TAKINGS JURISPRUDENCE AS THREE-TIERED REVIEW

MARK W. CORDES*

I. INTRODUCTION

Takings jurisprudence has long been and remains, in the opinion of many, a constitutional quagmire, with little in the way of predictable results or coherent principles.1 The Supreme Court itself has acknowledged the largely ad hoc nature of its takings analysis, emphasizing the fact-sensitive nature of takings decisions and its reluctance to articulate precise formulae in this area.2 Moreover, although articulating a variety of standards and tests, such as "investment-backed expectations"3 and "economic viability,"4 the Court has not clearly stated their relation to each other or their precise meanings.5 This has led a number of commentators to lament these unclear standards, labeling this area of law an unworkable "muddle,"6 a "jumble of

1 Professor of Law, Northern Illinois University College of Law.


3 The Supreme Court first identified the "extent to which the regulation has interfered with distinct investment-backed expectations" as a significant factor in takings analysis in Penn Central, 438 U.S. at 124. Recent decisions have continued to recognize the importance of this factor, at least where regulated property retains some economic viability and therefore does not constitute a categorical taking. See Tahoe, 535 U.S. at 327 n23; Palazzolo v. Rhode Island, 533 U.S. 606, 617 (2001).


confusing holdings,” an “enduring legal dilemma,” and a state of “doctrinal and conceptual disarray.”

What is sometimes lost in the lament, however, is the degree to which the Court has established, with some clarity, three distinct types of takings concerns and three analytical approaches in resolving them. Thus, despite continued ambiguity on some details, the “big picture” of takings jurisprudence is shaping up rather nicely and in a way that is quite sensible. This has been particularly true in the last several decades, where in a number of decisions the Court has fleshed out the broad outlines of differing levels of takings review. Although these decisions are often seen as reflecting a growing protection of property rights, they in fact establish several distinct levels of protection depending upon the type of takings issue posed. As a practical matter, these distinct approaches provide heightened protection for landowners when autonomy and fairness concerns are present, but provide substantial latitude for government to regulate property for environmental and other purposes.

This past term, in _Lingle v. Chevron_, the Court again took an important, albeit small, step in clarifying the takings doctrine when it held that the “substantially advances” test from _Agins v. Tiburon_ is not part of the takings analysis. As noted by the Court, that language had become “ensconced” in takings cases over the past two decades, yet as a practical matter had not played a role in any takings decisions and is inappropriate for takings analysis. Whereas takings concerns focus on “the magnitude and character of the burden a particular regulation imposes on private

---

8 Oswald, supra note 5 at 92.
10 Most commentators have been critical of what is perceived as the confusing and ambiguous state of takings doctrine, but one recent article argues that the vagueness of takings jurisprudence is actually desirable. See Marc R. Poirier, The Virtue of Vagueness in Takings Doctrine, 24 Cardozo L. Rev. 93 (2002). In a very thoughtful article, Professor Poirier argues that the vagueness of takings doctrine serves important societal purposes.
12 Id. at 2074, 2082-83 (2005).
13 Id. at 2082 (citing Agins v. City of Tiburon, 447 U.S. 255 (1980)).
14 Id. at 2078.
15 Id. at 2077-78.
property rights," an ends/means test examines a regulation's effectiveness in achieving a legitimate purpose. For this reason, takings jurisprudence is governed by tests designed to examine the magnitude of burdens and the character of actions and to address the fundamental questions of "fairness and justice." The Court stated that takings jurisprudence is largely governed by three inquiries drawn from *Loretto v. Teleprompter Manhattan CATV Corp.*, *Lucas v. South Carolina Coastal Council*, and *Penn Central Transportation Co. v. New York City*. The first two inquiries concern the relatively rare instances of categorical takings, but the third inquiry is a multi-factor balancing test designed to address the majority of takings questions. The Court acknowledged, however, that an additional takings inquiry existed for exaction cases, thus bringing to four the actual number of inquiries governing takings cases.

The four tests identified in *Lingle* actually govern three distinct types of takings recognized by the Court: physical invasions, excessive development exactions, and unfair economic burdens from land use regulations. It is the thesis of this article that current takings analysis can be viewed as reflecting a three-tiered level of review, roughly analogous to the three levels of equal protection review, that correspond to the three types of takings that might occur. Where government action results in a physical invasion, the Court will strictly scrutinize the activity, applying a test from *Loretto* that results in a nearly *per se* finding of a taking. Where the government requires an exaction as part of development approval, the Court applies a "rough proportionality" standard from *Dolan v. City of Tigard* that is analogous to intermediate review. Finally, in the typical regulatory situation in which the government merely restricts future land uses, the Court applies a two-part "economic impact" test drawn from *Lucas* and *Penn Central*. Although this standard occasionally results in

---

16 Id. at 2084.
17 Id. at 2083.
18 Id. at 2081-82.
22 See *Lingle*, 125 S. Ct. at 2086.
23 Commentators generally have recognized that the Supreme Court applies three levels of scrutiny in equal protection cases, usually depending upon the classifications drawn. See, e.g., ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 645-47 (2nd ed. 2002); KATHLEEN M. SULLIVAN & GERALD GUNTHER, CONSTITUTIONAL LAW 601-04 (14th ed. 2001).
24 458 U.S. at 438.
26 The Court's approach to evaluating whether the economic impact of a regulation constitutes a taking is a two-step standard. It first asks whether the restriction deprives the landowner of all economic viability. If the answer is yes, then it is a categorical taking. If some economic viability remains, then the regulation is analyzed under a three-part balancing test derived from *Penn Central*. See Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 122 S.Ct. 1465, 1482-84 (2002); Palazzolo v. Rhode Island, 533 U.S. 606, 615-18 (2001); Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1015 & 1019 n. 8 (1992).
the finding of a taking, as a practical matter it is highly deferential and permits substantial restrictions on property owners.

The analogy to the three tiers of equal protection review is only a rough one, of course, and is not intended to suggest similar types of analysis. The three types of equal protection review each largely apply the same type of means/ends analysis, but they require different strengths of interest and precision of means, depending on the level of scrutiny being applied. The three levels of takings scrutiny, however, differ substantially in the tests used, not only in comparison to equal protection analysis but also in relation to each other. Nonetheless, the comparison of the different levels of scrutiny is appropriate. Like equal protection review, takings analysis can involve strict, intermediate, or deferential scrutiny, depending on the interests involved.

From this perspective the differing levels of scrutiny reflect understandable societal values on how the balance between private and public interests in land should be struck. As is commonly noted, property ownership involves both individual and communal dimensions, which themselves reflect several distinct policy concerns. As it has developed, the takings clause operates to balance the interests of individual and community as it relates to property ownership. Thus, the Court applies strict scrutiny in those instances where individual interests are paramount, while applying deferential standards where community concerns are more clearly implicated. In particular, the role of property in protecting individual autonomy has been primary in strict scrutiny, while "fairness"

---

27 The three levels of equal protection review all require that the challenged government action relate to some recognized interest. The different scrutiny applied at each level turns on the degree of required relationship and the strength or importance of the asserted government interest. Thus, mere rationality review involving the lowest degree of scrutiny only requires that the challenged action be rationally related to some legitimate government interest. See, e.g., Mass. Bd. of Retirement v. Murgia, 427 U.S. 307 (1973). Intermediate scrutiny requires that government actions be "substantially related" to "important government objectives." See Craig v. Boren, 429 U.S. 190 (1976). Strict scrutiny requires that government actions must be narrowly tailored to serve compelling government interests. See Grutter v. Bollinger, 539 U.S. 306 (2003).


29 Viewing the takings clause as balancing individual and community interests was implicit in the Court's initial recognition of regulatory takings in Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922). The Court acknowledged that government could not go on if it had to pay every time its regulations reduced the value of land. Id. at 413. On the other hand, the Court stated that if a regulation "goes too far it will be recognized as a taking." Id. at 415. The Court also concluded the opinion with the observation that "the question at bottom is upon whom the loss of the changes desired should fall." Id. at 416.
concerns have largely dictated scrutiny for the intermediate and deferential levels of scrutiny.

Characterizing the physical invasion and the exaction takings tests as forms of strict and intermediate scrutiny should strike most people as sensible. Characterizing the two-part *Lucas* and *Penn Central* tests as reflecting deferential review, however, might be surprising, and even a little odd, to some. The Court itself has never referred to the tests in this manner, and the *Penn Central* test in particular calls for a careful balancing of concerns not typically found with deferential review. Moreover, some commentators have viewed the Court's recent takings jurisprudence as overly protective of property rights and as posing a threat to environmental land use regulations—hardly deferential review. Yet viewed from a broad perspective, in which takings jurisprudence essentially balances the rights of individuals and community in how land is used, the *Lucas-Penn Central* analysis is highly deferential to the government's ability to restrict the use of land for the broader public good. It is true that on rare occasions these tests will result in finding land use restrictions invalid, and therefore they might be viewed as deferential review "with some teeth." However, from a broad perspective, government is given substantial latitude in regulating land, thus suggesting deferential scrutiny.

This article will review current takings jurisprudence as reflected in these three levels of scrutiny. Part I will briefly review the development of the Supreme Court takings doctrine. The next three parts of the article will then examine the three types of takings concerns and the three levels of scrutiny that are used, examining both the types of analysis applied and the rationales supporting the particular level of scrutiny.

II. BACKGROUND

Modern takings analysis began with the seminal case of *Pennsylvania Coal Co. v. Mahon*, where the Supreme Court first established that the mere regulation of property might constitute a taking. In *Pennsylvania Coal*, the Court reviewed a state statute that prohibited the mining of anthracite coal when subsidence damage might result. The effect of the statute was to force coal companies to keep a portion of the

---


31 260 U.S. 393 (1922).

32 Id. at 412-13.
coal in the ground. Although the Court acknowledged that government could not go on if it had to pay every time its regulations reduced the value of land,\textsuperscript{33} it stated that if a regulation goes too far it will be recognized as a taking.\textsuperscript{34} The Court concluded that the statute had indeed "gone too far" and therefore constituted a taking, but failed to explain that conclusion other than to state that the statute made the mining of anthracite coal "commercially impracticable."\textsuperscript{35}

Despite the lack of precision in the Court's analysis, \textit{Pennsylvania Coal} did recognize two important principles for understanding the balance of private and public interests in land use. First, it confirmed that land can be subject to regulations, even when it results in lost value, in order to pursue legitimate government purposes.\textsuperscript{36} Conversely, a taking occurs if the regulation "goes too far" or if the economic impact is of too great a magnitude.\textsuperscript{37} Under this embryonic "economic impact" analysis, private interests must necessarily yield to the public good to a certain extent. At some point, however, the degree of economic impact becomes so great that the private interest must be protected. Although the Court gave almost no guidance in discerning when this point is reached, it said that the question is ultimately one of fairness and where the burden of regulation should lie.\textsuperscript{38} This, in essence, involves a balancing of interests, determining where community concerns should end and private interests begin.

Despite the significance of its holding in \textit{Pennsylvania Coal}, the Court gave relatively little attention to the takings clause for more than half a century. The one notable exception was in the area of what has come to be known as "physical invasions," where the Court in several cases applied a near \textit{per se} rule that government activity that results in a physical invasion of private property is a \textit{per se} taking.\textsuperscript{39} Building on case law that long predated \textit{Pennsylvania Coal},\textsuperscript{40} the Court held that physical invasions constituted takings because they interfered with the right to exclude others. In so doing the Court gave little attention to the economic impact of the activity, instead finding that any interference with the right to exclude others constituted a taking.

\begin{itemize}
\item \textsuperscript{33} \textit{ld.} at 413.
\item \textsuperscript{34} \textit{ld.} at 415.
\item \textsuperscript{35} \textit{ld.} at 414.
\item \textsuperscript{36} \textit{ld.} at 413.
\item \textsuperscript{37} \textit{ld.} at 415.
\item \textsuperscript{38} \textit{ld.} at 416.
\item \textsuperscript{39} See United States v. Pewee Coal Co., 341 U.S. 114 (1951) (holding that government seizure of coal mine during war constituted a taking); United States v. Causby, 328 U.S. 256 (1946) (holding that overhead flights constituted a taking).
\item \textsuperscript{40} See, \textit{e.g.}, United States v. Cress, 243 U.S. 316 (1917) (cited in United States v. Causby, 328 U.S. 256, 266 (1946)).
\end{itemize}
Other than the physical invasion cases, the Court gave little attention to takings concerns again until its 1978 decision in *Penn Central Transportation Co. v. New York City*, in which it reviewed the validity of New York City's Landmark Preservation Law. The effect of the law, as applied to Penn Central's property, was to eliminate or to reduce greatly the pre-existing and quite valuable air rights owned by Penn Central. In finding the law valid, the Court began its analysis by noting it had previously eschewed any "set formula" for takings concerns, instead deciding takings claims on an essentially ad hoc basis. It then identified several factors in determining whether a taking occurred, including the nature of the government action, the diminution in value, and the degree of interference with investment-backed expectations. On this basis the Court held that the Landmark Preservation Law was not a taking as applied to Penn Central's property, emphasizing that the regulation still permitted a reasonable return on the land and that the regulation did not interfere with what had been the primary expectations of the landowner.

Although *Penn Central* affirmed the basic holding of *Pennsylvania Coal* – that land use regulations serving a legitimate government purpose might still constitute a taking if the economic impact is too severe – in several respects it suggested a quite deferential approach in assessing the economic impact issue. First, the Court clearly held that, in assessing the regulation's economic impact, the parcel is considered as a whole rather than examining only that portion subject to the regulation. Second, in assessing the degree of interference with investment-backed expectations, the Court emphasized that the landmark law did not prevent *Penn Central* from using the land as originally purchased and as it had been previously used. Thus, even though the law eliminated more intensive development

---

42 In *Penn Central*, the City of New York, pursuant to its Landmark Preservation Law, designated Grand Central Terminal, owned by Penn Central, as a "landmark." As a consequence, Penn Central could not make any exterior changes to the terminal, even if consistent with applicable zoning regulations, without prior approval of the Landmark Preservation Commission. Penn Central sought approval of two alternative plans to build either a 53 or 55 story addition on top of the terminal. The Commission rejected both plans. In response, Penn Central challenged the application of the Landmark Preservation Law as a taking. *Id.* at 115-19.
43 *Id.* at 124 (citing United States v. Cent. Eureka Mining Co., 357 U.S. 155, 168 (1958)).
44 *Id.* at 136.
45 *Id.* at 127-8.
46 "'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 government 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." *Id.* at 130-31.
47 The Court stated that Grand Central Terminal had "been used for the previous 65 years: as a railroad terminal containing office space and concessions." For that reason the Court said the Landmark Preservation Law did not "interfere with what must be regarded as Penn Central's primary expectation concerning the use of the parcel." *Id.* at 136.
opportunities previously permitted by zoning, the assurance of a reasonable return on the property viewed as a whole and the continuation of previous uses negated takings concerns.\textsuperscript{49}

In the opinion of many, \textit{Penn Central}'s more deferential approach to takings analysis has been turned on its head in recent years, with the Court deciding a number of regulatory takings cases almost always in favor of landowners. Indeed, starting in 1987 with its famous takings trilogy,\textsuperscript{50} the Court has decided eight major regulatory land use cases, with property owners prevailing in six of the decisions.\textsuperscript{51} Moreover, the Court has at times used language emphasizing a resolve to protect property rights, even on one occasion favorably comparing them to liberties such as speech.\textsuperscript{52} These decisions have therefore been understandably received with some concern by the environmental community, eliciting concerns over the future of environmental regulation and land use controls.\textsuperscript{53}

Despite the undeniable shift toward greater protection of property rights that these cases represent, as a practical matter the cases are a far cry

\textsuperscript{49}Id.

There have been several other takings cases decided during this period, but they do not directly involve the primary issues raised in a regulatory land use context. For example, this past term the Court decided three important takings cases, but none directly dealt with the substance of regulatory land use. In \textit{Kelo v. City of New London}, 125 S. Ct. 2655, 2668 (2005), the Court clarified the "public use" requirement for exercise of eminent domain. In \textit{San Remo Hotel v. City and County of San Francisco}, 125 S. Ct. 2491, 2507 (2005), the Court held it will not create an exception to the federal full faith and credit statute, 28 U.S.C. §1738, for land use litigants seeking to advance federal takings claims in federal court. In \textit{Lingle v. Chevron}, 125 S. Ct. 2074, 2083 (2005), the Court clarified that the \textit{Agins} "substantially related to a legitimate interest" test is not part of the regulatory takings analysis. This holding certainly applies to regulatory land use cases, yet the case itself did not involve a land use regulation and the Court never addressed how the core taking analysis should apply in the case.

\textsuperscript{52}See \textit{Dolan}, 512 U.S. at 392 (stating that the takings clause should not be "relegated to the status of a poor relation" to the First and Fourth Amendments).
\textsuperscript{53}See, e.g., John A. Humbach, \textit{Evolving Thresholds of Nuisance and the Takings Clause}, 18 \textit{COLUM. J. ENVTL. L.} 1, 3 (1993) (stating the possible effect of \textit{Lucas} is to stunt legislative protection against harmful land uses); Marilyn Phelan, \textit{The Current Status of Historical Preservation Law in Regulatory Takings Jurisprudence: Has the Lucas "Missile" Dismantled Preservation Programs?}, 6 \textit{FORDHAM ENVTL. L. J.} 785, 787 (1995) (stating that \textit{Dolan} and \textit{Lucas} "raise questions whether the Court has indeed adopted a more expansive course" in its takings analysis that might have a profound impact on historic preservation programs); Daniel A. Crane, Comment, \textit{A Poor Relation? Regulatory Takings After Dolan v. City of Tigard}, 63 U. CHI. L. REV. 199, 201 (1996) ("T[he Rehnquist Court has begun to reinvigorate the Takings Clause, much to the joy of property rights activists and to the dismay of environmentalists").
from an elevation of property interests over environmental concerns. Rather, they suggest a balanced treatment of the relationship between private and public interests, with the scrutiny applied turning on the type of taking problem presented. Although the decisions confirm and establish what might be viewed as heightened and intermediate scrutiny for certain government acts, they continued to affirm a generally deferential approach for the vast majority of land use regulations.

The Court’s treatment of takings might be best treated by examining five of the recent decisions – Nollan v. California Coastal Commission,\(^5^4\) Dolan v. City of Tigard,\(^5^5\) Lucas v. South Carolina Coastal Council,\(^5^6\) Palazzolo v. Rhode Island,\(^5^7\) and Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency.\(^5^8\) In Nollan, one of the 1987 decisions, the Court addressed whether a taking occurs when development approval is conditioned on a landowner first providing a physical dedication of land, where the dedication is unrelated to the development.\(^5^9\) Emphasizing the Court’s longstanding concern for physical invasions of property,\(^6^0\) the Court held that such exactions would be valid only if there is an “essential nexus” between the required dedication and the asserted state interest that would justify denial of the development in the first instance.\(^6^1\) On that basis, the Court struck down an exaction that required the owner of beachfront property, who wanted to build a larger house, to dedicate an easement to the public along the beach. The Court found the exaction invalid, stating there was no relationship between it and purported concerns that the house would block views from the road.\(^6^2\) The Court did not answer the question of how much of a relationship is needed, noting that under the facts before it the exaction was completely unrelated to the developmental impact.\(^6^3\)

---

\(^5^5\) 512 U.S. 374 (1994).
\(^5^7\) 533 U.S. 606 (2001).
\(^5^9\) 483 U.S. at 827-29. In Nollan, the owners of a small house on the Pacific coast sought a “coastal development permit” from the California Coastal Commission in order to demolish the house and replace it with a larger one. The Commission approved the permit contingent on the Nollans granting a public easement across their property between the high tide mark and a seawall. After an administrative hearing upheld the grant of the easement as a prerequisite to permit approval, the Nollans challenged the easement requirement as a taking.

\(^6^0\) Id. at 831.
\(^6^1\) Id. at 837.
\(^6^2\) Id. at 838. The Coastal Commission had tried to defend the easement requirement on the basis that the larger house would interfere with “visual access” to the beach for people on the road and in turn create a “psychological barrier” to use of the beach for those on the road. The Court found no nexus at all between these problems and the required easement, stating “[i]t was quite impossible to understand how a requirement that people already on the public beaches be able to walk across the Nollans’ property reduces any obstacle to viewing the beach created by the new house.”

\(^6^3\) Id.
The question of how much of a relationship is required was answered seven years later in *Dolan v. City of Tigard*, where the Court again considered the validity of a development exaction requirement. In that case, the city had conditioned approval to double the size of an existing store upon two exactions, one for a pedestrian/bike path and the other for a greenway development. In evaluating the validity of the exactions, the Court adopted a test requiring "rough proportionality" between the exaction and developmental impacts. In particular, the Court stated that, although precise calculations are not required, "the city must make some sort of individual determination that the required dedication is related both in nature and extent to the impact of the proposed development." Under this standard, both exactions were found to be invalid, the Court noting that the city had failed to show proportionality with either.

Together, *Nollan* and *Dolan* established the applicability of takings analysis to the increasingly important practice of development exactions. In so doing, however, the Court carved out a unique analytical approach distinct from that previously applied in either the physical invasion or regulatory takings areas. Although the "rough proportionality" standard calls for a level of scrutiny typically not seen with land use regulations, neither does it require the exactitude one might expect from strict scrutiny. Indeed, the decisions clearly affirm the validity of development exactions as a land control technique, but simply require that exactions relate to and flow from the development in question. As a practical matter it established what might be viewed as an intermediate standard of scrutiny — a characterization the Court itself suggested when adopting the standard.

As important as *Nollan* and *Dolan* were, they concerned the more focused practice of development exactions, rather than the broader

---

64 512 U.S 374 (1994).
65 Id. at 380.
66 Id. at 391.
67 Id.
68 With regard to the greenway dedication, the Court acknowledged that restricting development in the floodplain would help confine the increased stormwater runoff created by the store expansion. However, the Court said the city failed to explain why a public, rather than a private, greenway was necessary. Both would equally serve to address the problem of increased stormwater runoff. Thus, the additional requirement of a physical dedication of the property, which would intrude on the Dolans' right to exclude others, was altogether unrelated to the problems posed by the development. *Id.* at 392-95. The Court similarly acknowledged that a larger store might increase traffic, but the city made no effort to show how the required dedication for a pedestrian/bike path would relate to a decrease in traffic. *Id.* at 395-96.
69 The Court in *Dolan* began its analysis of how much of a relationship was required between development impact and requested exaction by reviewing state court approaches to the issue. The Court identified three general groups of states. First were those states taking a very deferential approach, where even generalized statements regarding the required connection were sufficient. The Court rejected this standard as too lax to provide sufficient protection for property rights. Second were those states that applied a "very exacting" standard, which the Court rejected as too demanding. It then aligned itself with what it called the intermediate and majority position. *Id.* at 389-91.
regulatory practice of restrictions on the use of land. This was the focus of the *Lucas* decision, in what might well be viewed as the most significant takings case since *Pennsylvania Coal*. In *Lucas* the plaintiff purchased two undeveloped beachfront lots for $975,000, both of which were zoned for residential development at the time of purchase. Subsequently, a coastal preservation law was passed that had the effect of prohibiting any development on the property.\(^{70}\) Lucas challenged the restriction as a taking. The state trial court found that the restriction rendered the property "valueless," and therefore constituted a taking under *Pennsylvania Coal*.\(^{71}\) The South Carolina Supreme Court reversed, stating that however great the economic impact might be, it was not a taking because it was enacted "to prevent serious public harm."\(^{72}\)

The United States Supreme Court began its analysis by stating that, although most takings inquiries are generally fact specific and ad hoc in nature, it had recognized two types of categorical takings in previous cases, in which a taking is found once certain facts are established.\(^{73}\) The first category is where the government "physically invades" or requires that another be permitted to invade private property. In such situations a compensable taking is nearly automatic, "no matter how small the economic impact and no matter how weighty the public purpose behind it."\(^{74}\)

The second type of categorical taking recognized in *Lucas* occurs "where the regulation denies all economically beneficial or productive use of land."\(^{75}\) In recognizing this type of categorical taking, the Court pointed to a number of cases in which it had stated, albeit as dicta, that a taking occurs when a regulation "denies an owner economically viable use of his land."\(^{76}\) In justifying this categorical taking, the Court noted that "in the extraordinary circumstance" when land has lost all economic viability, "it is

\(^{70}\) *Lucas*, 505 U.S. at 1008-09.

\(^{71}\) Id. at 1009.

\(^{72}\) Id. at 1010. The South Carolina Supreme Court relied upon what it perceived to be the U.S. Supreme Court's "nuisance" line of cases, such as *Mugler v. Kansas*, 123 U.S. 623 (1887), which arguably held that there is no talking when government regulates noxious activity, no matter how great the economic loss to the landowner.

\(^{73}\) Id. at 1015.

\(^{74}\) Id.

\(^{75}\) Id.

\(^{76}\) Id. at 1015-16. The Court had used the phrase "economically viable" in *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980), as part of a two-prong test for takings, stating that a land use law will be taking if it "does not substantially advance legitimate state interests or denies an owner economically viable use of his land." The Court used that same articulation of the standard in a series of decisions in the 1980's to begin discussion of takings. See, e.g., *Nollan*, 483 U.S. at 834; *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 495 (1987); *Hodel v. Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 295-296 (1981). In none of the decisions was there a finding of "no economic viability." The first part of the test, stating that a taking exists if a regulation "does not substantially advance legitimate state interests," was rejected by the Court in *Lingle v. Chevron*, 125 S. Ct. 2074, 2087 (2004) as being inappropriate to a takings analysis.
less realistic to indulge our usual assumption that the legislature is simply “adjusting the benefits and burdens of life.”77 The Court indicated, however, that loss of economic viability would not constitute a taking where the regulation is merely prohibiting a common law nuisance, since such land use was not part of the landowner’s property interest.78

In recognizing that the loss of economic viability constituted a categorical taking, the Court was careful not to preclude the possibility of finding a taking when a restriction reduces, but does not altogether eliminate, economic viability. In a footnote, the Court noted that such a restriction might still constitute a taking under the Court’s ad hoc balancing test in Penn Central.79 It did not clearly define how such a test might operate, but stated that “[t]he economic impact of the regulation on the claimant and . . . the extent to which the regulation interfered with distinct investment-backed expectations’ are keenly relevant” to its general takings analysis.80 Thus, the Court established what might be viewed as a two-fold test for analyzing whether the economic impact of a regulation constitutes a taking: first, there is a categorical taking if the regulation deprives the owner of all economic viability, absent a finding that the prohibited use would have constituted a common law nuisance; second, even if some economic viability remains, a court is to examine the interference with investment-backed standards under Penn Central.

In some respects Lucas was understandably hailed as a significant victory for property rights. Most importantly, it confirmed the earlier premise of Pennsylvania Coal, that regulation alone might constitute a taking, and it identified at least one instance in which that occurs without balancing interests. Yet, as the Court itself recognized, deprivation of all economic viability is a relatively rare occurrence, and the facts of Lucas are rather unique.81 For that reason, Lucas was not the seismic shift seen by some, but left the basic balance of private and community rights largely unchanged.

The past several years have continued to see the Court’s active involvement in the takings area, with two cases of particular significance. In the first case, Palazzolo v. Rhode Island, the Court addressed several issues, the most prominent being whether notice of a regulation when property is acquired precludes a taking claim.82 In that case, the claimant

---

77 Lucas, 505 U.S. at 1017-18.
78 See id. at 1029-31. The Court reasoned that, since under common law concepts of property a landowner cannot cause a nuisance to his or her neighbor, the activity being regulated would not “inhere in the title” to begin with.
79 Id. at 1019 n. 8.
81 See id. at 1017-18.
in question had acquired property subsequent to restrictions being placed on the property to protect coastal wetlands. After having several development proposals for the property denied because of the wetlands' restrictions, the landowner sued on takings grounds. The trial court held there was no taking, and the Rhode Island Supreme Court affirmed, holding, among other things, that any takings claim that might have existed was precluded because Palazzolo had notice of the restrictions when he acquired the property.

The Court began its analysis by affirming the two-part takings test for regulatory takings earlier established in Lucas and Penn Central. Thus, it stated that, subject to certain qualifications, a regulation that "denies an owner all economically beneficial or productive use of land" will be a categorical taking under Lucas. It affirmed, however, that a regulation which falls short of eliminating all economic viability might still be a taking under Penn Central, and thus must be separately analyzed under what it labeled the "complex of factors" from that decision. As stated by the Court, these include "the regulation's economic effect on the landowner, the extent to which the regulation interferes with reasonable investment-backed expectations, and the character of the government action." Importantly, the Court stated that this analysis is to be "informed by the purpose of the Takings Clause," which, reiterating a frequently emphasized point, "is to prevent the government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."

The Court, after addressing the initial question of ripeness, turned its attention to the central issue in Palazzolo: whether notice of a regulation

---

83 The claimant, Palazzolo, had formed a small corporation in 1959 for the sole purpose of acquiring the land in question. At that time the property was not subject to special coastal wetlands restrictions. In 1977 the Rhode Island Coastal Resources Management Council enacted special regulations which prohibited any development without prior approval of the Council. In 1978 the state revoked the corporation's corporate charter for failure to pay taxes. As a result, the property passed to Palazzolo as the corporation's sole shareholder, who thereafter owned the property personally. The Court treated Palazzolo as becoming owner in 1978, a year after the restrictions were in place. See id. at 613-14.

84 Id. at 613-15.
86 Palazzolo, 533 U.S. at 615. The qualifications alluded to by the Court concerned the observation in Lucas that a landowner cannot recover for a loss of all economic viability where the restriction constitutes a "background principle" of law. See id. at 622-23 (citing Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1029 (1992)).
87 Id. at 617-18.
88 Id. at 617.
90 See Palazzolo, 533 U.S. at 618-25.
when property is acquired precludes a takings claim.\textsuperscript{91} As noted above, the Rhode Island Supreme Court had held that Palazzolo's notice of the restriction precluded a takings claim.\textsuperscript{92} This in fact reflected a position frequently taken by lower courts, which often rejected takings claims when property owners were aware of restrictions at the time the property was purchased.\textsuperscript{93} Whether viewed as an issue of notice or of negation of investment-backed expectations,\textsuperscript{94} the final result was the same in almost all lower court decisions: If the challenged restriction existed when the property was acquired, then the current owner could not succeed on a takings claim.

The Supreme Court rejected this position in \textit{Palazzolo}, stating that post-regulation acquisition of property did not preclude challenging the regulation as a taking.\textsuperscript{95} In so holding, the Court emphasized two concerns: First, restrictions that are unreasonable when imposed do not become less so over time. Second, rejection of the notice rule was necessary to protect owners at the time a restriction is imposed; otherwise, pre-regulation owners would essentially lose the right to transfer their property.\textsuperscript{96} Thus, rejection of the notice rule was necessary not so much to protect the interests of the current owners as to secure full protection for the rights of the landowner when the restriction was imposed. The Court's holding, however, was in part qualified by a concurring opinion by Justice O'Connor in which she said that, although notice should not preclude a takings claim, notice of a restriction can play a role in assessing the degree of interference with investment-backed expectations under \textit{Penn Central}.\textsuperscript{97} The four dissenting justices were each careful to agree with O'Connor on this point,\textsuperscript{98} making a majority of five justices stating that notice can continue to play a role in evaluating the degree of interference with investment-backed expectations.

\textsuperscript{91} See id. at 626-27.  
\textsuperscript{94} See, e.g., Claridge v. N.H. Wetlands Bd., 485 A.2d 287, 291 (N.H. 1984) ("A person who purchases land with notice of statutory impediments to the right to develop that land can justify few, if any, legitimate investment-backed expectations of development rights which rise to the level of constitutionally protected property rights").  
\textsuperscript{95} See \textit{Palazzolo}, 533 U.S. at 627, 630.  
\textsuperscript{96} See id. at 627.  
\textsuperscript{97} See id. at 632-36 (O'Connor, J., concurring).  
\textsuperscript{98} See id. at 634-45 (Stevens, J., dissenting); id. at 654 n.3 (Ginsburg, J., dissenting) (joined by Justices Souter and Breyer).  
\textit{See also id.} at 654 (Breyer, J., dissenting) (agreeing with O'Connor on the issue of notice).
The Supreme Court’s most recent land use takings decision is *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*. As with *Palazzolo*, the case involved a rather focused issue: whether a moratorium that prohibited development for up to thirty-two months constituted a temporary taking. The landowner argued that moratoria of any significant length were categorical takings under the combined logic of *Lucas* and *First English Evangelical Lutheran Church v. County of Los Angeles*. *Lucas* said that a loss of all economic viability constitutes a categorical taking. *First English* held that even temporary takings required just compensation under the Fifth Amendment. Therefore, since a moratorium prohibits all economic viability for a temporary period, it was argued that it should be recognized as a temporary taking under the combined logic of the two cases.

The Supreme Court rejected this argument, holding that a moratorium that temporarily deprives an owner of economic use is not a categorical taking. It stated that the categorical rule announced in *Lucas* was limited to the “‘extraordinary case’” in which a regulation deprives a landowner “of all economically beneficial uses.” This can occur only when a regulation is intended to be permanent when enacted because, in the case of a temporary prohibition on economic use, the property recovers value when the prohibition is lifted. To hold otherwise would permit landowners to conceptually sever a thirty-two month segment from the fee simple estate and then analyze “whether the segment had been taken in its entirety by the moratoria.”

The Court proceeded to note that such attempts at conceptual severance were precluded by *Penn Central*, which stated that, in analyzing takings, the parcel must be considered as a whole. According to the majority in *Tahoe*, this includes not only the full geographic dimensions of the property, but also the temporal dimensions of the property. Thus, a

---

100 See id. at 306.
101 See *Tahoe*, 122 S.Ct. at 1477-78.
102 See *Lucas*, 505 U.S. at 1015.
105 See id.
106 Id. at 330.
107 Id. at 331.
108 Id.
109 The Court stated that land is defined by both “geographic” and “temporal” dimensions, and that both “must be considered if the interest is to be viewed in its entirety.” The Court stated that only a permanent deprivation of the entire geographic area can constitute a categorical taking. A temporary taking of the entire geographic area cannot be a categorical taking, since the property recovers its value when the restriction is removed. Thus, there is not a loss of all economic viability. See id. at 331-32.
permanent deprivation of economic use on all of a parcel is a categorical taking, while a temporary deprivation is not.\(^{110}\)

Although the Court held that moratoria would therefore not constitute categorical takings,\(^{111}\) it did not go so far as to declare moratoria never vulnerable to a takings challenge. Instead, it held that the *Penn Central* test was the appropriate standard for determining when a moratorium might constitute a taking.\(^{112}\) This is necessarily an ad hoc and very particularized analysis, requiring a "weighing of all relevant circumstances."\(^{113}\) Importantly, as in *Palazzolo*, the Court emphasized that the analysis was to be guided by the fundamental principal of "fairness and justice."\(^{114}\)

Read together, these five recent decisions recognize three types of takings scenarios and establish what might be loosely labeled as strict, intermediate, and deferential standards of review to address them. In dictum, the Court continued to give the highest protection possible to physical invasions, suggesting a near *per se* rule that makes even the most minimal permanent invasion a taking.\(^{115}\) *Dolan* established intermediate scrutiny in the form of the "rough proportionality" standard that applies to the use of development exactions.\(^{116}\) Finally, *Lucas*, *Palazzolo*, and *Tahoe* confirm that run of the mill land use restrictions are subject to a two-step "economic impact" analysis, which first examines whether there is a loss of all economic viability, and, if economic viability remains, analyzes the restriction under the *Penn Central* factors.\(^{117}\) Although landowners prevailed in two of these decisions, the victories were of quite limited reach. The Court in *Lucas* acknowledged it was addressing a very rare scenario, and the victory in *Palazzolo* was on the isolated issue of notice and was substantially undermined by O'Connor's concurring opinion. As we shall see, the basic two-step test outlined in those cases has turned out to be very deferential.

---

\(^{110}\) *Id.*

\(^{111}\) After rejecting the principal argument that the combination of *First English* and *Lucas* made the moritorium a categorical taking, the Court also briefly considered seven other theories that might require a conclusion that on its face the moratorium in question constituted a taking. The Court concluded that none of these theories would support finding the moratorium a categorical taking. *See id.* at 33-42. The Court summarized by stating that the "interest in 'fairness and justice' will be best served by relying on the familiar *Penn Central* approach when deciding cases like this, rather than attempting to craft a new categorical rule." *Id.* at 342.

\(^{112}\) *Id.*

\(^{113}\) *Id.*

\(^{114}\) *Id.* at 334-36, 342.

\(^{115}\) *See Tahoe*, 535 U.S. at 321-22; *Dolan*, 512 U.S. at 384; *Lucas*, 505 U.S. at 1015.

\(^{116}\) *Dolan*, 512 U.S. at 391.

\(^{117}\) *See Tahoe*, 535 U.S. at 342; *Palazzolo*, 533 U.S. at 615, 617-18; *Lucas*, 505 U.S. at 1019 n. 8.
These three standards, which will be examined more closely in the next section, reflect different levels of accommodation between private and public interests in land. In striking this balance, however, the Court consistently stated that the principal purpose of the takings clause is "to bar the Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." This language was first used in 1960 in Armstrong v. United States, and has since been consistently repeated by the Court as the primary policy concern underlying its takings jurisprudence. The Court's recent decisions in Palazzolo and Tahoe have particularly emphasized "fairness and justice" as the central concern of takings jurisprudence. The three distinct levels of takings review might therefore be fairly understood as the Court's respective accommodation of interests in determining when property owners themselves should bear the burden of regulation and when the public should bear the burden through payment of just compensation.

The next three sections of the article will examine more thoroughly the three types of takings and the three levels of review. These sections will examine both the application of each standard and the rationales for the balance between private and public interests struck by the Court. Although takings jurisprudence remains far from clear, this article will suggest that, for the most part, the balance is a sensible one.

III. PHYSICAL INVASIONS AND STRICT SCRUTINY

Perhaps the most certain aspect of takings jurisprudence is the Supreme Court's consistent treatment of permanent physical invasions of private property as per se takings, no matter how minimal the economic impact. As noted above, Lucas, in dictum, recognized this as one of two types of categorical takings, in which no balancing of respective interests was required, rather, once an invasion or occupation is shown, a taking is established. The near-automatic nature of this type of taking was similarly recognized in Nollan and in Dolan, decisions that were both predicated, in part, on the Court's physical invasion standard.

The Court's close scrutiny of physical invasions as takings predates even Pennsylvania Coal, finding its origins in several decisions rendered more than a century ago. For example, in Pumpelly v. Green Bay Co.,

120 See Tahoe, 535 U.S. at 323-33, 342; Palazzolo, 533 U.S. at 617-18.
121 Lucas, 505 U.S. at 1015.
122 See Dolan v. City of Tigard, 512 U.S. 374, 384 (1994); Nollan, 483 U.S. at 831 ("had California simply required the Nollans to make an easement across their beachfront available to the public on a permanent basis . . . we would have no doubt there would have been a taking.").
123 13 Wall 166, 20 L.Ed. 557 (1872).
the Court held that permanent flooding of private property as a consequence of a state authorized dam constituted a taking. The Court stated that "where real estate is actually invaded by superinduced additions of water, earth, sand, or other material, or by having any artificial structure placed on it, so as to effectually destroy or impair its usefulness, it is a taking, within the meaning of the Constitution." 124 In several subsequent decisions the Court affirmed that permanent invasions by flooding constitute a taking, distinguishing it from merely temporary interferences. 125 The Court likewise suggested in other early cases that similar types of permanent physical invasions, even when involving only small areas, such as with telephone or telegraph lines, constituted takings. 126

More recent years have seen the physical invasion principle applied to other types of government activities. For example, in United States v. Causby, 127 the Court held that frequent flights by military aircraft a short distance above the ground constituted a taking. 128 Similarly, in Kaiser Aetna v. United States 129 the Court held that recognition of a navigational servitude that consequentially required public access to a private marina was a taking. 130 In finding a taking, the Court emphasized that the mandated servitude deprived the landowner of the right to exclude, which it labeled as "one of the most essential sticks in the bundle of rights that are commonly characterized as property." 131

What is probably the Court's most significant physical invasion case came in 1981 in Loretto v. Teleprompter Manhattan CATV Corp., 132 where it held that a New York law that required landlords to provide cable access to tenants constituted a taking. In finding the law unconstitutional, the Court noted that the law's effect was to give cable companies the right to run cables on private property and thereby physically occupy a portion of

124 Id. at 181.
125 See United States v. Lynch, 188 U.S. 445, 468-70 (1903) (flooding of land caused by government built dams and training walls constituted permanent physical invasion and taking); United States v. Cress, 243 U.S. 316 (1917) (government lock and dam subjected land to frequent flooding constituted permanent invasion so as to be a taking). In contrast, the Court held that there was not a taking where government action caused a temporary flooding with some resulting damage, instead of "an actual, permanent invasion of the land, amounting to an appropriation of the land, and not merely an injury to, the property." Sanguinetti v. United States, 264 U.S. 146, 149 (1924); see also Bedford v. United States, 192 U.S. 217, 225 (1904).
127 328 U.S. 256 (1946).
128 Id. at 261.
130 Id. at 180 ("the imposition of the navigational servitude in this context will result in an actual physical invasion of the privately owned marina . . . And even if the Government physically invades only an easement in property, it must nonetheless pay compensation.").
131 Id. at 176.
Although the Court acknowledged that the degree of invasion was in fact quite small and only caused minimal economic impact, it nevertheless stressed that any physical invasion constitutes a taking under the Court's precedent. Moreover, the minimal economic impact was not a consideration, since physical invasion takings were not predicated on economic concerns.

In reaffirming the bright line physical invasion standard, the Court stressed not only its longstanding concerns about such actions, but also what it perceived as the critical role that the right to exclude played in property ownership. Emphasizing that the right to exclude is at the core of property ownership, the Court noted that the owner of land "suffers a special kind of injury when a stranger directly invades and occupies the owner's property."

As noted above, the near per se rule regarding physical invasions seen in Loretto and its progeny has been reiterated in dicta in a number of the recent takings cases. As it currently stands, the rule might be fairly characterized as a form of strict scrutiny because of the near absolute nature of the prohibition against physical invasions. Although the test itself does not involve a closely scrutinized means/ends formula, such as is found in equal protection review, it nevertheless essentially prohibits any form of permanent, physical invasion of property. This is true no matter how small the actual invasion, or how minimal the economic impact on the landowner's interest. Thus, in the same way that equal protection analysis closely guards against race-based classifications, so too does the physical invasion standard closely guard against even the most minimal occupations of land.

The physical invasion test therefore strikes the balance between private and public interests heavily in favor of private rights when the right to exclude is at stake. In so doing, the Court has consistently emphasized that the right to exclude others is at the core of what we understand as property rights. In this sense it is qualitatively different than mere use

---

133 See id. at 438.
134 See id. at 434-35 (where a permanent physical invasion occurs there is a taking "without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner.").
135 See id. at 426-35 (reviewing Court's treatment of permanent physical invasions).
136 Id. at 436 (emphasis original).
137 See Tahoe, 535 U.S. at 322; Palazzolo, 533 U.S. at 617; Lucas, 505 U.S. at 1015; Nollan, 483 U.S. at 1015.
138 See, e.g., Tahoe, 535 U.S. at 322 ("involves the straightforward application of per se rules"); Lucas, 505 U.S. at 1015 (physical invasion constitutes a categorical taking).
139 See Tahoe, 535 U.S. at 322 (physical invasion is a taking "no matter how small"); Palazzolo, 533 U.S. at ("even a minimal 'permanent physical occupation'... requires compensation"); Lucas, 505 U.S. at 1015 (physical invasion is a taking "no matter how minute the intrusion, and no matter how weighty the public interest behind it").
140 See Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979) (right to exclude others is "one of the most essential sticks in the bundle of rights that are commonly characterized as property");
rights and deserving of almost absolute protection. As such, even the most minimal intrusions are problematic and the economic impact is altogether irrelevant to the Court's analysis.\footnote{141}

The near sacred status the Court has given to the right to exclude, as reflected in the physical invasion test, has not been without critics, especially when compared to the more deferential standard with regard to use restrictions.\footnote{142} As stated in the dissent in \textit{Loretto}, for many property owners, especially those with nonresidential land, the economic use of property is its primary purpose and is more important than the right to exclude.\footnote{143} This is particularly true when comparing minimal physical invasions with substantial economic loss. Critics have noted that, to many landowners, severe use restrictions are more problematic and constitute a greater interference with expectations than minor physical invasions, and therefore to give almost complete protection to one and only limited protection to the other does not coincide with landowner interests.\footnote{144}

Although it is undoubtedly true that, for many property owners, physical invasions are less of a concern than significant use restrictions, the bright-line physical invasion test can be justified for several reasons. As noted by the Court in \textit{Loretto}, the bright-line physical invasion test avoids the inevitable line drawing problems that would otherwise occur.\footnote{145} More fundamentally, however, the bright-line rule, which precludes balancing of the particular interests involved, simply reflects that the Supreme Court itself has already done the balancing in advance and concluded that the right to exclude others is so fundamental to our concept of property that trade-offs should not occur. This does not preclude government from physically invading or appropriating property but simply requires that government pay just compensation if it does so.

Seen in this way, the Court's near absolute physical invasion test is understood as recognition of the particularly significant role that the right to


\footnote{142}{The Court has not considered the severity of economic impact in deciding physical invasion cases, see \textit{Loretto} v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1981), and has emphasized that even minimal invasions are unconstitutional, see, e.g., \textit{Tahoe}, 535 U.S. at 323 (physical invasion is a taking "no matter how small"); \textit{Lucas}, 505 U.S. at 1015 (physical invasion a taking "no matter how minute the intrusion").}

\footnote{143}{See \textit{Loretto}, 458 U.S. at 447 (Blackmun, J., dissenting).}

\footnote{144}{See \textit{id. See also} Costonis, supra note 142 at 507-08 (stating that \textit{Loretto}'s "greatest defeat" was its "failure to acknowledge that fairness is the takings clause's dominant goal").}

\footnote{145}{See \textit{Loretto}, 458 U.S. at 436-37.}
exclude plays in property ownership. That in turn can be justified on several grounds. First, as noted by the Court in *Loretto*, the right to exclude cuts across each of the three traditional aspects of property ownership: possession, use, and disposal. When property is occupied by the government or by a third party, not only does this occupation interfere with the owner's right to possession, but it also greatly interferes with or negates the use and disposal of that portion of occupied land. Thus, as noted by the Court, physical invasions do not just take a strand from the bundle of property rights, but in fact cut through each of the strands that are in the bundle.

Second, as a general matter, the right to exclude is essential to productive use of land in our system. The ability to exclude others from property is an important incentive to the investment of resources. If others cannot be excluded from property, there are few incentives to invest in property improvements, since any improved value is shared by and potentially dissipated by others. To take an extreme example, there is little incentive to improve property by building a home if others cannot be excluded from the premises. By ensuring that the full benefits of land investments and improvements are reserved to the owner, the right to exclude provides incentives for land development, which is essential to economic growth and personal well-being.

On a larger scale, the right to exclude is a central component to ensuring that incentives exist to provide for a number of critical societal goods. By ensuring that one "reaps what one sows," the right to exclude provides incentives for the provision of critical resources, such as housing, for our society. Minimal physical invasions do not necessarily threaten such incentives, but the right to exclude as a general matter is so critical to our economic and property system that it should be guarded from even minimal intrusions.

Third, and perhaps most important, the right to exclude is necessary for personal autonomy and privacy, which serves an important mediating function in society. The Supreme Court strongly voiced this position as it relates to the home in *Carey v. Brown*, when it said:

Preserving the sanctity of the home, the one retreat to which men and women can repair to escape from the

---

146 See 458 U.S. at 435-36.
147 See id. at 435.
149 See id. at 268 (without "reasonably secure expectations of continued ownership" there would be little reason to improve resources and property); John A. Humbach, *Law and a New Land Ethic*, 74 MINN. L. REV. 339, 347 (1989) ("[p]eople more likely will sow when they are assured that they will reap and enjoy the fruits of their labors").
150 447 U.S. 455 (1980).
tribulation of their daily pursuits, is surely an important value. Our decisions reflect no lack of solitude for the right of an individual 'to be let alone' in the privacy of the home, 'sometimes the last citadel of the tired, the weary, and the sick' . . . . The State's interest in protecting the well-being, tranquility, and privacy of the home is certainly of the highest order in a free and civilized society.  

Beyond economic use, property serves to preserve autonomy and privacy and to ensure a space secure from both government and the public. It is this mediating function, in which property serves to buffer the individual from society and the state, that perhaps most strongly justifies the bright-line physical invasion standard. In balancing the relative private and public interests involved, the private interest in maintaining privacy and autonomy is made paramount. 

It is true that many of the types of physical invasions struck down by the Supreme Court do not realistically threaten autonomy and privacy concerns or, for that matter, future investment in property. Yet the Court seems to recognize that the right to exclude, more than any other characteristic of property ownership, distinguishes our system of private property. And, as noted, that core understanding of property ownership is essential to productive use of property for society's benefit and to individual autonomy. Thus, the Court appears unwilling to permit the slightest permanent interference with the right to exclude, not because of the harms posed in specific cases themselves, but because of where the slippery slope might lead.

The near absolute manner in which the physical invasion test is applied suggests a standard analogous to strict scrutiny. In at least one important way, however, the physical invasion test differs from strict scrutiny. One reason the Court applies strict scrutiny to racial classifications, for example, is that race is rarely a relevant basis for classifying people. Hence, the Court is suspicious of any use of race. As the Court's recent decision in Grutter v. Bollinger demonstrates, however, the Court will examine to see if there is a compelling government interest that supports the classification, and, if narrowly drawn, will permit

\[151\] Id. at 471 (citations omitted).
\[152\] This, of course, does not mean that government cannot have temporary and limited access to property for investigation purposes, nor does it mean that property owners have a right to do whatever they want in the privacy of their home. The law permits reasonable searches of property, including homes, and can criminalize activity, such as drug use in the privacy of the home. What the balance means, however, is that the state cannot claim a possessory interest in private property, for the public welfare, absent compensation. In this sense the law clearly makes private property interests paramount over broader public concerns.
racial classifications.\textsuperscript{154} Thus, although it is an uphill battle, strict scrutiny under equal protection does examine the strength of the state’s interest and, in rare instances, will find it justifies the classification.

With regard to permanent physical invasions, however, the Court gives little or no regard to the strength of the government’s interest. For example, in \textit{Lucas} the Court stated that compensation is required for any physical invasion “no matter how minute the intrusion and no matter how weighty the public purpose behind it.”\textsuperscript{155} This disregard for the importance of the state interest when physical invasions are involved can be explained, in part, by the option of compensation to secure the interest where necessary. Thus, the state is never deprived of the opportunity to pursue weighty interests that might interfere with a landowner’s right to exclude. It just has to pay for it. Seen in that light, the \textit{per se} rule against uncompensated physical invasion, while drawing the balance heavily in favor of the individual and against the state, still leaves ample room for the state to pursue important interests.

Defining the public/private balance this way makes sense both conceptually and pragmatically. How landowners use their property frequently imposes broader costs on society, and society can therefore legitimately assert some communal interest in \textit{land use} so as to avoid or at least minimize those costs. In contrast, the right to exclude others from land is less likely to have broader societal implications. In such an instance it is typically hard to conceptualize the right to exclude as infringing on public rights and interests. Instead, it appears that the public is trying to obtain additional rights. Thus, the broader public interest, which can be considerable with regard to how land is used, is more minimal in terms of public access to land.

From a pragmatic perspective, drawing such a one-sided balance between private and public interests when there is a permanent physical invasion poses few problems. As noted, the public can always obtain the right to invade by paying compensation. Generally speaking, the public will infrequently need to assert an invasive interest in land, far less frequently than with regard to use restrictions. Moreover, the actual just compensation will be minimal, since often only relatively minor parts of property will be affected. Thus, there is little reason to believe that the Court’s rigid physical invasion test will preclude the federal and state governments from pursuing important interests.

\textsuperscript{154} See id. at 336-39.
\textsuperscript{155} \textit{Lucas}, 505 U.S. at 1015.
IV. DEVELOPMENT EXACTIONS, "ROUGH PROPORTIONALITY," AND INTERMEDIATE REVIEW

The second type of taking scenario identified by the Court is development approval made contingent upon providing development exactions in the form of a physical dedication of land. This type of taking was first recognized in Nollan v. California Coastal Commission, where the Court required an essential nexus between the required development exactions and the development impacts, meaning that there had to be at least some minimal relationship between the two. The Court later clarified the required degree of relationship in Dolan v. City of Tigard, stating that there must be "rough proportionality" between the exaction and the impacts. It noted this did not require "mathematical precision," but it did necessitate some effort to quantify the relationship.

In recognizing and establishing a standard for this second type of taking, the Court in both Nollan and Dolan predicated its analysis upon the physical invasion standard discussed above. In both decisions the Court noted that, if the government had simply demanded the physical dedications in question instead of making them a condition of development approval, they would clearly constitute a taking. It noted, however, that, if legitimate reasons existed to deny the development because of its impact, then approval of the development may be made contingent on exactions designed to alleviate the impact. This provides landowners with expanded options beyond an outright denial and is thus justified so long as the exactions relate to the concerns associated with the development.

In a sense, therefore, the Nollan-and-Dolan test for development exactions is a derivative of the physical invasion test; it essentially recognizes a limited circumstance in which the government might appropriate a physical use without paying compensation. Yet the development exaction scenario and the accompanying Dolan test are best considered a distinct type of taking for several reasons. First, development exactions are a unique regulatory device very distinct from the type of government actions that constitute physical invasions. In recent years exactions have become an intricate part of the land development process and are increasingly used for a variety of purposes. Although not

---

157 Id. at 837.
159 Id. at 391.
160 See Dolan, 512 U.S. at 384; Nollan, 483 U.S. at 831.
161 See Nollan, 483 U.S. at 836-37.
technically a land use regulation, they might be fairly understood as part of the regulatory land use system as it exists today. Indeed, they have become a central feature of the modern land development process and are commonly seen as serving various regulatory purposes. Thus, exactions have a distinct regulatory flavor that, together with their ubiquitous use and the unique concerns they present, suggest they be understood as a distinct type of taking.

Recognition of development exactions as a distinct taking concern is further reflected in the "rough proportionality" standard itself, which is distinct from the more rigid physical invasion standard. Whereas outright physical invasions trigger a bright-line standard that is near fatal in its execution, the "rough proportionality" standard involves a more fact-sensitive inquiry into the relationship between the exaction and the developmental harm. It asks an entirely different question than is involved in direct physical invasions and invokes a unique and more thoughtful analysis. Moreover, unlike the per se rule for physical invasions, the "rough proportionality" test for exactions anticipates the propriety and even the desirability of development exactions, but requires that they be done for the right reasons.

In this sense, "rough proportionality" can be fairly understood as a type of intermediate scrutiny, falling between the strict physical invasion standard and the more deferential "economic impact" analysis. On one hand, by requiring "proportionality" between the regulatory burden (the exaction) and the perceived harm to which it is addressed (development impacts,) the Court is clearly requiring a level of scrutiny beyond that which is normally given to economic and social legislation, where there typically only needs to be some minimal relationship. This is reinforced by the requirement that the relationship be quantified in some manner.

---


See Vicki Been, "Exit" as a Constraint on Land Use Exactions: Rethinking the Unconstitutional Conditions Doctrine, 91 COLUM. L. REV. 473, 482-83 (1991) (stating that in addition to shifting infrastructure costs to developers, exactions also serve to "induce a more efficient use of infrastructure," help mitigate the negative effects of development on neighboring areas, help to internalize development harms, enables growth in areas where government cannot provide public facilities fast enough or where a development proposal is controversial, and allow communities to recapture from developers "value added to land" by community financed improvements).


See Nollan, 483 U.S. at 836-37.


See Dolan, 512 U.S. at 391.
Quantification is not required in more deferential levels of review.\textsuperscript{168} Together, the requirements of proportionality and quantification call for scrutiny of the relationship substantially greater than that normally demanded of regulatory practices.

On the other hand, the burden falls far short of that normally associated with strict scrutiny. The term "rough" itself suggests a somewhat loose standard, as the Court indicated that, although the relationship had to be quantified in some manner, mathematical precision was not required.\textsuperscript{169} This suggests the need for only a reasonable approximation of relationship between exaction and impact. Moreover, unlike the physical invasion scenario, the test is not intended to operate as a near \textit{per se} rejection of government actions, but instead anticipates the propriety of many exactions.

This characterization of the level of review as intermediate is further supported by the Court’s own discussion, in which it characterized “rough proportionality” as corresponding to an intermediate position taken by states. In \textit{Dolan}, the Court, before articulating its own standard, examined state court approaches to reviewing exactions, placing them in three categories: exacting, deferential, and intermediate.\textsuperscript{170} It specifically rejected those decisions taking what it characterized as a “lax” standard on one hand and as an “exacting” standard on the other, instead aligning itself with what it labeled the “intermediate position.”\textsuperscript{171}

“Rough proportionality” therefore is designed to police, but not to discourage, the use of development exactions. While affirming the propriety and even the necessity of exactions, the Court stated that exactions must relate to and must flow from the development in question. This requirement guards against use of the development process as a means to extort property interests that would normally require payment of just compensation. As a practical matter, the “rough proportionality” standard of review should not impose substantial costs on local governments.

As such, “rough proportionality” seeks to balance two competing concerns. On one hand, the Court was clearly cognizant of the need to use exactions as a reasonable device to offset the impacts of development. This is particularly true when compared to the alternative of prohibiting the proposed development altogether, which would often be justified by the negative external impacts created by the development. Thus, exactions are

\textsuperscript{168} See, e.g., Fed. Commc’ns Comm’n v. Beach Commc’ns, 508 U.S. 307 (1993) (stating that under rational basis review “a legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data); see generally CHEMERINSKY, \textit{supra} note 23 at 601-04, 651-59.

\textsuperscript{169} See \textit{Dolan}, 512 U.S. at 391.

\textsuperscript{170} \textit{Id.} at 389-91.

\textsuperscript{171} \textit{Id.} at 390.
a perfectly legitimate way to address the secondary impacts often created by development, and the Court was careful to affirm their validity and necessity as a land use device.

On the other hand, the Court was also cognizant of the potential abuse of the exaction process. In particular, the Court was aware of how it might easily be used to "extort" concessions from landowners completely unrelated to the impact of development. In this sense, the standard is predicated upon the fairness concerns often noted by the Court as underlying any takings analysis. Where new development results in impacts upon the community, which is often the case, landowners can reasonably be expected to pay, through exactions, for measures designed to offset those impacts. However, fairness prohibits making landowners pay for problems unrelated to their development. Such demands amount to extortion and violate fundamental understandings of fair play.

The "rough proportionality" standard thus represents an intermediate accommodation of communal and private interests in land. The standard strongly affirms that local governments have a legitimate interest in addressing and, if necessary, prohibiting the impacts of development. In this sense, it is a strong affirmation of the government's ability to regulate property for the common good and stands for the proposition that individual interests in land are limited by the broader impact they might have. However, the test limits the public interest to the external impacts of proposed development.

Perhaps more importantly, the intermediate standard of review represented by the "rough proportionality" test is arguably a reasonable response to the threat posed to private interests. Although the test is in part predicated upon physical invasion concerns, the typical exaction scenario does not pose the qualitative concerns presented by direct physical invasions. Landowners are not being directly denied the right to exclude others, but they are provided an alternative to denial of a proposed development. More importantly, to the extent physical appropriation might result (as with land dedicated for a school or a park,) it relates to and flows from the impact the landowner's development will have on the broader community. Thus, the rationales supporting the stricter physical invasion standard do not apply.

However, the potential for abuse is much more substantial with exactions than in the typical regulatory setting. Unlike typical zoning controls, which are broad-based legislative enactments, exactions are imposed in an adjuducatory setting. The fairness concerns that exist here are

172 See Nollan, 483 U.S. at 837.
not based upon regulatory impact, though that is relevant, so much as upon regulatory method. The fear that the government would use the permit approval process as a pretext for obtaining more than the situation warrants justifies the greater scrutiny.

V. LAND USE RESTRICTIONS, ECONOMIC IMPACT, AND DEFERENTIAL REVIEW

A. The Deferential Review of Government Land Use Regulations

The third and most significant type of taking is that which is based on the economic impact of a land use regulation. Unlike the physical invasion and exaction takings, which are limited to more unique scenarios, takings based on economic impact are potentially applicable to any land use restriction. For this reason, economic impact analysis is properly viewed as the heart of the takings issue and helps shape the core of what might be viewed as constitutionally recognized property rights.

As discussed in part II, the Court's current approach to takings based on economic impact emanates from two cases, *Penn Central Transportation Co. v. New York City*¹⁷⁴ and *Lucas v. South Carolina Coastal Council*.¹⁷⁵ Taken together, those two cases established what might be viewed as a two-fold test for analyzing whether the economic impact of a regulation constitutes a taking. First, if the regulation leaves the owner with no economic viability, it is a categorical taking,¹⁷⁶ unless the regulation is prohibiting a common law nuisance.¹⁷⁷ Second, even if some economic viability remains, a court is to determine if a taking exists under *Penn Central* by examining the character of the government action, the economic impact of the regulation, and the degree of interference with investment-backed expectations.¹⁷⁸ The Court's recent decisions in *Palazzolo v. Rhode Island* and *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency* clearly affirmed this dual *Lucas/Penn Central* analysis as the proper standard for determining when a regulation's economic impact constitutes a taking.¹⁷⁹

The emergence of this two-part economic impact analysis, and in particular the recognition of loss of economic viability as a categorical taking, has been perceived by some as an expansion of private property

---

¹⁷⁶ *Id.* at 1015.
¹⁷⁷ *Id.* at 1029-31.
¹⁷⁸ *Id.* at 1019 n. 8.
¹⁷⁹ See *Tahoe*, 535 U.S. at 330, 342; *Palazzolo*, 533 U.S. at 617-18.
rights at the expense of the government’s ability to control land uses.\textsuperscript{180} Lucas itself was hailed as a significant victory for property rights proponents and a signal that the Court would give heightened scrutiny to land use regulations.\textsuperscript{181} Moreover, the Court’s clear statement in Palazzolo and Tahoe that, even when economic viability remains, there still might be a taking under Penn Central, might be viewed as further scrutiny of government efforts to regulate land.

Of particular concern has been the impact on the government’s efforts to protect environmentally sensitive land. These properties, such as coastal zones, wetlands, habitat for endangered species, farmland, and open space, provide special environmental amenities to society that justify their protection. By their very nature, however, these properties must be kept in their natural state to protect their use as an environmental resource. This potentially poses a problem under the Lucas “loss of economic viability” standard since such regulations often preclude development.

Despite these concerns and the perceptions of heightened scrutiny associated with Lucas, as a practical matter the Court’s “economic impact” takings analysis for typical land use restrictions is quite deferential to government regulatory objectives. Although recognizing that government regulation of property might constitute a taking in extreme situations, the standard provides the state with significant ability to regulate private property for the public good. This is true even where the restriction results in a substantial diminution of property value, as long as some economic viability remains. Thus, most common zoning restrictions, though foreclosing a number of development options with some resulting economic loss, nevertheless leave some development opportunities. Even regulations


\textsuperscript{181} See Beach & Connolly, supra note 180 at 6 (noting that property rights proponents saw Lucas as signaling new era); Ronald H. Rosenberg, \textit{The Non-Impact of the United States Supreme Court Regulatory Takings Cases on State Courts: Does the Supreme Court Really Matter?}, 6 FORDHAM ENVTL. L.J. 523, 533-34 (1995) (language of recent Supreme Court takings decisions “has given attorneys, academic analysts, and the public at large the impression that the Court is increasingly sympathetic” to property rights).
to protect environmentally sensitive land should, in most instances, fare well under the test.

For this reason, the two-part economic impact test from *Lucas* and *Penn Central* might be properly viewed as a highly deferential form of review. The form of the test does not necessarily resemble deferential review in other contexts since it closely examines the supporting facts and, under the *Penn Central* component, balances various factors. This is a level of inquiry that does not normally accompany deferential review. In terms of the relationship it establishes between the government and individuals, however, it is highly deferential to the government, permitting substantial regulation of private land and rarely finds a taking. This is in contrast to the physical invasion scenario, where the balance weighs heavily on the side of the landowner, and the exaction scenario, where the balance is relatively even. True, the *Lucas/Penn Central* test might be viewed as deferential review with some bite, since it occasionally does result in a court finding a taking, but in the big picture the balance weighs substantially on the side of government in its efforts to regulate private property for the public good.

The next two subsections will examine more closely the deferential nature of the test, first discussing the *Lucas* "loss of economic viability" prong and then discussing the three-part *Penn Central* test. This article will then examine the policy rationales supporting deferential review for this third type of taking challenge.

1. Loss of Economic Viability

The Court has clearly indicated that the first part of the *Lucas/Penn Central* test, which recognizes a categorical taking when a regulation results in a loss of all economic viability, will occur only in the most extraordinary of circumstances. *Lucas* itself characterized loss of economic viability as an "extraordinary circumstance" that would typically occur only when land is "left substantially in its natural state." The Court's sole focus in its discussion in *Lucas* was the absence of any beneficial, economic, or productive uses. There was no suggestion in *Lucas* that severe economic impact itself could create a categorical taking. Indeed, the

---

182 See CHEMERINSKY, supra note 23 at 657 ("The Court has declared that under national basis review the actual purpose behind a law is irrelevant and the law must be upheld 'if any state of facts reasonably may be conceived to justify' its discrimination.").

183 *Lucas* 505 U.S. at 1018.

184 See id. at 1017 ("[s]urely, at least, in the extraordinary circumstance when no productive or economically beneficial use of land is permitted . . .") (emphasis original); id. at 1019 ("there are good reasons for our frequently expressed belief that when the owner of real property has been called upon to sacrifice all economically beneficial uses . . .") (emphasis original).
TAKINGS JURISPRUDENCE

Court indicated in a footnote that even a 95% loss in property value would not constitute a denial of all economic or productive use, though noting it still might be a taking under *Penn Central*.\(^ {185}\) Thus, the tone of *Lucas* demonstrates that categorical takings are based on a complete absence of remaining productive uses, which will only occur in highly unusual circumstances.

Both *Palazzolo* and *Tahoe* affirm that categorical takings based on loss of economic viability are extremely rare. In *Palazzolo*, the regulated landowner tried to make the case for a “total taking” by comparing the profit potential for the property, $3,150,000, with the minimum residual value after regulation, $200,000. He argued in that context that the state “cannot sidestep” *Lucas* by “the simple expedient of leaving a few crumbs of value.”\(^ {186}\) The Court rejected the comparison, however, focusing on what remained rather than what was taken. It acknowledged that the state cannot escape a categorical taking under *Lucas* by leaving just a “token interest” in the property but said that “a regulation permitting a landowner to build a substantial residence on an 18-acre parcel does not leave the property ‘economically idle.’”\(^ {187}\) Although this treatment of the “economically viable” standard is cursory, it affirms the standard’s narrow reach.

The Court in *Tahoe* again took occasion to emphasize the need for a complete loss of all economic use before a categorical taking could be found. In discussing the reach of a categorical taking under *Lucas*, it noted that the statute in that case had “‘wholly eliminated the value’” of the property.\(^ {188}\) The Court stressed that *Lucas* required there be no productive use of the property and that there be a “complete elimination of value.”\(^ {189}\)

Taken together, these cases indicate that even a severe economic impact will not constitute a categorical taking if some minimal economic use remains. Rather, the *Lucas* standard clearly requires a complete loss of value and economic use. As noted by the Court in *Lucas*, this might only occur when the property is required to be left in its natural state.\(^ {190}\) Few land use controls involve this degree of regulation; they limit rather than eliminate development opportunities. The one exception, of course, is land

---

\(^ {185}\) In this footnote the Court responded to an argument in Justice Stevens’ dissenting opinion, in which he had criticized the majority rule as “wholly arbitrary” because a “landowner whose property is diminished in value 95% recovers nothing,” “while the landowner who suffers a complete elimination of value recovers the land’s full value.” *Id.* at 1019 n. 8 (quoting dissent of Justice Stevens, *id.* at 1064). The majority appeared to agree that a 95% diminution in value would not constitute a categorical taking, but was quick to note that a taking might still be found under *Penn Central*. It further noted, however, that at least in some cases even a 95% diminution in value is not a taking. *Id.* at 1019 n. 8.

\(^ {186}\) See *Palazzolo*, 533 U.S. at 630-31.

\(^ {187}\) *Id.* at 631.

\(^ {188}\) *Tahoe*, 535 U.S. at 330.

\(^ {189}\) See *id.* (quoting *Lucas*, 505 U.S. at 1019, 20).

\(^ {190}\) See *Lucas*, 505 U.S. at 1018.
use control designed to protect environmentally sensitive lands, such as farmland, wetlands, coastal zones, habitat for endangered species, and the like. By their nature, such restrictions often must prohibit development on that land subject to regulation in order to meet the environmental objectives.

Even here, however, the Court has indicated there will not be a categorical taking if the restriction is on less than all of the property. The Court has held that, for purposes of analyzing economic impact, courts are to evaluate a regulation's impact on the entirety of a claimant's property and not just on the restricted portion of the property.\textsuperscript{191} Although \textit{Lucas} itself raised a question in a footnote on how the property should be defined in such situations,\textsuperscript{192} in other cases the Court has clearly indicated that, for purposes of evaluating the economic impact of a regulation on property, courts should consider the economic impact on the entire contiguous parcel, and not just on the restricted portion.

The Court first held that property must be viewed as a whole in \textit{Penn Central}, where the property owner argued that the relevant unit of property for analyzing economic impact was only the restricted air rights, which would indicate a significant economic impact. The Court rejected the argument, however, instead treating the relevant unit of property as the air rights together with the underlying currently developed parcel. The Court stated that

\textit{Takings 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


\textsuperscript{192} The Court stated:

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

Lucas, 505 U.S. at 1016-17 n.7.
deciding whether a particular government action has
effected a taking, this Court focuses rather on the character
of the action and on the nature and extent of the
interference with rights in the parcel as a whole.193

The court reaffirmed this analysis in several subsequent decisions,
including *Keystone Bituminous Coal Association v. DeBenedictis,*194
where it again emphasized that property is not to be segmented but instead treated
as a whole. It stated that any other approach would permit landowners to
argue that virtually any restriction on property, including such basic
limitations as zoning setback requirements, constitutes a taking.195

The Court again affirmed a "property as the whole" analysis in
*Tahoe,* albeit in a slightly different context. There the affected landowners
had argued that a thirty-two month moratorium on development constituted
a categorical taking under the combined logic of *First English* and *Lucas,*
stating that it constituted a complete loss of economic viability.196
In rejecting this argument, the Court again emphasized that takings
jurisprudence does not divide property into discrete segments but views the
property as a whole.197
The Court stated that this included both the spatial
and temporal dimensions of the property.198
Thus, just as the restricted
portion of property is not to be severed for analysis, so too a thirty-two
month period is not to be severed and treated as a loss of all economic
viability.199

These cases demonstrate the Court's adoption of the "parcel as a
whole" approach when analyzing economic impact. This not only
comports with typical views of land ownership but also avoids the problem
of potentially turning all regulations into takings by narrowing the
definition of property.200
Indeed, almost all lower courts have treated the
property as a whole when assessing economic impact.201

193 *Penn Central,* 438 U.S. at 130-31.
195 See id. at 498. In *Keystone* the Court reviewed a statute, similar to that in *Pennsylvania Coal,* which required that coal be kept in the ground to avoid subsidence, problems. Although the
regulated coal companies attempted to segment the property by defining the relevant unit of property as
only that coal subject to regulation, the Court construed the relevant unit of property as including coal
that could be mined. In doing so it emphasized that property is not to be segmented for purposes of
takings analysis, but instead treated as a whole. *Id.* at 497-99.
197 See id. at 331 (quoting *Penn Central*).
198 See id. at 331-32. The Court in *Tahoe* emphasized that a *Lucas* categorical taking, based
on loss of all economic viability, occurs only when there is a total taking of the entire parcel. It then
stated that "[a]n 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." *Id.*
199 See id.
201 The nonsegmentation principle is well illustrated by two recent lower court decisions,
*K&K Constr., Inc. v. Dep't of Natural Res.*, 456 Mich. 570, 575 N.W.2d 531 (1998), and *Zealy v. City of
Evaluating economic impact in this manner, which makes both conceptual and policy sense, frequently works to avoid a loss of all economic viability. For example, environmentally sensitive land will often only be part of a greater parcel of land, as was the case in Palazzolo where the parcel included several acres of dry “uplands.” Even where an entire parcel might be environmentally sensitive, landowners might be able to get permits allowing development on some limited portion of the land. Finally, some prohibitions on all development, such as agricultural zoning, still permit other economically viable uses.

For these reasons, the Lucas “no economic viability” standard poses little threat to government land use regulations, even where protecting environmentally sensitive land. This has been borne out by lower court decisions subsequent to Lucas, which have consistently rejected Lucas-type categorical takings whenever at least some economic viability remains. For example, in McAssociates v. Town of Cape Elizabeth, a state court held that, in order to establish a taking under Lucas, the claimant has to demonstrate that the property is “substantially useless and stripped . . . of all practical value.” Other courts have similarly followed the lead of Lucas itself and limited categorical takings to extreme situations.  

Waukesha, 201 Wis.2d 365, 548 N.W.2d 528 (1996). In K&K, the Michigan Supreme Court reviewed a restriction on four contiguous lots, which were 55, 16, 9 and six acres in size. Although the court of appeals had segmented the parcels for takings analysis, the Michigan Supreme Court reversed, stating that “[o]ne of the fundamental principles of takings jurisprudence is the ‘nonsegmentation principle.’” 456 Mich. at 578, 575 N.W.2d at 536. The court found the four parcels were bound together through their continuity, unity of . . . ownership, and plaintiff’s proposed development plan. Id. at 581, 575 N.W.2d at 537. The Wisconsin Supreme Court applied a similar analysis in Zealy, again firmly applying the nonsegmentation principle. In that case the landowner owned a 10.4 acre parcel zoned residential/business, of which 8.2 acres were subsequently rezoned to a conservancy district, precluding any development as to those acres. In rejecting an argument that only the 8.2 acres zoned conservancy should be considered for the takings analysis, the court noted that the United States Supreme Court had consistently held that property must be viewed as a whole. 201 Wis.2d at 375-77, 548 N.W.2d at 532-33. On that basis it held that the entire 10.4 acres, including the 2.2 still zoned residential/business, must be used for evaluating the conservancy restriction’s economic impact. Id. at 378, 548 N.W.2d at 533.

---


203 773 A.2d 439 (Me. 2001).

204 Id. at 443.

205 See Cooley v. United States, 324 F.3d 1297, 1305 (Fed. Cir. 2003) (98.8% diminution in value not a categorical Lucas taking, but instead subject to the Penn Central test); Wonders v. Pima County, 89 D. 2d 810, 815 (Ariz. App. 2004); Gore v. Zoning Bd. of Appeals, 444 Mass. 754, 831 N.E.
As a practical matter, therefore, the first part of the "economic impact" test, triggered by loss of all economic viability, is limited to extreme situations. Despite the environmental concern brought on by *Lucas*, it poses little threat to land use controls in general, and to controls on environmentally sensitive land in particular. The only instance in which it might be triggered is the very rare occurrence where a regulation completely prohibits development on the totality of a person's property. Thus, the "denial of economic viability" standard imposes only a very modest restraint on government regulatory efforts.

2. The Penn Central Test

As noted above, the Supreme Court has clearly indicated that, even when economic viability remains, there might still be a taking under the *Penn Central* test. As typically construed, this test requires courts to consider the economic impact of a regulation, the character of the government action, and, in particular, the degree of interference with distinct, investment-backed expectations. Since this test anticipates that takings might occur even when economic viability remains, it would seem to have the potential to limit government regulatory efforts.

As a practical matter, however, the *Penn Central* factors have rarely resulted in takings being found, and even then in only extreme fact situations. Although both courts and commentators have often puzzled over what "interference with investments-backed expectations" means and how the three factors relate to each other, the bottom line is this: courts applying the *Penn Central* balancing test almost always uphold land use restrictions against takings challenges.

Indeed, a careful analysis of the factors suggests that most regulatory efforts should be permissible under the *Penn Central* test. Although diminution in value is to be considered, the Court in *Penn Central* and other courts have stressed that diminution by itself, no matter how great, is not enough to establish a taking. Similarly, the Court’s reference in *Penn Central* to character of the government action as a factor seemed to be in regards to whether it was a physical invasion or mere regulatory

---

2d 865, 872-73 (2005); Zanghi v. Bd. of Appeals, 807 N.E. 2d 221, 223-24 (Mass. App. 2004); K & K Construction, Inc. v. Dep't of Natural Res., 575 N.W. 2d 531, 539 n.13 (1998). For a rare example of where a court says a restriction deprives an owner of all economic viability, see *Mehling v. Town of San Anselmo*, 2004 WL 1179428 (Cal. App. 2004). The facts of *Mehling* are unique, however, in that neighbors were challenging a city's decision not to enforce a slope density ordinance. The court said the decision not to enforce the ordinance was justified, since it would deprive the owner of all economic viability under *Lucas*, and thus be a categorical taking.

This seems to suggest that an action that is regulatory in nature raises a presumption of validity.

Thus, the real heart of the *Penn Central* balancing test would appear to be the degree of interference with investment-backed expectations. Even here, however, most land use restrictions would not pose any constitutional problem. For example, when a landowner seeks and is denied an upzoning to a more profitable use, there is certainly no interference with investment-backed expectations. Although refusal to upzone in such a situation might result in significant loss of potential appreciated value, this can hardly be viewed as a significant interference with investment-backed expectations. Even where the purchase price reflects the potential for intensive development, this is speculation on a possible zoning change and is certainly not the type of investment for which compensation should be required.

Similarly, a downzoning of property to a more restrictive use will usually not be a significant interference with investment-backed expectations. This is particularly true if the landowner can continue to use the property as originally intended when acquired. *Penn Central* essentially involved this same scenario, in that what had been permitted development was eliminated, resulting in significant economic impact, but not interfering with what had been the original expectation of the landowner. Lower courts have similarly rejected *Penn Central* challenges in such situations.

A cognizable interference with investment-backed expectations might occur only when property is acquired with fairly crystallized development expectations consistent with then applicable zoning regulations, only to have the property subsequently downzoned to a more restrictive use, resulting in a substantial diminution in value. In such a situation the landowner’s development expectations are arguably backed by

---

207 *Penn Central*, 438 U.S. at 124. In setting out what has become known as the *Penn Central* test, the Court said:

> Several factors . . . have particular significance. The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations. So, too, is the character of the government action. A “taking” may be more readily found when the interference can be characterized as physical invasion, than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good.

208 See *id.* (stating that interference with distinct investment-backed expectations was a “particularly” “relevant” factor).


210 See Oswald *supra* note 5 at 115-16.

211 See *Penn Central*, 438 U.S. at 136.

an inflated purchase price, and the diminution in value resulting from downzoning is an interference that arguably constitutes a taking.

The Supreme Court has, however, indicated that this scenario will not usually be a taking, notwithstanding the interference with purchase expectations. The Court has consistently affirmed the need to permit newly enacted land use regulations, despite the fact that some purchase expectations are frustrated. For example, zoning, when first implemented in any location, necessarily involves restricting previous development opportunities, which inevitably will affect some recently purchased property. Yet the Court, in consistently affirming the validity of various zoning schemes, has never suggested that an interference with purchase prices in this manner would be unconstitutional.

This idea finds further support in the concept of "regulatory risk," a theory that helps form the reasonableness of any investment-backed expectations. The Supreme Court recognized this in Lucas, where it stated, "It seems to us that the property owner, necessarily expects the use of his property to be restricted, from time to time, by various measures newly enacted by the State in legitimate exercise of its police powers . . . ." This builds on statements by the Court in other regulatory contexts, in which it has strongly affirmed the idea that the risk of regulation, including the distinct possibility of economic loss, is part of economic life. The Court has noted this is particularly true with regard to activities that have "long been the source of public concern and the subject of government regulation." This is certainly true of land development, which has long been subject to government regulation, and, if anything, is trending toward greater controls.

For this reason, reasonable investment expectations about property based on development potential must necessarily include the possibility that tighter restrictions might be enacted, depriving the owner of previous development opportunities and resulting in a diminution of property

---

213 See Palazzolo v Rhode Island, 533 U.S. 606, 627 (2001) (newly enacted zoning restrictions can limit land values without constituting a taking if reasonable); Dolan v. City of Tigard, 512 U.S. 374, 384-85 (1994) (noting the authority of government to engage in land use planning even when it diminishes property values); Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1027 (1992) (landowners should reasonably expect some newly enacted regulations that affect land values); Euclid v. Ambler Realty Co., 272 U.S. 365 (1926) (holding zoning ordinance valid despite 75% diminution in value on some land); Pa. Coal Co. v. Mahon, 260 U.S. 393, 413 (1922) ("government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law").


216 The Court has often said that "[t]hose who do business in the regulated field cannot object if the legislative scheme is buttressed by subsequent amendments to achieve the legislative end." FHA v. The Darlington, Inc., 358 U.S. 84.91 (1958); Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Trust for S. Cal., 508 U.S. 602, 645 (1993) (quoting Darlington).

value. Accordingly, purchase prices should be discounted by the possibility of regulation as a practical matter. Similarly, at least with undeveloped property, any development expectations should be viewed as contingent, at best, with the possibility that the government might subsequently change previous understandings in order to further legitimate public interests.

For these reasons, the only clear case for a taking under *Penn Central* would be where the investment reflects actual development expenditures, such as constructing facilities or homes, rather than speculation on future uses. In such a situation the expenditure of money is almost certainly the type of crystallized investment that *Penn Central* intended to protect. When a landowner actually has spent money developing land, there is a strong public policy that the landowner reasonably can expect that the investment is protected. Otherwise, incentives for the development of land—critical to our economic well-being—are jeopardized. Indeed, land-use law has long protected such distinct development-related investments through vested-rights doctrine, and the investment-backed expectations factor of *Penn Central* is most reasonably understood as engaging at this same point. Thus, *Penn Central* should be understood as protecting investment expectations based on actual development expenditures, absent nuisance-like activity.

A strong argument can be made that takings under *Penn Central* should be limited to such interferences with investments in actual development expenditures. The Supreme Court, however, has implicitly indicated that, at least in some limited contexts, interferences with investments on undeveloped land might constitute a taking under *Penn Central*. However, the totality of the Court’s jurisprudence makes it clear that any reasonable investment-backed expectations must anticipate further restrictions on property that eliminate previously existing opportunities and substantially diminish property values. If nothing else, this strongly suggests that, at least as regarding future uses on undeveloped land, takings under *Penn Central* are to be relatively rare exceptions based on compelling facts.

---

218 Lower court decisions have also noted that landowner expectations must include the possibility of more restrictive enactments. See, e.g., Elias v. Town of Brockhaven, 783 F.Supp. 758 (E.D. N.Y. 1992); Elsmere Park Club Ltd v. Town of Elsmere, 771 F.Supp. 646 (D. Del. 1991).

219 See Michelman, supra note 142 at 1233-34 (discussing interferences with actual development expenditures as the type of “distinctly crystallized expectations” that the takings clause should protect).

220 See Tahoe, 535 U.S. at 331,342; Palazzolo, 530 U.S. at 917-18; Lucas, 505 U.S. at 1019 n.8.

221 See Lucas, 505 U.S. at 1027.
Lower court decisions applying *Penn Central* bear out this observation, as the courts rarely finding a taking under the *Penn Central* analysis. This is true even when the restriction results in a substantial diminution in value. Indeed, even though there is no automatic cut-off, it seems fair to say that, generally, diminution in value must substantially exceed 50%, and should be closer to 90%, before any serious consideration is given of a *Penn Central* taking. This observation was made in a recent Court of Claims decision, *Walcek v. United States*,\(^{222}\) where the court held that a 59.7% diminution in value did not constitute a taking under *Penn Central*.\(^{223}\) In reaching this conclusion, the court reviewed a number of decisions from the Supreme Court, the Federal Circuit, and the Court of Claims in which economic impact and diminution in value had been considered. It noted that, on several occasions, the Supreme Court has suggested diminutions in value “approaching 85 to 90 percent do not necessarily” constitute a taking.\(^{224}\) Similarly, the Court of Claims generally “relied on diminutions well in excess of 85 percent before finding a regulatory taking.”\(^{225}\) It noted that both the Supreme Court and the Federal Circuit had rejected takings challenges based on the degree of diminution in value present in *Walcek*, which was about 60%.\(^{226}\)

These observations are supported by other decisions that have also rejected takings challenges despite a substantial diminution in value. These have not always been predicated on the *Penn Central* analysis, since, prior to *Palazzolo*, some lower courts ignored it if economic viability existed. Yet, to the extent economic diminution in value was considered in these cases, courts have consistently sustained land use restrictions despite substantial economic impacts.\(^{227}\)

\(^{222}\) 49 Fed. Cl. 248 (2001), aff’d 303 F.3d 1349 (Fed. Cir. 2002).

\(^{223}\) See id. at 271-72.

\(^{224}\) Id. at 271 (citing Euclid v. Ambler Realty Co., 272 U.S. 365, 384 (1926) (holding a zoning ordinance valid despite a 75% diminution in value); Hadacheck v. Sebastian, 239 U.S. 394, 405 (1915) (finding no taking despite an 87.5% diminution in value)).

\(^{225}\) Id. at 271 (citing Loveladies Harbor v. United States, 21 Cl. Ct. 153, 160 (1990) (finding a 99% diminution was a taking), aff’d, 28 F.3d 1349 (Fed. Cir. 1994); Bowles v. United States, 31 Fed. Cl. 37, 48-49 (1994) (finding a 92-100% diminution was a taking); Formananek v. United States, 26 Cl. Ct. 332, 340 (1992) (finding an 88% diminution was a taking). See also, David F. Courson, *The Takings Jurisprudence of the Court of Federal Claims and the Federal Circuit*, 29 ENVTL. L. 821, 848 (1999) (stating that Federal Court of Claims and Federal Circuit seemed to have evolved a *de facto* takings threshold of roughly ninety percent in value in wetlands cases).

\(^{226}\) See *Walcek*, 49 Fed. Ct. at 271.

\(^{227}\) See Pace Res., Inc. v. Shrausbury Township, 808 F.2d 1023, 1031 (3rd Cir. 1987) (finding that a property reduced in value from $495,600 to $52,000 was not a taking); Nasser v. City of Homewood, 671 F.2d 432, 438 (11th Cir. 1982) (finding a 53% diminution in value was not a taking); William C. Hass & Co. v. San Francisco, 605 F.2d 1117, 1120-21 (9th Cir. 1979) (finding no taking with a 95% diminution in value); Appolo Fuels, Inc. v. United States, 381 F.3d 1338, 1348 (Fed. Cir. 2004) (78% and 92% diminution in value in two leases did not constitute a taking under *Penn Central* analysis); Bernardsville Quarry, Inc. v. Borough of Bernardsville, 608 A.2d 1377, 1386-90 (1992) (finding no taking with a 90% diminution in value). But see, Friedenburg v. New York State Dep’t of Envtl. Conservation, 3 A.D. 3d 86, 767 N.Y.S. 2d 451 (2003) (taking under *Penn Central* where 95% diminution in value).
Similarly, those lower courts that have explicitly applied *Penn Central* have almost without exception found restrictions to be valid. In doing so, they have at times noted that the landowner took the property with knowledge of the restriction, thus negating or at least minimizing interference with investment-backed expectations.\(^{228}\) Where restrictions were imposed after acquisition of the property, courts have noted, as the Supreme Court did in *Lucas*, that reasonable expectations need to include the possibility of further restrictions.\(^{229}\) Moreover, courts have evaluated the restriction’s impact on the parcel as a whole, noting that a number of uses remain.\(^{230}\)

**B. The Policies Supporting Deferential Review**

As suggested in the previous subsection, current takings jurisprudence draws a sharp distinction between restrictions on current uses where actual development expenditures have been made and restrictions on potential uses of land. In the relatively rare instance where a land use regulation interferes with substantial development expenditures, the *Penn Central* test would likely find an interference with investment-backed expectations constituting a taking, absent a nuisance-like activity. In contrast, in the far more common scenario where potential uses are restricted, takings occur only in very extreme situations. Although some view recent Supreme Court takings jurisprudence as re-striking the balance more in favor of property owner’s rights, the adjustment is minor and only at the edges.

As suggested above, the policy protecting landowner property rights when actual development expenditures occur is relatively straightforward. When a landowner actually has spent money developing land, there is a strong public policy that the landowner reasonably can expect that the investment is protected. Otherwise, incentives for the

---


development of land – critical to our economic and social well-being – are jeopardized.231 Not only would interference with such investments appear unfair, but, as noted by Frank Michelman, the demoralization costs would be enormous.232 This would lead to an underutilization of resources and a disincentive to produce housing and other land uses critical to meeting societal needs. It is not surprising that the law, although not as developed in this area, strongly suggests that landowners’ expectations should be protected in these situations.

Such restrictions on established uses are extremely rare, however. The vast majority of land use controls restrict potential, not established, uses, often on undeveloped land. The Court’s jurisprudence weighs heavily in favor of the government’s ability to restrict potential uses of land, even when it results in substantial diminution in value. The real question, therefore, is this: Why draw the balance so heavily in favor of government regulatory interests rather than private property owners’ use rights? In particular, why not find a taking when land use regulations result in a substantial, though not complete, economic loss on a landowner? This is particularly true when environmental regulations impose substantial restrictions on development opportunity, resulting in significant economic loss when compared to the value of unrestricted land. The concern is exacerbated when the benefits of the regulation go to society as a whole, with a few private property owners carrying most of the burden.

One answer is that offered by Justice Holmes in Pennsylvania Coal, who stated that government could not go on if it had to pay every time its regulations reduced the value of land.233 Thus, although the Court acknowledged that a regulation’s economic impact could be so great as to be a taking, pragmatic concerns require that landowners tolerate some economic loss for societal good. Underlying this idea is the presumption that some degree of government regulation of land is both necessary and good – a presumption that is defensible on several grounds. Governmental regulatory efforts promote the common good, of which the affected landowners are a part. To enjoy the benefits of government regulation, one must also bear the burden.

Justice Holmes’ observation arguably touches on one-half of the balance supporting the Court’s deferential review with regard to land use regulations, which is the perceived value of the regulations themselves. Land use restrictions are typically justified by reference to two related concepts: minimizing land conflicts posed by incompatible uses and

232 See Michelman, Just Compensation, supra note 142 at 1214-16.
avoiding misallocation of land uses resulting from market externalities. The coordinating function of zoning is perceived to increase land values and enjoyment by avoiding, or at least minimizing, land conflicts that would otherwise exist. The avoidance of such conflicts enhances the use and enjoyment of land, thus increasing its value. It also encourages investment in land development, since landowners can be reasonably confident that incompatible uses will not locate nearby.

A second rationale supporting zoning is its help in minimizing externalities that lead to market misallocations of land resources. In a perfect world, the market itself, through pricing mechanisms, would reach the best use of land that will maximize societal welfare. As is frequently noted, however, market participants often fail to consider harms or benefits from their decisions that do not directly affect them and are therefore external to the decision making process. For example, a landowner might decide that a particular tract of land is best used for commercial purposes, not considering the harmful effect of increased traffic on the neighbors. This externality might lead to a misallocation of the land in question, since, from a broader societal perspective, the land is best used for non-commercial purposes when the harm to the neighbors is considered.

Externalities are particularly problematic with regard to environmentally sensitive land, such as wetlands, coastal zones, habitat for endangered species, and farmland. From a societal perspective, these properties are often best kept in their natural or undeveloped state because of a variety of benefits they create for society. Wetlands, for example, provide society with benefits such as water purification, flood control, and wildlife habitat. From the landowner's perspective, however, wetlands are almost always more valuable drained, filled, and developed. Most of the other benefits go to society broadly rather than directly to the landowner. In a market decision, those benefits would be external to the landowner's decision-making, resulting in loss of the societal resource. Governmental regulation is necessary to address the externality problem and to prevent misallocation of the resource.

The takings clause, though, is primarily not about economic efficiency, but about fairness. Even if public policy strongly supports restricting land use for the public good, which it certainly does, it does not answer the question – central to takings analysis – about why it is fair to

---

234 See Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 394-95 (1926) (discussing the various types of land use conflicts that zoning minimizes or prevents).
236 See id.
impose the cost of such restrictions on private landowners, which the Court’s current deferential approach does. Thus, the ultimate takings concern, often emphasized by the Court, “is to prevent some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.” And, as suggested in Pennsylvania Coal, the mere fact that government interests are important is not enough, by itself, to justify what would otherwise be an unfair burden on landowners. Therefore, the ultimate question from a policy perspective is why the imposition of substantial economic losses on individual landowners is not unfair.

Imposing substantial economic costs on property owners to achieve broader societal objectives, as could happen with restrictions on environmentally sensitive land, might seem unfair. In particular, it might seem that property owners are forced to give up substantial property interests in order to bestow benefits on the rest of society. Whatever the importance of the government interest in seeking the efficient use of land and preserving critical resources, it is unfair to require private landowners to bear the cost of such preservation.

Although this has some intuitive appeal, it is overstated for several reasons. Indeed, from a broad perspective, requiring that landowners bear the cost of most regulatory efforts, even those imposing substantial diminution in potential land values, is both fair and sensible. As such, the balance drawn by the Court with regard to general restrictions on land use is supported by sound policy, since it achieves the important societal benefit of government regulation without being unfair to landowners. The next two subsections will briefly review three reasons why such regulations should not be viewed as unfair.

---


239 The Court in Pennsylvania Coal implicitly conceded the often important interests served by land use regulations, see 260 U.S. at 413, but clearly established that at some point the power to regulate crosses from police power to eminent domain, requiring payment of just compensation if government wants to pursue those interests. See id. at 416.


240 The discussion in these two subsections, and in particular the arguments why imposing substantial diminution on landowners is not necessarily unfair, is drawn from several previous law review articles I have written. See Mark W. Cordes, Takings, Fairness, and Farmland Preservation, 60 Ohio St. L.J. 1033, 1072-81 (1999); Mark W. Cordes, Leapfrogging the Constitution: The Rise of State Takings Legislation, 24 Ecology L.Q. 187, 229-38 (1997).
1. Property Rights and Landowner Expectations

An initial response to concerns about unfair regulatory burdens concerns the nature of property rights and landowner expectations. The argument that substantial diminution of potential land values is unfair is in part predicated on the idea that private property ownership includes the right to use the property as the owner chooses. Thus, land use restrictions that significantly reduce development options are viewed as forcing landowners to forego opportunities that are interwoven into their rights as property owners. The forced loss of what are viewed as normal property rights without compensation is seen as unfair.

However, as a number of legal commentators have noted, such a perspective is neither the traditional nor the proper way to view property rights. Rather, our legal system has long recognized that private property ownership is subject to a broader public interest. Such recognition of a public interest in privately owned land is not a recent invention of the Supreme Court, but rather traces its origins back to the beginning of our country and is a consistent theme in property law. It is clearly reflected in the *sic utere* principle of nuisance law, which states that a person cannot use his or her land in such a way as to harm the property rights of others. Beyond that, courts have long held that use of private property is subject to the common good and to public rights.

This sentiment was expressed in several early cases where private land use conflicted with public interests, typically with shared resources such as air and water. Courts consistently recognized that private interests were not absolute and must yield to public interests when conflicts arise. This recognition of inherent limits on private property interests is similarly seen in the widespread growth and acceptance of land use

---


243 A number of commentators have noted that private property must necessarily be viewed as subject to certain public rights or interests. See, e.g., Jerry L. Anderson, *Takings and Expectations: Toward a "Broader Vision" of Property Rights*, 37 KAN. L. REV. 529, 535 (1989) (treating private property rights "as a balance between social and individual interests" is the most appropriate way to solve the as yet unresolved debate as to the meaning of the takings clause as it relates to private property); Gerald Torres, *Taking and Giving: Police Power, Public Value, and Private Right*, 26 ENVTL. L. 1 (1996) (emphasizing "social function of property"); John A. Humbach, *Law and the New Land Ethic*, 74 MINN. L. REV. 339, 344-48 (stating that "legal property rights are shaped and limited by the many competing needs of the general welfare").

restrictions in the late nineteenth and early twentieth centuries. In recognizing the validity of such restrictions, courts also recognized that property rights are not absolute but are necessarily limited by the broader good. The Supreme Court itself recognized this principle in a number of decisions during this period, frequently stating that property use was limited by public interests. This principle that private property is subject to broader social concerns has often been referred to as the social function of property. It reflects the fundamental concept that property is a social construct and that society can legitimately define the extent of private property interests to be limited by social concerns. Construing property interests in this manner recognizes that the consequences of property use often extend beyond land boundaries and will often conflict with other social needs, necessitating a reasonable accommodation of interests.

It is important to emphasize that this accommodation between private and public interests is an inherent limitation in the nature of private property to begin with, rather than a deprivation of interests. The balance the Supreme Court’s takings jurisprudence has drawn in this area is therefore quite consistent with how property interests are defined in the first place.

2. Accounting for Givings and Reciprocity

A second reason why it is not necessarily unfair to restrict private property to serve public interests, even when it results in a substantial loss in value, is that much of that value was the result of public, as opposed to private, activity. This is often known as the “givings” argument, highlighting the fact that government often gives significant value to land as well as takes it away. As such, the extent of the true loss is often far less than it might appear to be, lessening fairness concerns.

245 See Pa. Coal Co. v. Mahon, 260 U.S. 393, 413, (1922) ("As long recognized some values are enjoyed under an implied limitation and must yield to the police power."); Mugler v. Kansas, 123 U.S. 623, 665 (1887) ("all property in this country is held under the implied obligation that the owner’s use of it shall not be injurious to the community"); Hudson County Water Co. v. McCanter, 209 U.S. 349, 355 (1908) (private property limited by other public interests, including exercise of police power “to protect the atmosphere, the water and the forests”); Hadacheck v. Sebastian, 239 U.S. 394, 410 (1915) (private property interests must at times “yield to the good of the community” for the sake of “progress”).

246 See Torres, supra note 243 at 5.

Government actions frequently add value to land in numerous ways, such as mortgage interest deductions. Land use restrictions themselves often enhance land values by minimizing the harms that might otherwise affect landowners, especially those arising from incompatible land uses. For example, the increased value of environmentally sensitive land in alternative, residential use in part exists because government zoning would protect any residential development from conflicting commercial and industrial uses. Thus, the very scheme of restricting property can add significant value to neighboring property.

Perhaps the most obvious example of government givings in the context of land development is basic infrastructure support that makes land developable. Almost any infrastructure support, such as sewer lines and public facilities, adds significant value to land by making necessary services available to the property. Although property owners today often pay for some infrastructure through exactions, such exactions reflect the cost of the infrastructure and not the value it adds to the property.\footnote{See Dolan v. City of Tigard, 512 U.S. 374, 391 (1994) (requiring “rough proportionality” between exaction and development impact).} More significantly, exactions do not attempt to recover the broader infrastructure support, such as roads, that makes land developable and without which commercial value would be negligible.\footnote{The potential impact of government givings on land value can be illustrated by a simple example. Assume a property owner has a tract of remote land worth $10,000. The government then puts in a major highway near the property, creating new commercial opportunities and raising the total value to $60,000. A short time later, the government imposes an environmental restriction on the property, decreasing its value to $30,000. Although it might initially appear that the government actions diminished property values by as much as 50% in this example, in fact the cumulative effect was to increase value by threefold.}

Closely related to givings is the concept of “general reciprocity.”\footnote{See Cordes, Farmland Preservation, supra note 241 at 1075-77; Cordes, Leapfrogging the Constitution, supra note 241 at 236-37.} The Supreme Court itself has often spoken of the idea of an “average reciprocity of advantage” in its takings cases.\footnote{See, e.g., Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Council, 535 U.S. 302, 341 (2002); Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1017-18 (1992); Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1977); Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).} This usually refers to the fact that the same regulation that imposes regulatory burdens on property might also create reciprocal benefits. For example, a broadly applicable land use restriction to single-family use will limit previously existing development opportunities on a particular parcel of land, but it will also impose similar limitations on surrounding parcels. Thus, each owner loses something (the previous opportunity to develop) and gains something (the benefits of similar restrictions on neighboring land).
The Supreme Court's own invocation of "average reciprocity of advantage" typically refers to this specific reciprocity flowing from the challenged restriction. Reciprocity can also be viewed from the broader perspective of "general reciprocity." General reciprocity refers to the economic benefits of regulation in general, rather than the challenged restriction, which from a broader perspective help to secure "an average reciprocity of advantage" to participants in the American economy. Thus, although a particular regulation might decrease the value of an owner's property, that same owner also benefits from numerous other regulations that restrict other parties. These might include flood plain restrictions and environmental regulations on neighboring lands, as well as various economic and social regulations that benefit citizens.

As noted by Larry Libby, the tendency is to accept the benefits of regulation as a given but complain about the burdens as an infringement of rights. That perspective distorts the true accounting of regulatory impacts by focusing on only half of the equation. Any true discussion of fairness must consider the myriad benefits accruing to landowners from economic regulations, as well as their inevitable burdens. This is not meant to suggest that we are all financial winners based on overall regulatory impact. However, the concept of general reciprocity does demonstrate that diminution in value resulting from property restrictions is not necessarily unfair. Rather, the fairness or unfairness of economic impacts must be decided with a broader perspective that also considers the many regulatory benefits that accrue to landowners.

These policy considerations help explain the Court's deferential approach to takings based on economic impact, in which the balance between government and individual is weighed heavily in favor of government. On one hand, the broader public interest served by land use restrictions is substantial, including development restrictions on environmentally sensitive land. On the other hand, the costs imposed on effected landowners by such restrictions are not nearly as great as they may

253 This point was also made in Professor Frank Michelman's seminal law review article on takings, Property, Utility, and Fairness: Comments on the Ethical Foudnations of “Just Compensation Law,” 80 HARV. L. REV. 1165 (1967):
Efficiency – motivated collective measures will regularly inflict on countless people disproportionate burdens which cannot practicably be erased by compensation settlements, In the face of this difficulty, it seems we are pleased to believe that we can arrive at an acceptable level of assurance over time the burdens associated with collectively determined improvements will have been distributed "evenly" enough so that everyone will be a net gainer.
Id. at 1225 (emphasis in original).
254 For a recent criticism of the types of "givings" and reciprocity arguments presented in the text, see Jesse J. Richardson, Jr., Downzoning, Fairness and Farmland Preservation, 19 J. LAND USE & ENVTL. L. 59 (2003). For my response, see Mark W. Cordes, Fairness and Farmland Preservation: A Response to Professor Richardson, 20 J. LAND USE & ENVTL. L. 371 (2005).
appear. Private property rights have always included implied limitations for the public good and any investment in land must anticipate "regulatory risk." Moreover, the economic loss in value that at times accompany such restrictions are partially offset by government "givings" and reciprocal benefits imposed on surrounding property. Ultimately, the fairness or unfairness of any specific regulation must also be understood in a broader regulatory context in which other regulatory measures likely benefit a particular landowner.

VI. CONCLUSION

Takings law remains, if not a mess, at least somewhat messy. The Court's focus on *ad hoc* balancing to decide most takings cases inevitably results in some uncertainty. In *Lingle*, the Court conceded its current approach results in a number of "vexing questions."\(^2\)\(^5\)\(^5\) Moreover, despite the number of takings cases decided in the past quarter century, the Court still has not clearly defined some of its most fundamental concepts, leaving lower courts feeling their way through the dark on some issues.

Yet the big picture of takings is shaping up rather nicely. Ultimately, takings jurisprudence concerns the balance of community rights and individual rights in the use and control of property. In striking the balance between government and individual, the Court has recognized three distinct types of takings concerns and three analytical approaches in resolving them. In turn, these three analytical approaches loosely represent three levels of judicial review: takings based on physical invasions are subject to a type of strict scrutiny, in which the government action is near per se invalid; takings based on exactions are subject to intermediate review; and takings based on a land use regulation's economic impact are subject to what in effect amounts to deferential review, permitting government substantial latitude in controlling land use.

Of these three characterizations, the one that might appear the most surprising is viewing the Court's economic impact analysis under *Lucas* and *Penn Central* as a type of deferential review. Not only do the tests involve a level of factual inquiry and balancing typically not associated with deferential review, but many perceive the Court in recent years as more aggressively protecting property rights in this area. Yet, when viewed from a broad perspective, there is little doubt that the Court's economic impact analysis used for most land use restrictions is highly deferential to government in regulating land for the public good. When closely examined, the *Lucas* and *Penn Central* tests themselves are structured in a

way to find takings in relatively rare circumstances. This has been borne out by lower court decisions under the *Lucas* and *Penn Central* framework, with takings rarely being found.

Finally, the balance struck by the Court for these three types of takings is quite sensible and strongly supported by policy rationales. Strict scrutiny for physical invasions reflects the high value placed on the right to exclude, the protection of which is essential to the efficient use of the land resource and preserving individual autonomy and privacy. Intermediate review for exactions reflects the legitimate role that exactions serve in the land development process, while at the same time seeking to police the very real abuses that can occur in their implementation. Deferential review for takings based on economic impact reflects that land use cannot be viewed in isolation, but as part of a broader community of interests. Therefore, the economic impact that often accompanies land use restrictions, especially on environmentally sensitive land, must be seen in a broader context in which economic loss is in part offset by government givings and other regulatory benefits. More fundamentally, deferential review for takings based on economic impact recognizes that private property rights necessarily include implied limitations for the public good.