation.” *Id.*

29. *Penn Central*, 438 U.S. at 121–22. The Court explained: The government “takes” property within the meaning of the Fifth Amendment when it uses its own property in such a way that it destroys private property,” enacts a regulation that “forces a property owner to submit to a permanent physical occupation or deprives her of all economically beneficial use of her property,” or “recharacterizes as public property what was previously private property.” Thus, the federal Supreme Court has concluded that “the particular state actor is irrelevant,” and that “if a legislature or a court declares that what was once an established right of private property no longer exists, it has taken that property, no less than if the State had physically appropriated it or destroyed its value by regulation.” *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot.*, 560 U.S. 702, 715 (2010).

In sum, the Takings Clause bars the State from taking private property without paying for it, no matter which branch is the instrument of the taking. To be sure, the manner of state action may matter: Condemnation by eminent domain, for example, is always a taking, while a legislative, executive, or judicial restriction of property use may or may not be, depending on its nature and extent. But the particular state actor is irrelevant. If a legislature or a court declares that what was once an established right of private property no longer exists, it has taken that property, no less than if the State had physically appropriated it or destroyed its value by regulation. “[A] State, by ipse dixit, may not transform private property into public property without compensation.” *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot.*, 560 U.S. 702, 715 (2010).
Penn Central requirements, especially considering Penn Central’s test for a compensable taking to be the distinct investment-backed expectations formulation. This formulation really is for the purpose of determining what would be just compensation, not what is a taking.

Further, under Lucas, if compensation is required, there arises the problem of determining just what interest the government has taken; although the regulation must presumably have taken all economic use of the land, or even more significantly under Tahoe have taken all value of the land, what happens when the regulation that has gone too far is later repealed? The title holder would have received an undeserved windfall if the just compensation truly had compensated for the permanent deprivation of all value of the prop-


The categorical rule that we applied in Lucas states that compensation is required when a regulation deprives an owner of “all economically beneficial uses” of his land. Under that rule, a statute that “wholly eliminated the value” of Lucas’ fee simple title clearly qualified as a taking. But our holding was limited to “the extraordinary circumstance when no productive or economically beneficial use of land is permitted.” The emphasis on the word “no” in the text of the opinion was, in effect, reiterated in a footnote explaining that the categorical rule would not apply if the diminution in value were 95% instead of 100%. Anything less than a “complete elimination of value,” or a “total loss,” the Court acknowledged, would require the kind of analysis applied in Penn Central.


31. See Penn Central, 438 U.S. 104, 121 (1978) (explaining when a regulation interferes with investment-backed expectations, the regulation can equate to a taking if it results in investors not being able to earn a “reasonable return” on their investment).

32. Consider: “While [prior] cases considered whether particular regulations had “gone too far” and were therefore invalid, none of them addressed the separate remedial question of how compensation is measured once a regulatory taking is established.” Tahoe-Sierra, 535 U.S. at 330.

33. Pa. Coal Co. v. Mahon, 260 U.S. 393, 416 (1922). “The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.” Id. See Lucas, 505 U.S. at 1014–15 (“Nevertheless, our decision in Mahon offered little insight into when, and under what circumstances, a given regulation would be seen as going ‘too far’ for purposes of the Fifth Amendment. In 70-odd years of succeeding ‘regulatory takings’ jurisprudence, we have generally eschewed any ‘set formula’ for determining how far is too far, preferring to ‘engage in . . . essentially ad hoc, factual inquiries.’”).

34. Bailey v. United States, 78 Fed. Cl. 239, 270 (Ct. Cl. 2007). The Court of Claims provided that:

Once a court determines that a taking has occurred, the government retains the whole range of options already available—amendment of the regulation, withdrawal of the invalidated regulation, or exercise of eminent domain. But “no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective.”

Bailey, 78 Fed. Cl. at 270 (quoting First English, 482 U.S. at 32).
property, that is if it contemplated infinite duration of the regulation. Yet, under *Tahoe* the compensation award must be for permanent losses.

In fact, what the cases since *Tahoe* have shown is that it is likely that most regulations, of course, will not deprive the property owner of the entire value of the property. These may, however, destroy use and enjoyment of the property just as effectively as physical occupation or destruction would do. The *Lucas/Tahoe* rules really afford very little protection against such regulatory takings; yet, does not justice require compensation for them? Yes.

In *Tahoe*, the Supreme Court held that temporary development moratoria do not automatically constitute regulatory takings requir-

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The analysis of compensation rules encompasses two distinct issues. (1) The first is that the rules themselves affect the decisions of both government and landowners. The government’s appetite for private property is limited by the acquisition costs. The landowner’s investment in property improvements depends on the level of compensation if the land is taken. (2) The second is that the perceived fairness (equity) of the outcome depends on the compensation.

The importance of an equitable outcome is highlighted in the Supreme Court’s 1960 decision in Armstrong v. United States: “The Fifth Amendment’s guarantee [is] designed to bar Government from forcing some people alone to bear the public burdens which, in all fairness and justice, should be borne by the public as a whole.”

Id. at 57 (quoting Armstrong v. United States, 364 U.S. 40, 49 (1960)).

36. *Tahoe-Sierra*, 535 U.S. at 324 (noting treating all land use regulations as takings “would transform government regulation into a luxury few governments could afford”).

37. See e.g., *Colony*, 888 F.3d at 447 (discussing when the property owner has some value remaining in his title); *Appolo Fuels, Inc. v. United States*, 381 F.3d 1338 (Fed. Cir. 2004) (in which a coal producer sued the United States claiming temporary and permanent regulatory takings of surface mining leases); see also, Daniel L. Siegel, *The Impact of Tahoe-Sierra on Temporary Regulatory Takings Law*, 23 UCLA J. ENVTL. L. & POL’Y 273, 302 (2005); *Bass Enters. Prod. Co. v. United States*, 381 F.3d 1360, 1361 (Fed. Cir. 2004) (finding that the lessors failed to show a compensable taking, stating: “The Act required complex regulatory decision making relating to the significant environmental and health hazards at the site, and thus the delay could not be deemed extraordinary as required to establish a compensable regulatory taking. Further, the government’s concern for the public welfare in protecting the public from the possible release of radioactive waste was a proper consideration in determining whether unwarranted delay in permitting drilling near the site resulted in an unconstitutional taking.”).

38. See 31 AM. JUR. PROOF OF FACTS 3D 563 (2018) (stating that “[a]bsent a physical occupation of a landowner’s property, an overly intrusive government regulation can have the same effect by destroying the use and enjoyment of private property. For example, a single-family zoning regulation aimed at preserving neighborhood character may serve a legitimate public purpose while depriving a landowner of all beneficial use of his property. In such an instance, courts have employed a balancing of interests test focusing on the nature and extent of the benefit derived for the public and the nature and extent of the loss occasioned on the landowner.”).
ing just compensation under the Fifth Amendment. Whether a takings claim requires compensation when a government enacts temporary regulation denying property owners all viable economic use of property is to be decided by applying factors of *Penn Central*. 40

I hasten to say: Justice Stevens in *Tahoe* probably misapplied the *Lucas* standard for meeting the categorical rule by stating that the *Lucas* test turned on the regulation having “wholly eliminated the value of Lucas’s fee simple title.” 41 However, simply looking at the text of the majority opinion in *Lucas*, this test only calls for a regulation that denies “all economically beneficial or productive use” of the land to meet the categorical rule’s standard for compensation. 42 Justice Stevens’s characterization of what happened in *Lucas* probably was not accurate because the land would have still had a market value, even if only on the prospect of eventual change in the law. 43

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The text of the Fifth Amendment itself provides a basis for drawing a distinction between physical takings and regulatory takings. Its plain language requires the payment of compensation whenever the government acquires private property for a public purpose, whether the acquisition is the result of a condemnation proceeding or a physical appropriation. But the Constitution contains no comparable reference to regulations that prohibit a property owner from making certain uses of her private property. Our jurisprudence involving condemnations and physical takings is as old as the Republic and, for the most part, involves the straightforward application of per se rules. Our regulatory takings jurisprudence, in contrast, is of more recent vintage and is characterized by “essentially ad hoc, factual inquiries,” designed to allow “careful examination and weighing of all the relevant circumstances.”

40. *Id.* at 341–42.

It may well be true that any moratorium that lasts for more than one year should be viewed with special skepticism. But given the fact that the District Court found that the 32 months required by TRPA to formulate the 1984 Regional Plan was not unreasonable, we could not possibly conclude that every delay of over one year is constitutionally unacceptable. Formulating a general rule of this kind is a suitable task for state legislatures. . . . We conclude, therefore, that the interest in “fairness and justice” will be best served by relying on the familiar *Penn Central* approach when deciding cases like this, rather than by attempting to craft a new categorical rule.

41. *Id.* at 330.

The categorical rule that we applied in *Lucas* states that compensation is required when a regulation deprives an owner of “all economically beneficial uses” of his land. Under that rule, a statute that “wholly eliminated the value” of Lucas’ fee simple title clearly qualified as a taking. But our holding was limited to “the extraordinary circumstance when no productive or economically beneficial use of land is permitted.”

42. *Lucas*, 505 U.S. at 1030. “When, however, a regulation that declares “off-limits” all economically productive or beneficial uses of land goes beyond what the relevant background principles would dictate, compensation must be paid to sustain it.” *Id.*

43. See United States v. Miller, 317 U.S. 369, 374 (1943) (discussing an owner’s property value increasing due to a government project on an adjacent land and knowledge that the land may be condemned as well).
I say “probably” because whether the phrase fairly captures what the Lucas rule was meant to cover depends on how one reads: “no productive or economically beneficial use of the land is permitted.” For example, in his dissent in Tahoe, Justice William Rehnquist said Lucas was about total deprivation of use, not total deprivation of value—the fact that the law could change may mean that the land has a market value even though the owner cannot use the land, regardless of whether the prohibition of use purports on its face to be temporary or permanent. However, we cannot ignore the observation that Justice Stevens was deliberate in his majority opinion in Tahoe when interpreting Lucas, rendering Lucas effectively inapplicable to all government regulations since, thus requiring all takings cases to be analyzed under Penn Central. But, do we analyze a case to determine

The basic legal standard for determining what constitutes just compensation is well established: the owner is entitled to the fair market value, in turn, refers to the amount that a willing buyer would pay a willing seller of the property, taking into account all possible uses to which the property might be put other than the use contemplated by the taker.

Id. 44. Lucas, 505 U.S. 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. “For what is the land but the profits thereof[?]” Surely, at least, in the extraordinary circumstance when no productive or economically beneficial use of land is permitted, it is less realistic to indulge our usual assumption that the legislature is simply “adjusting the benefits and burdens of economic life,” in a manner that secures an “average reciprocity of advantage” to everyone concerned.

Id. (internal citations omitted) 45. Tahoe-Sierra, 535 U.S. at 346–47.
Neither the Takings Clause nor our case law supports such a distinction. For one thing, a distinction between “temporary” and “permanent” prohibitions is tenuous. The “temporary” prohibition in this case that the Court finds is not a taking lasted almost six years. The “permanent” prohibition that the Court held to be a taking in Lucas lasted less than two years. The “permanent” prohibition in Lucas lasted less than two years because the law, as it often does, changed. . . . Under the Court's decision today, the takings question turns entirely on the initial label given a regulation, a label that is often without much meaning. There is every incentive for government to simply label any prohibition on development “temporary,” or to fix a set number of years. As in this case, this initial designation does not preclude the government from repeatedly extending the “temporary” prohibition into a long-term ban on all development. The Court now holds that such a designation by the government is conclusive even though in fact the moratorium greatly exceeds the time initially specified. Apparently, the Court would not view even a 10-year moratorium as a taking under Lucas because the moratorium is not “permanent.”

The categorical rule that we applied in Lucas states that compensation is required when a regulation deprives an owner of “all economically beneficial uses” of his land. Under that rule, a statute that “wholly eliminated the value” of Lucas' fee simple title clearly qualified as a taking. But our holding was limited to “the extraordinary circumstance when no productive or economically beneficial use of land is permitted.” The emphasis on the word “no” in the text
whether or not it is a taking requiring just compensation, or do we use that multi-factor test to determine what would be just compensation because clearly there had been something taken?

The Fifth Amendment provides “... nor shall private property be taken for public use without just compensation.” The clause has two requirements: (1) all takings must be for public use, and (2) even takings that are for public use must be accompanied by just compensation. As written, the Fifth Amendment necessitates an analysis of four distinct concepts: (1) private property, (2) taking, (3) public use, and (4) just compensation. The discourse on the law of regulatory takings has focused on what is and is not considered a taking requiring just compensation.

For a long period, the requirement was understood to mean that property could be taken only for use by the public; the fact that the taking was beneficial was not enough. Eventually, however, courts concluded that a wide range of uses could requisitely serve the public, even if the public did not in fact gain possession of the property post-

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47. U.S. CONST. amend. V.
49. U.S. CONST. amend. V.; see generally Alberto B. Lopez, Weighing and Reweighing Eminent Domain’s Political Philosophies Post-Kelo, 41 WAKE FOREST L. REV. 237 (2006) (discussing how republican views of just compensation are favored and subjective damages are not included in deciding the amount for just compensation).
50. See generally Robert Meltz, Takings Law Today: A Primer for the Perplexed, 34 ECOLOGY L.Q. 307, 307–80 (2007) (discussing generally two key issues (1) Was the property taken? and (2) How much compensation should the property owner receive?).
51. See Jed Rubenfeld, Usings, 102 YALE L.J. 1077, 1079 (1993) (arguing that the takings clause is directed only against governmental “usings” of private property, that is, against situations in which government officials actually use the property that has been taken).
52. See Lawrence Berger, The Public Use Requirement in Eminent Domain, 57 ON. L. Rev. 203, 203–05, 209 (1978) (discussing the history of public use and the multiple ways it has been interpreted over the years); see Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 242–43 (1984) (discussing when the government takes citizens’ property for its own use it is unconstitutional and not considered a valid taking for public use).
taking. The current jurisprudence has identified three types of takings. First, a forced acquisition of title [and/or physical occupation] is a taking and the market value is the measure of compensation. Second, a regulation that totally deprives a landowner of all economically beneficial use of the land is a taking and the market value is the measure of compensation. Third, a regulation not totally depriving a landowner of all economically beneficial use of the land may or may not be a taking, depending on the Penn Central factors. The Penn Central factors are: (1) the economic impact on the property-holder, particularly the interference with the owner's investment-backed expectations; (2) the character of the governmental action, under which the Court looks at (a) the way the action impacts the property (for example, is it like an acquisition, a physical invasion of the property?), and (b) the social value of the action. If the Court finds a regulation not totally depriving a landowner of all economically beneficial use of the land to be a taking, then the measure of compensation would be the market value of what has been lost. Note that there is not really a difference between what is happening to the owner's

53. See Id. at 244 (“The [State’s] Act advances its purposes without the State's taking actual possession of the land. In such cases, government does not itself have to use property to legitimate the taking; it is only the taking’s purpose, and not its mechanics, that must pass scrutiny under the Public Use Clause.”).

54. See United States v. Pewee Coal Co., 341 U.S. 114, 120 (1951) (“Market value, despite its difficulties, provides a fairly acceptable test for just compensation when the property is taken absolutely.”).

55. See Lucas, 505 U.S. at 1019 (1992) (discussing it is rare for a regulation to remove all of the economically beneficial use of the property). “[W]hen 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.” Id. at 1019.

56. Tahoe-Sierra, 535 U.S. at 330; see Penn Cent., 438 U.S. at 105 (discussing the factors for a just taking).

57. See Penn Cent., 438 U.S. at 105 (discussing the factors for a just taking). For example, is it like an acquisition, a physical invasion of the property?

58. See Penn Cent., 438 U.S. at 105 (discussing the factors for a just taking). For example, regulations are more likely to be held takings if they are not reasonably necessary to effectuate a substantial public purpose.

59. Tahoe-Sierra, 535 U.S. at 330. “[A]sk whether there was a total taking of the entire parcel; if not, then Penn. Central was the proper framework.” Id.; see also Penn. Central, 438 U.S. at 124.

60. See Bauman v. Ross, 167 U.S. 548, 574 (1897).
rights in any particular instance because the stratification of takings is simply a separation in the degrees of magnitude of the taking, no less justifying an analysis of what is the proper just compensation under the fifth amendment to the landowner, although the Court has not followed this train of thought.

In Tahoe, the Supreme Court ruled that the moratoria at issue were not takings within the meaning of the Fifth Amendment; and, for this reason, the landowners were not entitled to compensation. The Court’s rationale rested on the temporary nature of the moratoria and the public purpose they served. The Court held: “[w]hether a temporary moratorium effects a taking is neither a ‘yes, always’ nor a ‘no, never,’ the answer depends on the particular circumstances of the case.”

Come on. No matter what the circumstances, moratoria such as these take. Why then decline to recognize that they are takings re-

[When part only of a parcel of land is taken for a highway, the value of that part is not the sole measure of the compensation or damages to be paid to the owner; but the incidental injury or benefit to the part not taken is also to be considered. When the part not taken is left in such shape or condition, as to be in itself of less value than before, the owner is entitled to additional damages on that account.]

Id. See also Pewee Coal, 341 U.S. at 119–20.


Id. 61. Tahoe-Sierra, 535 U.S. at 303 (2002) (noting that the Court held the moratoria ordered by TRPA are not per se takings of property requiring compensation under the Takings Clause because the regulation was temporary and did not deprive the landowners of all economic use).

62. Id. at 332.

Hence, a permanent deprivation of the owner’s use of the entire area is a taking of ‘the parcel as a whole,’ whereas a temporary restriction that merely causes a diminution in value is not. 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.

Id.

63. Id. at 321.

64. See generally id. at 354 (Rehnquist, J., dissenting).

Resolution 83–21 reflected this understanding of the limited duration of moratoria in initially limiting the moratorium in this case to 90 days. But what resulted—a “moratorium” lasting nearly six years—bears no resemblance to the short-term nature of traditional moratoria as understood from these background examples of state property law. Because the prohibition on development of nearly six years in this case cannot be said to resemble any “implied limitation” of state property law, it is a taking that requires compensation.
quiring just compensation under the Fifth Amendment? The question should be what would constitute “just compensation,” which very well may be zero in some circumstances. Lucas and Tahoe, read together and interpreted since 2002, have set up a total deprivation versus partial deprivation distinction that is arbitrary in many ways.65

Why should an owner who loses ninety percent of all economically beneficial uses, including what may very well be one-hundred percent of all the uses he actually planned on pursuing, have his interest weighed against the social value of the regulation when deciding whether to compensate him at market value? Whereas an owner who loses one-hundred percent of uses gets to be compensated at market value without a court subjecting the owner to the balancing test.66

Further, why should an owner who loses one-hundred percent of beneficial uses under a regulation that purports to be temporary be treated differently from one who loses one-hundred percent of beneficial uses under a regulation that purports to be permanent, given that it is actually impossible to know what will prove temporary and what will prove permanent?67

But in drawing a distinction, as we historically have, between acquisitions and regulatory takings, we have already established a completely arbitrary distinction as the foundation for our takings law.68 To see why this is an arbitrary distinction it is important to understand how we conceive property.

III. BRIEF HISTORICAL SUMMARY OF CONSTITUTIONAL ANALYSES OF REGULATORY TAKINGS

When a community recognizes an individual to own some piece of the earth’s resources, what is it that she has? She has a bundle of powers and freedoms over that piece of the earth’s resources.69 The community’s regulations define what that bundle of powers and free-

65. See generally Lucas, 505 U.S. at 1029 (discussing just compensation requirement for a regulation depriving the property of all economic beneficial use); Tahoe-Sierra, 535 U.S. 302 at 342 (discussing a temporary regulation that does not require just compensation due to not depriving all economic value).
66. Cf. Palazzolo v. Rhode Island, 533 U.S. at 616 (2001) (involving a property owner who failed to show he was deprived of all economically beneficial use of the property); Lucas, 505 U.S. at 1015–16 (1992) (involving a state action which sought to sustain a regulation that deprived land of all economic and beneficial use effected a taking).
67. As of 2018, the thrilling conclusion to the lots referenced in Lucas, in Wild Dunes, Isle of Palms, SC., is that privately-owned, large, waterfront homes reside on each respective lot.
68. Physical acquisitions do not get weighed against the social value of the government action; they are always called takings and therefore market value compensation is always required. See Thomas J. Miceli and Kathleen Segerson, Regulatory Takings: When Should Compensation Be Paid, 23 J. LEGAL STUD. 749, 749–76 (1994).
doms are. They directly define how she can acquire the right to say that she owns that piece of the earth, and they both directly and indirectly define what that right lets her do—what powers and freedoms she actually has.

If at the time she acquires property, existing regulations limit what she can do with it, then the bundle of powers and freedoms she acquires—what counts as her right in the piece of earth she has acquired—does not include powers and freedoms to do the things those regulations prohibit. If regulations that existed at the time a property-holder acquired the property were invalid because they violated some other provision of the federal or state constitutions, for example the due process clause, then the property-holder could, of course, challenge them. But she could not seek compensation under the takings clause, because at the time she acquired the property, she just did not get any power or freedom that the regulations withheld, and the market price she paid presumably reflected that.

Almost all government action takes rights, value, power, and freedom from people's property; likewise it increases the rights, value, power, and freedom that property confers on people. 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 prescribed use interests were not part of his title to begin with. This accords, we think, with our "takings" jurisprudence, which 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.

Lucas, 505 U.S. at 1027. See also Moore v. Regents of the Univ. of Cal., 51 Cal. 3d 120 (Cal. 1990) (Mosk, J. dissenting). "[T]he concept of property is often said to refer to a 'bundle of rights' that may be exercised with respect to that object—principally the rights to possess the property, to use the property, to exclude others from the property, and to dispose of the property by sale or by gift." Id. at 165.

70. See Euclid v. Ambler Realty Co., 272 U.S. 365 (1926) (describing a zoning ordinance which confiscated 75% of the value of the property owned by Amber Realty); see also Agins v. City of Tiburon, 447 U.S. 255, 260 (1980) (finding the test for determining whether a zoning ordinance or governmental regulation may be considered a taking in when such action "substantially advances" a legitimate state interest).

71. Agins, 447 U.S. at 260 (ruling that the test for determining whether a zoning ordinance or governmental regulation may be considered a taking is when such action does not "substantially advances" a legitimate state interest, or denies an owner economically viable use of his land).

72. First English Evangelical Lutheran Church of Glendale v. Los Angeles County, 482 U.S. 304, 311–12 (1987) (holding the complete destruction of the value of property constituted a taking under the Fifth Amendment even if that taking was temporary and the property was later restored); see also Gene R. Rankin, The First Bite at the Apple: State Supreme Court Takings Jurisprudence Antedating First English, 22 U. Ms. L. 417, 429 (1990) (discussing how at least eight states had already held, prior to First English, that their own constitutions required compensation for regulatory takings, and seven of these required compensation for temporary taking).

73. See Agins, 447 U.S. at 260.

power, and freedom of other people.\textsuperscript{75} The government does not tax people for the gain of such action.\textsuperscript{76} Also, our founding fathers made it abundantly clear in the Constitution that whenever government deprives people of property, those people are to be given what justice requires: “Private property [will not] be taken for public use, without just compensation.”\textsuperscript{77} In fact, this clause is the only reference in the Constitution to a mandated remedy for the people.\textsuperscript{78}

Prior to 1922, the U.S. Supreme Court had held that regulation of land was not a taking. The Court opined that this was an exercise of the government's police power to protect lives, safety, welfare, and morals. For instance, in 1915, in \textit{Hadacheck v. Sebastian},\textsuperscript{79} the Court held that a Los Angeles ordinance prohibiting the operation of a brick kiln or a brick yard within the city limits was a legitimate exercise of police power and was constitutional, even though the plaintiff claimed that the ordinance rendered his property valueless because it could only be used as a brickyard. Justice Joseph McKenna's discussion in the majority opinion effectively states the Court's reasoning as: “there must be progress, and if in its march, private interests are in the way, they must yield to the good of the community.”\textsuperscript{80} Justice McKenna also noted the ordinance did not amount to a complete denial of the use of Mr. Hadacheck's property, and a brickyard, actually, was inconsistent with neighboring uses. Mr. Hadacheck could potentially use the clay on his land, of course for Mr. Hadacheck it would be “prohibi-

\textsuperscript{75} See \textit{First English}, 482 U.S. 304, 318 (discussing temporary regulatory takings require just compensation, as in any other kind of takings).

\textsuperscript{76} See infra note 105 and accompanying text for an analysis of taxation of increased property values under takings law.


\textsuperscript{79} 239 U.S. 394 (1915).

\textsuperscript{80} \textit{Hadacheck}, 239 U.S. at 410. The Court stated: To so hold would preclude development and fix a city forever in its primitive conditions. there must be progress, and if in its march private interests are in the way, they must yield to the good of the community. The logical result of petitioner's contention would seem to be that a city could not be formed or enlarged against the resistance of an occupant of the ground, and that if it grows at all it can only grow as the environment of the occupations that are usually banished to the purlieus.

\textit{Id.}
tive from a financial standpoint,”81 in other words, more expensive to do so. Justice McKenna discussed establishing a nuisance-control measures test.82 This case was one of the first cases involving regulatory takings under zoning law. It recognized the city’s police powers and use of zoning ordinances whereby a city may enact regulations to protect the safety of lives and property, welfare, peace, and morals.

A. CURRENT STATE OF U.S. SUPREME COURT INTERPRETATIONS OF REGULATORY TAKINGS

In 1922, Pennsylvania Coal v. Mahon, 260 U.S. 393 (1922),83 the U.S. Supreme Court held that a Pennsylvania state law called the Kohler Act84 was not a legitimate exercise of police power, and instead amounted to an unconstitutional taking of property rights without adequate and just compensation.85 Justice Oliver Wendell Holmes, Jr. discussed the Court’s decision and focused on the extent of the diminution in the value of the property in determining whether a regulatory

81. Id. at 412. “This is not urged as a physical impossibility, but only, counsel say, that such transportation and the transportation of the bricks to places where they could be used in construction work would be prohibitive ‘from a financial standpoint.’” Id.
82. Id. at 413. To a certain extent the latter comment [that the business was not a nuisance] may be applied to other contentions; and, besides, there is no allegation or proof of other objectionable businesses being permitted within the district, and a speculation of their establishment or conduct at some future time is too remote.

83. 260 U.S. 393 (1922). Homeowners sought to enjoin a coal mining company from mining beneath their property. The homeowners purchased the surface rights of the property from the company some years prior with the deed expressly reserving the company the right to remove all coal underneath the land. The plaintiffs argued the Kohler Act, 1921 Pa. Laws 1198, extinguished any subsurface rights of the company. Ultimately the Court held the Kohler Act qualified as an unconstitutional taking of the defendant’s contractual and property rights due to the lack of just compensation. Mahon, 260 U.S. at 412–13.
84. Id.
85. Id. at 414–15. The court reasoned:

The statute forbids the mining of anthracite coal in such way as to cause the subsidence of, among other things, any structure used as a human habitation, with certain exceptions, including among them land where the surface is owned by the owner of the underlying coal and is distant more than one hundred and fifty feet from any improved property belonging to any other person.

Id. at 414–15. The court reasoned:

It is our opinion that the act cannot be sustained as an exercise of the police power, so far as it affects the mining of coal under streets or cities in places where the right to mine such coal has been reserved. As said in a Pennsylvania case, “For practical purposes, the right to coal consists in the right to mine it.” What makes the right to mine coal valuable is that it can be exercised with profit. To make it commercially impracticable to mine certain coal has very nearly the same effect for constitutional purposes as appropriating or destroying it. This we think that we are warranted in assuming that the statute does.

Id. (quoting Commonwealth v. Clearview Coal Co., 100 A. 820, 820 (Pa. 1917)) (citations omitted).
act constituted a taking. Holmes's oft cited passage in Pennsylvania Coal is, “while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.” Thus, deriving a diminution-of-value-test.

Courts have required that people are made whole again after a government deprives them of property—placed, so far as money can, where they would have been if the government had not deprived them of the property. Courts have made that standard ostensibly manageable by construing “takings of property” narrowly. Is this limited interpretation truly the intention of the founding fathers?

1. Developing a Doctrine Since Pennsylvania Coal

In Penn Central Transportation Co. v. New York City, the U.S. Supreme Court suggested that a balancing test is required when a regulation has taken any economic value or use from a parcel of land. In fact, the Court held that a regulatory takings claim re-

86. Id. at 414.
As long recognized, some values are enjoyed under an implied limitation and must yield to the police power. But obviously the implied limitation must have its limits, or the contract and due process clauses are gone. 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.

Id.

87. Id. at 415; see also Palazzolo v. Rhode Island, 533 U.S. 606, 617 (2001) (“In Justice Holmes’ well-known, if less than self-defining, formulation, ‘while property may be regulated to a certain extent, if a regulation goes too far it will be recognized as a taking.’”); Tahoe-Sierra Pres. Council v. Tahoe Reg’l Planning Agency, 535 U.S. 302, 326 (2002) (“In subsequent opinions we have repeatedly and consistently endorsed Holmes’ observation that ‘if regulation goes too far it will be recognized as a taking.’”); Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 537 (2005) (“In Justice Holmes’ storied but cryptic formulation, ‘while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.’”).

88. Armstrong v. United States, 364 U.S. 40, 49 (1960) (holding government action effecting a taking of property rights implicates the constitutional obligation to pay just compensation); see also Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1015 (1992) (citing Holmes, J.) (“[W]hile property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.”).

89. Lucas, 505 U.S. at 1017 (construing a taking as a physical appropriation or when an owner of real property is denied all economically beneficial use of the land).

90. 438 U.S. 104 (1978). Restrictions prohibiting the construction of additional office space on top of the historic Grand Central Terminal qualify as a taking. The Court considered a variety of factors, including a regulations economic impact on the claimant, the extent to which a regulation interferes with landowner’s investment backed expectations, and the nature of the government’s action. Here, the restrictions substantially related to the promotion of general welfare, and although the restriction limited enhancements that could be made to the property, they did not deny the owners’ reasonably beneficial use. Ultimately, the Court held the restriction did not qualify as a taking as since it did not interfere with the owners’ present use of the building or significantly impact the claimants’ investment backed expectations. Penn. Cent., 438 U.S. at 124.

91. Id. at 124.
quires an “ad hoc, factual inquiry” where 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 . . . relevant considerations.” So, too, is the character of the governmental action.

2. Drawing a Line Between Legislative Land Use Controls and an Unconstitutional Taking Without Just Compensation

The Penn Central multi-factor test, which takes account of the social value of what the government has done, makes sense only if we think the clause has the more broad purpose of compensation at the level of what justice requires. Justice is the goal under Penn Central and a strict market value analysis of what is considered just compensation falls short. If we think that the clause is solely about making the property-holder whole, then however good the government’s reason for removing a property right is, and however burdensome on the public finances market-value compensation would be, those factors would not be considered in deciding what the property-holder is due.

Consider that the Court has always required that the most obvious category of takings—government acquisitions—be compensated

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92. Id. at 110.

While the law does place special restrictions on landmark properties as a necessary feature to the attainment of its larger objectives, the major theme of the law is to ensure the owners of any such properties both a ‘reasonable return’ on their investments and maximum latitude to use their parcels for purposes not inconsistent with the preservation goals.

93. Id. at 128 (“[G]overnment actions that may be characterized as acquisitions of resources to permit or facilitate uniquely public functions have often been held to constitute ‘takings.’”).

94. Id. at 124 (examining how the Court identified several factors to be considered when evaluating whether an action qualifies as a taking. These factors include, the nature of the government’s action, the economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations).

95. Id. (explaining when determining the market value of a property, courts have routinely adopted an impartial fair market value assessment of the property using comparable sales of similar properties under similar conditions).

96. Id. at 124 (explaining that when the Court considers whether a restriction requires just compensation, the Court weighs the interference with the property’s primary use and the resulting diminution value against the regulations impact on furthering a public interest).
solely by reference to the goal of making the property-holder whole.\textsuperscript{97} Justice Stevens in \textit{Tahoe} said that this jurisprudence is as old as the republic, and mostly involves the straightforward application of \textit{per se} rules—presumably the market value of the interest acquired.\textsuperscript{98} Along this line, the \textit{Penn Central} multi-factor test is not serving the goal of making the property owner whole; instead, it is serving a different goal—producing a just mediation between the property-holder’s interests and the society’s interests, having regard to some broader idea about social justice.\textsuperscript{99}

\textbf{B. Yet Unsettled Issues in Regulatory Takings}

These different visions of what the takings clause is meant to accomplish are not truly different visions of what counts as a taking.\textsuperscript{100} Yet, the U.S. Supreme Court’s decisions debate these visions under the rubric of what counts as a taking. The debate should take place elsewhere, in the analysis of what is considered just compensation.\textsuperscript{101}

These different visions of what the takings clause is meant to accomplish are different visions of what counts as just compensation. Conservative jurists think that the goal of the clause is to make the owner whole—that amounts to reading just compensation as full com-

\textsuperscript{97} United States v. Causby, 328 U.S. 256, 267 (1946) (holding flights over property owner's chicken farm by U.S. Military aircraft constituted a taking. On remand, the Court of Claims determined the property interests that were taken and further determined that compensation was based on the occupancy of the property interests).

\textsuperscript{98} Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 322 (2002). “Our jurisprudence involving condemnations and physical takings is as old as the Republic and, for the most part involves as straight forward application of the \textit{per se} rules. Our regulatory takings jurisprudence, in contrast, is of more recent vintage and is characterized by ‘essentially ad hoc, factual inquiries.’” Tahoe-Sierra, 535 U.S. at 322 (quoting \textit{Penn Central}, 438 U.S. at 124).

\textsuperscript{99} \textit{Penn. Cent.}, 438 U.S. at 124 (discussing the purpose of the multi-factor test when determining what “fairness and justice” demand when economic injuries are caused by state action, and ultimately determined it would rely on essentially ad hoc, factual inquiries regarding the circumstances of each particular case).

\textsuperscript{100} See First English Evangelical Lutheran Church of Glendale v. Los Angeles County, 482 U.S. 304, 322 (1987) (holding the complete destruction of the value of property constituted a taking under the Fifth Amendment even if that taking was temporary and the property was later restored); Armstrong v. United States, 364 U.S. 40, 49 (1960) (holding government action effecting a taking of property rights implicates the constitutional obligation to pay just compensation); see generally Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1015 (1992) (holding a state regulation that deprived land of all economic and beneficial use effecting a taking).

\textsuperscript{101} Scholars have commented on the meaning of just compensation. One such scholar, Michelman, states:

[a] court, it seems, must choose between denying all compensation and awarding ‘just’ compensation; the loss is either a ‘taking’ of ‘property’ or it is not. If ‘just’ compensation is essentially incalculable, or if the cost of computing it is very high, the court may be led to classify a situation as non-compensable. Frank I. Michelman, \textit{Property, Utility, and Fairness: Comments on the Ethical Foundations of Just Compensation Law}, 80 Harv. L. Rev. 1165, 1253–54 (1967).
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pensation.\textsuperscript{102} Liberal jurists think the goal of the clause is to be fair to
the owner—to ensure he is not made to bear an unjust burden—but
they do not assume that social justice requires all citizens to bear the
burdens of the regulation equally.\textsuperscript{103}

Consider taxation, and let us go closest to home by considering
property taxes that rise with value of the land, even though the ser-
VICES for which they pay are not provided proportionally to what has
been paid.\textsuperscript{104} We do not say that progressive taxation must be fully
compensated by spending most tax revenue on services for the rich.
Instead, we permit governmental action that unevenly taxes people
and spends on people so long as such action disparately impacts peo-
ple's property rights only in ways that our theory of social justice holds
to be fair. "Taxing is just a species of taking."\textsuperscript{105}

This way of understanding the takings clause also sheds light on
the interest-on-trust accounts cases that had come before the Supreme
Court in the years following \textit{Tahoe}.\textsuperscript{106} Regulations that require law-
yers to deposit client trust money in government accounts are alleged
by the petitioners to take the interest on that money without just compensa-
tion, even though if kept in myriad private trust accounts, the interest
would be negligible or, net of bank fees, nothing.\textsuperscript{107} Under
the analysis just proposed, the answer would be clear: of course there
is a taking. A power, the "spite right" if you will, to deny others the
interest even if one cannot have it, which the lawyer would otherwise

\textsuperscript{102}. See Thomas S. Ulen, \textit{Still Hazy After All These Years}, 22 \textit{Law \\& Soc. Inquiry}
1011 (1997).

\textsuperscript{103}. See id.

\textsuperscript{104}. See Wallace E. Oates, \textit{The Effects of Property Taxes and Local Public Spending on Property Values: An Empirical Study of Tax Capitalization and the Tiebout Hypothesis}, 77 \textit{J. Pol. Econ.} 957, 959 (1969) (applying Tiebout model and concluding that "it is the present value of the future stream of benefits from the public services relative to the present value of future tax payments that is in this case important").

\textsuperscript{105}. We tolerate social arrangements that foster unequal distribution of the earth's resources among us because we accept some theory under which the inequality can be justified. Government action in providing the law of contracts and property and torts helps create wealth but also helps concentrate wealth. Yet, we may have a theory of social justice under which somehow the uneven distribution of created wealth is fair. The same theory of social justice that is applied to decide when unequal taxation and government spending is fair should also be applied to decide when other takings of property rights are fair for purposes of the Takings and Due Process clauses. After all, exercise of the taxing power must also pass muster under the Takings and Due Process clauses, too.

\textsuperscript{106}. See Wash. Legal Found. v. Legal Found. of Wash., 271 F.3d 835 (9th Cir. 2001); Phillips v. Wash. Legal Found., 524 U.S. 156, 172 (1998) (holding that interest income generated by funds held in IOLTA accounts was the "private property" of the principal for the purposes of the takings clause.).

exercise on behalf of his or her clients over their money, is taken. But the good that is produced—funds for legal aid—and the lack of genuine harm mean that justice does not require compensation.108

As another example, civil rights laws prohibiting private businesses from discriminating against minorities took a freedom away from those businesses.109 The freedom to discriminate on grounds of race, sex, ethnicity, might plausibly have had economic value to those businesses if their patronage was built on exclusion.110 The civil rights laws were not just reflecting a new understanding of a constitutional requirement that had always been there—the Equal Protection clause only applies to government discrimination.111 Such regulations would never be viewed by the Court as takings, because of the moral force behind their enactment—Penn Central factor analysis would weigh the good served very heavily.112

Likewise, in Tahoe, as this line of reasoning goes, the regulations protecting the environment had a moral force behind them. Following Penn Central analysis, most environmental regulations should therefore, not be takings.114 Wrong. The discourse in these instances should concern when justice requires compensation rather than when a taking occurs.115 Of course a property right was a taking from the racist owners of public accommodations in the South when they were forced to admit folks they did not want on their premises.116 We are not going to pay them anything for the loss of that right, because we

108. See generally Risa I. Sackmary, IOLTA’s Last Obstacle: Washington Legal Found. v. Massachusetts Bar Found.’s Faulty Analysis of Attorney’s First Amendment Rights, 2 J. L. & POL’Y 187, 188 (1994) (“IOLTA accounts purpose is to give money to a worthwhile organization rather than to give an interest-free loan to a bank.”).

109. Katzenbach v. McClung, 379 U.S. 294, 305 (1964) (holding that the Civil Rights Act of 1964 prohibited restaurants from discriminating against interstate travelers); see also Holmes v. City of Atlanta, 350 U.S. 879, 879 (1955) (holding improper the City of Atlanta’s practice of operating a golf course that was open to different races on different days).


111. U.S. CONST. amend. XIV.


114. Tahoe-Sierra Pres. Council v. Tahoe Reg’l Planning Agency, 535 U.S. 302, 334 (2002). “[A]part from the District Court’s finding that TRPA’s actions represented a proportional response to a serious risk of harm to the lake, petitioners might have argued the moratoria did not substantially advance a legitimate state interest.” Id.

115. Id. 535 U.S. at 356 (Thomas, J., dissenting). “To my mind, such potential future value bears on the amount of compensation due and has nothing to do with the question whether there was a taking in the first place.” Id.

116. Heart of Atlanta Motel v. United States, 379 U.S. 241, 262 (1964) (upholding a permanent injunction issued by the district court requiring the Heart of Atlanta Motel to receive business from clientele of all ethnicities).
are just not sorry for them. We do not think that justice requires compensation.

C. LOOKING AHEAD TO A LEGAL CHANGE IN FOCUS

The discourse between jurists regarding takings is not a fight about what counts as a taking. It is a fight about what justice in compensation requires. Once we recognize that property consists of the bundle of powers and freedoms that existing regulations allowed the property-holder to acquire by becoming a property-holder, then every subsequent restriction on one of the powers or freedoms in the bundle is a taking.

Consider Justice Brennan’s Penn Central analysis, which concludes that there was no taking. Of course, there was a taking. Prior to the landmarks law, Penn Central would have had the right to build a skyscraper. The landmarks law therefore, took that right out of Penn Central’s property bundle. Brennan’s analysis was really about whether doing justice required compensation, and if so, in what amount. That is, his multi-factor test is really an interpretation of “just compensation,” not of “taking.”

In Lucas, the Court established a categorical rule to be applied in a “total takings” situation. The court held, “when . . . a regulation that declares ‘off-limits’ all economically productive or beneficial uses of land goes beyond what the relevant background principles would dictate, compensation must be paid to sustain it.”

The Lucas test applies when the regulation deprives an owner of all the economically beneficial use of her property. The Penn Central test applies when the regulation causes the owner to lose something less. The Tahoe interpretation of the Lucas test has led to cur-
rent regulatory schemes “taking” less than all the economically beneficial use of one’s private property because municipalities can circumvent a Lucas analysis simply by adding a temporal component to all regulations that deprive an owner of the economically beneficial use of the private property. As such, regulations today appear to be less than permanent because of the expiration date or sunset provision, thus requiring any private owner seeking just compensation to meet the Penn Central threshold for it to even be considered a taking.

In Penn Central, the Court began its analysis by acknowledging that it “has been unable to develop any ‘set formula’ for determining when . . . economic injuries caused by public action” become a taking of property, and concluded that it will generally depend on the circumstances of the case. The Court, however, identified three factors, which are usually assessed when “engaging in these essentially ad hoc, factual inquiries.” “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 . . . relevant considerations. So, too, is the character of the governmental action.”

The Penn Central test is flexible. Individual courts must determine the relevant weight to accord each factor and then balance the competing interests. This “balancing” is highly case-specific, and an owner need not allege a total destruction of either property value or use to bring a takings claim under Penn Central.

Because courts generally find that the “character of the governmental action” is a legitimate exercise of police power, whether a regulation effects a taking of property will largely depend on the aggrieved owner’s ability to show a significant economic impact and clear inter-

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123.  Penn Cent., 438 U.S. at 124. “[W]e have frequently observed that whether a particular restriction will be rendered invalid by the government’s failure to pay for any losses proximately caused by it depends largely upon the particular circumstances [in that case].” Id. (quoting United States v. Cent. Eureka Mining Co., 357 U.S. 155, 168 (1958)).
124.   Penn Cent., 438 U.S. at 124. “In engaging in these essentially ad hoc, factual inquiries, the Court’s decisions have identified several factors that have particular significance.” Id.
125.  Id. at 124 (referencing the nature or purpose of a regulation as an additional relevant factor).
126.   Id. “[W]hether a particular restriction will be rendered invalid by the government’s failure to pay for any losses proximately caused by it depends largely upon the particular circumstances [in that case].” Id. (quoting Cent. Eureka, 357 U.S. at 168).
ference with distinct investment-backed expectations. This framework for the analysis is misplaced.

IV. REFOCUSING THE DOCTRINAL LENS OF REGULATORY TAKINGS

Takings analysis should take place not to determine if something is or is not a “taking” in situations where the government has indubitably taken away a right that was an incident of property. In such circumstances, it is a taking and the analysis described in Penn Central should be understood to determine what “just compensation” would be.

In Lucas, the court examined precedent and determined that a case specific inquiry has never been required when a regulation either compels a “property owner to suffer a physical ‘invasion,’” or “denies all economically beneficial or productive use of land.” The U.S. Supreme Court held that when a regulation intrudes so severely, market value compensation is always required. Because the trial court

127. Penn Cent., 438 U.S. at 127 (stating that “Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922), is the leading case for the proposition that a state statute that substantially furthers important public policies may so frustrate distinct investment-backed expectations as to amount to a ‘taking.’”). Id.
130. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1012 (1992). The Court reasoned: Without even so much as commenting upon the consequences of the South Carolina Supreme Court’s judgment in this respect, the Council insists that permitting Lucas to press his claim of a past deprivation on this appeal would be improper, since “the issues of whether and to what extent [Lucas] has incurred a temporary taking . . . have simply never been addressed.” Yet Lucas had no reason to proceed on a “temporary taking” theory at trial, or even to seek remand for that purpose prior to submission of the case to the South Carolina Supreme Court, since as the Act then read, the taking was unconditional and permanent. Moreover, given the breadth of the South Carolina Supreme Court’s holding and judgment, Lucas would plainly be unable (absent our intervention now) to obtain further state-court adjudication with respect to the 1988–1990 period. Lucas, 505 U.S. at 1012 (internal citation omitted).
131. See id. at 1015–18 (explaining regulations that leave the owner of land without economically beneficial or productive options for its use typically require land to be left substantially in its natural state because of the heightened risk that private property is being pressed into some form of public service under the guise of mitigating serious public harm). “As we have said on numerous occasions, the Fifth Amendment is violated when land-use regulation ‘does not substantially advance legitimate state interests or denies an owner economically viable use of his land.’” Id. at 1016 (quoting Agins v. City of Tiburon, 447 U.S. 255, 260 (1980)).

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.

Id. at 1019.
132. Id. at 1029.
found that the regulation had extinguished the economic value of Lucas’s lots, the Court applied the categorical rule to his claim.  

The Lucas test is not flexible; market value compensation is owed when a regulation extinguishes the beneficial economic use of land, unless the restriction falls within a narrow exception. As such, a court that finds an owner has not suffered a total deprivation of economically viable use employs a partial takings analysis to determine if that owner has suffered a loss sufficient to warrant compensation. This analysis is what should happen in all cases, and it should be done through the lens of determining just compensation, regardless of whether there has been a partial or total deprivation of property.

We should concern ourselves with justice, not arbitrary classifications. In Lucas, the Court did not examine whether Lucas had reasonable, distinct investment-backed expectations at the time he purchased the property. Instead, the Court’s reasoning was simplistic: Lucas proved that the regulation had extinguished the economically beneficial use of his property, and therefore the regulation effected a taking. Indeed it did, but then the Court held

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We have, however, described at least two discrete categories of regulatory action as compensable without case-specific inquiry into the public interest advanced in support of the restraint. The first encompasses regulations that compel the property owner to suffer a physical “invasion” of his property. In general (at least with regard to permanent invasions), no matter how minute the intrusion, and no matter how weighty the public purpose behind it, we have required compensation . . . . The second situation in which we have found categorical treatment appropriate is where regulation denies all economically beneficial or productive use of land.  

Id. at 1015.

133. Id. at 1020. “The trial court found Lucas’s two beachfront lots to have been rendered valueless . . . . Under Lucas’s theory of the case, which rested on our ‘no economically viable use’ statements, that finding entitled him to compensation.” Id.

134. Id. at 1027. “It is correct that many of our prior opinions have suggested that ‘harmful or noxious uses’ of property may be proscribed by government regulation without the requirement of compensation.” Id. at 1022.


|Our holding was limited to “the extraordinary circumstance when no productive or economically beneficial use is permitted.” The emphasis on the word ‘no’ in the text of the opinion was, in effect, reiterated in a footnote explaining that the categorical rule would not apply if the diminution in value were 95% instead of 100%.

Tahoe-Sierra, 535 U.S. at 329–30 (quoting Lucas, 505 U.S. at 1017).

136. See Lucas, 505 U.S. at 1015–32 (finding that because the trial court deemed the properties to be totally valueless, there was no need to examine or consider Lucas’s investment-backed expectations).

137. Id. at 1020. “The trial court found Lucas’s two beachfront lots to have been rendered valueless by respondent’s enforcement of the coastal-zone construction.” Id.

138. See id. at 1015–18. (explaining when the owner of real property has been called upon to sacrifice all economically beneficial uses, that deprivation is the functional equivalent of a physical appropriation).
an automatic right to market value compensation—the investment-backed expectation of the owner did not have to factor into the just compensation analysis because it was a “total” taking.  

Significantly, Justice Stevens attacked the categorical rule as being “wholly arbitrary,” because “[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.” The majority responded by acknowledging that a landowner who has not been deprived of all economically viable use “might not be able to claim the benefit of [The Supreme Court’s] categorical formulation;” however, the majority insisted that he would be able to bring a takings claim under the usual *Penn Central* balancing test.

*Lucas* contains an exception to its own categorical rule. If a regulation duplicates the result that could have been achieved in the courts by adjacent landowners under the State’s general law of private

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139. *Id.* at 1030–31.

The “total taking” inquiry we require today will ordinarily entail (as the application of state nuisance law ordinarily entails) analysis of, among other things, the degree of harm to public lands and resources, or adjacent private property, posed by the claimant’s proposed activities, see, e.g., Restatement (Second) of Torts §§ 826, 827, the social value of the claimant’s activities and their suitability to the locality in question, see, e.g., id., §§ 828(a) and (b), 831, and the relative ease with which the alleged harm can be avoided through measures taken by the claimant and the government (or adjacent private landowners) alike, see, e.g., id., §§ 827(e), 829(c), 830.

140. *Id.* at 1064.

The case at hand illustrates this arbitrariness well. The Beachfront Management Act not only prohibited the building of new dwellings in certain areas, it also prohibited the rebuilding of houses that were “destroyed beyond repair by natural causes or by fire.” Thus, if the homes adjacent to Lucas’ lot were destroyed by a hurricane one day after the Act took effect, the owners would not be able to rebuild, nor would they be assured recovery. Under the Court’s categorical approach, Lucas (who has lost the opportunity to build) recovers, while his neighbors (who have lost both the opportunity to build and their homes) do not recover. The arbitrariness of such a rule is palpable.

141. See *Lucas*, 505 U.S. at 1030–31 (explaining how the “total taking” inquiry required “will ordinarily entail (as the application of state nuisance law ordinarily entails) analysis of, among other things,” (1) “the degree of harm to public lands and resources, or adjacent private property, posed by the claimant’s proposed activities,” (2) “the social value of the claimant’s activities and their suitability to the locality in question,” and (3) “the relative ease with which the alleged harm can be avoided through measures taken by the claimant and the government or adjacent private homeowners, alike”) (internal citations omitted).

142. *Id.* at 1029.

Where a 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 prescribed use interests were not part of his title to begin with.
nuisance then no taking has occurred. 143 No taking has occurred not because of a lack of investment-backed expectations, as the owner’s expectation is generally to make economically viable use of her property, but rather because background “principles of [state] nuisance and property law” demonstrate that the proscribed use was never part of the title. 144 This analysis is consistent because nothing was taken from the titleholder, thus no analysis of what would be just compensation is necessary—unless state courts have evolved state nuisance law in the meantime to be more intrusive. 145

A. MANY MORE TAKINGS ARE HAD

Realistically, to be frank, in no way do we think that when courts interpret the common law in a new and different way that they are

143. Id. at 1029–30.
A law or decree with such an effect must, in other words, do no more than duplicate the result that could have been achieved in the courts — by adjacent landowners (or other uniquely affected persons) under the State’s law of private nuisance, or by the State under its complementary power to abate nuisances that affect the public generally, or otherwise.

Id.

144. See id. at 1031–32.
We believe similar treatment must be accorded confiscatory regulations, i.e., regulations that prohibit all economically beneficial use of land: Any limitation so severe cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles of the State’s law of property and nuisance already place upon land ownership. A law or decree with such an effect must, in other words, do no more than duplicate the result that could have been achieved in the courts — by adjacent landowners (or other uniquely affected persons) under the State’s law of private nuisance, or by the State under its complementary power to abate nuisances that affect the public generally, or otherwise. On this analysis, the owner of a lakebed, for example, would not be entitled to compensation when he is denied the requisite permit to engage in a landfilling operation that would have the effect of flooding others’ land. Nor the corporate owner of a nuclear generating plant, when it is directed to remove all improvements from its land upon discovery that the plant sits astride an earthquake fault. Such regulatory action may well have the effect of eliminating the land’s only economically productive use, but it does not proscribe a productive use that was previously permissible under relevant property and nuisance principles. The use of these properties for what are now expressly prohibited purposes was always unlawful, and (subject to other constitutional limitations) it was open to the State at any point to make the implication of those background principles of nuisance and property law explicit.

Id. at 1029–30

145. Id. at 1030.
Such a regulatory action may well have the effect of eliminating the land’s only economically productive use, but it does not proscribe a use that was previously permissible under relevant property and nuisance principles . . . South Carolina must identify background principles of nuisance and property law that prohibit the uses he now intends in the circumstances in which the property is presently found. Only on this showing can the State fairly claim, in proscribing all such beneficial uses, the Beachfront Management Act is taking nothing.

Id. at 1030–32.
just newly discovering what it always was. On the contrary, they are simply changing it. Although one could say that rights are acquired against the backdrop of potential change in nuisance law, remember that rights are also acquired against the backdrop of potential change in legislation, too, and the U.S. Supreme Court skirts that issue.

And, the whole juridical perspective is to blame for this illogical analysis. Liberal jurists are mistaken to have the fight about just compensation under the rubric of takings. In doing so, they look conceptually incoherent. In each of these fights, of course a property interest—a power or freedom in the property bundle—is being taken. The interesting question is whether justice requires compensation.

Further, if the fight were had explicitly under the rubric of just compensation, then conservative jurists would look conceptually incoherent. Every new zoning ordinance, every law that imposes some new restriction on existing freedoms or powers over property takes. Even the most conservative minds must concede that compensation cannot be paid for all of these takings. Yet, the conservative view is that “just compensation” means “making the property owner whole.”

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146. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1030 (1992). “The use of these properties for what are now expressly prohibited purposes was always unlawful, and (subject to other constitutional limitations) it was open to the State at any point to make the implication of those background principles of nuisance and property law explicit.” Lucas, 505 U.S. at 1030.

147. See id. at 1030–31 (referencing how although the Court makes express reference to how rights are affected by nuisance principles, it fails to address how property rights can be affected by legislative change).

148. Of course, justice requires compensation.

149. “Every act of zoning is a ‘taking’ in a sense, because the state takes some rights of use away from the owner.” Town of Gurley v. M & N Materials, Inc., 143 So. 3d 1, 35 (Ala. 2012) (Parker, J., concurring). See e.g., Dryden Oaks, LLC v. San Diego Cty. Reg’l Airport Auth., 224 Cal. Rptr. 3d 333 (Cal. Ct. App. 2017). See also Jesse Dukeminier et al., Property 1107 (8th ed. 2014) (discussing zoning and takings, the court states, “Unsatisfied with private arrangements (servitudes) and nuisance law as the means of land use control, the government might and often does embark on more activist courses-leaving property in the hands of its owners but regulating its use, or taking, property from its owners and reallocating it to governmentally preferred uses. The first approach regulating, is illustrated by the method of zoning, the second approach, taking, is the method of eminent domain.”); Bernard Schwartz, Takings Clause—“Poor Relation” No More?, 47 Okla. L. Rev. 417, 428–32 (1994) (“In other words, if government deprives plaintiffs of their right to sell their eagle feathers, that is a taking, even if the owners still have the rights to possess and use the feathers.”) (discussing Andrus v. Allard, 444 U.S. 51 (1979)).


151. For a discussion on the “parcel as a whole theory,” see generally the majority opinion in Lucas, 505 U.S. 1003 (1992); see also Woffinden, supra note 113, at 628–33, stating:
sation whenever a power or freedom in the property bundle is restricted.\textsuperscript{152}

Liberal jurists, on the other hand, could cheerfully concede that all such restrictions are takings but then say that justice does not always require compensation, and instead requires some measure to determine what compensation, if any, is just.\textsuperscript{153} When would justice require compensation, and in what amount? That necessarily depends on the unique relation between the property interest and the regulation at issue in any particular case.\textsuperscript{154} So, then, what factors might be relevant to the analysis? The same \textit{Penn Central}\textsuperscript{155} factors, which consider: (1) the economic impact of the taking on the claimant; (2) the investment-backed expectations; and, (3) the character of the taking.\textsuperscript{156}

\section*{B. What is Just About Compensation?}

The U.S. Supreme Court constructs its own set of principles for deciding when justice requires compensation, and the \textit{Penn Central}\textsuperscript{157} analysis is effectively the Court trying to do just that.\textsuperscript{158} It is a vague standard risking inconsistent application by courts,\textsuperscript{159} but having bright-line rules makes inconsistency of application even more visible, thus bringing the law into even greater disrepute. If we have a bright-

\begin{itemize}
  \item If the court looks to all of the owner’s property in aggregate, then the effect on the parcel as a whole might be quite small. In short, the more inclusive the definition of the “parcel” denominator, the smaller impact on the entire parcel, and the less likely a property owner will be able to succeed on a takings claim; conversely, the more likely a property owner will be able to receive compensation for government action that affects the value of the property. \textit{Id.} at 624.
  \item See \textit{Lucas}, 505 U.S. at 1027 (referencing the circumstance which an individual’s rights can be removed from the property bundle without just compensation, the Court states, “[W]e 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. This accords we think, with our ‘takings’ jurisprudence, which 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 new property.”).
  \item The majority opinion in \textit{Penn. Central} penned by Justice Brennan identifies three central factors as definitive for determining whether there is a “taking”: (1) economic impact of the taking on the claimant; (2) investment-backed expectations; and (3) the character of the taking. \textit{Penn Cent.}, 438 U.S. at 124–25.
  \item 438 U.S. 104 (1978).
  \item \textit{Penn Cent.}, 438 U.S. at 124–25.
  \item 438 U.S. 104 (1978).
  \item Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Planning Agency, 535 U.S. 302, 320 (2002) (Stevens, J., opining that when “[f]aced squarely with the question whether a taking had occurred, the Court held that \textit{Penn Central} was the appropriate framework for analysis”).
  \item Which itself is unjust.
\end{itemize}
line rule, we can see the cases just on either side of the line; however, if we have a multi-factor standard, courts can look at what was awarded in one case, where a certain set of circumstances existed, and can consider how the circumstances in a case at bar differs; thus, over time, a common law of property takings would evolve. The courts could come up with a theory of justice, and, through the process of concrete application by common-law method, this theory of justice would acquire a predictable content, sensitive to the range of factors relevant to whether justice requires compensation and, if so, how much.

Conservative jurists are left with the problem that they must define “takings” more narrowly than “any restriction of a right or freedom in the property bundle,” because they plan on forcing the government to pay full, make-whole compensation for all takings. But, there is no principled other place to draw the “takings” line, so the conservative position ends up as arbitrary.

V. CONCLUSION

To recap, the Takings Clause assures Americans that they will not be forced to sacrifice their property for a public good without just compensation. A categorical rule applies when a property owner


161. See Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992) (referencing how the Court, in the interest of fairness and justice, adjusted the existing categorical rule to provide a remedy for an obvious economic injury resulting from a state action).


163. There are candidates for the line. Consider compensation anytime there is an existing market for the particular right that the government has removed or restricted. But why should the vagaries of market formation decide which deprivations get compensated? There may not be a market for the right to dance naked around your property (and, thus, no proxy for how much you value your right to do so), but if a government regulation restricts that right, why is it not a taking from anyone who does value that right?


Tahoe-Sierra, 535 U.S. at 321; see also United States v. Pewee Coal Co., 341 U.S. 114, 120 (1951) (explaining how a physical invasion of private property or a direct government appropriation requires compensation while referencing the government’s occupation of a coal mine to prevent a national strike effected a taking); Penn Cent., 438 U.S. at 124 (1978) (“We have recognized that this constitutional guarantee is designed to bar Government from forcing some people alone to bear public burdens which, in all fair-
has been denied all economically viable use of her property, while a balancing test applies when she loses something less.\textsuperscript{165} Determining just compensation is when we analyze policy, investment-backed expectations, etc., not to determine if something is a taking requiring just compensation. A total regulatory taking is analogous to a physical taking.\textsuperscript{166} The U.S. Supreme Court has generally held that physical invasions of any sort require market-value compensation.\textsuperscript{167} Fine, but any regulatory taking is analogous to a physical taking, too.

There is no principled distinction between outright acquisitions and regulatory takings—all are takings, and all should be subject to the Penn Central\textsuperscript{168} factor analysis to determine what counts as just compensation, what justice requires as compensation.\textsuperscript{169} Justice may require compensation without necessarily measuring that compensation as the market value of the right taken at some particular time,\textsuperscript{170} particularly because, since Tahoe,\textsuperscript{171} takings themselves are identified by the Penn Central \textit{ad hoc} balancing test.