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Regulatory Takings: Survey of a Constitutional Culture

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Regulatory Takings: Survey of a Constitutional Culture

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Abstract

Fifth Amendment property protections under the Takings Clause have grown increasingly contentious as governing entities have used regulations to limit what property owners can do with their land. This paper profiles regulatory takings jurisprudence from Pennsylvania Coal, to Penn Central, to Nollan and Dolan, and Tahoe-Sierra. The paper also examines conceptual constructs that have shaped the field’s evolution, including: the doctrine’s origin, the nuisance exception, the changed circumstances argument, unconstitutional conditions, temporary takings and the denominator problem.

I. Introduction

The Takings Clause in the Fifth Amendment of U.S. Constitution contains inherent tension between government and individuals. Although the plain wording of the Clause demonstrates that the drafters recognized government had to be able to take private property when necessary to accomplish public goals, it also demonstrates that the drafters were concerned this power could be abused. This tension has increased as the modern regulatory state has significantly limited the way private property owners can use their land. This tension has given rise to issues surrounding whether the Takings Clause protects property owners from these indirect or regulatory takings. Instead of government making a direct and open eminent domain taking of a property owner’s land, regulators instead issue myriad controls and limitations on the ability to use, exclude and divide or alienate that land. Property owners must then raise a claim of inverse condemnation to seek compensation for their perceived harm.¹

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¹ San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621, 638 n.2 (1981) (Inverse condemnation is “a cause of action against a government defendant . . . even though formal condemnation proceedings . . . have not been instituted by the government entity. . . . [T]he condemnation is ‘inverse’ because it is the landowner, not the government entity, who institutes the proceeding.”).
This paper will explore those tensions and is organized as follows: Part II examines the origins of the regulatory takings doctrine, including: the drafters’ original intent, the nuisance exception and the changed circumstances argument.\textsuperscript{2} Part III profiles types of regulatory takings, including: two per se tests, the dominant \textit{Penn Central} balancing test and a look at unconstitutional conditions.\textsuperscript{3} Finally, Part IV tries to untangle the denominator problem, including: horizontal metes and bounds, vertical integration, temporal implications and a search for an objective solution.\textsuperscript{4}

\section*{II. Origins of the Doctrine}

\subsection*{A. The Fifth Amendment’s Takings Clause}

The Constitution simultaneously recognizes the government’s need and ability to take private property and protects property owners by requiring that the government can only take property for a public purpose and has to pay just compensation when it does so. The Fifth Amendment’s Takings Clause reads, “nor shall private property be taken for public use, without just compensation.”\textsuperscript{5} Although there is much scholarship discussing what qualifies as “public use” and “just compensation,” this paper will explore the concepts of “property” and when it has been “taken” by regulation.

A proper examination of the Takings Clause must begin with its original meaning and inclusion in the Constitution. Although today we consider it a benchmark protection of property, “none of

\textsuperscript{2} See \textit{infra} Part II.A-D.
\textsuperscript{3} See \textit{infra} Part III.A-E.
\textsuperscript{4} See \textit{infra} Part IV.A-B.
\textsuperscript{5} U.S. \textit{CONST. AMEND. V}. 
the state proposals [to the Constitutional Convention] … suggested a compensation clause.”

James Madison appears to have drafted and proposed the Takings Clause at the first session of Congress of his own accord. Madison’s first draft of the Takings Clause read: “No person shall … be obliged to relinquish his property, where it may be necessary for public use, without a just compensation.” Between Madison’s introductory floor speech on June 8, 1789 and the final vote on September 25, the clause’s wording changed. Congress sent twelve amendments to the States for consideration, including the now familiar: “nor shall private property be taken for public use, without just compensation.” What should we make from this alteration from “relinquish” to “taken”?

Legislative history provides little assistance, as no known record of the Committee of Revision’s debates exists. That has not stopped modern judges and theorists from giving the change meaning. In Lucas v. South Carolina Costal Council, Justice Scalia asserted that the change allows the Supreme Court to extend the clause’s protection to regulations in addition to physical expropriations; he wrote: The “text of the Clause can be read to encompass regulatory as well as physical deprivations … in contrast to the text originally proposed by Madison.” Scalia didn’t say that the final language compels an inclusion of regulatory takings, only that Madison’s original language precluded it and thus the alteration is noteworthy. However, in an article taking an extensive look at the original meaning of the Takings Clause, Duke Professor of

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7 See HUGO GROTTFUS, THE LAW OF WAR AND PEACE, Bk. II, ch. XIV, § VII (1625) and WILLIAM BLACKSTONE, COMMENTARIES 139 (1765) (for an examination of the philosophy behind the Takings Clause).
9 U.S. CONST. AMEND. V.
10 FRED BOSSELMAN ET AL., THE TAKING ISSUE 99 (1973) ("The language, but not the substance changed slightly in Committee, probably also the work of Madison, and in Conference with the Senate, to its present form. The amendments were debated in the House and Senate but apparently no record of any debate on the just compensation clause exists."). See also Joseph Sax, Takings and the Police Power, 74 YALE L.J. 36, 58 (1964).
History John Hart claims that although the *Lucas* Court confirmed that the original text did not include regulations, they did “not contend that the Committee of Revision intended to comprehend regulation by its change of Madison’s wording, or that the ratifying conventions understood it as having that scope.”\(^{12}\) Hart is asserting that although the language changed, the lack of explicit authorization for regulatory takings should be paramount.

The difference in meaning between the two words that Justice Scalia seemed to be alluding to is that “relinquish” has a completeness to it, and implies an affirmative action by the property owner, while “taken” arguably means neither. If we apply one of Scalia’s preferred methods of construction and give the words their meaning at the time they were written, “relinquish” is defined as “to forsake; to abandon; to leave.”\(^{13}\) None of those meanings can be read to refer to a regulation, but instead point to a property owner permanently distancing himself from his previous claim of ownership. This definition of Madison’s original draft aligns with the view that the Takings Clause limits compensation solely to physical expropriation. Again looking to 18\(^{th}\) century definitions, “take” is characterized as “to seize what is not given” and “taking” is defined as a “seizure.”\(^{14}\) This calls to mind a passive property owner and an active government regulator. While the final version’s term does not compel the inclusion of regulations, it does not explicitly preclude regulations as takings either.

Most scholars agree that the original meaning and historical context are not the deciding factors, nor are they the grounds upon which the Supreme Court has placed its analysis. Professor

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\(^{14}\) Id.
Richard Epstein writes, “Historical arguments have played virtually no role in the actual interpretation of the clause. . . . The Supreme Court has never resorted to historical sources to explain the relationship between the [Takings Clause] and particular government action.”

Professor Bruce Ackerman concurs in his analysis on property and the Constitution: “Nobody is now taken in by the claim that the Constitution’s ‘plain meaning,’ taken together with history and precedent, will inevitably dictate answers to the basic question of compensation law.”

John Hart also pivots away from historical analysis pointing out that “the Court’s main justification for the regulatory takings doctrine rests [not on Constitutional history but] on stare decisis: ‘a constitutional culture’ derived from the Court’s own opinions.”

B. Beginning a Constitutional Culture: Pennsylvania Coal v. Mahon

The Supreme Court decision that began to build the “constitutional culture” recognizing regulatory takings was *Pennsylvania Coal Co. v. Mahon.* The case involved a statute that restricted a coal company from exercising its contractual right to mine subsurface coal because the mining risked the subjacent support for Mahon’s house. The company had previously deeded surface interests away but expressly reserved the right to mine beneath the property.

The deed included a provision that surface buyers “waived all rights to damage in the event that

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16 ACKERMAN, supra note 6, at 8.
17 Hart, supra note 12, at 1105.
18 Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922).
19 Id. at 412.
20 BOSSELMAN ET AL., supra note 10, at 130 (“The Coal Company had conveyed title to the property in 1877 to a Mr. Craig, the Company retained the mineral rights below the surface of the property. Further, Mr. Craig’s deed stipulated that he waived any future claim against the coal company for personal injury or property damage due to possible mine subsistence … the waiver passed through the chain title down to the Mahons.”). See also Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of “Just Compensation” Law,* 80 HARV. L. REV. 1165, 1230 (1966) (“Holmes intimated strongly that the separation in ownership of the mining rights from the balance of the fee, prior to enactment of the restriction, was critically important to the petitioner’s victory.”).
the surface fell.”21 After the deeding occurred, Pennsylvania passed the Kohler Act forbidding “the mining of anthracite coal in such ways as to cause the subsistence of . . . any structure used as a human habitation.”22 The Court was faced with the question of whether the statute was an uncompensated taking of the subsurface mineral rights; they held that it was.

Justice Holmes wrote for the majority finding that in this case the use of police power had been stretched “too far,” two magical words that remain the core of regulatory taking jurisprudence.23 He started by introducing the diminution-of-value test, acknowledging that once a regulation “reaches a certain magnitude, in most cases if not all cases there must be an exercise of eminent domain and compensation” must be given.24 Holmes never answered the obvious question of how much diminution in value is too much. Instead he opted to condition it as “a question of degree -- and therefore [one that] cannot be disposed of by general propositions.”25 The theory Holmes offered is that when a regulation makes it impracticable to profitably exercise a previously existing contractual or property right, the regulation “has very nearly the same effect for constitutional purposes as appropriating or destroying” the property.26

While Pennsylvania Coal can be read as a Lochner Era decision that protected economic substantive due process rights from government regulation,27 there is a larger discussion in the

21 Epstein, Takings, supra note 15, at 63.
22 Pennsylvania Coal, 260 U.S. at 412-13. The Takings Clause was incorporated against the states via the 14th Amendment in Chicago, B. & Q. R.R. Co. v. City of Chicago, 166 U.S. 226, 239 (1897).
23 Pennsylvania Coal, 260 U.S. at 415.
24 Id. at 413.
25 Id. at 416.
26 Id. at 414.
case about cost shifting in society. The Kohler Act did not simply apply to Mahon’s house but also to subsurface support for public streets and buildings. However, the local government had only purchased the surface rights to lay streets and erect buildings and did not pay to secure the subjacent rights. In this instance, public representatives can be characterized as dividing the economic impact of the public improvement between the public fisc (paying for the surface rights) and the subsurface rights holder (using restrictive regulations via the Kohler Act). The cost of the surface half of the improvement is divided between everyone who contributes revenue to government, but the cost of the subsurface half is shifted disproportionately onto the private individuals with the preexisting mineral rights, rights they had consciously retained when deeding away the surface rights. Holmes refused to allow this sleight-of-hand, writing:

If in any case [public] representatives have been so short sighted as to acquire only surface rights without the right of support, we see no more authority for supplying the [right of support] without compensation than there was for taking the [surface] right of way in the first place and refusing to pay for it because the public wanted it very much.\(^{28}\)

The holding in *Pennsylvania Coal* is not a statement protecting contractual or economic substantive due process rights but instead one of properly allocating the cost of government-initiated changes in society. Holmes again:

[T]he question at bottom is upon whom the loss of the changes desired should fall. So far as private persons or communities have seen fit to take the risk of acquiring only surface rights, we cannot see that the fact that their risk has become a danger warrants the giving to them greater rights than they bought.\(^{29}\)

\(^{28}\) *Pennsylvania Coal*, 260 U.S. at 415.

\(^{29}\) Id. at 416. See also Richard A. Epstein, Lucas v. South Carolina Coastal Council: *A Tangled Web of Expectations*, 45 STAN. L. REV. 1369, 1387 (1992) (“The rationale is that people should never be allowed to take by majority vote without compensation what they would have to pay for if they acted cooperatively in the private capacities.”) [hereinafter Epstein, *A Tangled Web*].
Holmes placed the public and private rights holders on more or less equal footing. He did not lean on the concept of police power regulations at all.

C. The Nuisance Exception

Pennsylvania Coal’s recognition of a regulatory taking stood in stark contrast with the until-then nearly unqualified police power to abate nuisance. An early examination of the extents of this power is the 1887 case Mugler v. Kansas, where a brewery owner not only had his establishment closed but also his building and property within it destroyed because of a state law banning the production and sale of alcohol, which he had admittedly violated. Finding that no taking occurred, the Court discussed the legislature’s police power to resolve nuisances that it observes in society. In defining the scope of nuisances that are within the legislature’s regulatory ken, Justice Harlan employed the traditional common law test that protects an individual’s right to act so long as it “does not endanger or affect the rights of others.” Furthermore, he reminded that “society has the power to protect itself . . . against . . . injurious consequences . . . [and may] require each citizen to so conduct himself . . . as not unnecessarily to injure another.” The Court took no issue with Kansas finding that the production and sale of alcohol was a nuisance-creating behavior.

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31 Id. at 677 (“To regulate and abate nuisances is one of [the legislature’s] ordinary functions.”).
32 Id. at 660.
33 Id. (quotation marks omitted).
34 Epstein, Takings, supra note 15, at 130 (“Missing was the necessary constitutional analysis of whether this public nuisance was properly attributable to these defendants. Even today the expansive theories of proximate causation only allow an injured party to reach the immediate supplier of the alcohol . . . not the original producers.”).
In *Mugler*, Harlan went on to illuminate the line between non-compensable regulations that may result in diminished property value and compensable takings, writing:

The exercise of the police power by the destruction of property which is itself a public nuisance, or the prohibition of its use in a particular way, whereby its value becomes depreciated, is very different from taking property for public use. . . . In the one case, a nuisance only is abated; in the other, unoffending property is taken away from an innocent owner.35

The *Mugler* Court cited two contemporary decisions to clarify the point: one it used in support, the other it distinguished. In *Fertilizing Co. v. Hyde Park*, the Supreme Court upheld an Illinois village’s authority to regulate an animal processing facility out of existence.36 Although when it was constructed the facility was far afield from the rest of the community, the expanding residential population eventually encroached on the slaughterhouse. The regulation being challenged “operated to destroy the business of the company, and seriously to impair the value of its property. As, however, its business had become a nuisance to the community in which it was conducted . . . the village [had the authority] . . . to protect the public health against such nuisance.”37 Here the nuisance was created not by any new activity of the property owner, but instead by the shifting priorities of the community around it. Even though the regulation seriously impaired the property value, resolving the nuisance was paramount and no compensation was due.

The Court distinguished *Mugler* from a decision a decade earlier that compensated a landowner when the construction of a dam flooded his property. In *Pumpelly v. Green Bay Co.*, the state of Wisconsin authorized the building of a dam that caused “the water of the lake . . . to overflow

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35 *Mugler*, 123 U.S. at 669.
37 *Mugler*, 123 U.S. at 667; citing *Fertilizing Co.*, 97 U.S. at 667.
[the owner’s] land . . . [resulting in] an almost complete destruction of the value of the land.”

The *Pumpelly* Court relied on the effect’s permanency and actual physical invasion of the owner’s land as the factors relevant in triggering compensation:

> [I]t would be a very curious and unsatisfactory result, were it held that, if the government refrains from the absolute conversion of real property to the uses of the public, it can destroy its value entirely, can inflict irreparable and permanent injury to any extent, can, in effect, subject it to total destruction, without making any compensation, because, in the narrowest sense of that word, it is not taken for the public use.

Although in both cases there was no taking in the sense of transferring ownership, in *Pumpelly* the permanency and physical invasion of the flooding made the use of the land impossible, while in *Mugler* the regulation and destruction of the brewery only limited the land’s use. Also critical to these early cases, there was no nuisance being remedied in *Pumpelly*.

In *Mugler*, the Court set up a series of factors to use when weighing future regulations. If the regulation seeks to resolve a noxious use or nuisance, it is within the legislature’s police power and thus not a taking. If the nuisance-remedying action results in a severe diminution in the value there is still no taking. However, if the action results in a permanent physical occupation of the land or total destruction of value that is independent from any nuisance, then a compensable taking has occurred.

In his dissent in *Mugler*, Justice Field made a compelling point about the scope of a remedy to resolve nuisance. He insisted that if a regulation is truly authorized under the police power to abate nuisance, “the abatement must be limited by its necessity, and no wanton or unnecessary

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38 *Pumpelly v. Green Bay Co.*, 80 U.S. 166, 177 (1872).
39 *Mugler*, 123 U.S. at 667-68 (quotation marks omitted); distinguishing from *Pumpelly*, 80 U.S. at 178-79.
40 *Boselman et al.*, *supra* note 10, at 118.
41 *See infra* Part III.C.1.
42 *Mugler*, 123 U.S. at 675-78.
injury can be committed to the property.” ⁴³  Field would have required that the brewery be
closed but “not to tear down or to demolish the building itself, or to destroy property found
within it.” ⁴⁴ Scope of remedy has not been the only critique of Mugler.  The line Justice Harlan
drew between police power regulations and compensable takings has not always been received
amicably.  Justice Oliver Wendell Holmes once opined that “he found Justice Harlan’s opinion
in Mugler to be pretty fishy and that tests employed to distinguish police power regulation from
compensable takings were simply a matter of determining a line between grabber and grabbee
that turns on the feeling of the community.” ⁴⁵  Professor Frank Michelman likewise found
Mugler to be a convenient appeal to the moral desires of the community.  In his landmark article
Property, Utility, and Fairness: Comments on the Ethical Foundations of “Just Compensation”
Law, ⁴⁶ Michelman writes: “It is easy, when it is convenient, to discover moral delinquency in
any conduct which a legislature later finds it expedient to prohibit.  But the accuracy, and the
ingenuousness, of the Court’s gratuitous moral judgment were probably questionable then, and
surely have been ridiculed by history.” ⁴⁷

Applying the Mugler nuisance standard in Pennsylvania Coal, Justice Holmes saw the difference
between regulations and physical takings as one of degree, as evidenced by his regulations gone
“too far” consideration. ⁴⁸  This was a marked departure from Mugler where police power
regulations were a different kind of action than physical takings.

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⁴³ Mugler, 123 U.S. at 678.
⁴⁴ Id.
⁴⁵ Steven J. Eagle, Regulatory Takings § 3-4(b) (4th ed. 2009) (quotation marks omitted) [hereinafter Eagle,
Regulatory Takings].
⁴⁶ Fred R. Shapiro and Michelle Pearse, The Most-Cited Law Review Articles of All Time, 110 Mich. L. Rev. 1483,
1489 (2011) (Michelman’s article was recently found to be the 12th most-cited law review article ever.).
⁴⁷ Michelman, supra note 20, at 1199 n.72.
⁴⁸ Boselman et al., supra note 10, at 134.
Justice Brandeis’s dissent in *Pennsylvania Coal* shows how the compensability question can be one of semantics. He called the regulation “merely the prohibition of a noxious use.” He was not at all concerned with the total deprivation of value to the mine owners, saying it is not a taking “merely because it deprives the owner of the only use to which the property can then be profitably put.” Brandeis called the Kohler Act’s protection against subsistence “obviously enacted for a public purpose” and left it at that. Semantics and labels remain central to many aspects of takings jurisprudence.

**D. Changed Circumstances**

One of the primary arguments contributing to the constitutional culture recognizing regulatory takings is that regulations have dramatically changed since the Constitution was written. Justice Holmes included this theme in *Pennsylvania Coal*, writing:

> When this seemingly absolute protection [for private property] is found to be qualified by the police power, the natural tendency of human nature is to extend the qualification more and more until at last private property disappears. But that cannot be accomplished in this way under the Constitution of the United States.

What is implicit in this argument is that the Framers did not specifically deal with regulatory takings not because they didn’t deem them worthy of protection but because the “natural tendency of human nature” to expand the use of police power had not yet reached a critical state.

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49 *Pennsylvania Coal*, 260 U.S. at 417.
50 *Id.* at 418.
51 *Id.* at 422.
52 See infra Part III.C.2-3.
53 *Pennsylvania Coal*, 260 U.S. at 415.
A number of scholars supportive of recognizing regulatory takings have also adopted this argument. Professors Richard Epstein, Joseph Sax and Steven Eagle have all levied charges that regulatory takings should be compensable because of changed circumstances and the rapid increase in economic regulations in the 20th century. Epstein writes: “The full range of legislative programs was wholly unknown to the framers, who were never exposed to the mysteries of rent control, workers’ compensation, the pooling of oil and gas interests, or the intricacies of zoning.”

He goes on to argue that a rigid interpretation of the Takings Clause would lead to a compensation scheme that finds that “novel institutions are either always valid [regulations are never takings] or always invalid [regulations are always takings].” Such an interpretation would clearly lead to absurd results. Sax makes the same contention about the expanding regulatory state, writing: “As the scope of government regulations grew . . . the economic impact of government regulation undermined the” argument that full expropriation was required before the Takings Clause could apply.

Finally, Eagle writes, “The fact that cases involving physical takings are as old as the Republic and that regulatory takings cases are of more recent vintage may say more about the sweeping severity of recent regulations, particularly those pertaining to the environment, than they do about distinctions in modes of adjudication.”

John Hart attacks this historical tapestry head on and claims that modern supporters of regulatory takings have created a fanciful backdrop of a passive 18th century federal government upon which to base their changed circumstances argument. Hart meticulously explicates a whole series of land use restrictions that were in place at various levels of government when the

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54 EPSTEIN, TAKINGS, supra note 15, at 28.
55 Id. at 29.
56 Sax, supra note 10, at 40.
57 Eagle, Property Tests, supra note 27, at 937 (quotation marks omitted).
58 Hart, supra note 12, at 1099.
Framers wrote the Takings Clause, including: aesthetic order regulations, waterpower rules, drainage rules, mining and metal production guidelines, common grazing field and fencing provisions, and passive ownership laws.\textsuperscript{59} Hart contends that the Framers were no strangers to regulations that went beyond nuisance abatement but instead they lived with laws that “called upon landowners to contribute to the community positive externalities from their use of private land.”\textsuperscript{60} He argues that Congress’s adoption of the Takings Clause should be read in the context of “contemporary American legislation. Where statutes authorized physically appropriating private property for public use . . . compensation was normal, . . . [but] for other forms of regulation, no matter how severe the economic impact, compensation [had] never been paid.”\textsuperscript{61}

The early history of regulatory takings hangs almost exclusively on Holmes’ “too far” standard from \textit{Pennsylvania Coal}. Neither the actual text nor the original meaning of the Takings Clause reveal the answer to when regulations go “too far” and are thus compensable takings. Nor does the original text explain when the nuisance exception allows government to regulate private property with paying compensation. Notwithstanding these historical hurdles, the Supreme Court has found several types of regulatory takings compensable.

\section*{III. Types of Regulatory Takings}

Regulatory takings jurisprudence went largely unaltered from the 1920s to the 1970s. However, since the late 1970s the Supreme Court has established three tests to determine whether a regulation is compensable under the Takings Clause. The most common category of cases

\textsuperscript{59} Hart, \textit{supra} note 12, at 1107 -1131.

\textsuperscript{60} \textit{Id} at 1107.

\textsuperscript{61} \textit{Id}. at 1134.
implicates the balancing test from *Penn Central*, which weighs a regulation’s economic impact on the property owner, the regulation’s effect on investment-backed expectations and the nature of the government action.\(^{62}\) The second category involves per se regulatory takings, which includes two tests: permanent physical occupation\(^{63}\) and total deprivation of value.\(^{64}\) The third category deals with the compensability of unconstitutional conditions on permit approvals.\(^{65}\) What follows is an examination of each test in turn.

**A. Ad hoc Decision Making: The Penn Central Balancing Test**

*Penn Central Transportation Co. v. New York City* introduces a three-factor balancing test into regulatory taking jurisprudence.\(^{66}\) In *Penn Central*, the company that owned Manhattan’s Grand Central Terminal challenged the building’s designation as an historical landmark under the city’s new Landmarks Preservation Law.\(^{67}\) The designation created both an affirmative duty on Penn Central to maintain the terminal’s exterior façade and required review and approval from a public commission before material changes could be made to the structure.\(^{68}\) Penn Central wanted to develop the superjacent air space into an office tower. The commission denied the application for two different versions of the improvement on the basis that balancing “a 55-story office tower above a flamboyant Beaux-Arts façade seems nothing more than an aesthetic joke . . . and would reduce the Landmark itself to the status of a curiosity.”\(^{69}\) Penn Central did not challenge whether the city had the authority to restrict its ability to build the office tower, only

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\(^{64}\) *Lucas*, 505 U.S. at 1003.


\(^{66}\) *Penn Central*, 438 U.S. at 104.

\(^{67}\) *Id.*

\(^{68}\) *Id.* at 110-11.

\(^{69}\) *Id.* at 117-18.
whether in so doing they committed a compensable taking of the air rights above the existing terminal.\textsuperscript{70} Justice Brennan wrote for the Court ruled that no taking had occurred.\textsuperscript{71}

Before considering the instant case, Justice Brennan provided a few factors that the Court had used in the past to evaluate whether a taking has occurred. One consideration is “the extent to which the regulation has interfered with distinct investment-backed expectations.”\textsuperscript{72} He also invoked the physical invasion test, noting that the Court is more likely to find a regulatory taking when the nature of the government action involves physical intrusion onto the property.\textsuperscript{73} On the other hand, Brennan leaned against finding a taking when the regulation “arises from some public program adjusting the benefits and burdens of economic life to promote the common good.”\textsuperscript{74} He then applied these factors to Penn Central’s challenge.

In finding that the city’s denial of Penn Central’s desire to develop the superjacent airspace was not a taking, the Court relied on the notion that no underlying value of the existing terminal had been affected. It was only the claimed right to create new economic value that was found “untenable” here.\textsuperscript{75} The Court was unwilling to entertain the idea that “appellants may establish a ‘taking’ simply by showing that they have been denied the ability to exploit a property interest that they heretofore had believed was available for development.”\textsuperscript{76} The Court also declined to

\textsuperscript{70} \textit{Penn Central}, 438 U.S. at 122.
\textsuperscript{71} \textit{Id}. at 138 (“[W]e conclude that the application of New York City’s Landmarks Law has not effected a ‘taking’ of appellants’ property.”).
\textsuperscript{73} \textit{Penn Central}, 438 U.S. at 124. \textit{See, e.g., United States v. Causby}, 328 U.S. 256 (1946) (The Court found a taking due to low-flying government planes invading a chicken farm’s airspace rendering it unproductive due to the noise.).
\textsuperscript{74} \textit{Penn Central}, 438 U.S. at 124.
\textsuperscript{75} \textit{Id}. at 130.
\textsuperscript{76} \textit{Id}..
find a taking because Penn Central asserted that the regulation took only a portion of its property (the superjacent airspace) but did not destroy the entire parcel. In so doing, Brennan held:

“Taking” jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole.

While holding that no taking has occurred, the Court then added that Penn Central should be appeased by the fact that New York City obliged them transferable development rights at other parcels Penn Central owned throughout the city. Here Brennan conflated remedy with harm, writing:

[I]t is not literally accurate to say that [Penn Central has] been denied all use of even those pre-existing air rights. Their ability to use these rights has not been abrogated; they are made transferable to at least eight parcels in the vicinity of the Terminal. . . . [A]t least in the case of the Terminal, the rights afforded are valuable. While these rights may well not have constituted “just compensation” if a “taking” had occurred, the rights nevertheless undoubtedly mitigate whatever financial burdens the law has imposed on appellants.

The fact that Penn Central was allowed to further develop other properties in its portfolio in contravention of preexisting zoning restrictions is to put the cart before the horse. If no taking occurred, as Brennan insisted, then no transference of development rights is due. If, however, a taking did occur then just compensation analysis should have been conducted; Brennan demurred to take on this step.

The order of analysis is not the only problem with the transferable-development-rights-as-compensation theory in Penn Central. Epstein points out that “One peculiarity . . . is that the air

77 See infra Part IV.A.
78 Penn Central, 438 U.S. at 130-31.
79 Id. at 137.
rights to be granted . . . were over eight properties . . . that Penn Central already owned.”

In order for the grant to Penn Central to be of value, the city must have first owned the thing it was granting. Epstein argues that since the city did not own the air rights above Penn Central’s other holdings, “the city’s compensation for the loss of air rights thus came from its prior uncompensated takings. It is as though $A$ uses money stolen from $B$ to pay $B$ for” the taking. In order for proposed compensation scheme to work, we would first need to recognize that the building height restrictions affecting Penn Central’s other buildings had actually taken some value from Penn Central and transferred that value to the city, such that the city could now transfer it back. However, courts often hold that evenly applied zoning laws are not takings and thus it would seem there is nothing for the city to return.

**B. Average Reciprocity of Advantage**

This discussion of zoning laws brings us to the final curiosity in *Penn Central* and requires the introduction of the concept of average reciprocity of advantage. Zoning laws have long been excluded from the realm of regulatory takings on the basis that in the long run, evenly applied zoning laws both burden and benefit members of society to a similar (although not exactly equal) degree. A residential-only designation for a certain subdivision of a city is a good example. While all property owners in the subdivision are equally burdened by their inability to convert their land to perhaps more beneficial use as an office building, convenience store or factory, they all also benefit by their neighbors inability to do the same. There is, as the term suggests,

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80 Epstein, Takings, supra note 15, at 189.
81 Id.
82 See generally Eagle, Regulatory Takings, supra note 45, at § 11-7(a)(1) (discussing the concept of average reciprocity of advantage).
reciprocity of advantage between those burdened and benefited. The same property owner holds both designations simultaneously, even though one person may have no interest in building a factory while the other does.

Average reciprocity of advantage does not require that burdens and benefits are always equal, only that they are averaged throughout society over time. Professor Michelman notes that society’s “insistence on [takings] compensation is relaxed when there are visible reciprocities of burden and benefit, or when burdens similar to that for which compensation is denied are concomitantly imposed on many other people.”

Michelman would prefer that we find a way to distribute the benefits and costs associated with each collective measure so that each person would share equally in the net benefit. But such perfection is plainly unattainable. . . . In the face of this difficulty, it seems we are pleased to believe that we can arrive at an acceptable level of assurance that over time the burdens associated with collectively determined improvements will have been distributed “evenly” enough so that everyone will be a net gainer. The function of a compensation practice . . . is to fulfill a strongly felt need to maintain that assurance at an “acceptable” level to justify the general expectations of long-run “evenness.”

Under Michelman’s construction, regulatory takings must be compensable so that the long-run evenness is maintained. That is the function of the compensation: It removes the uneven burden from those disproportionally affected by the regulation and divides it between everyone contributing to the public fisc.

*Penn Central*, however, is an example of a failure to recognize and account for average reciprocity of advantage. In his *Penn Central* dissent, Justice Rehnquist restated the conceptual goals of reciprocity, writing:

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83 Michelman, *supra* note 20, at 1223.
84 *Id.* at 1225.
85 *Penn Central*, 438 U.S. at 138-54.
Typical zoning restrictions . . . limit the prospective uses of a piece of property [and] diminish the value of that property . . . such abstract decrease in value will more than likely be at least partially offset by an increase in value which flows from similar restrictions as to use on neighboring properties. All property owners in a designated area are placed under the same restrictions, not only for the benefit of the municipality as a whole but also for the common benefit of one another.\textsuperscript{86}

In \textit{Penn Central}, however, the historic designation neither treats all surrounding buildings equally nor allows property owners to operate within permitted bounds. Under the Landmarks Preservation Law, New York City singled out roughly 400 buildings (many of which were public spaces and thus not relevant for takings analysis) from the millions of structures in the city and tightly controlled any future changes to use and required detailed maintenance of those buildings. There is no reciprocity between Penn Central and the owners of the dozens of buildings that overlook the now-historically preserved Grand Central Terminal. It would seem the opposite is true: Office space in the surrounding towers is now protected from the downward price pressure of increased office space supply in the area. In essence, as Rehnquist continued in his dissent, “a multimillion dollar loss has been imposed on . . . one-tenth of one percent of the buildings in New York City for the general benefit of all its people. It is exactly this imposition of general costs on a few individuals at which the ‘taking’ protection is directed.”\textsuperscript{87}

Nonetheless, Justice Brennan’s majority construction of a three-part balancing test carried the day and now forms the benchmark against which most regulatory takings claims are considered. To summarize, the first factor to consider is the economic impact on the property owner. This is essentially the diminution-of-value test. The Court is willing to allow a very large diminution of value before this factor becomes dispositive.\textsuperscript{88}

\textsuperscript{86} \textit{Penn Central}, 438 U.S. at 139-40; citing \textit{Pennsylvania Coal}, 260 U.S. at 415.
\textsuperscript{87} \textit{Penn Central}, 438 U.S. at 147.
\textsuperscript{88} \textit{See infra} Part III.C.2.
The second factor is the impact on investment-backed expectations, which has been criticized for its one-way ratchet effect and departure from the constitutional text. Professor Eagle writes that one of “the most troubling aspect[s] of the ‘expectations’ analysis is its self-referential quality . . . [creating] a ratcheting down of property rights . . . [where] except for a regulation of almost unimaginable abruptness, all regulation will build on prior regulation and hence be said to defeat any expectations. . . . Thus regulation begets regulation.”

This ratcheting concern is not the only aspect of the investment-backed-expectations element that commenters have found wanting. The expectations construction begs the question, does the Takings Clause really only protect expectations and not simply private property as the text says? Examining the same factor in a future case, Epstein insists that we:

Examine the idea of “reasonable expectations” (sometimes unfortunately called “investment-backed expectations”) on which [Scalia’s] holding [in Lucas] so clearly depends. Neither he nor anyone else offers any telling explanation of why this tantalizing notion of expectations is preferable to the words “private property” (which are, after all, not mere gloss, but actual constitutional text).

Focusing on the investor’s expectations also opens up a giant loophole where government could regulate away a donee’s gift or inheritance without needing to pay compensation. Such an application would “divert the Takings Clause from its original purpose. The only expectation that the Framers held when they drafted the Clause was that government would conform its behavior to the requirements of the Takings Clause, whatever those turned out to be.”

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90 Epstein, A Tangled Web, supra note 29, at 1370.
91 Harmon v. Markus, 412 Fed. Appx. 420 (2011), cert. denied, Harmon v. Kimmel, 2012 U.S. Lexis 3201 (U.S., Apr. 23, 2012) (Building owner’s knowledge of rent stabilization law and the fact that the owner inherited the building were considered relevant factors in denying a compensable taking.).
92 Epstein, A Tangled Web, supra note 29, at 1386.
The final factor from *Penn Central* is the nature of the government action. This element was originally cast as requiring the regulation to “substantially advance legitimate state interests.” However, the Court later recognized that “such an inquiry is logically prior to and distinct from the question whether a regulation effects a taking.” This element is now merely a differentiation between physical and regulatory takings.

**C. Per Se Regulatory Takings**

In contrast to the malleability of the three-factor test from *Penn Central*, the Court has also established two per se regulatory takings protections. The first—permanent physical occupation—was created in *Loretto v. Teleprompter Manhattan CATV Co.* and is notable because of how slight the occupation was while still giving rise to the compensation requirement. The second—total deprivation of value—was created in *Lucas v. South Carolina Costal Council* and greatly reshaped how courts look at land-use controls. Both tests seek bright lines in a field bereft of easy answers.

1. **Permanent Physical Occupation**

In *Loretto*, the Court established that a government-sanctioned permanent physical occupation of private property is a regulatory taking. The facts of the case are as follows: Jean Loretto challenged a New York State law that allowed cable television providers to run cables over the

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roof of a rental property that she owned and pay her only $1 for the privilege of doing so.\(^{95}\) Prior to this law, Teleprompter had entered into agreements with individual building owners and paid them 5% of the gross revenues that the company earned from providing cable television to the building’s tenants.\(^{96}\) In 1973, the State of New York passed a statute that prohibited owners of rental buildings from limiting cable companies’ access and established a commission that subsequently set the fee for such access at a “one-time $1 payment [as] the normal fee to which a landlord in entitled.”\(^{97}\) Previous to and again later pursuant to this regulation, Teleprompter installed a series “of plates, boxes, wires, bolts, and screws to the building, completely occupying space immediately above and upon the roof and along the building’s exterior wall.”\(^{98}\) Thus the Court was faced with the question of “whether a minor but permanent physical occupation of an owner’s property authorized by government constitutes a ‘taking’ of property for which just compensation is due under the Fifth and Fourteenth Amendments of the Constitution.”\(^{99}\) The Court held that it was a compensable taking.

Justice Marshall wrote for the Court and articulated a new bright-line test holding that permanent physical invasions always constitute takings. Although Marshall recalled the *Penn Central* balancing test, throughout the *Loretto* opinion he called permanent physical invasions an “extreme form” of taking,\(^{100}\) “special” cases of invasion,\(^{101}\) and a “government action of . . . a unique character.”\(^{102}\) Marshall established “permanent physical occupations . . . [as] a taking

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\(^{95}\) *Loretto*, 458 U.S. 419 (1982).
\(^{96}\) Id. at 423.
\(^{97}\) Id. at 423-24.
\(^{98}\) Id. at 438.
\(^{99}\) Id. at 421.
\(^{100}\) Id. at 426.
\(^{101}\) Id. at 432.
\(^{102}\) Id.
without regard to the public interest that it may serve”¹⁰³ and regardless of the severity of economic impact on the owner. Marshall applied the bundle-of-sticks property metaphor, writing: “The power to exclude has traditionally been considered one of the most treasured strands in an owner’s bundle of property rights.”¹⁰⁴ A physical invasion obviously runs counter to this power.

Marshall was clearly and consciously dividing takings analysis into two steps. First, he measured whether a taking had occurred; second, he looked at the proper level of compensation. Since he was doing the test in two distinct steps, Marshall had no problem finding a taking here despite the almost *de minimus* nature of the intrusion. Marshall wrote:

> Once the fact of occupation is shown . . . a court should [then] consider the *extent* of the occupation as one relevant factor in determining the compensation due. For that reason . . . there is less need to consider the extent of the occupation in determining whether there is a taking in the first place.¹⁰⁵

Marshall looked at the history of takings decisions and found that “when the character of the government action . . . is a permanent physical occupation of property . . . cases uniformly have found a taking . . . without regard” to other balancing test factors.¹⁰⁶ Marshall also relied on the Michelman article, quoting: “The modern significance of physical occupation is that courts . . . *never* deny compensation for a physical takeover. The one incontestable case for compensation . . . seems to occur when the government” permanently occupies private property.¹⁰⁷

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¹⁰³ *Loretto*, 458 U.S. at 426. *But see Arkansas Game and Fish Comm’n v. United States*, No. 11-597, slip op. at 14 (U.S. Sup. Ct. decided Dec. 4, 2012) (holding that intent and the foreseeability of invasion are relevant factors).


¹⁰⁵ *Loretto*, 458 U.S. at 437-38.

¹⁰⁶ *Id.* at 434-35 (quotations marks and citations omitted). *See also* *Pumpelly*, 80 U.S. at 177.

¹⁰⁷ *Loretto*, 458 U.S. at 427 n.5; *citing* Michelman, *supra* note 20, at 1184.
In his dissent Justice Blackmun was critical of the Court’s departure from the balancing test and ad hoc, fact-based decision making on which it had previously relied. He called the new test a “formulistic quibble” and “potentially dangerous as well as misguided.”\(^{108}\) Blackmun then went on to weigh the other factors (besides nature of the government action) and found that the public purpose of allowing cable lines to be distributed was worthwhile. Also, since Loretto’s investment was in the renting of apartments she should be glad that Teleprompter had run lines to her units “thereby likely increas[ing] both the building’s resale value and its attractiveness on the rental market.”\(^{109}\) Blackmun was also not willing to wait until the compensation calculation stage to evaluate the severity of the taking. He insisted that an inquiry must “also ask whether the extent of the State’s interference is so severe as to constitute a compensable taking.”\(^{110}\) Blackmun was using *Pennsylvania Coal* and trying to determine when a regulation goes “too far.”

One factor that neither Marshall nor Blackmun weighed was average reciprocity of advantage. Marshall didn’t need to analyze this factor because he found a taking immediately without getting to a balancing test. However, it would seem that there is no reciprocity in *Loretto*. The regulation requiring landlords to allow cable companies to install equipment on their property for $1 did not occur in a vacuum. There was a pre-existing economic relationship between these two groups of private parties, a point Loretto made convincingly in her brief:

> Teleprompter had, as a . . . matter of management policy, paid 5% of gross revenues to landlords pursuant to form contracts prepared by [Teleprompter] for the privilege of installing cable and related equipment on their property, thus reflecting Teleprompter’s

\(^{108}\) *Loretto*, 458 U.S. at 442-43.
\(^{109}\) *Id.* at 452.
\(^{110}\) *Id.* at 453.
own assessment of appropriate market price for its use of private property. Teleprompter set out to reduce this cost and did so to the landlords’ detriment. The state did not, as a matter of public policy, find that access to cable was so important that all cable lines should be strewn across the city nearly free of charge. To the contrary the state maintained the public benefit of charging Teleprompter “5% or more of its gross revenues to the City of New York for the privilege of installing cables and other equipment under the public streets.” Furthermore, when “Teleprompter utilize[d] the under-the-street ducts of Empire City Subways, Inc. it [had to] pay for them.” The state singled out landlords and stripped them of their pre-existing economic benefit. This regulation was not one meant to enact a broad public policy regarding access to cable television, but instead one meant to reorder the economic relationship between two groups of private parties. The correct consideration of the nearly de minimus physical invasion is not what the landlord have done with the tiny strip of roof in Teleprompter’s absence, but instead what would the market have charged Teleprompter for access to that strip. Thankfully, in Loretto we do not need to speculate; the access price was already established at 5% of gross revenues from customers on the property. The state upset that balance and did so without a resulting average reciprocity of advantage and allowed one party to permanently occupy the property of another.

111 Brief for Jean Loretto at 81, Loretto, 458 U.S. 419 (1982) (No. 81-244).
112 Id. at 82.
113 Id.
2. **Total Deprivation of Value**

Ten years after the *Loretto* decision, the Court established the second per se regulatory takings test in *Lucas v. South Carolina Coastal Council*. The Court held that regardless of the government’s motivation for regulating, if the measure worked a total deprivation of value then it does run afoul of the Takings Clause. This per se rule is still subject to a form of the nuisance exception.

In *Lucas* the Court dealt with a state-issued regulation of property pursuant to the federal Coastal Zone Management Act. The facts in *Lucas* are simple. In 1986, Lucas paid $975,000 for undeveloped seaside lots that were zoned for residential development; he intended to erect single-family homes and resell the parcels. Two years later, South Carolina enacted a statute that effectively barred Lucas from building any permanent residential structures on the land. Lucas challenged the restriction on the grounds that “the Act’s complete extinguishment of his property’s value entitled him to compensation” under the Takings Clause. The trial court agreed with Lucas’s characterization of the impact on his land and found that the property was now “valueless.” The South Carolina Supreme Court rejected the claim, and thus the U.S. Supreme Court was left to determine “whether the Act’s dramatic effect on the economic value of Lucas’s lots accomplished a taking of private property . . . requiring payment of just

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115 *Id*. See also *Nollan*, 483 U.S. at 825.
116 *Lucas*, 505 U.S. at 1007.
117 *Id*.
118 *Id*. at 1009.
119 *Id*. at 1007.
compensation.”120 The Court held that the total deprivation of value did work a taking.

Justice Scalia recounted the Court’s progression from Mugler, through Pennsylvania Coal, Penn Central and Loretto. He recalled that although nuisance-abating regulations have universally been held not to require compensation, and a balancing test is required to determine if a regulation has gone “too far,” there have been two areas where the Court has found categorical takings. “The first encompasses regulations that compel the property owner to suffer physical invasion of his property. . . . The second . . . is where regulation denies all economically beneficial or productive use of land.”121 Although the first instance was readily established in Loretto, the second required explication. Scalia asserted that the Court is more willing to find a categorical taking in the case of a total deprivation of value because it undermines the Court’s ability “to indulge [in their] usual assumption that the legislature is simply adjusting the benefit and burdens of economic life . . . in a manner that secures an average reciprocity of advantage to everyone.”122 Instead, Scalia noted these types of regulations “carry with them a heightened risk that private property is being pressed into some form of public service” without paying the required compensation.123

However, this categorical rule runs into a very quick caveat; the total-deprivation-of-value per se rule is still subordinate to the overriding nuisance exception. Scalia wrestled with how to define “nuisance” to satisfy this exception. He started by considering a “substantially advances” test

120 Lucas, 505 U.S. at 1007 (quotation marks omitted) (Lucas also involved a question of ripeness given that during litigation the South Carolina Legislature passed an amendment to the Beachfront Management Act that allowed Lucas to apply for a variance from the setback requirements affecting his desired development.).
121 Id. at 1015 (quotation marks omitted); citing Loretto, 458 U.S. at 149.
122 Lucas, 505 U.S. at 1017, (quotation marks and citations omitted).
123 Id. at 1018.
that would keep certain regulations non-compensable if the regulation substantially advanced a goal laid out in the legislature’s authorizing statute. However, Scalia abandoned that metric because he did not trust that there is a principled distinction between a nuisance-created harm and a general public benefit for which the legislature is trying to make a private property owner pay. Scalia wrote:

[T]he distinction between “harm-preventing” and “benefit-conferring” regulation is often in the eye of the beholder. It is quite possible . . . to describe in either fashion the ecological, economic, and esthetic concerns that inspired the South Carolina Legislature in the present case. One could say that imposing a servitude on Lucas’s land is necessary in order to prevent his use of it from “harming” South Carolina’s ecological resources; or, instead, in order to achieve the “benefits” of an ecological preserve.124

Scalia was essentially unwilling to leave the definitions to state legislatures who would simply, as he saw it, draft their findings to achieve the outcomes they desire in an attempt to hijack the nuisance exception to sidestep the new total-deprivation-of-value test. “A legislature’s recitation of a [nuisance] justification cannot be the basis for departing from” the new categorical rule.125

Instead, Scalia turned to the “background principles” of the common law of property and nuisance to determine which regulations that deprive “all economically productive or beneficial use of land” will result in compensation.126 The background principles he educed include, but are not limited to:

[1] [T]he degree of harm to public lands and resources, or adjacent private property, . . . [2] the social value of the claimant’s activities and their suitability to the locality in question, . . . [3] the relative ease with which the alleged harm can be avoided through measures taken by the claimant and the government, . . . [4] The fact that a particular use has long been engaged in by similarly situated owners . . . (though changed circumstances or new knowledge may make what was previously permissible no longer

124 Lucas, 505 U.S. at 1024.
125 Id. at 1026.
126 Id. at 1030.
so[ ] . . . [and 5] other landowners . . . are permitted to [engage] in similar behavior.127

These five factors elucidating the scope of the nuisance exception notwithstanding, the Court made a significant new categorical rule in Lucas, moving a field that had been characterized by ad hoc decision making toward one with more bright lines to delineate when regulations have gone “too far.”

Justice Blackmun’s dissent in Lucas was laced with objections that the majority was “inflicting this damage upon our Takings Clause jurisprudence” with a new rule and a new exception “neither of which is rooted in … prior case law, common law, or common sense.”128 Blackmun took each element of the Court’s new test in turn. He first objected to the idea that the South Carolina legislature actually destroyed all of Lucas’s property’s economic value. Lucas still had the right to exclude others, one of the most essential sticks in the bundle of rights . . . the right to alienate the land, which would have value for neighbors and for those prepared to enjoy proximity to the ocean without a house. . . . [What’s more,] [t]he appraiser’s value was based on the fact that the highest and best use of these lots is luxury single family detached dwellings.129

The Court had previously long held that just because a property could not be put to its maximum value did not necessarily mean it had lost all economic value.130 Blackmun was concerned that the threshold test (total deprivation of value) for the new categorical rule would be impossible to objectively determine.131 The “composition of the denominator in [the new] deprivation fraction” could be characterized as either the “total deprivation of an aptly defined entitlement”

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127 Lucas, 505 U.S. at 1030-31 (quotations and citations omitted). See also Loveladies Harbor, Inc. v. United States, 28 F.3d 1171, 1179 (1994) (Judge Plager refers to this test as a “sea change [that] removed from regulatory takings the vagaries of the balancing process, so dependent on judicial perceptions with little effective guidance in law. It substituted instead a referent familiar to property lawyers everywhere, and one which will have substantial . . . likelihood of predictability for both property owners and regulators.”).
128 Lucas, 505 U.S. at 1036.
129 Id. at 1044 (quotations, ellipses and citations omitted).
130 See Mugler, 123 U.S. at 623; Pennsylvania Coal, 260 U.S. at 393.
131 Lucas, 505 U.S. at 1054.
or as a “mere partial withdrawal from full, unencumbered ownership.”\footnote{Lucas, 505 U.S. at 1054. See infra Part IV; see also Michelman, Takings, supra note 94, at 1614.} Put another way, the regulation could be seen as burning only one stick in an otherwise undisturbed bundle or rights, or the single stick can be held out on its own and seen as totally destroyed. However, some scholars are critical of characterizing property as a bundle of sticks with rights that accrue to the holder because it allows the analysis to shift from an \textit{in rem} discussion about “acts of government with respect to property” to a discussion of the \textit{in personam} “relationship between government and owners.”\footnote{Eagle, Property Tests, supra note 27. See generally Symposium, Property: A Bundle of Rights?, 8 ECON J. WATCH 3, 193 (2011) (for a discussion about the bundle-of-sticks metaphor).}

Blackmun was also, not unsurprisingly, unsettled by the majority’s holding that “legislative findings are not sufficient to justify” the regulation and that “the State now has the burden of showing the regulation is not a taking.”\footnote{Lucas, 505 U.S. at 1046.} While Blackmun was correct that this was a departure from prior cases, he offered no argument for why Scalia’s concerns about state legislatures simply drafting findings to sidestep the harm-benefit principle were unfounded.

One question Scalia’s “background principles” doctrine raises is when does a regulation itself turn into a background principle of a state’s nuisance or property law? In \textit{Palazzolo v. Rhode Island}, the Supreme Court discussed in dictum the Rhode Island Supreme Court’s ruling that since a particular regulation was in place before a property transfer, it then qualified as a “background principle” of state common law with respect to that piece of property, thus satisfying the \textit{Lucas} nuisance exception.\footnote{Palazzolo v. Rhode Island, 533 U.S. 606 (2001).} The \textit{Palazzolo} Court noted that it was not in a position “to consider the precise circumstances when a legislative enactment can be deemed a

background principle of state law. . . . [However,] a regulation that otherwise would be unconstitutional absent compensation is not transformed into a background principle of the State’s law by mere virtue of the passage of title.”136 In Loveladies Harbor v. United States, the Federal Circuit Courts of Appeals did hold that “by issuing [a state] permit” New Jersey “in effect established that there was not nuisance under state law.”137 The Supreme Court has given little further guidance on when and how the background principles will be established.

3. Nuisance Semantics and the Harm-Benefit Principle

A case that may have concerned Scalia and the rest of the Lucas majority occurred five years earlier and nicely displays the problem with relying on judicial or legislative constructions of the nuisance exception. In Keystone Bituminous Coal Ass’n v. DeBenedictis, the Court reconsidered nearly the same question that it faced 60 years earlier in Pennsylvania Coal: whether a statute that restricted a coal company’s ability to fully leverage its mineral and support estate rights due to risk of subsistence constitutes a compensable regulatory taking.138 In 5-4 decision distinguishing the purpose and application of the more recent statute, the Court held Keystone did not present a taking.139

The issue was essentially the same. Coal mining has been conducted in Pennsylvania for more than a century. Pennsylvania law recognizes three estates in land: the mineral estate, the surface

136 Palazzolo, 533 U.S. at 629-30 (quotation marks and citations omitted).
137 Loveladies Harbor, 28 F.3d at 1183.
139 Id. at 474.
estate and the support estate. Companies seeking to mine coal have gone about purchasing and severing the deeper two estates from the surface estate. These land deeds often include waivers of damage resulting from subsistence, that is, loss of subsurface support for the surface estate. As coal mining expanded and the state’s population increased, residential and public buildings on the surface have increasingly occurred in the same area as subsurface coal mining. Correspondingly, the state legislature has passed statutes in an attempt to prohibit coal companies from subsisting these surface estates. In Pennsylvania Coal, the Kohler Act was found to be a compensable regulatory taking of the mining company’s mineral and support estates. In Keystone, the Court found that the Subsistence Act did not work a taking. Justice Stevens opined for the court and had numerous hurdles to clear to distinguish Keystone from Pennsylvania Coal. His primary distinction between the two cases was that the Kohler Act in Pennsylvania Coal was ostensibly “a private benefit statute . . . [because] the [Pennsylvania Coal] Court believed that the Commonwealth had acted only to ensure against damage to some private landowners’ homes.” Whereas through the Subsistence Act challenged in Keystone, “by contrast, the Commonwealth [was] acting to protect the public interest in health, the environment, and the fiscal integrity of the area.” This distinction was pivotal for Stevens because it moved the regulation away from one that aimed to interpose itself between two contracting landowners and toward one that was rooted in police power to promote

140 Keystone, 480 U.S. at 478.
141 See supra Part II.B.
142 Bruce M. Kramer, Recent Developments in Land Use and Environmental Law: Revolution of Evolution?, in INSTITUTE ON PLANNING, ZONING, AND EMINENT DOMAIN 5.02[2] (Janice R. Moss ed., 1988) (Stevens’ opinion is an effort that “interjects, blurs, and blends various theories of taking clause jurisprudence” so that we’re left with “another line drawing exercise.”). See also Michelman, Takings, supra note 94, at 1600 n.2(i) (Stevens’ opinion is an “amazing reconstruction . . . recasting as advisory opinion what generations of sophisticated lawyers and judges have regarded . . . as gospel holding.”).
143 Keystone, 480 U.S. at 486-87 (quotation marks omitted).
144 Id. at 488.
the “general welfare of the public.” Stevens likened this police power to the undisputed nuisance exception. He then moved from nuisance to reciprocity of advantage, asserting that the “Court’s hesitance to find a taking when the State merely restrains uses of property that are tantamount to public nuisances is consistent with the notion of ‘reciprocity of advantage’ that Justice Holmes referred to in Pennsylvania Coal.”

Stevens’ argument was strung together from the original premise that since the legislature passed the Subsistence Act for the public purpose of abating the subsistence nuisance, then it had to be allowable under the police power to regulate nuisance and therefore it accrued an average reciprocity of advantage. A good deal of that proposition rests on the assertion that the Kohler Act from Pennsylvania Coal was not similarly enacted. In his dissent in Keystone, Justice Rehnquist took issue with that characterization of the Kohler Act. Rehnquist quoted the Kohler Act’s preamble to show that the Act was aimed at addressing “wrecked and dangerous streets and highways, collapsed public buildings, churches, schools, factories, streets, and private dwellings, broken gas, water and sewer systems, the loss of human life.” Rehnquist concluded, “There can be no doubt that the Kohler Act was intended to serve public interests.” Thus even focusing on labels alone does not satisfy Stevens’ desire to distinguish.

Foreshadowing the Lucas Court’s concern with labels, Rehnquist also asserted that the legislature’s mere citation of a public purpose and nuisance abatement did not necessarily vacate

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145 Keystone, 480 U.S. at 479.
146 Id. at 488 n.17 (In his dissent in Pennsylvania Coal, Justice Brandies argued: “The State has an absolute right to prohibit land use that amounts to a public nuisance,” a proposition that Justice Holmes in his majority opinion “did not contest.”).
147 Id. at 491.
148 Id. at 509.
149 Id. at 509-10.
the need for compensation. First, the Fifth Amendment obviously envisions public purposes as part of a taking but still requires compensation. So Rehnquist found Stevens’ distinction between a statute to protect private dwellings and one to protect public streets inapposite. Second, Rehnquist recognized a narrowing principle to nuisance regulations. He insisted these regulations are only exempt from takings analysis when they have “discrete and narrow purposes.”150 He found the Subsistence Act far too broad to qualify, with its goals of “economic development and maintenance of property values to sustain the Commonwealth’s tax base.”151 This, he wrote, should make the Court “hesitant to allow a regulation based on essentially economic concerns to be insulated from the dictates of the Fifth Amendment by labeling it nuisance regulation.”152

The Keystone Court’s attention to the semantic distinctions between the Kohler Act and the Subsistence Act go a long way toward offering credence to the Lucas Court’s subsequent desire to distance Takings Clause jurisprudence from nuisance labels.153 However, is ironic that in Lucas the Court shuns the strictures of labels while establishing a new bright line rule.

D. Unconstitutional Conditions: Nollan and Dolan

In addition to the Penn Central balancing test and the two per se tests, the Court has found that certain conditions placed on permit approvals can also rise to the level of compensable

150 Keystone, 480 U.S. at 513.
151 Id.
152 Id.
153 The Court has long eschewed form over substance in its related Fifth Amendment due process jurisprudence; see Crowell v. Benson, 285 U.S. 22, 53 (1932) (The Court said that “regard must be had, as in other cases where constitutional limits are invoked, not to mere matters of form, but to the substance of what is required.”); Commodity Futures Trading Comm’n v. Schor, 478 U.S. 833, 854 (1986) (In separation-of-power cases the Court must look “beyond form to the substance of what” Congress has done.).
regulatory takings. In a pair of cases, *Nollan* and *Dolan*, the Court established the following construct to be used when considering permit conditions: if a government body is able to deny a permit outright to advance a legitimate public purpose, then the government may also add a condition to that permit’s approval, but only if the permit condition would achieve a result that is roughly proportional to the remedy an outright denial of the permit would have achieved. Otherwise, it is an unconstitutional condition and is thus a compensable regulatory taking.

The unconstitutional-condition doctrine began in *Nollan v. California Coastal Commission*.\(^{154}\) The Nollans owned an oceanfront bungalow in Ventura, California. Over time the bungalow fell into disrepair. A clause in their lease-to-buy option contract required the Nollans to demolish the bungalow and build a new structure.\(^{155}\) The Nollans were more than willing to do so and submitted their plans to the California Costal Commission for approval.\(^{156}\) The Commission was willing to approve the plans but it had concerns about visibility and public access to the shore beyond the Nollans’ home. Therefore, the Commission insisted on a condition that the Nollans grant “the public an easement to pass across a portion of their property bounded” by high tide on one side and a preexisting seawall on the other.\(^{157}\) The Nollans objected and insisted that the attempt to condition the approval of their construction permit on their relinquishment of an easement was a taking. The Court agreed with the Nollans, reversed the court of appeals and held that if the state wanted to obtain the easement, “it must pay for it.”\(^{158}\)


\(^{155}\) *Id.* at 828.

\(^{156}\) *Id.*

\(^{157}\) *Id.*

\(^{158}\) *Id.* at 843.
Justice Scalia wrote the opinion and used two fairly straightforward arguments to support the finding of a compensable taking. First, he cited *Loretto* and reminded that when there is a permanent physical occupation occasioned by a government action, it is a taking.\(^\text{159}\) The only wrinkle in the *Loretto* test here is whether the public’s “permanent and continuous right to pass to and fro . . . even though no particular individual is permitted to station himself permanently upon the premises” constitutes the same permanent occupation as when the same person or object is present throughout the occupation.\(^\text{160}\) Scalia had no trouble finding that the two situations are comparable for takings analysis.

Second, Scalia brought another element of police power regulation into the takings conversation. The Court had already established the question of whether the problem identified and the solution proposed had to be sufficiently linked to avoid a taking.\(^\text{161}\) Scalia reaffirmed that the Commission clearly could have refused Nollans’ permit based on concerns about visibility and access to the public shoreline.\(^\text{162}\) Further, he acknowledged that instead of simply refusing the permit the Commission could have included conditions to remedy those same concerns that could have led to an outright ban. However, that “constitutional propriety disappears . . . if the condition substituted for the prohibition utterly fails to further the end advanced as the justification for the probation.”\(^\text{163}\) Scalia then critiqued the tradeoff that the Commission was

\(^{159}\) *Nollan*, 483 U.S. at 831-32; *citing Loretto*, 458 U.S. at 419.

\(^{160}\) *Nollan*, 483 U.S. at 832.

\(^{161}\) *Agins*, 447 U.S. at 260 (stating that a regulation must “substantially advance” a “legitimate state interest”); the *Agins* substantially-advances test was later abrogated in *Lingle*, 544 U.S. at 540 (2005) (The “formula prescribes an inquiry in the nature of a due process, not a takings, test, and that it has no proper place in . . . takings jurisprudence.”).

\(^{162}\) The Commission’s objection is based on their obligation to honor Article X, §4 of the California Constitution, which includes that no individual “shall be permitted to exclude the right of way to such [public] water whenever it is required for any public purpose.”

\(^{163}\) *Nollan*, 483 U.S. at 837. *See also* Robert K. Best, *New Constitutional Standards for Land Use Regulation: Portents of Nollan and First English Church in Institute on Planning, Zoning, and Eminent Domain* 6.01
prepared to permit the Nollans to undertake. Under the permit, the Nollans would be allowed to increase the size of the building on their property, which would be a “psychological barrier”\textsuperscript{164} to the public’s understanding of their right to access the beach beyond the Nollans’ home, in exchange for formalizing the public’s right to walk between the home and the water. Since the condition on the permit did not address the public’s view of the beach, Scalia found “that this case does not meet even the most untailored standards.”\textsuperscript{165} He scolded the Commission because it is “quite impossible to understand how a requirement that people already on the public beach be able to walk across the Nollans’ property reduces any obstacles to viewing the beach created by the new house.”\textsuperscript{166} Instead, Scalia equated the Commission’s move to extortion as the Commission knew the Nollans wanted to expand their house and would thus likely give up a small portion of their land to the public right of way in order to do so.

In conclusion, Scalia and the Court held that an unbroken strip of access along the shoreline is a worthy public goal and that must be where the Commission’s desire for the easement originated. However:

That is simply an expression of the Commission’s belief that the public interest will be served by a continuous strip of publicly accessible beach along the coast. The Commission may well be right that it is a good idea, but that does not establish that the Nollans (and other coastal residents) alone can be compelled to contribute to its realization. Rather, California is free to advance its “comprehensive program,” if it wishes . . . but if it wants an easement across the Nollans’ property, it must pay for it.\textsuperscript{167}

Justice Brennan wrote the dissent in \textit{Nollan} and roundly attacked Scalia’s meddling in the Commission’s fact finding regarding the appropriateness of the easement that the Commission

\footnotesize{(Janice R. Moss ed., 1988) (“The exaction must serve to reduce or eliminate those adverse effects of the proposed use of the property that by themselves could have justified denial of the permit.”).}

\textsuperscript{164} \textit{Nollan}, 483 U.S. at 835.
\textsuperscript{165} \textit{Id.} at 838.
\textsuperscript{166} \textit{Id.}
\textsuperscript{167} \textit{Id.} at 841-42.
conditioned in the permit. He found the “standard of precision for the exercise of a State’s police power” that the majority called for to be unreasonable.\(^{168}\) He was encouraged by the “flexible manner” with which the Commission was willing to approve the permit despite the Commission’s apprehensions about overdevelopment and thought the board did so with an “informed judgment.”\(^{169}\) Although Brennan was critical of Scalia’s rehashing of the fact finding, Brennan also waded in and found that Commission had effectuated a good trade “to mitigate the burden produced by a diminution of visual access” to the public beach.\(^{170}\)

Perhaps more interesting than Brennan’s objection to Scalia’s “fit” analysis was Brennan’s introduction of the economic factors, which the majority neglected. The Nollans could make no argument that the value of the property was diminished by the permit approval conditioned on the easement. Before the approval they had a lease with an option to buy on a dilapidated bungalow, afterwards they had a permit to construct a more valuable home with an easement across the land. “The State [had] not sought to interfere with any pre-existing property interest . . . [and this case wouldn’t have come up] had the Nollans not proposed more intensive development in the coastal zone.”\(^{171}\) What’s more, allowing the conditional permit was a “classic case of reciprocity of advantage” as 43 other beachfront properties had already granted the easement.\(^{172}\) Brennan rebuffed the Nollans’ economic harm arguments as flawed because they rest “on the assumption of entitlement to the full value of their new development . . . [However], the interest in anticipated gains has traditionally been viewed as less compelling than

\(^{168}\) *Nollan*, 483 U.S. at 842.
\(^{169}\) *Id.* at 847.
\(^{170}\) *Id.* at 850.
\(^{171}\) *Id.* at 855-56.
\(^{172}\) *Id.* at 856.
other property-related interests.” Brennan completed his economic tour de force by calling out the Nollans’ lack of investment-backed expectations. The Commission could almost make out a prescriptive easement case against the Nollans because the family that leased the beach property since the early part of this century . . . and their lessees [including the Nollans] had not interfered with public use of the beachfront . . . so long as public use was limited to pass and repass lateral access along the shore. . . . California therefore has clearly established that the power of exclusion for which appellants seek compensation simply is not a strand in the bundle of appellants’ property rights, and appellants have never acted as if it were.

In the end, although Brennan and the minority were able to foist a significant number of the balancing-test factors against the Nollans, in the aftermath of Loretto, Nollan appears correctly decided. Since the easement would have created a permanent physical occupation of the Nollans’ land (a conclusion Brennan did not deny) under Loretto no further analysis was needed, only compensation need be determined.

Nollan only created half of the unconstitutional condition doctrine. The Nollan Court only established that without a link between the permit condition and the public objective there was a regulatory taking; it did not address how close of a link was needed to avoid a taking. The Court elaborated on the doctrine seven years later in Dolan v. City of Tigard.

In Dolan, the owner of a hardware store claimed that the conditions placed on the permit she requested to expand her store were an uncompensated taking and an inappropriate “exaction” under Nollan. The City of Tigard, Oregon had a comprehensive zoning code in place that

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173 Nollan, 483 U.S. at 857; citing Andrus, 444 U.S. at 66 (quotation marks omitted).
174 Nollan, 483 U.S. at 858.
176 Id.
controlled development in the Central Business District where Dolan’s store was located. The code, *inter alia*, was concerned with two issues: mitigating increased water runoff from impermeable land improvements (such as parking lots) and limiting traffic congestion from increased business development. In order to accomplish these goals the city conditioned the approval of Dolan’s permit request to demolish her existing store, pave the parking lot and erect a larger store on two things. First, the city required that Dolan not only refrain from developing any portion of her property within the 100-year floodplain of the nearby Fanno Creek, but also that she “dedicate to the City as Greenway all portions of the site that fall within” the floodplain. Second, the city required that Dolan “dedicate an additional 15-foot strip of land [to the city] . . . as a pedestrian/bicycle pathway.” Taken together, the two dedications would have required Dolan to cede “roughly 10% of the property.”

The *Dolan* Court was thus faced with two questions. First, “whether the essential nexus exists between the legitimate state interest and the permit condition exacted by the city.” Second, if that nexus did exist, whether “the required degree of connection between the exactions and the projected impact of the proposed development” was also present. The Court held that the nexus was present but that the conditions imposed did not meet a “rough proportionality” test to remedy the development’s impact.

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177 *Dolan*, 512 U.S. at 377.
178 *Id.* at 377-78.
179 *Id.* at 380 n.2 (The dedication would have required Dolan to permanently deed that portion of her land to the city.).
180 *Id.* at 380.
181 *Id.*
182 *Id.* at 386; citing *Nollan*, 483 U.S. at 837 (quotation marks omitted).
183 *Dolan*, 512 U.S. at 386.
Chief Justice Rehnquist wrote for the majority and moved swiftly past whether the nexus required for the conditional exaction existed. He found that preventing floods and alleviating traffic congestion were both clearly appropriate public purposes.\(^{184}\) He also found that a flat refusal to issue the development permit was clearly connected to accomplishing both of these goals, thus placing conditions to the same end was also permissible.\(^{185}\) However, Rehnquist took considerably more time with the second question, “whether the degree of the exactions demanded by the city’s permit conditions bears the required relationship to the projected impact of [Dolan’s] proposed development.”\(^{186}\)

The Court reviewed a series of state court decisions for assistance in developing this new addition to the *Nollan* nexus test. After a Goldilocks-like treatment of some standards being “too lax” and some “very exacting,” the Court settled on an “intermediate position, requiring the municipality to show a reasonable relationship between the required dedication and the impact.”\(^{187}\) However, the Court declined to adopt the reasonable relationship terminology because of its close association with the Equal Protection rational basis test, and thus employed the term: “rough proportionality.”\(^{188}\) Although the Court was not looking for mathematical precision, they were placing the burden on the public entity to show that the condition was “related in both nature and extent to the impact of the proposed development.”\(^{189}\)

\(^{184}\) *Dolan*, 512 U.S. at 387.
\(^{185}\) *Id.* at 387-88.
\(^{186}\) *Id.* at 388.
\(^{187}\) *Id.* at 389-90.
\(^{188}\) *Id.* at 391.
\(^{189}\) *Id.* (Only the “extent” condition is newly established in *Dolan*; the “nature” condition was established in *Nollan*, 483 U.S. at 837.).
Rehnquist then applied the two-pronged test to the two exactions the city attempted to place on Dolan. First, he had no qualms with the idea of the city requiring undeveloped land adjacent to a swollen creek as a means by which to mitigate runoff from the newly paved and expanded parking lot. Those concepts were linked in nature. However:

The city demanded more -- it not only wanted [Dolan] not to build in the floodplain, but it also wanted [Dolan’s] property . . . for its [public] greenway system. The city never said why a public greenway, as opposed to a private one, was required in the interest of flood control.¹⁹⁰

The nature prong was met but the extent of requiring not just undeveloped land but actual dedication of the land to the public trust did not accrue to any greater degree than keeping it in private hands. Turning the land over to the city did not help achieve the desired public outcome more than allowing Dolan to keep it. The largest impact to Dolan’s bundle of property rights was her loss of the ability to exclude others.¹⁹¹ Even though this property was held open to the public, Dolan would “lose all rights to regulate the time in which the public entered onto the greenway. . . . [Her] right to exclude would not be regulated, it would be eviscerated.”¹⁹²

Rehnquist next turned to the pedestrian and bicycle path condition and found that lacking as well. He conceded that a larger hardware store would likely increase traffic and that constructing a bicycle path could alleviate some of that traffic, but he was not convinced that the path would actually go far enough toward the solution. Again placing the burden on the regulating body, he did not find that path “will, or is likely to, offset some of the traffic demand.”¹⁹³ Rehnquist found no fault with either the public purpose targeted or the conditions designed, he only held

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¹⁹⁰ *Dolan*, 512 U.S. at 393.
¹⁹¹ *Id.*
¹⁹² *Id.* at 394.
¹⁹³ *Id.* at 395; citing *Dolan v. City of Tigard*, 854 P.2d 437, 477 (1993) (emphasizing the dissent’s position in the Oregon Supreme Court ruling upholding the exactions challenged here).
that when the city fails to show that those conditions will actually accomplish their purpose, then the conditions fail to satisfy the dual Nollan – Dolan nexus test and compensation is due under the Takings Clause.

In dissent, Justice Stevens attacked the new test on two primary grounds. First, that it inappropriately shifted away from a presumption of constitutionality and created a test where the public bears the burden to adduce evidence to uphold its actions.194 Second, that it unduly elevates one strand (the right to exclude) from the broader bundle of property rights, an outcome he found “particularly misguided in a case involv[ing] the development of commercial property.”195 Stevens also flatly rejected the idea that the unconstitutional conditions doctrine has any place in takings jurisprudence because the property owner and the city were entering into a “mutually beneficial transaction.”196 He argued that since Dolan had a choice at all times whether to improve her store or retain possession of the floodplain and bicycle path area of her property, there had been no forceful expropriation of her land. Stevens wrote, “Dolan has no right to be compensated for a taking unless the city acquires property interests that she has refused to surrender.”197

1. Revisiting Nollan and Dolan: Unconstitutional conditions and personal property

The Court found regulatory takings in both Nollan and Dolan. However, both of those cases involved unconstitutional conditions attempting to induce the owner to cede real property. Does

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194 Dolan, 512 U.S. at 402.
195 Id. at 401.
196 Id. at 407.
197 Id. at 408.
the doctrine extend to personal property as well? On October 5, 2012, the Supreme Court
granted a petition for certiorari in *Koontz v. St. Johns River Water Management District*, where
the Court will consider whether the *Nollan – Dolan* protection extends beyond real property.\(^{198}\)

In *Koontz*, the landowner sought to develop 3.7 acres “of which 3.4 acres were wetlands and .3
acres were uplands.”\(^{199}\) St. Johns agreed to allow Koontz to expand the development of his
property provided that he “deed the remaining portion of his property into a conservation area
and perform offsite mitigation by either replacing culverts four and one-half miles southeast of
his property or plug certain drainage canals on other property some seven miles away.”\(^{200}\)
Koontz estimated this offsite mitigation would cost him between $90,000 and $150,000.\(^{201}\) The
trial court concluded that St. Johns had unduly denied Koontz’s permit and awarded him
$376,000.\(^{202}\) The Florida Supreme Court reversed, holding that

*Nollan* and *Dolan* both involved exactions that required the property owner to dedicate
real property in exchange for approval of a permit. . . . Absent a more limiting or
expanding statement from the United States Supreme Court with regard to the scope of
*Nollan* and *Dolan*, we decline to expand this doctrine beyond the express parameters for
which it has been applied by the High Court. Accordingly, we hold that under the takings
clauses of the United States and Florida Constitutions, the *Nollan/Dolan* rule with regard
to “essential nexus” and “rough proportionality” is applicable only where the
condition/exaction sought by the government involves a dedication of or over the owner’s
interest in real property in exchange for permit approval; and only when the regulatory
agency actually issues the permit sought, thereby rendering the owner’s interest in the
real property subject to the dedication imposed.\(^{203}\)

We will have to wait and see whether the Supreme Court uses *Koontz* to further refine or expand
the unconstitutional-condition doctrine.

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\(^{198}\) *Koontz v. St. Johns River Water Mgmt. Dist.*, 77 So. 3d 1220 (Fla. 2011), cert granted 2012 U.S. Lexis 7808

\(^{199}\) *Id.* at 1224.

\(^{200}\) *Id.*


\(^{202}\) *Koontz*, 77 So. 3d at 1225.

\(^{203}\) *Id.* at 1230.
E. Summary of the Three Doctrines

The Supreme Court has recognized three viable regulatory takings claims. First, if a property owner is seeking a permit and the governing authority has conditioned the permit’s approval on the property owner dedicating real property, the property owner may then apply the Nollan-Dolan unconstitutional conditions test. Second, the property owner may try to establish a per se taking by showing that the government has authorized a permanent physical occupation of the owner’s property, or that the government has issued a regulation that results in the total deprivation of value of the owner’s property, provided that the Lucas-nuisance exception does not apply. All other regulatory takings claims will be weighed according to the Penn Central balancing test that considers a regulation’s economic impact on the property owner, the owner’s reasonable investment-backed expectations and the nature of the government action.

IV. What has been taken? The Denominator Problem

One of the biggest challenges when applying the tests outlined above is defining what has been taken and against what parcel that taken portion should be measured. This is known as the denominator problem, which is especially important given the total-deprivation-of-value test from Lucas. Professor Michelman isolated this problem as early as 1966 when he wrote:

The “fraction of value destroyed” test . . . appears to proceed by first trying to isolate some “thing” owned by the person. . . . Ideally, it seems, one traces the incidence of the imposition and then asks what “thing” is likely to be identified by the owner as “the thing” affected by this measure? Once having thus found the denominator of the fraction, the test proceeds to ask what proportion of the value or prerogatives formerly attributed by the claimant to that thing has been destroyed by the measure.204

204 Michelman, supra note 20, at 1223, 1232.
Justice Blackmun also nicely encapsulated the challenge in his *Lucas* dissent, writing, the “composition of the denominator in [the new] deprivation fraction” could be characterized as either the “total deprivation of an aptly defined entitlement” or as a “mere partial withdrawal from full, unencumbered ownership.”

Courts on several levels have struggled to define the relevant denominator. Not only have they worked to define the horizontal metes and bounds, but also the vertical scope of the property interest. In addition to physical dimensions, property interests exist across time, and the Supreme Court has given muddled guidance on the compensability of temporary takings. Property owners and regulators obviously have conflicting motivations in their characterizations of the relevant denominator. Property owners often attempt to shrink the size of the denominator to make the percentage diminution appear larger; a practice known as conceptual severance. Regulators want courts to look at the largest possible parcel against which to weigh a regulation’s impact; this is known as conceptual agglomeration. The answers to the questions of what is the size of the relevant parcel and who gets to define it often determine whether the taking is compensable, as the following cases demonstrate.

A. Defining the Parcel in Space and Time

In its most basic form, “An interest in real property is defined by the metes and bounds that describe its geographic dimensions and the term of years that describes the temporal aspect of

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the owner’s interest.”\textsuperscript{208} The Supreme Court has not always had an easy time defining those dimensions but it has tended to use the “parcel as a whole” approach. In \textit{Penn Central}, the Court held that “‘Taking’ jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. . . . This Court focuses . . . [on] the parcel as a whole.”\textsuperscript{209} Again in \textit{Tahoe-Sierra} the Court reminded, “In regulatory takings cases we must focus on the parcel as a whole.”\textsuperscript{210} However, identifying “the parcel” is no easy task.

1. \textbf{Finding the Horizontal Metes and Bounds}

\textit{Palazzolo v. Rhode Island} is a simple example of when the Court refused to allow a landowner to minimize the horizontal metes and bounds of his property in order to bolster his regulatory takings claim.\textsuperscript{211} In \textit{Palazzolo}, a landowner brought an action in inverse condemnation based on the denial of a permit to develop his land under the Coastal Resource Management Program.\textsuperscript{212} Palazzolo owned a long thin strip of land (approximately 20 acres) boarded on one side by Winnapaug Pond and on the other by a road.\textsuperscript{213} The land was almost entirely salt marsh, requiring a substantial amount of fill in order to make it suitable for construction.\textsuperscript{214} Palazzolo filed permit applications with various Rhode Island permitting boards and councils to develop the strip of land; all of these requests were denied for lack of specificity or unacceptable impact.

\textsuperscript{208} Restatement of Property §§ 7-9 (1936).
\textsuperscript{209} Penn Central, 438 U.S. at 130-31.
\textsuperscript{210} Tahoe-Sierra, 535 U.S. at 331.
\textsuperscript{211} Palazzolo, 533 U.S. at 606.
\textsuperscript{212} Id.
\textsuperscript{213} Id. at 613.
\textsuperscript{214} Id.
on the environment. Palazzolo eventually filed a suit claiming the state had by virtue of the coastal management regulations taken his land without compensation. However, “The trial court accepted uncontested testimony that an upland site located at the eastern end of the property would have an estimated value of $200,000 if developed.” The Court ruled that since Palazzolo could still build on this upland portion of the lot, he had not been denied all economically beneficial use of the land as required under his Lucas claim. This finding was essentially dispositive in Palazzolo.

The Court refused to allow Palazzolo to conceptually sever the upland portion from the rest of the parcel to claim that he had been denied all economically viable use in the remainder. Instead, they looked at the parcel as a whole and found that leaving Palazzolo with $200,000 of viable use in the entire parcel was sufficient to escape compensability.

A more interesting and nuanced treatment of the metes and bounds challenge occurred in Loveladies Harbor v. United States, where Judge Jay Plager showed how the Federal Circuit Court of Appeals worked through the denominator problem. The facts are as follows. Loveladies purchased a 250-acre plot and developed 200 of the acres. In order to build on the remaining 50 acres, he had to fill an area that had been designated as a wetland. Loveladies entered into negotiations with the New Jersey Department of Environmental Protection (NJDEP), and they eventually agreed that he could develop 12.5 of the 50 acres. The remaining

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215 Palazzolo, 533 U.S. at 613-14.
216 Id. at 621.
217 Eagle, Regulatory Takings, supra note 45, at § 7-8(d).
218 Loveladies Harbor, 28 F.3d 1171.
219 Id. at 1174.
38.5 acres “were to be dedicated to the state in return for the NJDEP permit.” Loveladies then sought the requisite federal Clean Water Act § 404 permit to fill the wetlands. The Army Corps of Engineers consulted with the NJDEP who admitted they had issued the state permit (under the settlement) but expressed concerns about the development. The Army Corps subsequently denied Loveladies permit; he then challenged the denial as an uncompensated regulatory taking. The trial court found that the value of the 12.5-acre remaining parcel had been worth $2.6 million before the permit denial and after was worth only $12,500, working a 99% diminution of value.

Judge Plager applied the Lucas test and found that not only was the regulation a complete deprivation of economic value but also that the government could not rely on any common law nuisance principles to avoid paying compensation. First, Plager had to grapple with the denominator problem. What was the proper size parcel from which to calculate Loveladies’ loss? Three possible answers were 1) the original 250 acres, 2) the undeveloped 50 acres or 3) the 12.5 acres that the Army Corps denied Loveladies a permit to fill. The trial court found, and Plager agreed, that the full 250 acres was an inappropriate denominator because almost all of it had been developed and sold before the Clean Water Act even existed. Plager rejected the 50-acre denominator because Loveladies relied on his agreement with the NJDEP when he did not seek a federal permit to develop those acres. “It would seem ungrateful . . . to require Loveladies to convey . . . the rights in the 38.5 acres [to New Jersey] in exchange for the right to develop

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220 Loveladies Harbor, 28 F.3d at 1180.
221 Id. at 1173. Clean Water Act § 404(f)(2), 33 U.S.C. § 1344(f)(2) (2012) (requiring that “Any discharge of dredged or fill material into the navigable waters . . . shall be required to have a permit under this section.”).
222 Loveladies Harbor, 28 F.3d at 1174.
223 Id. at 1175.
224 Id. at 1180.
225 Id. at 1181.
12.5 acres, and then to include the value of the grant as a charge against” him later on the federal level.\(^{226}\) That left only the 12.5 acres as a possible denominator.\(^{227}\) The trial court found that parcel had its value reduced by 99\%, and Plager held Loveladies was “deprived of all economically feasible use” under \textit{Lucas}.\(^{228}\) Plager also addressed why the common law-based nuisance exception to the \textit{Lucas} total-deprivation-of-value test did not apply here: the NJDEP already said Loveladies could fill the wetland.\(^{229}\) Since common law nuisance claims are rooted in “equitable principles . . . it would be inequitable to allow the state . . . to now exercise authority to prevent the fill.”\(^{230}\)

Federal courts are not the only forums trying to establish the metes and bounds. In \textit{City of Coeur d’Alene v. Simpson}, the Idaho Supreme Court was forced to address the denominator question as well.\(^{231}\) The Simpsons owned two parcels of property that straddled a road, one was termed the upland portion that contained their home and the other was termed the waterward portion that bordered a local lake. After a time, the Simpsons grew tired of the public crossing their waterward portion and erected a fence to keep the public off their land.\(^{232}\) The city responded by enacting an ordinance requiring a 40-foot setback from the beach, requiring the Simpsons to remove the fence.\(^{233}\)

\(^{226}\) \textit{Loveladies Harbor}, 28 F.3d at 1181. \textit{See also} Michelman, \textit{Takings, supra} note 94, at 1616 (“What a difference a willingness to engage in conceptual severance can make to the rate at which courts will find that land-use regulations are compensable takings.”).

\(^{227}\) John H. Fee, \textit{Unearthing the Denominator in Regulatory Taking Claims}, 61 U. CHI. L. REV. 1535, 1549 (1994) (“Although \textit{Loveladies Harbor} may appear rather formalistic, it seems to represent a trend in the Court of Federal Claims toward giving property owners greater control in defining the relevant parcel.”).

\(^{228}\) \textit{Loveladies Harbor}, 28 F.3d at 1181.

\(^{229}\) \textit{Id.} at 1182.

\(^{230}\) \textit{Id.}

\(^{231}\) \textit{Id.} at 1182.

\(^{232}\) \textit{Id.}

\(^{233}\) \textit{Id.}
The district court ruled that the setback did not constitute a regulatory taking; however, the question of whether it denied the Simpsons all economically viable use remained outstanding. Following that decision, “Jack Simpson formed Beach Brothers as an Idaho corporation and named the Simpsons’ adult sons as sole shareholders. Jack and Virginia then quitclaimed the waterward parcel to Beach Brothers.” The Simpsons contended that the disposition was not related to the taking claim but was part of their estate planning and to protect them against personal liability that could result from the public crossing the property. The district court then considered the economic impact of the setback and found that “no taking had occurred because . . . when considering both parcels together, they retained value.”

The Idaho Supreme Court was thus forced to deal with the denominator problem. In order to determine the property at issue and the value thereof that has been taken . . . [the Court had to] compare the value that has been taken from the property with the value that remains. . . . [Thus] the proper inquiry is what constitutes the relevant property? Although the lower court readily engaged in conceptual agglomeration and held that both the upland and waterward parcels were one for takings analysis, the higher court was reticent to do so. It was “undisputed that the parcel was deeded to, and legal ownership remains solely in, Beach Brothers, Inc., a corporation recognized under the laws of Idaho. . . . Jack and Virginia Simpson no longer hold any interest in the waterward parcel. Beach Brothers has no interest in the upland parcel.”

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234 City of Coeur d’Alene, 136 P.3d at 314.
235 Id. at 314 n.3.
236 Id. at 314.
237 Id. at 318-19 (quotation marks and citations omitted).
238 Id. at 320 (quotation marks and citations omitted).
The court then worked through a series of factors for the lower court to consider on remand to determine whether to conceptually agglomerate the two parcels. First, distinct legal ownership must be considered; although the court was not blind to the fact that landowners may try to divide “up ownership of their property so as to definitively influence the denominator analysis.” Therefore the “purpose, character and timing of any transfer” must be taken into consideration. Second, courts should look at whether the parcels are subject to different restrictions. The fact that the ordinance in this case affected the waterward but not upland parcel is relevant. The court cited *Loveladies Harbor* in support of applying this element in favor of recognizing the two distinct parcels. Third, courts should consider whether the two parcels are “economically independent.” This factor “entails assessment of the potential for development of each of the differently zoned properties, from the standpoint of both site economics and governmental cooperation.” The court also weighed the physical division of the parcels by a county road, but stated, “The road by itself cannot be considered to the exclusion of other relevant factors.” Of more importance to the court was that for tax purposes, following the transfer of ownership to Beach Brothers, the county “assessed the waterward parcel separate from the upland parcel.”

The dissent in *City of Coeur d’Alene* was critical of the idea that the court should consider whether a transfer was “primarily designed to influence the denominator analysis.” This would allow a court to reach a resolution where “if a seller had an improper motive for selling

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239 *City of Coeur d’Alene*, 136 P.3d at 320.
240 *Id.*
241 *Id.* at 320-21.
243 *City of Coeur d’Alene*, 136 P.3d at 323.
244 *Id.*
245 *Id.* at 329.
real property, the government can take that property from the purchaser without being required to pay compensation.”

The dissent also argued that from the buyer’s perspective, a seller’s “supposedly improper motive of wanting to enhance a takings claim by selling a parcel of real property is no different than buying real property with notice of existing land-use restrictions and then bringing a takings claim based upon those restrictions.”

*Palazzolo, Loveladies Harbor* and *City of Coeur d’Alene* all provide glimpses into elements courts will use when defining the relevant horizontal parcel. Although some courts have been willing to examine smaller parcels, the Supreme Court tends to look at the “parcel as a whole.”

2. **Vertical Integration**

In addition to horizontal metes and bounds, the Supreme Court has had occasion to consider three cases that dealt with vertical estates in land: *Pennsylvania Coal, Penn Central* and *Keystone*. In *Pennsylvania Coal*, the Court honored the Pennsylvania state law that recognized three distinct vertical estates (surface, support and mineral) when analyzing whether the Kohler Act worked a regulatory taking. By keeping all three estates separate, the Court was able to come to the conclusion that by prohibiting the property owner from mining the support estate the Act had taken that separate and distinct interest in land.

In *Penn Central*, the Court blocked the building owner from engaging in active conceptual severance to divide the superjacent airspace from the rail terminal while adjudging the impact of

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246 *City of Coeur d’Alene*, 136 P.3d at 329.
247 *Id.* at 330.
248 *See supra* Part II(B).
the Landmarks Preservation Law.\textsuperscript{249} Penn Central also produced the parcel-as-a-whole doctrine that states, “Taking jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated.”\textsuperscript{250}

And finally in \textit{Keystone}, the Court applied active conceptual agglomeration to undo the division of estates (surface, support and mineral) that the property owner had purposefully engaged in under Pennsylvania state law.\textsuperscript{251} In \textit{Keystone}, Justice Stevens was dubious of recognizing the support estate as severable from either the surface or mineral rights. He argued that since the support layer of the fee must either be exploited by the miner (to his economic advantage) or left in place for the surface owner (to his economic advantage), its “value is merely a part of the entire bundle of rights possessed by the owner of either the coal or the surface.”\textsuperscript{252} Since the coal company owned the support layer, Stevens treated it just as he did the coal in the mineral estate that the regulation required be left in the ground: non-compensable. He cited the \textit{Penn Central} Court’s refusal to treat the air rights above the rail terminal as separate from the fee.

In his \textit{Keystone} dissent, Rehnquist relied on both his disdain for labels and his respect for the states’ role in property law. As to the size of the parcel, he noted that the Court’s refusal to treat the coal left in ground “as a separate segment of property for takings purposes is based on the

\textsuperscript{249} See supra Part III(A).
\textsuperscript{250} \textit{Penn Central}, 438 U.S. at 130-31. See also \textit{Epstein, Takings}, \textit{supra} note 15, at 64 (Brennan’s position violates “the standard conceptions of property applied everywhere and at all times in the United States: ownership is divisible.”). \textit{See generally} \textit{John G. Sprankling, Understanding Property Law} §§31.01, 31.06 and 31.07 (2000) (noting that although the common law conception that vertical interests extended “to the heavens” collapsed with the invention of the airplane, the landowner still “owns enough air space above her land to accommodate a high-rise office building.”). \textit{But see} Michelman, \textit{Takings}, \textit{supra} note 94, at 1614 (discussion of “conceptual severance” as the “well-defined privilege of use correlative to negative easement or equitable servitude.”).
\textsuperscript{251} See supra Part III(C)(3).
\textsuperscript{252} \textit{Keystone}, 480 U.S. at 501.
fact that the alleged taking is ‘regulatory,’ rather than a physical intrusion.” However, we have seen that this distinction does matter in the jurisprudence, Rehnquist “cannot see how the label placed on the government’s action is relevant to consideration of its impact on property rights.” As to the support estate, the Subsistence Act made the coal company now strictly liable for damage to a portion of the estate that they had expressly paid to avoid. This regulation made “worthless what they purchased as a separate right under Pennsylvania law. . . . [This] complete interference with a property right extinguishes its value, and must be accompanied by just compensation.”

Seven years after *Keystone* was decided, commenter John Fee proposed a rule regarding the denominator problem that Rehnquist may have endorsed had it been published at the time. Fee suggested that takings jurisprudence could rely on state common law regarding whether an estate is severable. Fee opined that we could:

> Inquire whether the common law allows a particular set of property rights to be severed and traded as an independent unit. . . . The application of this principle is easier to grasp in the vertical *Keystone* context—where Pennsylvania allowed a support estate to be severed from the surface and mining estates—than in the horizontal context. Under most common law regimes, one may legally sever any horizontally identifiable segment of an estate and sell it, thereby creating two estates from one. If the common law “right to sever” were determinative of the regulatory taking denominator, then a property owner alleging a taking could horizontally define the relevant parcel as narrowly as she chose. Although conceptually sound, this rule could lead to extremely costly results in a modern regulatory state.

Fee’s criticism of the rule he proposes is common of proposals that actually remedy the inconsistencies that arise when trying to define the denominator. This suggested rule is

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253 *Keystone*, 480 U.S. at 515-16.  
254 *Id.* at 516.  
255 *Id.* at 520.  
256 Fee, *supra* note 227, at 1556.
internally consistent; however, it would expose the massive amount of regulatory interference with private property that is present in the modern regulatory state.

3. Understanding Temporal Implications

Regulations also have a temporal dimension. It is possible for a restriction to be put in place only temporarily, or for the same restriction to ostensibly be permanently embedded in a local code only to be repealed or withdrawn later. A pair of cases, *First English Evangelical Lutheran Church v. County of Los Angeles* and *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, provide a window into the Supreme Court’s view about how these temporal aspects impact regulatory takings.

In *First English*, the Court was looking more at the question of just compensation than it was at whether a taking occurred.257 The property owner in *First English* was a church with 21 acres of land located within a creek’s watershed, which the church used as a camp and retreat center.258 After a series of heavy rains, floods and washouts destroyed the buildings at the camp, the County of Los Angeles enacted an ordinance stating that a “person shall not construct, reconstruct, place or enlarge any building or structure, any portion of which is, or will be, located within” the creek’s watershed.259 The Supreme Court did not decide whether this formulation affected a regulatory taking under the *Lucas* total-deprivation-of-value test.260 Instead, the Court...

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258 *Id.* at 307.
259 *Id.*
260 *Id.* at 312-13.
accepted the California courts’ assumption that a taking had occurred\textsuperscript{261} and moved to the question of whether the Just Compensation Clause requires payment for a “temporary” taking.\textsuperscript{262}

Chief Justice Rehnquist wrote for the Court and listed the three responses a legislature could take to a judicially identified regulatory taking: the legislature could either 1) amend the regulation, 2) withdraw the regulation or 3) acknowledge that it had exercised its eminent domain powers and pay just compensation.\textsuperscript{263} In \textit{First English}, the Court was dealing with the first two responses and “whether abandonment [of the regulation] by the government requires payment of compensation for the period of time during which regulations deny a landowner all use of his land.”\textsuperscript{264} In finding that temporary takings do require compensation, Rehnquist analogized regulatory takings and physical takings. In a string of cases following World War II, the Court found that physical “appropriation[s] of private property by the United States . . . were in fact ‘temporary’ . . . [and] there was no question that compensation would be required.”\textsuperscript{265} Those cases established that the Court was less concerned with the length of the appropriation than with whether it “den[ied] a landowner all use of his property.”\textsuperscript{266} In \textit{First English}, the ordinance went into effect in January 1979 and the California Supreme Court did not finalize its denial of hearing until October 1985. The Court noted that this 6-year period of time was more than sufficient, as the “United States has been required to pay compensation for leasehold interests of shorter duration than this.”\textsuperscript{267}

\begin{footnotesize}
\begin{itemize}
\item[\textsuperscript{261}] \textit{First English}, 482 U.S. at 313 n.7.
\item[\textsuperscript{262}] \textit{Id.} at 313. \textit{See also} Eagle, \textit{Regulatory Takings, supra} note 45, at § 7-7(c).
\item[\textsuperscript{263}] \textit{First English}, 482 U.S. at 321.
\item[\textsuperscript{264}] \textit{Id.} at 318.
\item[\textsuperscript{265}] \textit{Id.;} citing \textit{Kimball Laundry Co. v. United States}, 338 U.S. 1 (1949); \textit{United States v. Petty Motor Co.}, 327 U.S. 372 (1946); \textit{United States v. General Motors Corp.}, 323 U.S. 373 (1945).
\item[\textsuperscript{266}] \textit{First English}, 482 U.S. at 318.
\item[\textsuperscript{267}] \textit{Id.} at 319.
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The key doctrinal contribution from *First English* was 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.” The *First English* Court recognized that property interests have a temporal component and that it is possible for a regulation to work a total deprivation of value within a portion of that temporal interest.

Justice Stevens wrote the dissent in *First English* and disagreed with the Court’s temporal analysis. While he agreed that it was possible for a temporary regulation to have “such severe consequences that invalidation or repeal will not mitigate the damage enough to remove the ‘taking’ label,” he found that to be an exceedingly rare case and one that was not present in *First English*. Stevens also discussed the “three-dimensional” aspects of regulations, which “for purposes of this case . . . regulations set forth the duration of the restrictions.” He relied on the *Penn Central*—approach when considering whether the regulation affected “a significant percentage of the property’s useful life.” He found that without asking this significant-percentage question we could not know “the economic effect that regulations have on the value of property and on an owner’s reasonable investment-based expectations with respect to the property.” However, while Stevens’ analysis could conceptually work with the horizontal and vertical dimensions of regulations, it does not fit as well within the temporal realm. After all, a property’s “useful life” is conceptually infinite. When does the “useful life” of the *First English* campground end? Are we to examine the regulation’s impact on the “useful life” for only this

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268 *First English*, 482 U.S. at 321.
269 *Id.* at 328.
270 *Id.* at 330.
271 *Id.* at 331.
272 *Id.* at 330.
property owner? All Stevens did was frame up a new form of the denominator problem.

In 2002, the Court used Tahoe-Sierra to refine the First English temporal-taking doctrine. The issue in Tahoe-Sierra was “whether a moratorium on development imposed during the process of devising a comprehensive land-use plan constitutes a per se taking of property requiring compensation.”

The facts in Tahoe-Sierra surround the negotiations pursuant to an interstate compact to protect environmentally sensitive areas near Lake Tahoe. The compact aimed, inter alia, to limit the addition of new impervious surfaces that accompany home and road construction. The restrictions were heightened “near streams or wetlands . . . [because they] are especially vulnerable to the impact of development.”

Designing these regulations within the confines of an interstate compact proved difficult, and the planning agency instituted two moratoria that banned construction: “Ordinance 81-5 and Resolution 83-21 effectively prohibited all construction . . . in California . . . for 32 months, and . . . in Nevada . . . for eight months.” The landowners issued a facial challenge to these two outright bans on construction. The landowners “purchased their properties prior to the effective date of the 1980 Compact . . . [and did so] for the purpose of constructing at a time of their choosing a single-family home to serve as a permanent, retirement or vacation residence.”

The landowners claimed they were owed compensation for the period of time they were denied all economically viable use of their land. The Court affirmed and held that no taking occurred.

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274 Id. at 308.
275 Id. at 312.
276 Id. at 312-13 (quotation marks omitted).
277 Id. at 342-43.
Justice Stevens wrote for the Court and summarized the issue as follows:

[The landowners] make only a facial attack. . . . They contend that the mere enactment of a temporary regulation that, while in effect, denies a property owner all viable economic use of her property gives rise to an unqualified constitutional obligation to compensate her for the value of its use during that period.\(^{278}\)

Stevens was unwilling to accept the landowners’ claim that the Court should “effectively sever a 32-month segment from the remainder of each landowner’s fee simple estate, and then ask whether that segment has been taken in its entirety by the moratoria.”\(^{279}\) Stevens called the “conceptual severance” argument “unavailing” because “it ignores Penn Central’s admonition that in regulatory takings cases [the Court] must focus on the ‘parcel as a whole.’”\(^{280}\) He analogized the temporal segments here with the surface and superjacent ones in *Penn Central*.\(^{281}\)

Stevens then went on to consider five different ways the Court could craft a takings rule for temporary permit delays. However, he rejected all five in turn as unworkable and creating more jurisprudential problems that they solve. Stevens placed permitting delay cases in the class of takings where the Court had “eschewed any set formula for determining when justice and fairness require that economic injuries caused by public action be compensated by the government.”\(^{282}\) Instead he relied on the *Penn Central* test where the “outcome instead depends largely upon the particular circumstances in that case.”\(^{283}\) On those grounds he ruled against the per se challenge and affirmed the lower court ruling that the permitting delay was not a taking.\(^{284}\)

\(^{278}\) *Tahoe-Sierra*, 535 U.S. at 320 (quotation marks and citation omitted).

\(^{279}\) *Id.* at 331.

\(^{280}\) *Id.*; citing *Penn Central* 438 U.S. at 130-31.

\(^{281}\) *Tahoe-Sierra*, 535 U.S. at 331-32. *See Restatement of Property §§ 7-9* (1936) (“An interest in real property is defined by the metes and bounds that describe its geographic dimensions and the term of years that describes the temporal aspect of the owner’s interest.”).

\(^{282}\) *Tahoe-Sierra*, 535 U.S. at 336.

\(^{283}\) *Id.* (quotation marks, brackets and citations omitted).

\(^{284}\) *Id.* at 343.
Chief Justice Rehnquist penned the dissent and claimed the majority minimized the true impact on the landowners by only looking at the two actual moratoria. Even after those bans expired, “petitioners still could make no use of their land.” Rehnquist added all of the various times during which the challengers had no economically viable use of their land and came to a total of more than “six years, [which] does not resemble any traditional land-use planning device.”

This struggle between Stevens and Rehnquist over minimizing or aggregating the impact on property is the core of regulatory takings disputes, and highlights the difficulty of the denominator question.

The dissent then took on the temporal issue by showing that “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.” Rehnquist shared Scalia’s concern for labels being a dispositive factor in a takings analysis. Both justices found that labels are “often without much meaning. There is every incentive for government to simply label any prohibition on development ‘temporary.’ . . . [T]his initial designation does not preclude the government from repeatedly extending the ‘temporary’ prohibition into a long-term ban on all development.”

The reason that temporary and permanent takings are synonymous for the dissenters was because from the property owners’ perspective, and in accordance with Lucas, the regulation “was the ‘practical equivalence’ of a long-term physical appropriation. . . . The ‘practical equivalence,’

285 Tahoe-Sierra, 535 U.S. at 344.
286 Id.
287 Id. at 346-47; citing Lucas, 505 U.S. at 1011-12.
288 Tahoe-Sierra, 535 U.S. at 347.
from the landowner's point of view, of a ‘temporary’ ban on all economic use is a forced leasehold.”\(^\text{289}\)

Justice Thomas also provided a dissent in *Tahoe-Sierra* and focused solely on the temporal issue. Under a *Lucas* test of total deprivation, Thomas would have relied on *First English*:

Which put to rest the notion that the ‘relevant denominator’ is land’s infinite life. Consequently, a regulation effecting a total deprivation of the use of a so-called ‘temporal slice’ of property is compensable under the *Takings Clause* unless background principles of state property law prevent it from being deemed a taking.\(^\text{290}\)

i. Permitting Delays

In *First English*, Stevens also pushed the majority’s new “artificial distinction between ‘normal [permitting] delays’ and the delays involved in obtaining a court declaration that the regulation constitutes a taking,” which is necessary in order to trigger the temporary taking compensation requirement Rehnquist laid out.\(^\text{291}\) Stevens was concerned that planning boards would hesitate to act in the face of a constitutional prohibition against total deprivation of value, if even for only a temporary duration. He insisted that the Court should recognize that planning boards “generally make a good-faith effort to advance the public interest when they are performing their official duties.”\(^\text{292}\) He did recognize that in the pursuit of those good-faith efforts, the planners “will often become involved in controversies that they will ultimately lose. Even though these controversies are costly and temporarily harmful to the private citizen, as long as fair procedures

\(^{289}\) *Tahoe-Sierra*, 535 U.S. at 348.

\(^{290}\) Id. at 355; citing *First English*, 482 U.S. 304.

\(^{291}\) *First English*, 482 U.S. at 334.

\(^{292}\) Id. at 340.
are followed,” he did not feel those were compensable takings. Stevens worried that the framework the majority set out would have a chilling effect on regulations and that, “much important regulation will never be enacted, even perhaps in the health and safety area.”

However, Stevens did not consider the converse of his position: that the cost of the good-faith efforts, admittedly flawed in the instances he references, will be borne by property owners. What about the cost and chilling effect on property owners who must remain ever vigilant and constantly challenge the planners’ good-faith efforts in the face of sometimes aggressive planning boards and commissions? This is the tension between regulatory impacts and property owners. During the adjudication and resolution of controversial rules, who bears the cost? In First English, the Court placed the cost of temporary regulations that deny landowners all use of their land on the party creating the cost: the government.

Not all permitting delays are due to reasonable good-faith efforts. A recent case in the Court of Federal Claims, Resource Investments, Inc. v. United States, dealt with whether an agency’s unreasonable assertion of regulatory jurisdiction and the subsequent prolonged permitting process can be considered a compensable taking. While the case is still pending on the merits, this decision held that for the purpose of summary judgment these are cognizable claims. The plaintiff in Resource Investments purchased a large tract of land in Washington State to use as a landfill. In order “to construct the landfill, plaintiffs had to obtain a total of twelve state or local permits, four quasi federal-state permits, and one federal Clean Water Act . . . permit, the

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293 First English, 482 U.S. at 340.
294 Id. at 340-41.
last of which is at the heart of this Fifth Amendment takings claim.”

After the plaintiffs obtained several state and local permits and endured nine years of federal litigation, the “Ninth Circuit held that the [Army] Corps [of Engineers] did not have jurisdiction over the landfill site because solid waste landfills . . . were outside the Corps’ jurisdiction.”

Importantly, the Ninth Circuit held that the Corps were not just mistaken in their assertion but were “unreasonable” in light of the Corps’ own regulations issued pursuant to “a 1986 Memorandum of Agreement between the Corps and the EPA providing that the EPA would assume jurisdiction over the disposal of solid waste into wetlands under [the Resource Conversation and Recovery Act].”

Both the Ninth Circuit and Court of Claims stopped short of finding the Corps acted in bad faith.

Following the Ninth Circuit’s ruling that the Corps’ assertion of jurisdiction was “unreasonable,” the plaintiffs amended their complaint to argue that the ruling converted “any potential permanent taking . . . into a temporary one.” After finding as a matter of law that operation of a landfill is a “compensable stick in [plaintiff’s] bundle of property rights,” the Court of Federal Claims addressed the more interesting question of whether applying the Lucas denial-of-all-economically-beneficial-use test “would violate Tahoe-Sierra . . . and the ‘parcel as a whole’ rule.”

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296 Resource Investments, 85 Fed. Cl. at 457.
297 Id.
298 Id. at 462; Id. at 496 (It was “‘unreasonable’ in that it was legally erroneous or contrary to law, and incongruous with other statutory and regulatory definitions limiting the Corps’ jurisdiction.”).
299 Id. at 462.
300 Id. at 479.
301 Id. at 469.
The court summarized that *Tahoe-Sierra* “breathed new life into the ‘parcel as a whole’ approach” by appending the cognoscibility of the temporary takings rule from *First English*.  

Again employing the bundle of sticks analogy, the Court invoked *Tahoe-Sierra*, writing:

> It improper to find a total taking of some stick in the bundle of rights only after slicing up the temporal dimensions of the landowner’s property interests . . . [because] a temporary prohibition on economically viable use could not logically . . . effect a taking of an entire fee simple estate, which would recover its value when the prohibition is lifted. . . . The *Tahoe-Sierra* Court thus explained that because an interest in real property is defined by the metes and bounds of its geographic dimensions and bounded by the length of the owner’s temporal interest, any analysis of the “parcel as a whole” must consider both . . . [The court] held that “a permanent deprivation of the owner’s use of the entire area is a taking of ‘the parcel as a whole,’ whereas a mere temporary restriction that simply causes a diminution in value is not,” presumably because . . . the property owner will regain the use of the property at a future date.

The court then applied that metric to the claims in *Resource Investment*. The court said that pursuant to the Corps’ denial of the CWA §404 dredge-and-fill permit it was clear that the denial specified no date or condition on which it would terminate. From the point it took effect, it was unconditional and permanent, thus effecting [sic] a taking of the parcel as a temporal whole. Here, like *Lucas*, it appeared to plaintiffs that they would never be able to develop their property.

The plaintiffs in *Resource Investments* are shielded from the *Tahoe-Sierra* “parcel as a whole” limitation because the “Corps’ denial of [their] application was prospectively permanent, extinguishing the future interests.” The fact that the Ninth Circuit “cut short” that ostensible permanency “does not diminish the extent of what . . . the Corps had taken from plaintiffs.”

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302 *Resource Investments*, 85 Fed. Cl. at 476.
303 *Id.* at 476-77.
304 *Id.* at 484.
305 *Id.*
306 *Id.*
ii. Summary

Thus there are three instances in which temporary regulatory takings are cognizable. First, when “a court invalidates a regulation that had previously affected” a total and permanent taking.\(^{307}\) Second, when the government decides to “cut short” a regulation that was in place, as in *First English*. Third, when the government denies a permit but later recants and allows the activity to take place.\(^{308}\) It is also relevant whether the regulation was perceived to be temporary or permanent when it was enacted. The Court very recently held that even with a temporary invasion of property, it is relevant whether the “invasion is intended or is the foreseeable result of authorized government action.”\(^{309}\) In *Lucas*, the regulations giving rise to the denial of all economically beneficial use were foreseeable, “unconditional and permanent.”\(^{310}\) In *First English*, the regulations were permanent when issued but only later “cut short” giving rise to finding of a temporary taking in the intervening period and “no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective.”\(^{311}\) In *Tahoe-Sierra*, the “Court found it dispositive that the regulations at issue . . . were merely temporary measures, which specifically stated that they would terminate.”\(^{312}\) However, as in most regulatory takings tests, the “outcome . . . depends largely upon the particular circumstances in that case.”\(^{313}\)
B. Searching for an Objective Answer to the Denominator Problem

A current flaw in the way the denominator problem is approached is that the ad hoc application of conceptual severance and conceptual agglomeration allows for the appearance that decision makers are simply applying whichever tool will guide them toward their desired result. We should be applying a test that provides an “objective measure that would not only prevent owners from engaging in conceptual severance, but also prevent governmental bodies from engaging in conceptual agglomeration.”314 In short, there are few objective signposts to guide judges, lawyers, regulators and property owners through the denominator jurisprudence. Although some have suggested that the field’s obsession with the denominator is incorrectly placed,315 both judges and scholars have offered objective tests that the Supreme Court could adopt to provide clarity in this perpetually cloudy area.

1. Common Ownership of Contiguous Land

One approach would be to consider whether contiguous land is under common or separate ownership.316 Courts have not always been consistent when applying this standard. In City of Coeur d’Alene, distinct legal ownership was considered, although the court was wary that landowners might try to divide “up ownership of their property so as to definitively influence the denominator analysis.”317 Therefore the “purpose, character and timing of any transfer” must be

314 Eagle, Property Tests, supra note 27, at 942-43 (quotation marks omitted).
315 Epstein, A Tangled Web, supra note 29, at 1376 (“What is taken is what counts; what is retained, or the ratio between retained and taken property, is irrelevant. . . . Under this approach, all the discontinuities are eliminated, and the line between total and partial takings is relevant only to the question of how much compensation is required, not to whether there is a basic obligation to compensate.”).
316 Fee, supra note 227, at 1546.
317 City of Coeur d’Alene, 136 P.3d at 320.
taken into consideration. Conversely, in *Deltona Corp. v. United States*, a developer purchased a large tract of land and divided it into five distinct areas. After obtaining permits for a few portions, Deltona sold off some of the developed tracts. The company was eventually denied permits for two of the other areas. “The Court of Federal Claims held that the relevant parcel included the whole ten-thousand-acre tract originally purchased by Deltona, despite the fact that it no longer owned all ten thousand acres.” The same court held the opposite 13 years later in *Loveladies Harbor* when the developer’s prior disposition of numerous parcels did reduce the size of the denominator in that case.

2. **Owner’s Demonstrated Expectations**

Another approach would be to defer to the owner’s expectation as demonstrated by the owner’s behavior prior to either the regulation being issued or the takings claims being raised. One element of this examination would be whether the areas in question were used for a common enterprise. The property owner would bear “the burden of showing that [two parcels] have been, or would be, treated separately when [their] development plans are submitted and considered. If [the property owner] makes this showing, the [parcels] must be analyzed as . . . separate parcel[s] for taking purposes.” However, if the owner could not make such a showing, he would be estopped from claiming the parcels were separate. Another element would be whether the two parcels were purchased at the same time. For example, in *Ciampitti v. United States*, the court

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318 *City of Coeur d’Alene*, 136 P.3d at 320.
320 Fee, supra note 227, at 1546; citing *Deltona*, 657 F.2d at 1191-94.
321 See supra Part IV.A.1; *Loveladies Harbor* 28 F.3d at 1181.
322 *Am. Savings & Loan Ass’n v. Marin County*, 653 F.2d 364, 372 (9th Cir. 1981).
did not allow the landowner to conceptually sever the two parcels. The “most persuasive consideration is that [the landowner] treated all of [the various lots] . . . as a single parcel for purposes of purchase and financing. It would be inappropriate to allow him now to sever the connection he forged when it assists in making a legal argument.”

3. **Operation of Law**

Another objective factor that could be used to solve the denominator problem is whether the parcels have been joined or severed by operation of law. For example, in both *Penn Central* and *City of Coeur d’Alene*, the two parcels’ tax treatment was considered. In *Penn Central*, the Court did not divide the vertical estates (surface and superjacent), in part, because the landmark-site designation was given to the entire “city tax block.” In *City of Coeur d’Alene*, in finding separate parcels (upland and waterward) it was relevant that following the transfer of ownership, the county “assessed the waterward parcel separate from the upland parcel” for tax purposes. Unity of law can also be demonstrated by whether the two parcels are regulated the same or differently. Historical conveyance as a unified parcel may also point toward the parcels being inseparable for takings considerations. An operation-of-law test could also rely on “whether the [state] common law allows a particular set of property rights to be severed and traded as an independent unit.”

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324 *Id.* at 320.
325 *Penn Central*, 438 U.S. at 131.
326 *City of Coeur d’Alene*, 136 P.3d at 323.
327 *Id.* at 320-21. *See also Palm Beach Isles Assocs. v. United States*, 208 F.3d 1374 (Fed. Cir. 2000); *Loveladies Harbor*, 28 F.3d 1171.
328 Fee, *supra* note 227, at 1556.
4. **The Commercial Unit Test**

Professor Eagle suggests courts look at the “commercial unit” when trying to establish the denominator. “In commercial law, ‘commercial unit’ means such a unit of goods as by commercial usage is a single whole for purposes of sale and division of which materially impairs its character or value on the market or in use.”

Under this test, “An owner could claim a taking of a particular property interest but would have the burden of demonstrating that the interest asserted is one actually recognized as traded in a market in the community in which it is located.” This test would not foreclose partial takings but would also use an objective measure so an owner could not “custom-tailor, as the requisite bundle of rights that constituted the property, exactly what the government diminished.” For example:

If an owner alleges that the loss of the use of 50 acres out of 500 constitutes a taking, he might have an easy time establishing that there is a ready market for 50 acres in the vicinity. If he alleges that a restriction destroys the right to use 50 acres for the painting of landscape portraits, he is entitled to establish that there is a market for such rights in the area, which promises to be a more difficult endeavor.

5. **Independent Economic Viability**

Finally, John Fee has also offered that courts could look to the parcel’s “economically productive potential as an independent unit.” Fee suggests that his test would apply only to horizontal divisions and would establish “any identifiable segment of land [as] a parcel for purposes of regulatory taking analysis if prior to regulation it could have been put to at least one

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329 Eagle, *Regulatory Takings, supra* note 45, at §7-7(e)(5); BLACK’S LAW DICTIONARY, 6th ed.; citing U.C.C. § 2-105(6).
331 Eagle, *Regulatory Takings, supra* note 45, at §7-7(e)(5).
332 Id.
333 Fee, *supra* note 227, at 1557; Eagle, *Regulatory Takings, supra* note 45, at §7-7(e)(6).
economically viable use, independent of the surrounding land segments.”

This test allows “both the takings claimant and the government . . . to obtain appraisals showing that the proffered relevant interest did or did not possess freestanding economic value.”

It is notable that Fee only believes this test should apply to horizontal parcels, thus exempting the Pennsylvania Coal, Penn Central and Keystone line of cases that have been particularly difficult to align.

V. Conclusion

The entire field of regulatory takings remains contentious. Some justices and scholars do not even concede that regulations should be covered under the Takings Clause at all. Others insist that the current state of takings jurisprudence exempts far too many regulatory actions from the Just Compensation requirement. Although some areas appear settled, including the general Penn Central balancing test and the per se takings tests, others appear ripe for further clarification.

The Supreme Court could offer significant additional guidance on temporal takings, explaining when and how long government may deny property owners use of their land. The Court could begin to establish how the background principles of state nuisance and property law are created such that they are applicable to the nuisance exception in the Lucas total-deprivation-of-value test. The Court could tackle the denominator problem by establishing a comprehensive and objective test in order to provide guidance on what satisfies the “parcel as a whole” rule. The

334 Fee, supra note 227, at 1557.
335 Eagle, Property Tests, supra note 27, at 942.
Court also currently has an opportunity to weigh in on whether the unconstitutional conditions doctrine from *Nollan* and *Dolan* extends beyond extortions of real property.

Regulatory takings are certain to remain a controversial topic. The tension inherent in the constitutional test mirrors the tension we see in modern society over the role of regulators and private property. This area’s maze of rules is unlikely to get solved anytime soon.