ARTICLES

Why Lingle Is Half Right
Thomas W. Merrill ................................................................. 421

Environmental Land Use Restriction and Property Values
Jeffrey A. Michael & Raymond B. Palmquist.......................... 437

Takings and the Problem of Value: Grappling with Truth in Land-Restriction Cases
Laura S. Underkuffler............................................................... 465

Temporary Takings: Settled Principles and Unresolved Questions
Daniel L. Siegel & Robert Meltz ............................................ 479

Bundled Rights and Reasonable Expectations: Applying the Lucas Categorical Taking Rule to Severed Mineral Property Interests
Patrick C. McGinley............................................................... 525

Is Regulation of Water a Constitutional Taking?
John D. Echeverria................................................................. 579

Rising Seas and Common Law Baselines: A Comment on Regulatory Takings Discourse Concerning Climate Change
J. Peter Byrne ........................................................................ 625

Some Unorthodox Thoughts About Rising Sea Levels, Beach Erosion, and Property Rights
Joseph L. Sax ........................................................................ 641
2009–2010

EDITORIAL BOARD

EDITOR-IN-CHIEF
Kristin L. Hines

ADMINISTRATIVE EDITOR
Lillian Kortlandt

SENIOR MANAGING EDITOR
Andrew J. Klimkowski

SENIOR ARTICLES EDITOR
Joseph Barnett

SENIOR NOTES EDITOR
Jessica Scott

MANAGING EDITORS
Emily Cobb
Ferrell Ryan

SYMPOSIUM EDITOR
Genesis Wren Miller

HEAD NOTES EDITORS
Markell Ripps
Nathaniel Smith
Laurie Wheelock

WEB EDITOR
Sam Weaver

EVENTS EDITORS
Joseph Starnes
Louisa Yanes

ARTICLES EDITORS
Kevin Cooke
Shannon Sawyer
Andrew Schwartz
Abel Russ

PRODUCTION EDITORS
Daniel D. Burke
Christiana Cooley
Noel Hudson
Andrew Jacob Rouchka
Adam Sherwin
Tyler Soleau

INACTIVE MEMBERS
Caroline Jelavich
Ashley Santner

EDITORIAL STAFF

James Abraham  
Scott Allen  
Alice Baker  
Addison Barnhardt  
Mary Beth Blauser  
Brent Bowden  
Clare Cragan  
Mark H. Foster, Jr.  
Brandon Gillin  
Crystal Heide  
Ashley Hintz  
Eric Hutchens  
Kirby Keeton  
Jenna Kennett  
Melissa Krah  
Dudley Loew  
Brian E.J. Martin  
Heather Marie McCarthy  
Edalin Michael  
Stephen Nadeau  
John (Jack) Peters  
Nathan Rectanus  
Jessica Reiss  
Shannon Salembier  
Brian Selogie  
Ian Sinderhoff  
Sarah Stein  
Laurie Stern  
Andrew Stone  
Peter Vetere
VERMONT JOURNAL OF ENVIRONMENTAL LAW  
VERMONT LAW SCHOOL  
Volume 11, Issue 3  
Spring 2010

FACULTY ADVISORS

Jason J. Czarnezki  
Professor of Law

Tseming Yang  
Professor of Law

Christine Ryan  
Environmental Research Librarian

ADMINISTRATION

Geoffrey B. Shields  
President, Dean, and Professor of Law

Gil Kujovich  
Vice Dean for Academic Affairs and Professor of Law

Lorraine Atwood  
Vice President of Finance and Administration

Kathleen Hartman  
Associate Dean for Enrollment Management

Shirley Jefferson  
Associate Dean for Student Affairs and Diversity

Dorothy Behlen Heinrichs  
Vice President for Institutional Advancement
**FACULTY**

- Susan Apel, Cheryl Hanna, Craig M. Pease
- Tracy L. Bach, Hillary M. Hoffmann, Brian Porto
- Betsy Baker, Gregory Johnson, Robert Rachlin
- Alexander W. Banks, Martha L. Judy, Anthony Renzo
- Laurie Beyranevand, Donald Kreis, Giuliana Robertson
- Teresa Clemmer, Gil Kujovich, Hilary Robinson
- Liz Ryan Cole, Siu Tip Lam, Geoffrey B. Shields
- Jason J. Czarnecki, Mark Latham, Linda Smiddy
- Johanna Dennis, Reed E. Loder, Gus Speth
- Michael Dworkin, Michelle Martinez, Pamela J. Stephens
- Alexander W. Banks, Martha L. Judy, Anthony Renzo
- Betsy Baker, Gregory Johnson, Robert Rachlin
- Alexander W. Banks, Martha L. Judy, Anthony Renzo
- Laurie Beyranevand, Donald Kreis, Giuliana Robertson
- Teresa Clemmer, Gil Kujovich, Hilary Robinson
- Liz Ryan Cole, Siu Tip Lam, Geoffrey B. Shields
- Jason J. Czarnecki, Mark Latham, Linda Smiddy
- Johanna Dennis, Reed E. Loder, Gus Speth
- Michael Dworkin, Michelle Martinez, Pamela J. Stephens
- Stephen Dycus, James May, Peter Teachout
- John Echeverria, Michael McCann, Pamela Vesilind
- Arthur C. Edersheim, David Mears, Joan Vogel
- Peg Elmer, Philip Meyer, Jeff White
- Stephanie Farrior, Marc Mihaly, Stephanie Willbanks
- Paul S. Ferber, Janet E. Milne, L. Kinvin Wroth
- David B. Firestone, Laura Murphy, Tseming Yang
- Jackie A. Gardina, Sean Nolan, Carl A. Yirka
- Oliver R. Goodenough, Cathryn C. Nunlist, Maryann Zavez
- John M. Greabe, Patrick Parenteau

**VISITING FACULTY**

- Robert Gagnon, Betsy Schmidt
- Robert Sand, Jack Tuholske

**ADJUNCT FACULTY**

- Robin Barone, Eric Janson, Sheldon Novick
- Gary Brooks, Walter Judge, Larry Novins
- Nolan Burkhouse, Julie Kalish, Donald Powers
- Jennifer Emens-Butler, Robert Keiner, Linda Purdy
- John Evers, Peter Kunin, Anna Saxman
- Catherine Feeney, Craigh Leonard, Jan Sensenich
- Jamie Gallagher, Jingjing Liu, Stefanie Sidortsova
- Clara Gimenez, Randy Mayhew, Susanne Terry
- Kevin Griffin, Larry Meier
WHY LINGLE IS HALF RIGHT

Thomas W. Merrill*

TABLE OF CONTENTS

Introduction ................................................................. 421
I. Lingle ................................................................. 422
II. Two Conceptions of Regulatory Takings Doctrine ....... 424
III. Lingle’s Understanding of Regulatory Takings Doctrine ...... 428
IV. What Lingle Should Have Said .................................. 433
Conclusion .................................................................. 434

INTRODUCTION

Lingle v. Chevron U.S.A. Inc. is a highly unusual decision in that it repudiated a legal doctrine that the Supreme Court itself had created. The Court was able to do this without overruling any prior decision because the repudiated doctrine—which condemned as a taking any regulation of property that fails to “substantially advance legitimate state interests”—had taken hold in the lower courts but had never been applied by the Court itself in support of a judgment. Lingle is also unusual in that there is no indication that the Court was motivated to jettison the doctrine because it was unhappy with the result it suggested in the case before it. From all that appears, the Court was concerned solely with rationalizing the law of takings.

I take as my text the following wrap-up sentence from Justice O’Connor’s opinion for the Court in Lingle: “We hold that the “substantially advances” formula is not a valid takings test, and indeed conclude that it has no proper place in our takings jurisprudence.” The first half of this sentence, I think, is correct. There should be no facial takings “test,” analogous to the categorical rules for permanent occupations

* Charles Evans Hughes Professor of Law, Columbia Law School.
2. Id. at 531 (quoting Agins v. City of Tiburon, 447 U.S. 255, 260 (1980)).
3. Id. at 548.
or complete eliminations of economic value, that deems a regulation that fails to substantially advance any legitimate state interest a taking. This is the way that the Ninth Circuit had come to regard the “substantially advances” idea, and the Court was right to repudiate that approach.

The second half of the sentence, that the “substantially advances” inquiry has “no proper place” in takings jurisprudence, I think is not correct, or at least the Court failed to make the case for its correctness. In particular, I see no reason in principle why the question of whether a particular regulation substantially advances a legitimate governmental interest might not qualify as one of the “factors” that courts consider in conducting the “essentially ad hoc, factual inquiries” that Penn Central mandates as the general default inquiries in takings cases. The Court has never seriously deliberated about which factors are most probative and hence most appropriate for inclusion in an ad hoc inquiry, and certainly it did not do so in Lingle. Absent a more sustained inquiry about the proper content of the ad hoc inquiry, I think the Court was mistaken to banish “substantially advances” from the world of takings jurisprudence without giving it a fair hearing, so to speak, as to whether it might be given a reprieve in this reduced role.

I. LINGLE

At issue in Lingle was a Hawaii statute that imposed a cap on the rent that retail gasoline service station dealers must pay if they lease their facilities from an oil refining company. This was almost certainly a special interest law procured by one group of dealers. The competitors of these dealers—stations operated directly by refiners or by dealers who own their own stations or who lease their property from parties other than refiners—enjoyed no such ceiling on their costs of doing business. The statute proclaimed that its purpose was to counteract a concentrated retail gasoline market and to reduce prices charged to consumers. But this was inherently implausible, as the lower courts found based on expert testimony, since the statute regulated the rents of only one class of dealers, did not require these dealers to pass on the savings to consumers, and did not regulate wholesale gasoline prices. Thus, refiners would likely seek to offset any reduction in

5. Lingle, 544 U.S. at 532.
7. Id. at 856–57.
revenue from rents to this one class of dealers by increasing the wholesale price of gasoline to all dealers, and this would likely translate into higher prices for consumers.8

Indeed, in the Ninth Circuit the State of Hawaii abandoned the argument that the statute would reduce prices paid by consumers. Instead, the State sought to justify the measure on the ground that it would “maintain[,] the existence of an independent body of gas station operators . . . .”9 In effect, the State conceded that the statute was a narrowly distributional measure that took money from consumers and the shareholders of refining companies and transferred it to one class of service station dealers. This is the kind of “naked preference” for one group over others that ordinarily elicits little judicial sympathy.10

After some back and forth, the Ninth Circuit agreed with the Federal District Court in Hawaii that the statute was unconstitutional. The stated legal ground was that the measure violated the Takings Clause because it did not “substantially advance a legitimate state interest.”11 The Ninth Circuit had previously adopted this as a facial test for identifying measures that constitute a compensable taking,12 drawing on language in Agins v. City of Tiburon.13 Agins cited Penn Central Transportation Co. v. City of New York,14 which had in turn cited Nectow v. Cambridge,15 a case that appeared to rely on substantive due process rather than the Takings Clause.

The Supreme Court in Lingle sought to tidy up the constitutional pedigree of all this. The Court announced that on further examination the “substantially advances” test was properly grounded in the Due Process Clause, not the Takings Clause. In effect, a constitutional standard that

8. Based on the summary of the evidence in the opinions, it appears that the rent cap was set above the rentals that Chevron was currently collecting on all but a minority of its stations and thus would have little immediate effect on retail gasoline prices. Lingle, 544 U.S. at 534. Assuming the statute would at some point have real bite in constraining rents, this would likely cause the price of gasoline to rise as Chevron and other refiners sought to recoup a portion of the revenue lost due to the cap on rents. Bronster, 363 F.3d at 855–857. Even if dealers benefited from the rent cap, this would come at an expense to consumers in the form of slightly higher prices and to shareholders of the refining companies in the form of slightly lower earnings, the respective share of their losses being determined by the price elasticity of demand for gasoline. The more inelastic the demand, the higher the share of redistribution that would be borne by consumers in the form of higher prices.


12. See, e.g., Hotel & Motel Assn. of Oakland v. City of Oakland, 344 F.3d 959 (9th Cir. 2003); Richardson v. City and County of Honolulu, 124 F.3d 1150 (9th Cir. 1997).


belonged under one clause had jumped the tracks and attached itself to another clause. Once the test was reattached to the right clause, the oil refiners, having been misled by the Supreme Court and the Ninth Circuit into relying on the wrong constitutional clause, lost their case.

II. TWO CONCEPTIONS OF REGULATORY TAKINGS DOCTRINE

In order to explain why I think Lingle is only half right, it is necessary to consider two different conceptions of the purpose of the regulatory takings doctrine. The first posits that the doctrine is grounded in concerns about unfair redistribution. If the regulatory takings doctrine is based on unfair redistribution, then the Lingle Court was right that the “substantially advances” test should be banished from takings law. The second conception posits that the regulatory takings doctrine is necessary to maintain the boundaries between those governmental powers that require the payment of just compensation and those that do not. If the doctrine is based on boundary maintenance, then there may be a role for “substantially advances” after all. At the least, the Court failed to make the case that “substantially advances” cannot perform a useful role in the boundary maintenance process by helping to distinguish exercises in eminent domain, which require compensation, from exercises of the police power, which do not.

The unfair redistribution explanation for regulatory takings law is the one favored by most academics. It draws inspiration from the statement in Armstrong v. United States that the government should not “forc[e] some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.”16 Of course, different people have different ideas about what makes for unfair redistribution. Richard Epstein believes that all government redistribution is problematic, including progressive income taxes and welfare benefits.17 More commonly, the kind of troublesome redistribution associated with the Takings Clause is what has been called “singling out”—government action that imposes high costs

---


on a relatively small number of persons through no fault of their own.\footnote{See, e.g., Saul Levmore, Takings, Torts, and Special Interests, 77 Va. L. Rev. 1333, 1344–45 (1991).} The classic example would be a taking of land for a new public road.

Note that one implication of the unfair redistribution explanation is that the Court will never get regulatory takings doctrine right unless and until it develops a comprehensive theory of when redistribution from $A$ to $B$, or from $A$ to many $Bs$, or from many $As$ to $B$, is just. In order to decide takings cases we need a theory of distributive justice, or perhaps more accurately a theory about when a system of adversarial litigation can be used to rectify departures from what a theory of distributive justice would indicate is just.\footnote{The classic example of such an attempt is Frank I. Michelman, Property, Utility, and Fairness: Comments on the Ethical Foundations of “Just Compensation” Law, 80 Harv. L. Rev. 1165 (1967), which seeks to derive rules of thumb for assessing takings claims from utilitarianism and John Rawls’s theory of justice.} Why, for example, is the redistribution mandated by the statute in \textit{Lingle}—which would likely take money from consumers and the shareholders of oil companies and transfer it to one class of gasoline service station dealers—just? Or if it is unjust, why is this type of redistribution beyond the capacity of courts to rectify under a system of adversarial adjudication? These are very difficult questions for a court to answer, especially since commentators cannot agree among themselves about a theory of distributive justice or about the proper role of the courts in addressing deviations from what a theory of distributive justice would require.

Note further that under the unfair redistribution theory it matters not what sort of power the government is exercising in determining whether it has committed a taking. A government tax that has a sufficiently idiosyncratic distributional effect might be condemned as a taking.\footnote{See, e.g., Eric Kades, Drawing the Line Between Taxes and Takings: The Continuous Burdens Principle and Its Broader Application, 97 NW. U. L. Rev. 189, 223–24 (2002) (proposing that a tax with a disproportionate burden on the extremely wealthy could be a taking).} Similarly, an exercise of the police power can be condemned as a taking if it violates whatever norm we adopt for identifying troublesome redistributions. Conceptual distinctions grounded in history are irrelevant on this view. The task is to derive doctrinal rules and standards directly from abstract principles about just distribution and the institutional capacities of courts.

What I have called the boundary maintenance conception does not aspire to anything as highfalutin as a theory of distributive justice. The boundary maintenance idea is grounded in historical distinctions, and in
particular in ideas about the classification of government powers. 21 These ideas, like many other important constitutional concepts, were rather imprecisely understood at the time of the founding. 22 They crystallized only later, typically in the nineteenth century. For present purposes, the key distinction that eventually emerged in constitutional law was that between the power of eminent domain and the police power.

The power of eminent domain was understood to be the power to force an exchange of property rights in order to promote the public good. The police power was understood to be the power to regulate the use of property in order to forestall some public bad. Critically, the Takings Clause (and parallel state constitutional provisions) requires that any exercise of the power of eminent domain be attended by the payment of just compensation to the person whose property is taken. 23 An exercise of the police power, in contrast, is understood not to require any payment of compensation. Given this critical difference, it is necessary to distinguish between exercises of eminent domain and the police power. Conceivably, courts could simply defer to the legislature’s judgment about which power it is invoking. But, starting in the late nineteenth century, courts concluded that this would create too great a temptation for legislatures to engage in expropriation of the property of unpopular owners—such as investors in railroads—under the guise of police power regulation. 24 It was therefore necessary to develop a doctrine that in effect required the legislature to use eminent domain, rather than police regulation, in circumstances where ordinarily one would expect the legislature to use eminent domain.

The boundary maintenance idea does not require that we develop a general theory of distributive justice. It does require that we have in mind ideal typical situations when eminent domain should be used as well as ideal typical situations governed by the police power. For example, seizing possession of land might be regarded as a paradigmatic exercise of eminent domain, whereas ordering a landowner to stop discharging pollution on neighboring property might be regarded as a paradigmatic exercise of the police power. Armed with these ideal typical situations, we can then seek to decide disputed cases—such as whether ordering a landowner not to fill a wetland on his property requires the exercise of eminent domain or can be

22. See id. at 8–25 (explaining that little is known about the Founders’ reasons for including the Takings Clause in the Bill of Rights).
23. See U.S. CONST. amend. V (“[N]or shall private property be taken for public use without just compensation.”).
justified as a police regulation—by attempting to determine whether the challenged action falls closer to the eminent domain end of the spectrum or the police power end of the spectrum.

Note that it is implicit in this approach that government powers do not overlap. Either the action is an exercise of eminent domain or an exercise of the police power; it cannot be both. Similarly, either the action is an exercise of the power of taxation or an exercise of eminent domain; it cannot be both.

The boundary maintenance conception, in my view, provides a better foundation for understanding and rationalizing the regulatory takings doctrine than does the unfair redistribution theory. I cannot give a full accounting of the reasons for this view here. A few suggestions will have to suffice.

First, the unfair redistribution approach, if it is to be successful, requires that the Court agree upon a theory of distributive justice. As previously suggested, judges are not well suited by training or temperament to develop such a theory. It is also unlikely that a diverse panel of nine Justices appointed at different times by different political coalitions can reach a consensus about such a theory. The boundary maintenance approach, in contrast, relies on analogical reasoning from ideal typical cases. This is essentially the tried-and-true method of the common law, something with which all judges are comfortable and familiar.

Second, the boundary maintenance approach is far more consistent with the pattern of outcomes reached in the decided cases. The cases tell us, for example, that brickyards can be shut down without compensation, but compensation must be paid when a small cable TV wire is installed on top of an apartment building.\(^25\) If we expect regulatory takings doctrine to track common intuitions about unfair redistribution, these results seem “incoherent”—a constant lament in the law reviews.\(^26\) In contrast, these and other outcomes make complete sense under the boundary maintenance approach. The brick factory was deemed to be a nuisance, and hence could be abated under the police power. The cable TV line was analogous to other utility lines, which have always required acquiring an easement, if necessary by use of eminent domain. Or, consider again the statute at issue in *Lingle*, which appears to take money from consumers and (mostly out of state) shareholders, and transfer it to a handful of gasoline dealers. This seems hard to justify as an example of principled redistribution. Yet no

---


Supreme Court Justice was prepared to call the law a taking, perhaps because it was couched in the form of a rent control measure, which the Court has come to regard as a legitimate type of police power regulation. The boundary maintenance approach therefore draws strengths from a coherentist or integrity conception of legal truth, in which the generalization that provides the best fit with the data is preferred.

Third, both approaches are significantly complicated by the legal revolution of the 1930s, which validated the idea that deliberately redistributionist legislation is constitutionally permissible. Regulatory takings doctrine got its start in the late nineteenth century at a time when it was generally understood that purely redistributive legislation is not legitimate.27 If we regard the regulatory takings doctrine as a prohibition on unfair redistribution, then this transformation potentially puts the Takings Clause on a collision course with the activist post-New Deal state. The New Deal revolution also creates a problem for the boundary maintenance approach in that the original paradigm of the police power—the prevention of social harms like nuisances—must be augmented with alternative paradigms of the police power that include things like welfare laws and housing subsidies. On balance, however, I believe the boundary maintenance approach has an easier time adjusting to this revolution in the conception of the role of government. Precisely because it is built up out of paradigm cases and analogical reasoning, the boundary maintenance approach is easier to amend than is the unfair redistribution concept.

III. LINGLE’S UNDERSTANDING OF REGULATORY TAKINGS DOCTRINE

The Supreme Court has not come down decisively in favor of either the unfair redistribution conception or the boundary maintenance idea, and many of its decisions contain intimations of both. Lingle is of a piece with the Court’s ambivalence in this regard.28 Lingle contains statements that appear to be direct endorsements of the boundary maintenance idea. The Court noted, for example, that the original paradigm of a taking is “a direct


28. Steven Eagle likewise regards Lingle as an incompletely theorized decision torn between two different constitutional perspectives. Steven J. Eagle, Property Tests, Due Process Tests and Regulatory Takings Jurisprudence, 2007 BYU L. Rev. 899. We differ somewhat in our characterization of the alternative to the troublesome distribution perspective. I regard it as a search for the division between eminent domain and the police power; Eagle characterizes it as an arrogation of discrete property rights. Id. at 922–43.
government appropriation or physical invasion of private property,”
and that the rationale for applying the Takings Clause to certain regulations of
property as set forth in *Pennsylvania Coal Co. v. Mahon* was to extend the
obligation to compensate to situations “tantamount to a direct appropriation
or ouster.”

It also observed that each of the Court’s principal takings inquiries “share[s] a
common touchstone,” namely, “[e]ach aims to identify regulatory actions that
are functionally equivalent to the classic taking in which government
directly appropriates private property or ousts the owner from his domain.”
The search for “functional equivalents” is a concise way of describing the
boundary maintenance approach.

Yet *Lingle* also includes statements that appear to equate the regulatory
takings doctrine with unfair redistribution. The Court kicked off its
distillation of regulatory takings law with the quotation from *Armstrong,*
the battle standard of the just distribution school. Moreover, the Court
claimed that each of its principal takings inquiries—permanent occupation,
total loss of economic value, and the ad hoc inquiry—“focuses directly
upon the severity of the burden that government imposes upon private
property rights.” Perhaps most tellingly, the Court condemned the
“substantially advances” formula as a takings test because it “reveals
nothing about the magnitude or character of the burden a particular
regulation imposes upon private property rights,” and indeed provides no
“information about how any regulatory burden is distributed among
property owners.” If the Court thinks the Takings Clause is concerned
solely with the distribution of burdens, then it has essentially bought into
the unfair distribution idea.

One plausible characterization of *Lingle*’s implicit understanding of the
theoretical underpinning of the regulatory takings doctrine might be that it
synthesizes the boundary maintenance and unfair redistribution approaches
in the following fashion. On the one hand, *Lingle* understands the doctrine
to be an attempt to differentiate between exercises of eminent domain and
the police power by reasoning from analogical cases. On the other hand, it
also understands this process in a truncated fashion, as a process that
reasons from only one pole—the eminent domain pole—and looks to only
the degree of unfair redistribution as measured by how the challenged

---

32. Id. at 539.
33. Id. at 537; *see supra* note 16 and accompanying text.
34. Id. at 539.
35. Id. at 542.
regulation stacks up against a direct appropriation or physical invasion, i.e., the paradigmatic case of eminent domain.

If this is Lingle’s vision of the Takings Clause, then it was half right. It was right to intuit that the regulatory takings doctrine can best be explained as having evolved through a process of analogical reasoning from paradigmatic cases designed to preserve the boundary between the power of eminent domain and the police power. But it was wrong to assume that this line-drawing exercise proceeds only by reasoning from the eminent domain pole. If we envision eminent domain and the police power as governmental powers arrayed along a continuum or spectrum, with the ideal typical eminent action at one end and the ideal typical police power action at the other, then logically one can classify a particular governmental action as falling closer to one pole or the other either by reasoning analogically from the eminent domain end of the spectrum, or from the police power end of the spectrum. Lingle’s implicit suggestion that the analogical process proceeds in only one direction rests on a distortion of history, and yields an impoverished conception of how the inquiry should proceed.

To see Lingle’s mistake we need only recall the many instances in which the Court has resolved regulatory takings disputes by considering whether the challenged action resembles the traditional power of the state to regulate public nuisances. Pennsylvania Coal, which inaugurates modern regulatory takings doctrine, puts heavy emphasis (in both the Holmes majority opinion and the Brandeis dissent) on the public nuisance paradigm. Holmes thought the Kohler Act did not resemble a public nuisance law,36 Brandeis argued it did.37 Both Justices implicitly assumed that the proximity of the law to the police power end of the spectrum was critical to whether the Act was constitutional under the regulatory takings conception. Similarly, Lucas v. South Carolina Coastal Council,38 probably the Court’s most important modern decision, can be read as adopting successive categorical tests: a prima facie test based on whether the regulation causes a loss of total economic value,39 and a rebuttal test based on whether the regulation tracks the common law of nuisance in the jurisdiction.40 The first is based on proximity to the eminent domain pole; the second on proximity to the police power pole. Other important decisions that invoke the nuisance regulation or harm prevention rationale

37. Id. at 417–19 (Brandeis, J., dissenting).
39. Id. at 1014–19.
40. Id. at 1020–32.
for limiting takings liability include Mugler v. Kansas, Hadachek v. Sebastian, Village of Euclid v. Ambler Realty, Miller v. Schoene, Keystone Bituminous Coal v. DeBenedictis—the list goes on and on. It is inconceivable that all of these decisions can be explained on the ground that they did not entail distributional burdens analogous to eminent domain. They were resolved on the ground that the challenged action did or did not conform to a paradigmatic exercise of the police power.

Doctrinally speaking, Lingle is correct that the two most prominent categorical rules identified by the modern Court—the physical occupation rule and the total deprivation of economic value rule—are based on the close approximation to paradigmatic exercises of eminent domain. But if we consider a broader swath of takings doctrine, we can see that there are other important rules or understandings that play a role in fixing the line between eminent domain and other government powers that are not grounded in finding a functional equivalent to eminent domain. The public nuisance analogy is just one of these. Other categorical rules of non-liability include the navigation servitude, the conflagration rule, and the rule that forfeitures cannot be challenged as takings. The common thread in each of these situations, not surprisingly, is that the government action reflects a core exercise of the police power. The understanding that bona fide taxes cannot be challenged as takings similarly reflects a categorization process that focuses on the other end of a pole—in this instance the spectrum that divides the power of eminent domain from the power of taxation.

41. Mugler v. Kansas, 123 U.S. 623 (1887) (holding that a statute prohibiting distillation of alcoholic beverages did not require compensation because the legislature could conclude that production and sale of alcoholic beverages was a noxious use).
42. Hadachek v. Sebastian, 239 U.S. 394 (1915) (holding that an ordinance prohibiting the operation of a brickyard within city limits did not require compensation because the brickyard could be deemed a public nuisance).
43. Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926) (rejecting a facial challenge to zoning ordinance because the separation of incompatible land uses was a reasonable strategy for minimizing nuisances).
44. Miller v. Schoene, 276 U.S. 272 (1928) (statute could order the destruction of cedar trees transmitting rust to apple trees because rust was harming apple growers and their activity was more valuable to the economy).
46. DANA & MERRILL, supra note 21, at 115–20.
Perhaps Lingle’s biggest irony is its reaffirmation of the ad hoc test of Penn Central. Two of the factors identified by Penn Central as bearing on an evaluation of regulatory takings claims are centered on the eminent domain pole, namely, diminution in value and whether the government action represents a physical invasion of the premises.48 But the third (and in many respects most prominent) Penn Central factor—whether the regulation interferes with “distinct” (or “reasonable”) “investment backed expectations”49—appears to derive from the tradition of judicial protection of vested rights, and in particular the idea that existing structures or other improvements to land should be protected against down-zoning.50 If we engage in revisionism, this can be characterized as a particularly unfair type of burden. But the historical roots of this notion are firmly planted in due process tradition, and in particular the prohibition against retroactive legislation.51 In other words, the disfavored status of measures that frustrate investment backed expectations is an implicit limitation on the police power derived from substantive due process law. Penn Central also says that it is important to consider whether the challenged regulation is part of “some public program adjusting the benefits and burdens of economic life to promote the common good,”52 which seems like a highly generalized restatement of the police power. Finally, as previously noted, Penn Central is the modern decision that launched the “substantially advances” test,53 which, as Lingle itself spells out, is an idea that originated in due process.

In short, Lingle is highly selective in its insistence that the takings tradition and the due process tradition must be rigorously separated. The need for strict separation and a singular focus on the eminent domain analogy is invoked in support of repudiating the “substantially advances” test. But these imperatives are quietly set aside in ignoring large swaths of takings law, including all the decisions from Pennsylvania Coal to Lucas that apply the nuisance exception, and in re-affirming Penn Central’s ad hoc approach, which rests on a mixture of takings and due process traditions.

50. DANA & MERRILL, supra note 21, at 156–63.
51. See, e.g., Landgraf v. USI Film Products, 511 U.S. 244, 265–68 (1994) (discussing the constitutional underpinnings of the presumption against retroactive legislation).
52. Penn Central, 438 U.S. at 124.
53. Id. at 127.
IV. WHAT LINGLE SHOULD HAVE SAID

What, then, should we make of the “substantially advances” test under the boundary maintenance conception of the regulatory takings doctrine, correctly understood as a two-way, rather than one-way, process of reasoning from paradigmatic cases? Lingle was clearly correct to overturn the Ninth Circuit’s application of the “substantially advances” notion as a kind of categorical (or at least facial) regulatory takings doctrine. The “substantially advances” test asks whether a particular government regulation is not an exercise of the police power because it fails to do what every police regulation is supposed to do: substantially advance a legitimate state interest. But simply showing that a government action does not fit neatly within the police power paradigm does not establish that it falls on the eminent domain side of the line. Proving a negative does not establish the opposite. A failed exercise of the police power could simply be innocuous, or it could perhaps be an exercise of the power of taxation. So, the first half of Justice O’Connor’s wrap-up sentence was right. The Court should have said, “[w]e hold that the ‘substantially advances’ formula is not a valid takings test” and left it at that.54

But it does not necessarily follow that the “substantially advances” idea “has no proper place in our takings jurisprudence.”55 The question is whether asking if a regulation substantially advances a legitimate state interest helps us in carrying out the “essentially ad hoc, factual inquiry” required by Penn Central when all categorical rules fail.56 The answer here is that I am not sure. If we pose the question as whether a government action substantially advances a legitimate state interest, then I agree that the “substantially advances” test is useless for ad hoc adjudication purposes. Exercises of eminent domain, no less than exercises of the police power, must have a legitimate public purpose, or “public use” as it is called in the eminent domain context.57 Thus, showing that a government action does nothing to substantially advance a public purpose would not necessarily tell us which side of the eminent domain/police power line it falls on. It might just be a private taking, and hence invalid under the Public Use Clause.

But if we assume that the inquiry is limited to regulations of the use of property, then the test might have some probative value. If we limit the inquiry to use regulations, then surely the fact that the regulation does substantially advance a legitimate state interest has some probative value in

55. Id.
56. Penn Central, 438 U.S. at 124.
telling us that it is a proper exercise of the police power. It would increase the probability that the proposition is true and hence satisfy the general test of legal relevance. I am not sure that its probative value is very high. Asking whether the regulation entails an “average reciprocity of advantage,” or offers “implicit in-kind compensation,” or even, to use *Penn Central*’s formulation, whether it adjusts “the benefits and burdens of economic life to promote the common good” might be better formulations. But it cannot be condemned out of hand as being irrelevant to the inquiry.

**CONCLUSION**

This is all I wish to say. The *Lingle* Court was right to reject the idea that any regulation of property that fails to substantially advance a legitimate state interest is a taking requiring the payment of just compensation. But *Lingle* spoke too quickly and too broadly in saying that the “substantially advances” idea “has no proper place in our takings jurisprudence.” In this respect *Lingle* underscores a more general failing of the Court’s post-*Penn Central* takings jurisprudence. The Court since then has devoted itself to developing and fighting over the scope of categorical rules that obviate the need to engage in the *Penn Central* inquiry. The Court has paid little heed to the need to refine and adjust the *Penn Central* factors themselves, in order to assure that they channel the “essentially” factual inquiry in the right direction.

*Lingle* observes: “On occasion, a would-be doctrinal rule or test finds its way into our case law through simple repetition of a phrase—however fortuitously coined.” The Court in *Lingle* exhibited admirable candor and even some courage in excising a verbal formula that had been created too casually and perpetuated by rote repetition. Unfortunately, *Lingle*’s truncated conception of the regulatory takings doctrine will make it more difficult to perform similar corrective surgery on another and more important takings doctrine—*Penn Central*’s ad hoc regulatory takings formula. This too was created quite casually and has gained force by simple repetition rather than careful analysis. Here, as elsewhere in

---

59. Epstein, supra note 17, at 195.
60. *Penn Central*, 438 U.S. at 124.
62. *Id.* at 531.
constitutional adjudication, a more minimalist opinion would have better served the cause of future legal evolution.
ENVIRONMENTAL LAND USE RESTRICTION AND PROPERTY VALUES

Jeffrey A. Michael & Raymond B. Palmquist

TABLE OF CONTENTS

Introduction ............................................................................................... 437
I.  The Theory of How Legal Restrictions Affect Land Values .............. 439
    A.  Land Use Supply and Demand .................................................. 439
    B.  Urban Land Models .................................................................. 440
    C.  Hedonic Studies ........................................................................ 444
    D.  Theoretical Literature on Environmental Land Use Policies ....... 445
    E.  Towards a Comprehensive Predictive Model ............................. 447
II. Empirical Studies of the Effects of Legal Restrictions on Land Values ........................................ 450
    A.  Methodological Challenges ..................................................... 450
    B.  Urban Growth Boundaries ...................................................... 453
    C.  Minimum Lot Zoning ............................................................... 454
    D.  General Building Restrictions, Wetlands, and Watersheds ........ 457
    E.  Conservation Easements ......................................................... 460
III. Analysis, Future Research Needs, and Practical Implications .......... 462
Conclusion .............................................................................................. 464

INTRODUCTION

The effects of land use restrictions on property values is an important, cross-cutting issue in the fields of land use and natural resource management. Yet this issue has been under-examined, at least in a form that would be helpful to judges, legal advocates, regulators, conservationists, planners, and others who deal, in a variety of different

* Eberhardt School of Business, University of the Pacific. The authors are grateful to John D. Echeverria for useful comments and support during the research that generated this paper. The Packard Foundation provided financial support for the project.
** Department of Economics, North Carolina State University.
legal and policy contexts, with restrictions affecting land value. This article seeks to fill that gap.

In the United States, we employ a myriad of techniques to protect and manage private real property to achieve environmental goals. The focus of this paper is legal restrictions on the use of private property. Such restrictions can be imposed through legislative mandates, such as growth management laws, minimum lot size or density restrictions, agricultural, and open space zoning, and so forth. They may also be imposed voluntarily through the donation or purchase of easements or other interests in land. Some legal restrictions are designed to endure in perpetuity (e.g., most conservation easements), while others are designed to remain in effect for a finite period (e.g., development moratoria).

It is widely assumed that legal restrictions can adversely affect the value of real property. This premise underlies claims for compensation for regulatory takings under the federal and state constitutions, and legislative proposals to provide payments to land owners subject to legal constraints. It also supports the tax deductibility of donations of interests in land under the tax code. However, contrary to this general assumption, restrictions may also positively affect land values, and the positive effects of restrictions may offset, at least in part, their negative effects. For example, a regulation can positively affect property values by limiting the supply of developable land and/or by enhancing environmental amenities that increase demand for property. The positive effects of legal restrictions can be felt by the properties subject to the restrictions (direct effects) as well as by properties not subject to the restrictions (indirect effects). A full and accurate accounting of the effects of legal restrictions on property values requires consideration of both the negative and positive effects.

The purpose of this article is to synthesize the current theoretical understanding of how legal restrictions affect land values as well as the results of the valuable (albeit limited) empirical research on this topic.


3. Id.
Section I provides a theoretical framework for understanding how legal restrictions affect property values, including descriptions of the supply and demand factors that determine land prices, the models economists use to understand the effects of legal restrictions in urban land markets, and the so-called “hedonic methodology” economists sometimes use to identify specific determinants of land value. Section I concludes with a description of a comprehensive analytic framework for understanding how land use restrictions affect land prices and urban form under different assumptions. Section II describes the results of various empirical studies that have been conducted to test theoretical predictions with actual market data under different policy scenarios. Section III seeks to reconcile the empirical findings with the theoretical predictions by drawing some general conclusions about how legal restrictions apparently affect land values, identify potentially fruitful areas for future research, and describe some of the broader legal and policy implications of our analysis. Section IV provides a short conclusion to the article.

I. THE THEORY OF HOW LEGAL RESTRICTIONS AFFECT LAND VALUES

This section lays out the theory of how legal restrictions on land use affect the value of private property and describes some models that help illustrate the effects of different policies on property values and urban form.

A. Land Use Supply and Demand

Regulations and other land use policies can affect supply in urban land markets by withdrawing land from residential or other uses. In simple terms, more restrictions are likely to mean less developable land. However, the effects of restrictions on the market for land may not be completely straightforward. For example, regulations may lead builders to change the ratios of land to structure that are used in constructing housing. In other words, if less land is available, builders may tend to build on smaller lots.

On the demand side, land use restrictions can provide a range of amenities that increase demand. These may include visual amenities, recreational opportunities, preservation of agricultural life styles, or just the satisfaction from knowing that land is being preserved in an undeveloped state. These amenities will positively affect the demand for land if valued by prospective purchasers of property in the community. Other policies affecting the degree of crowding in the community or the costs of transportation may also affect demand.
The logical next question is: how do supply and demand interact to determine land prices and shape urban areas?

**B. Urban Land Models**

Economists have developed simple models designed to represent the economic forces at work in urban land markets. These models are highly simplified versions of what are actually very complex systems. The primary value of these models is to illustrate how individuals may behave and how properties may be affected in urban markets, and to identify potentially interesting questions to be explored through empirical research.4

Models for urban land markets are more complex than models for other kinds of goods and services because location and spatial effects are crucial in models for urban land markets. In addition, market prices for land are the product of a number of complex factors: the different alternative uses for the land, the mobility of residents, the complexity of the primary commodity associated with land (housing), and possible effects that are external to the markets. Fortunately, fairly simple spatial equilibrium models have proven quite robust over the years.

The simplest model involves a monocentric urban area in which residents commute to work in the center of the area and live at various distances from the center. In reality, cities have many locations for work and shopping, and residents differ in income and other characteristics, but this type of model yields useful insights even if these complexities are ignored.

This model assumes that the typical individual derives satisfaction from all the many goods she consumes, including housing. All of the choices a person makes among all non-housing goods can be treated, for convenience, as a single good. Thus, the individual can be said to derive satisfaction (utility) from this composite good and from housing. Housing is a spatial good because location affects the level of services and the cost of the services. When an individual chooses a particular house, the person chooses not only the physical structure but also a physical location, the attractiveness of which is affected by, among other things, the quality of the surrounding environment. In addition, if one lives further out from the center, transportation costs are greater. They are less the closer one lives to the center.

---

If land prices, or land rent and everything else other than transportation costs, were the same at all locations, each individual would prefer to live closer to the center. As a result, this model posits that competition for close-in locations will bid up land prices, and that prices will therefore increase with proximity to the center. In addition, construction at locations near the center will use relatively less land and relatively more capital. Thus, the model predicts that the density (individuals per acre) will be higher near the center and lower near the outer edge of the urban area. Finally, the model predicts that, starting at the center, land values will at first fall rapidly as one moves out from the center but then fall more slowly further out. This is referred to as the rent gradient. At the outer edge of the urban area, the price of land for urban use is expected to be equal to the price of land in agricultural use.

The reality in many urban areas generally conforms to this model. Except in some blighted areas near older central cities, land prices tend to be higher in urban centers and decline with distance from the center. In addition, the skyline of a city tends to be taller in the urban center, confirming the existence of a land price gradient and supporting the theory that higher land prices mean that structural capital (tall buildings) will be substituted for land.

Economists commonly elaborate upon this basic urban model in one of two ways. The first modification is called a small open urban model and the second is called a closed urban model. Each of these models is based on a different assumption about the relationship between a particular urban area and the surrounding region. While neither model captures the complexities of the real world, they are useful theoretical constructs.

In the small open model, an urban area is assumed to be one of many urban areas in a larger region, and it is further assumed that residents can move easily among different urban areas. Under these assumptions, the level of satisfaction (utility) will be the same for residents in all urban areas. This is because otherwise, given the assumption of ready mobility, residents could always make themselves better off by moving to another city. An urban area is deemed small relative to the region as a whole if policy changes in that area will not affect land values across the region. In other words, even though a new policy in the small open urban area may affect prices for individual properties, it will not affect the overall pattern of


prices across the region. If a policy increases the attractiveness of an area, the outer limit of the urban area should expand as new people move in. Evaluating the impacts of a new policy in a small open city is relatively straightforward because an increase or decrease in the price of lands affected by the policy will provide a measure of all the benefits or losses from adoption of the policy. This is because, under the open urban area model, the level of satisfaction of the residents remains unchanged. Therefore, any change in land prices captures all of the effects of the policy change.

In the closed urban model, it is assumed that the area is not embedded within a larger region and that there is not easy migration in and out of the area. Thus, at any particular point in time, the population of the area is assumed to be fixed. Under this model, in contrast to the small open model, the level of satisfaction (utility) may vary in response to public policies. Moreover, if a new policy affects a substantial number of properties in a closed urban area, land prices may change throughout the area. The new policy may also result in a change in the location of the urban area’s outer limit.

The differences between these models can be illustrated by the expected responses to various external events. For example, agricultural land owners might see their incomes rise as a result of an increase in commodity prices. Under the small open model, such an increase in agricultural income is expected to lead to an increase in agricultural land prices (rents) and cause the urban boundary to shrink (or to expand slower than it otherwise would) because land at the urban boundary is now more valuable in agricultural use. Under this model, a change in agricultural land prices will have no effect on the prices of urban land and housing. This is because the returns from ownership of urban land will be determined by conditions across the region. By contrast, a change in income levels throughout the community will have different effects. If income increases in a city, the limit of the urban area will expand, land and housing prices will increase, and housing density will increase. If transportation costs increase, the effects would be just the opposite of those felt from an increase in income.

The predicted effects under the closed urban model are more complex. If agricultural land prices increase, the urban boundary will shrink as it does under the open urban model. However, land and housing prices will now increase, as will density, because residents will be unable to move between cities as in the open model. If income increases, the urban area will again become enlarged and the price gradient will become flatter. This is because the increase in income will lead to an increase in the demand for housing
and land, which is cheaper farther from the center. Again, if transportation costs increase, the effect will be just the opposite.

In the real world, of course, public policies do not produce results that exactly match the predictions generated by either of these two stylized models, but they can provide guidance on potential effects of a policy. Whether one model or the other will be more useful in any particular case depends on the circumstances. For example, in the short run, the cost of moving between cities in response to a new policy is quite high. As a result, a closed city model may be more appropriate for modeling short-run effects. However, in the long run, movement between cities will occur for a variety of different reasons and the policy may affect many individual decisions about whether and where to move. Thus, an open city model may be more appropriate to predict long-term effects.

Furthermore, if a new policy affects only a small fraction of the properties in a particular urban area, it may be reasonable to assume that land prices elsewhere in the area will not change significantly. Because people can move within the urban area to adjust to the policy change, the open city model may be appropriate, even if the overall urban area is closed. This is analogous to the concept of a localized externality in hedonic studies. On the other hand, if the policy affects a significant fraction of the properties within an urban area, then modeling the urban area as closed is probably more appropriate. For example, suppose a municipal government purchases fifty acres of undeveloped land for a park. Setting aside this open space may well influence the value of neighboring land. However, the affected lands will be a small part of the urban area, and establishing the park will probably not influence land prices in the area overall. It would probably be appropriate to evaluate such a government action using the small open model. On the other hand, if a growth boundary were established around an entire urban area, this policy might affect property prices throughout the urban area. The appropriate model in this case may be the closed model.

While these relatively simple models explain a great deal about the structure of urban areas, they are static in the sense that they provide a snapshot of an urban area at a particular point in time. However, many land use policies are specifically designed to respond to dynamic changes, such as the ongoing growth of an urban area. Some land use policy research has adapted the static models described above, while others have used dynamic

---

models. Dynamic versions of these urban models incorporate changes in population and income over time and track the evolution of the urban area.

C. Hedonic Studies

The urban models discussed above produce housing by combining structural capital and land. These models do not consider variety in housing. To determine the effects of environmental amenities on property values economists generally turn to hedonic studies. In simple terms, hedonic analysis seeks to estimate the value of a particular feature or characteristic of a differentiated market good, such as land or housing. For example, the price of a house varies with square feet of living space, age of structure, number of baths, lot size, location, and so on. Hedonic analysis seeks to isolate the contribution of the particular characteristic being studied to the good’s value. In the case of housing this might be some feature of the structure (such as the presence of a fireplace) or some characteristic of the community (such as proximity to preserved agricultural lands). The basic features of urban economic models can provide insights in designing hedonic studies.

Both urban land models and hedonic models address land prices and other characteristics of the land, but they do so in very different ways. In urban models, spatial location is all important, whereas spatial location is only one of many factors studied in hedonic models. For example, the distance to a park or the distance to downtown may be included in a hedonic model, but these are only a few of the many determinants of property value. In addition, urban models generally treat housing services as a homogeneous product with a constant price at any given location. Hedonic models, however, generally recognize the diversity of housing by including many different characteristics of housing units.

As we discuss below, most of the empirical studies conducted to date addressing the negative as well as positive effects of regulatory action on property values have utilized the hedonic method.


D. Theoretical Literature on Environmental Land Use Policies

There is a small body of theoretical literature that seeks to predict the effects of specific environmental policies—such as establishment of urban growth boundaries and open space programs—on land values and urban form. Generally speaking, the literature tends to support the expectation that land use policies are likely to have complex and sometimes conflicting effects.

An urban growth boundary can have two effects on land values within a city. First, it may restrict the supply of land within the city, and second, it may increase demand for land in that city. Much of the early literature focused only on the supply restriction. The supply restriction will raise land values for developed parcels but reduce land values for parcels outside the boundary where development is no longer allowed. On the developed parcels, there is no net societal gain from the supply restriction because the landlords’ gain is offset by the loss to residents from paying higher rents. There is a net loss on undeveloped, restricted parcels since the landlords have lower land values and there are no residents to offset this loss.

However, the urban growth boundary may also affect demand, and this can increase property values and welfare. The increase in demand may result because the growth restriction mitigates negative externalities and congestion resulting from growth, or because it enhances amenities, such as open space. These demand effects would create a gain in the value of the unrestricted land, and they may also offset the loss on the restricted properties. To our knowledge, this point has not typically been raised. We return to this point in the next section.

One of the most accessible theoretical analyses of urban growth boundaries is by Engle, Navarro, and Carson. They analyze the effects of growth controls on a small open city. Migration into and out of this city comes from elsewhere in the system of cities, and the changes in the small open city do not significantly affect prices in the rest of the system. However, changes in the rest of the system do influence the small open city. They assume an external shock in the other cities causes a drop in utility and results in migration to the small open city. By framing the problem in this way, they are able to analyze the inherently dynamic issue of growth in a static model. This growth (migration) causes land rents to be bid up in the small open city, and the urban boundary expands if there are no growth controls.

If growth controls are imposed, the authors considered two possible scenarios. Under the first scenario, growth is assumed to have no adverse effects (congestion, pollution, etc.) on the community. While the urban growth boundary prevents the city from expanding, rents inside the boundary rise to the same level that they would without the growth boundary. This is because migration between cities means that utility levels are the same throughout the system. However, rents on land between the initial urban boundary and the boundary that would have existed if the city had been allowed to expand are lost. There is a net reduction in utility in the community when the growth control is imposed.

Under the second scenario, it is assumed that population growth in the small open city would produce various environmental harms, such as congestion. In the absence of an urban growth boundary, the city expands but the rent gradient becomes flatter as the population expands. This is because the congestion lowers utility, and this must be offset by a reduction in land rents. However, with the growth boundary, the increase in congestion is eliminated and total rents increase. Within the urban growth boundary, land rent will be higher than if the growth boundary had not been imposed. Thus, according to the theoretical model, a growth boundary can increase societal welfare even when land rents are lost on the land outside the urban growth boundary.

Bento, Franco, and Kaffine examine the effects of urban growth boundaries designed to control sprawl. In their model, households directly receive satisfaction from what they refer to as open space, as well as housing and the composite good. However, they restrict open space to be space at the urban boundary, deriving the marginal effect of different amounts of this type of open space on rents. They show, theoretically, that an urban growth boundary can increase land rents and have positive net welfare effects. Using numerical simulations to illustrate the effects of their model, they find that restricting development on 12% of the land would provide the greatest net benefit. Obviously, the optimal level of restriction estimated by the model depends on the assumed values of its parameters, but the simulation demonstrates the possibility of welfare enhancing regulations in the presence of externalities.

While the preceding articles use a static approach, Brueckner employs a dynamic approach to analyze the effects of growth control measures. He

12. Id. at 133.
assumes an open urban area and a population externality to represent the adverse effects of population growth on current residents. He concludes that a growth control policy increases the value of developed land because reducing the population externality increases future rents. With undeveloped land, he finds two countervailing effects. The growth control slows development, delaying the higher land rents that development would provide. On the other hand, he also finds that growth control exerts a positive influence on property values once the growth control is eased and development is allowed.

Yang and Fujita develop a model where an open space policy provides utility directly but also removes land from residential use. They assume that open space is a pure public good for those who live at the same distance from the central business district as the open space, and that it is not valued by those at other distances. They then solve for the optimal open space and also for the market outcome. They conclude that the optimal distribution of open space is in pie-shaped wedges emanating from the central business district and alternating with pie-shaped wedges of residential land. They also conclude that the market solution fails to achieve this because the open space is a public good and thus underprovided.

Minimum lot size requirements are widely used by communities to preserve community open space, but we are not aware of any economic studies that consider the possibility that larger lot sizes may confer benefits on surrounding residents. Most of the theoretical work on minimum lot size requirements examines their effect on municipal finances. This appears to be one of the gaps in the economic literature relating to the effects of environmental restrictions on property values, a topic to which we return in the final section of this paper.

E. Towards a Comprehensive Predictive Model

With this understanding of the theory describing how government polices affect land values and urban form, it is possible to construct a

14. Id. at 237–38, 246–47.
16. Id.
comprehensive analytic framework to predict how land policies may affect real estate prices.

First, this framework draws a distinction about the expected consequences of a land use or environmental policy depending upon whether or not it generates an amenity effect. This generic term is intended to refer broadly to the effects of policies that provide environmental benefits or preclude environmental deterioration. If there is no amenity effect, then the model posits that land use policies can positively affect land values only through supply restrictions, where the supply of land for certain types of uses is limited.

Second, the model draws a distinction between the direct and indirect effects of public policies on land prices. For example, a policy has a direct effect on land that is outside an urban growth boundary and cannot be developed, but that otherwise would have been developed. Similarly, minimum lot size zoning has a direct effect on lands subject to the zoning restrictions. On the other hand, public policies also have indirect effects on lands that are affected by the policies but are not directly subject to them. For example, land prices inside an urban growth boundary may be indirectly affected by an urban growth boundary and unzoned lands may be indirectly affected by zoning of other lands.

Under the open city model, if there are no amenity effects, the prices of lands directly affected by a land use restriction will fall. This is to be expected because the land can no longer be developed or can no longer be developed as intensively. The prices of lands that are not directly affected will not change if there are no amenity effects. As a result of the open city assumption, price levels of these lands are determined by the broader economy and are not influenced by the policy.

In contrast, if there are amenity effects, the predictions are quite different. The effect on the land that is directly affected depends on the policy. If land is completely withdrawn from urban use, the price of this land will decrease. However, if some development is still possible, there will be two effects moving in opposite directions. The supply restriction still reduces land prices, but the amenity effect will cause prices to move in the opposite direction. The net effect is indeterminate as a matter of theory and has to be determined empirically. If an empirical study found no effect or a positive effect from a policy on the value of directly affected lands, this evidence would suggest an amenity benefit from the policy.

When one considers the properties indirectly affected, the ambiguity disappears. If there is an amenity effect, it will lead to an increase in the prices of parcels that indirectly benefit from the policy. Thus, there are two potential tests for an amenity effect. First, if the policy has a non-negative effect on properties directly affected, this is evidence of an amenity effect.
Alternatively, if the policy has positive effect on properties that are indirectly affected, this also shows an amenity effect.

Under the closed city model, the predictions are a little different, and one of the tests described above no longer works. If there are no amenity effects, the prices of properties directly affected will still decline. But the prices of properties that are not directly affected will now rise, rather than remain unchanged as in the open city case. This is due to the fact that supply restrictions, when they are binding, should increase land values. This makes an empirical test of the amenity effect on properties indirectly affected more difficult because the supply restriction moves land prices in the same direction as the amenity effect.

If there is an amenity effect under the closed city model, properties that are directly affected will exhibit two countervailing effects: a positive amenity effect and a negative supply restriction effect. If the amenity effect is strong enough on these properties, land prices may be unchanged or increase as before. The amenity effect on properties that are indirectly affected will still be positive, but so is the supply restriction effect. Unless one can separately measure these effects, one cannot conclude unambiguously that there is or is not an amenity effect. On the other hand, in an empirical study, if the amenity effect is localized and the supply restriction affects a larger area, it may be possible to disaggregate the amenity effect from the supply effect.

<table>
<thead>
<tr>
<th>Model</th>
<th>Properties Directly Affected by the Regulation</th>
<th>Properties Indirectly Affected by the Regulation</th>
</tr>
</thead>
<tbody>
<tr>
<td>Open city, no amenity effect</td>
<td>Decrease</td>
<td>No Change</td>
</tr>
<tr>
<td>Open city, amenity effect</td>
<td>Uncertain</td>
<td>Increase</td>
</tr>
<tr>
<td>Closed city, no amenity effect</td>
<td>Decrease</td>
<td>Increase</td>
</tr>
<tr>
<td>Closed city, amenity effect</td>
<td>Uncertain</td>
<td>Increase</td>
</tr>
</tbody>
</table>

Table 1.

The table above summarizes the model’s predictions of how legal restrictions affect land prices. In every case, the impact on indirectly affected properties is more positive than on directly affected properties. Indirectly affected properties increase in price in all scenarios, except under the open city model, under the assumption that there are no amenity effects
when the effect is neutral. So long as regulations are assumed to have some positive amenity effect (a reasonable assumption in many cases), the model indicates that the net effect of the restriction on directly affected properties is uncertain. In other words, the actual effects of environmentally protective policies on directly affected lands can only be definitively settled through empirical research.

These results highlight the importance of the caution offered by Jaeger about not confusing positive impacts on indirectly affected properties with negative effects on regulated properties. If land prices are higher on unrestricted (indirectly affected) properties than restricted (directly affected) properties, the difference is likely to be due to, at least in part, the positive effect of the restriction on indirectly affected properties. Thus, the difference cannot properly be attributed to a negative impact of legal restrictions on land values. Only if a policy fits the open city model and there is no amenity effect can the price difference be taken to measure the negative effect of legal restrictions on restricted landowners.

II. EMPIRICAL STUDIES OF THE EFFECTS OF LEGAL RESTRICTIONS ON LAND VALUES

Empirical analysis of real property markets is critical to validating the foregoing theoretical predictions, determining the net impact on real property prices in situations where there are offsetting negative and positive impacts, and determining the magnitude of any gains or losses associated with restrictions. We first discuss some of the methodological challenges these types of studies present, and then turn to a summary of the findings of the most pertinent studies.

A. Methodological Challenges

It is important to distinguish between traditional appraisal techniques for measuring the effects of legal restrictions on land values and the approach to this issue generally taken by economists. The most common appraisal technique is to examine a small group of comparable sales, whereas economists generally use large samples of data and statistical models. The comparable sales approach to appraisals identifies a small number (typically three) of recently sold properties that are most like the property being appraised. Then, the appraiser makes adjustments in value

18. See Jaeger, supra note 2, at 105–07 (making the distinction between “the effect of a land-use regulation on property values and the value of an individual exemption to a land-use regulation”).
for the differences in the attributes between the comparable properties and the property being appraised. If the difference is in a common attribute, such as number of square feet of heated area, appraisers have reliable evidence on the necessary adjustments.

However, for legal restrictions and environmental amenities, the comparable sales approach has many problems. Unlike physical property characteristics such as a bathroom or fireplace, many environmental and land use restrictions affect supply and demand in the entire market. As discussed in the previous section, environmental regulations can have significant positive indirect effects on the value of parcels that are not directly subject to the regulation. Thus, the difference in observed values between comparable restricted and unrestricted parcels reflects both direct and indirect effects, and appraisals based on comparable sales will overestimate the effect of environmental restrictions on property values.

When comparable sales of restricted parcels are not available, appraisals will sometimes use an income approach to estimate a property’s restricted value. For example, development could be restricted on a parcel, but agriculture or other income producing uses are still allowed. The restricted value of the property would be set at the present value of estimated future cash earnings of the parcel. The income approach will also lead appraisals to overestimate the effect of environmental restrictions because it ignores the contribution of environmental amenities to the restricted properties value and includes indirect positive effects on unrestricted properties like the comparable sales approach.

Economists prefer to use hedonic studies of actual transactions and consider as many characteristics of the properties as possible. They seek to use estimators that control for the various factors that remain unobservable. Ideally, they would be able to use data from before and after the restriction was imposed. Such techniques will potentially allow the price effects of a restriction to be separated into the effects due to supply restriction, amenity creation, and external effects from other properties.

Hedonic studies use regressions, where land values or property values explain the characteristics of the properties, including the regulations which restrict the use of the property. However, there are often other unobserved factors influencing land values, and this can create a statistical problem known as endogeneity. If an explanatory variable such as the presence of a land use regulation is correlated with important, unobserved variables, the endogeneity problem can create unreliable results. For example, a regression may show that development restrictions have positive impacts on property prices, but if wealthier communities are more likely to adopt restrictions, the regression could be measuring, at least in part, the impact of unobserved community characteristics such as affluence rather than the
effect of the restriction itself. To use another example, a regression showing that conservation easements have no adverse impact on property values may be misleading if properties placed under conservation easement tend to be higher priced for unobserved reasons. Much of the earlier empirical research did not adequately address the problem of endogeneity.\footnote{See John M. Quigley & Larry A. Rosenthal, \textit{The Effects of Land Use Regulation on the Price of Housing: What Do We Know? What Can We Learn?}, 8 CITYSCAPE: J. OF POL’Y DEV. & RES. 69 (2005) (noting that “most studies ignore the ‘endogeneity’ of regulation and price”); Keith R. Ihlanfeldt, \textit{The Effect of Land Use Regulation on Housing and Land Prices}, 61 J. URB. ECON. 420, 421 (2007) (critiquing land use regulation literature).}

Empirical studies can attempt to account for endogeneity in several ways. One technique uses a two-step method where the first step estimates the probability that the regulation is imposed based on the attributes of the land and community, and the second step regresses property values against characteristics and incorporates results from the first step to control for the endogeneity.\footnote{Raymond B. Palmquist, \textit{Property Value Models}, in \textit{HANDBOOK OF ENVIRONMENTAL ECONOMICS, VOLUME 2}, at 763, 763 (K.G. Mäler & J.R. Vincent eds., 2005).} Another technique replaces the regulation variables with instrumental variables that are correlated with the regulation variable but not with the unobserved components of the error term of the regression.\footnote{Id. at 801.} Unfortunately, such instruments are often difficult to identify, limiting the effectiveness of this technique. Finally, matching models can be used to attempt to match properties that are subject to a restriction with properties that are as similar as possible, but which are not subject to the restriction.\footnote{James J. Heckman, Hidehiko Ichimura & Petra E. Todd, \textit{Matching As an Econometric Evaluation Estimator: Evidence from Evaluating a Job Training Program}, 64 REV. ECON. STUD. 605 (1997); Sandra E. Black, \textit{Do Better Schools Matter? Parental Valuation of Elementary Education}, 114 Q.J. OF ECON. 577 (1999).}

Yet another challenge for hedonic studies is the paucity of relevant data. Data on vacant land prices are limited because unimproved properties represent a small fraction of the properties in most markets and they sell relatively infrequently. While there is a much larger volume of data on housing prices, and land values can sometimes be derived from housing data, this type of computation can be fraught with difficulties. Ideally, our review of the relevant literature would be limited to studies of vacant, unimproved land that account for potentially endogenous regulations. Unfortunately, there are few studies that meet these criteria, as discussed below.
B. Urban Growth Boundaries

In the absence of amenity effects, theory suggests that the expected direct effects of an urban growth boundary will be a decrease in land prices in the restricted zone outside the boundary and an increase or no change in the prices of unrestricted lands inside the boundary. However, theory also suggests that the negative effects could be offset by positive amenity effects if the boundary reduces negative externalities associated with pollution and congestion that would have been generated by additional development in the absence of the boundary. The relatively few empirical studies on growth boundaries, mostly focused on Oregon, provide mixed support for these theoretical predictions.

Knapp studied the consequences of Portland, Oregon’s urban growth boundary (UGB) on the value of vacant land using data from about four years after the UGB was originally drawn in the mid-1970s. Only land within the UGB could be converted to urban use before some future date. An intermediate growth boundary (IGB) was also established that was inside the UGB. There were restrictions on development outside the IGB and inside the UGB, but these restrictions were subject to local control and were expected to apply over a shorter time period. Knapp also distinguished between urban and nonurban use by the density of development allowed (4.4 units per acre). In Washington County, Knapp found evidence that non-urban zoned lands had significantly lower values than urban zoned lands, regardless of location. In addition, nonurban lands outside each of the boundaries had lower prices than inside the boundaries, but the effect of the IGB was only slightly less than the effect of the UGB. In Clackamas County, the results were less clear cut. The urban-nonurban difference was not significant, and only nonurban lands outside the UGB had significantly lower values. He attributed this to differences between the counties as to how strictly the IGB was enforced. Unfortunately, he lacked data on land sales prior to adoption of the growth boundary. This makes it difficult to draw conclusions about whether these differences were the result of a rise in land values inside the boundaries or a decline in values outside the boundaries, or both.

In a later study, focused primarily on housing costs, Phillips and Goodstein described local government reports of a sharp differential in

---

24. Id.
average per acre land values at the urban growth boundary. However, their regression model is based on a cross-section of the median price of housing in thirty-seven cities. Thus, it is not well designed to address the question of the relative effect of the UGB in Portland and certainly could not show whether any price differences reflected increased prices inside the boundary or decreased prices outside the boundary, or both.

More recently, Jaeger and Plantinga looked at the impact of growth boundaries on vacant land price trends in three Oregon counties and compared them with trends in two Washington counties that did not have such controls. Their sample included smaller urban areas with growth boundaries such as Eugene and Medford-Ashland and did not include counties in the Portland area. Instead of using a hedonic model, they compiled a lengthy time series of assessed and appraised values for vacant land parcels before and after the implementation of growth boundaries. Examining average land values over several decades, they found no change in the rate of land value appreciation inside and outside urban growth boundaries. They also found no change in appreciation rates when comparing prices of restricted lands in Oregon to a set of similar counties in Washington without growth boundaries. They concluded that these results could be explained by the fact that boundaries are set so that they do not impose a binding constraint on the total amount of growth and development in an area and an adequate supply of developable land exists within the growth boundaries. These results could also be explained on the basis that the negative direct effects of regulation were largely, if not entirely, offset by positive indirect effects.

C. Minimum Lot Zoning

Beaton looked at zoning impacts on vacant land in the Pinelands region of New Jersey. For the most restrictive zones, he found that vacant land prices increased greatly compared to control areas between 1972, when the restrictions were originally proposed, and 1981, when they finally took effect. Following the implementation of restrictive zoning, vacant land

27. Id. at 6.
29. Id. at 190–91.
prices in the preservation area decreased to a level similar to that in the control areas. In contrast, the areas in the Pinelands zoned for development greatly increased in value after restrictions were imposed in 1981. Beaton’s results suggest that the price differential between more restricted and less restricted parcels is more the result of regulations increasing values in the development zone than decreasing values within the restricted zone. His results also illustrate how pressure to develop before restrictions are imposed can temporarily boost land values in areas targeted for future regulation.

Several other studies have examined the impact of agricultural preservation zoning on farmland values. Vaillencourt and Monty looked at the effect of agricultural preservation zoning instituted in Quebec, Canada in the late 1970s using a regression model. They did not allow the effect of the zoning to vary based on location and parcel characteristics, and as a result their model simply gives an average impact of zoning across all properties. Using data on over 1200 vacant land sales, they found that agriculturally zoned land sold for 15–30% less than unzoned land.

Henneberry and Barrows were interested in the potential positive effects of exclusive agricultural zoning in Wisconsin for properties that had little development potential. First, using data on both parcels that were developed and parcels that were not developed, they used discriminant analysis to develop a prediction equation for development potential. They then used this to predict the development potential for vacant parcels. Next, they selected parcels with little development potential for their regressions. They ran separate regressions for parcels that had exclusive agricultural zoning (EAZ) and for those that did not. They used the regression results to predict the value of various parcels with and without EAZ. EAZ was shown to provide an increase in sales price for larger parcels further from towns. For some smaller parcels close to towns the effect was negative, a result they attributed to possible misclassification in the discriminant analysis.

Beaton and Pollack studied the effects of Maryland’s adoption, in the 1980s, of critical area building restrictions in coastal areas bordering Chesapeake Bay. They did not find a significant decrease in the prices of

32. Id. at 252.
vacant land within the coastal zone, but did find increases in the prices of both vacant and residential developed lands in some areas in close proximity to employment centers, supporting the inference that positive amenity and supply constraint effects may have exceeded the negative direct effects of restrictions.34

In another study, Parsons examined the impact of the Maryland coastal restrictions on housing prices and found that the restrictions increased waterfront values by 50% and the value of homes located in the restricted critical area by about 20%.35 Parsons showed large amenity effects and supply restriction effects on housing, but it is difficult to infer from his data whether these impacts would offset the negative effects of restrictions on undeveloped land.

Spalatro and Provencher looked at the impact of minimum frontage restrictions on the value of undeveloped waterfront land in Wisconsin.36 During the study period, the state had a minimum 100-foot frontage rule for developing lakefront lots, but seven towns adopted local regulations with 200-foot frontage requirements, covering about one-third of the approximately 900 undeveloped property sales in the sample. The increase in the frontage requirement would eliminate the possibility of subdividing lots with 200 to 400 feet of frontage. The authors call this the development effect, and its effect on lot price should be negative in that range of frontage. However, this development effect may be offset by enhanced lake amenities (e.g., water quality, views, boat traffic, etc.) when other lots on the lake face the same restrictions. The results produced some evidence of a negative development effect, but the positive amenity effect of the restrictions clearly dominated it. Lakefront land values increased by about 20%.

However, it should be noted that these estimates do not take into account the possibility that increased restrictions could be endogenous. Coastal and lakefront building restrictions of the kind examined in the studies described above may be more likely to be adopted in areas with more valuable land because of unobserved characteristics. Amenity effects may be overestimated because of this endogeneity. Restricting waterfront building on a lake provides the largest amenity benefits to exactly the landowners who are regulated. By contrast, other kinds of restrictions, such

34. Id. at 451–52.
as general building restrictions designed to slow growth or protect open space (e.g., an urban growth boundary), may have less direct benefits.

A few studies have attempted to use the effect of zoning on housing costs to examine the effect of the restrictions on land values. For example, in a recent paper, Hardie, Lichtenberg, and Nickerson examined the value of lands subdivided for development. They used sales data for these properties to construct a dependent variable that subtracted the tax-assessed value of structures from the real sales price of the properties, summed this residual value across all sales within the subdivision, and divided by the total size of the subdivision to get an average price per acre for each subdivision. The resulting values had a very wide range, from $15,000 per acre to $3.25 million per acre, averaging $569,000 per acre with a standard deviation of $528,000 per acre. The authors found that increasing the amount of forested land within the subdivision, as required by the Forest Conservation Act, provided amenities that were valued more highly than the opportunity cost of the forested land. On the other hand, increasing the minimum lot size or reducing the maximum density had negative effects. The magnitude and variance of these calculated land values appear problematic and it is difficult to compare these results to the results of other studies. In addition, the results were influenced by reliance on tax assessors’ evaluations of structure value, which may or may not have been accurate.

D. General Building Restrictions, Wetlands, and Watersheds

Rather than focusing on a single regulation, several studies constructed indexes of the stringency of municipal building restrictions to explain differences in real estate values between cities. For example, the researcher will count the number of different types of restrictions—such as impact fees, minimum lot zoning, or building permit caps—employed by a given city and use this as an index in a hedonic regression model. A majority of these studies are set in California and generally address the effects of restrictions on housing costs. However, a few of the studies look at vacant land sales. For example, a recent paper by Ihlanfeldt examined both improved and vacant property sales in a broad cross-section of Florida cities that employ varying numbers of building restriction measures. His restriction index was simply the number of different restrictions the

community imposed, and he found that more stringent growth restrictions correlated with high income and education levels in the jurisdiction. Because of this, the regulation index may be correlated with unobserved characteristics of the properties and communities. To correct for this endogenous effect, he used an instrumental variable method. He concluded that restrictions decreased land values and increased house prices. Each additional restriction was found to decrease average land values in a jurisdiction by approximately 14%, yet it increased the value of an average house by 7.7%. While the study is carefully done, the restriction index is somewhat problematic because it gives equal weight to widely divergent restrictions. Also, vacant land prices are typically a nonlinear function of acreage, but that is not controlled for in this study and may affect the results. Finally, if vacant land prices depend on the restriction index, then an interaction term between lot size and the index may be required in the house price equation.

A recent study by Chamblee, Dehring, and Depken examined the impact of watershed development restrictions on vacant land prices in western North Carolina. To protect the quality of freshwater supplies, the state of North Carolina passed a Water Supply Watershed Protection Act requiring local governments to adopt a minimum two acre lot size in designated watersheds. Unlike the waterfront development restrictions discussed in the previous section, the local amenity benefits of the restrictions are likely to be smaller because most of the regulation’s environmental benefits accrued to downstream water users. Using a hedonic model, they found that the parcels most restricted by the regulation, those under four acres that could no longer be subdivided, incurred a 34% reduction in prices. They found no evidence of amenity or scarcity effects boosting local property values as a result of the regulation.

There are a small number of recent studies examining the impact of wetlands designations on property values. Since wetland regulation of individual properties is outside the control of the local political process or landowners, the regulation can be considered exogenous. Importantly, the properties containing wetlands might be less valuable in the marketplace even in the absence of regulations. For example, wetland properties may require costly drainage to develop even if it were permitted, or may be less productive for agriculture.

Shultz and Taff looked at vacant farmland in North Dakota. Their estimates show that the presence of wetlands reduced the value of agricultural land by about 40%. There is no development pressure in this area of North Dakota, so the effect (if any) of restrictions on the value of productive agricultural use would be largely negative. There is little potential for offsetting positive impacts from amenities or limiting the supply of developable land. Guttery, Poe, and Sirmans found that wetlands regulations decreased the value of multi-family housing properties by about 8% outside Baton Rouge, Louisiana. Kiel estimated that single family homes on wetland regulated parcels sold for about 4% less than comparable unregulated properties in Newton, Massachusetts. The coefficient is marginally significant, but it is not possible to tell if the effect is because of the wetlands or the regulation.

A related study by Netusil considered environmental zoning, including wetlands, riparian corridors, and upland forest in Portland, Oregon. There are two classifications for environmental zoning: environmental protection (p-zone) and environmental conservation (c-zone), with the former being more stringent. Netusil included all types of zoning and a wide variety of amenities as well as the traditional hedonic variables. This allowed her to attempt to separate the regulations’ effects from the amenity conditions. She also subdivided Portland into five geographic regions and considered the effects separately in each of the regions. The results for the coefficients of the environmental zoning variables were positive and significant, negative and significant, or not significant depending on the zoning and region of the city, so no general conclusions could be reached. If all environmental zoning categories were combined, there was some evidence of a negative effect from environmental zoning, with the effect being greater on large lots.

42. Steven Schultz & Steven Taff, Implicit Prices of Wetland Easements in Areas of Production Agriculture, 80 LAND ECON. 501 (2004).
43. Id. at 508.
47. Id. at 227.
There are many studies that examine the positive effects of protected open space on values of nearby properties. These studies demonstrate a clear positive amenity effect from permanent development restrictions on private lands through conservation easements and from publicly owned open space in parks or preserves. They raise the issue of how conservation easement restrictions may affect not only the value of nearby properties but also the value of properties encumbered by easements.

Compared to regulations, conservation easements should generally have a negative impact on property values. This is because conservation easements place restrictions on potential uses of a property and generally restrict only a single property or a few properties. As a result, one would not anticipate any offsetting positive impact from supply restrictions, and amenity effects would occur only if neighboring properties also participated, which is not guaranteed under most programs.

Because donated conservation easements are voluntary on the part of the landowner, it is especially critical to control for endogenous effects. It is not clear whether higher or lower value properties are more likely to engage in conservation easements. On the one hand, a landowner may have a greater incentive to put properties with low development value under easement. On the other hand, high-income landowners have a much greater incentive to donate easements because the tax benefits are much larger for individuals with large tax liabilities.

All of the recent studies of conservation easements have attempted to control for endogenous effects, although the approach differs between studies. Nickerson and Lynch, and Anderson and Weinhold use two-step Heckman models, Michael utilizes properties with easements placed after the time of sale, and the most recent studies by Lynch et al. use propensity score methods to match similar easement and non-easement properties.


Nickerson and Lynch examined Maryland farms in three geographically dispersed counties.50 Their data consisted of 24 preserved farms and 200 unpreserved farms that sold between 1994 and 1997. They used a combined model with both vacant parcels and parcels with a residence where the sale price had been adjusted by subtracting the tax-assessed value of the structures. The results showed conservation easements reduced farmland prices by 15%, but the effect was not statistically significant.

Anderson and Weinhold also examined the issue using a sample of 19 easement-restricted and 112 unrestricted land sales in south-central Wisconsin.51 When using a model that combined vacant parcels with those containing a residence, their results were similar to Nickerson and Lynch: conservation easements had no statistically significant impact on land prices. However, when they restricted the sample to vacant parcels, conservation easements had a statistically significant negative impact on land prices.

Michael looked at conservation easement sales in Baltimore County, Maryland, an area which has a large, long-running conservation easement program.52 Separate hedonic models were estimated for vacant parcels and properties with a residence. He found easements to have significant negative effects on the value of vacant land, but no effect on improved parcels. He argued that this is to be expected since private amenity effects to landowners are greater when there is an opportunity to live on the parcel.

Recent papers by Lynch, Gray, and Geoghegan reexamined the issue with larger data sets encompassing most of the state of Maryland and employed both hedonic methods and propensity score models to compare average values of matched properties.53 In the first paper, they pooled vacant and improved properties and found that easements reduced land values by a statistically significant 11–17% when there was no control for selection effects. However, they were unable to show any statistically significant difference in average prices for easement restricted properties with the propensity score methods when they controlled for the proximity of other easement properties. In the updated paper, Lynch, Gray and

---

50. Nickerson & Lynch, supra note 49.
51. Anderson & Weinhold, supra note 49.
52. Michael, supra note 49.
53. Lynch et al. 2007a, supra note 49; Lynch et al. 2007b, supra note 49.
Geoghegan modified the propensity score model and also examined unimproved properties separately. Their estimates showed statistically significant evidence that vacant farmland sells for 11–20% less with a conservation easement. Although easements are shown to decrease property values, they note that the impact in this and other studies is smaller than they expected and that the observed reductions in value are substantially less than the size of the payments landowners have been receiving for easements under an agricultural land preservation program.

III. ANALYSIS, FUTURE RESEARCH NEEDS, AND PRACTICAL IMPLICATIONS

In general, the empirical studies discussed above track theoretical predictions, although it is clear that the effects of legal restrictions on property values vary depending upon the circumstances. The data is sufficient to support the general conclusion that amenity effects do in fact exist, even for owners who are directly affected by regulatory restrictions. At the same time, the magnitude of these positive effects is difficult to measure and they may or may not match the negative effects of development restrictions. Theory suggests that comprehensive development restrictions designed to protect significant local amenities could produce positive amenity effects, and several empirical studies are consistent with this prediction.54 Accurately determining the net effect on property values in any individual case requires careful empirical research.

Our review of these studies suggests that easement restrictions precluding development of vacant lands reduce property values. But the impact of these restrictions appears to be surprisingly small, typically less than 20%. These figures are much smaller than the percentage property value reductions typically calculated using traditional appraisal methods, suggesting that offsetting amenity and scarcity effects significantly mitigate losses.

Our review of the literature revealed a surprisingly small number of empirical studies that have directly examined the effects of restrictions on land values (as opposed to housing prices). The lack of studies on the effect of large lot zoning on private property values is particularly striking. The lack of empirical research is a critical void in the economics literature, especially given the enormous practical significance of valuation questions in many legal and policy settings. There is a clear need for more research.

focused on the question of how legal restrictions on land use affect property values. One of the challenges in undertaking this research is the need for careful use of statistical tools to control for endogeneity, and to ensure that empirical studies measure the effects of the restrictions being studied and not the effects of the other attributes of the properties and locations.

While there is a clear need for more empirical research, this review of the relevant theory and the limited empirical literature points to some insights that may be helpful in legal or policy contexts. Future empirical research in this area could be designed to shed additional light on these topics.

The degree of economic harm allegedly caused by a regulatory restriction is a central issue in cases in which a landowner seeks compensation for a taking of private property under the Takings Clause of the Fifth Amendment to the United States Constitution. A variety of considerations unrelated to economics do, and arguably should, inform the resolution of takings cases, including the language and original understanding of the Takings Clause, Supreme Court precedent, and value judgments about the social harmfulness of regulated activities. But the economic impact of regulations is related to the role of the Takings Clause in “bar[ring] 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.”\(^55\) The conclusion that regulations typically have a mix of positive and negative impacts on property values highlights the practical difficulties courts face, in the context of individual lawsuits, in determining how an owner has been affected by a single regulation, much less by the totality of regulations that may restrict use of (and simultaneously protect) private property. At a minimum, it is clear that a simple before-and-after calculation of property values using standard appraisal techniques will often generate figures that overstate, perhaps significantly, the actual adverse effect (if any) of a legal restriction on the value of restricted property.

This review also has potentially important implications for conservation easement programs. Conservation easement restrictions are often more site-specific and less comprehensive in nature than regulatory programs. As a result, at least in some cases, it can be anticipated that easement restrictions will not generate the same level of indirect benefits as regulations. Nonetheless, as with regulatory takings claims, appraisals that utilize the with and without restriction methodology run the risk of overstating the adverse effects of legal restrictions on the value of properties with conservation easements. Furthermore, as discussed above,

recent empirical studies on the effects of conservation easements on property values reveal surprisingly modest adverse effects from easement restrictions, especially if the restricted parcels include a residence. These conclusions suggest that the public may be systematically overpaying for some conservation easements, meaning the public may be conferring unwarranted windfalls to some property owners and not achieving the full potential conservation benefit from its investments.

CONCLUSION

Both theory and available research results indicate that legal restrictions on the use of property have a mix of negative and positive effects on land values, and that accurately determining the net effect of any particular restriction requires careful empirical research. The empirical research that has been conducted to date is quite limited, however, and there is a need for further efforts in this important, yet neglected, area. Rigorous economic analysis has an important role to play in numerous settings where measuring the impact of legal restrictions on land values has practical significance, including litigating regulatory takings cases and administering conservation easement programs.
TAKINGS AND THE PROBLEM OF VALUE: GRAPPLING WITH TRUTH IN LAND-RESTRICTION CASES

Laura S. Underkuffler∗

TABLE OF CONTENTS

Introduction ............................................................................................... 465
I. Land Valuation: Complexities and Takings Implications..................... 466
Conclusion ................................................................................................. 476

INTRODUCTION

In their contribution to this symposium entitled Environmental Land Use Restrictions and Property Values, Jeffrey Michael and Raymond Palmquist challenge the conventional factual and legal assumption that environmental restrictions—such as growth-management laws, minimum lot sizes and density restrictions, open-space zoning, and others—reduce the value of land. They argue that regulations of this type typically have a mix of positive and negative impacts on property values, with the result that conventional assumptions often overstate the actual adverse effects (if any) on the value of restricted land.

The Michael-Palmquist study adds to a burgeoning literature that uses actual empirical data to undermine the reflexive assumption by politicians and landowners that regulatory restrictions on development can be assumed to negatively affect land values. Studies by Andrew Plantinga and William Jaeger, Patrick Beaton and Marcus Pollock, Fiorenza Spalatro and Bill Provencher, David Hennheberry and Richard Barrows, Kathryn Anderson and David Weinhold, and others have established, through the collection and analysis of empirical data, that development restrictions have complex

∗ J. DuPratt White Professor of Law, Cornell University Law School.
2. Id.
3. Id. at 28.
effects on land values that are often difficult to predict. In particular, several studies have documented an increase in land values after development restrictions have been imposed.

In this essay, I will discuss how the Michael-Palmquist study and others with similar findings might impact cases brought under the federal Takings Clause. If these studies are correct—and land valuation in an environmental-restriction setting is, in fact, a complex enterprise—then there should be acknowledgment of this truth in federal takings law. I will argue that such studies raise important questions about existing approaches to takings law as well as other assumptions regarding societal guarantees of land’s value.

I. LAND VALUATION: COMPLEXITIES AND TAKINGS IMPLICATIONS

Let us begin with what I believe to be the critical findings of the Michael-Palmquist study, in somewhat simplified form. From the point of view of takings doctrine, the following findings of this study are particularly salient:


5. See, e.g., Echeverria & Runge, supra note 4, at 23–26 (reviewing and summarizing prior studies of how government action affects property value).

6. See U.S. Const. amend. V (“[N]or shall private property be taken for public use, without just compensation.”).
(1) [E]quilibrium prices for land are the product of a number of complex factors, including the different alternative uses for . . . land, the mobility of residents, the complexity of the primary commodity associated with land (housing), and possible effects that are external to . . . markets.7

(2) Each of these factors is dynamic. Although one might look at a snapshot picture of these elements at a given moment in time, each changes continually due to changing intrinsic and extrinsic conditions.8

(3) Public policies—including land-use regulations—are important factors in this mix. Because of the interaction of all of these factors, land-use regulations—including significant land-use restrictions—affect land values in often unpredictable ways. They might (as conventionally predicted) decrease values in some cases, but they might increase land values in others. These disparate effects have been demonstrated in many studies, both theoretically and empirically.9

The following example illustrates the operation of these principles. Consider, for instance, a parcel of land whose development is restricted to low-density use through conservation zoning. In an immediate sense, this parcel’s value has been sacrificed for the greater good, or for the benefit of neighbors. In other words, the sacrificed value generates positive or environmental-amenity effects for neighboring parcels, which increase in value. This occurs, however, at a cost to the restricted parcel itself.

What the Michael-Palmquist study shows is that this idea of an assumed, simple loss for the restricted property is often inaccurate. In fact, the value of the restricted property often increases from the positive effects of the regulatory scheme, such as the preservation of open and beautiful landscapes, decreased traffic congestion, lack of pollution, and the luring of upscale development. This increase in value can be rooted in the restricted land’s own evolving characteristics and (as is often the case) in the evolving characteristics of the surrounding land.10

What do these essential findings mean for federal takings law?

7. Michael & Palmquist, supra note 1, at 12.
8. Id. at 7.
9. Id. at 10–12.
10. Id. at 17.
To begin, we need some understanding of current federal takings doctrine. Although it is notoriously difficult to sketch a coherent approach to the Supreme Court’s takings cases, the following guidelines apply:

(1) First, the challenged government action must be substantively permissible—that is, in the words of the Takings Clause, for permissible “public use.” This has traditionally been a narrow inquiry, with judicial acceptance of any plausible public good.

(2) Next, the court must determine whether the impairment of the claimant’s property is of such magnitude or type that it constitutes a compensable case of some kind. A compensable case is assumed to exist when the government “takes [physical] possession of . . . [the] property” or when the government “deprives an owner of ‘all economically beneficial uses’ of his [property].” Otherwise, a claimant has a compensable case only if he can establish that the government went “too far” in the regulation of the claimant’s property (considering the degree of impairment of the claimant’s interest, the importance of the government’s interest, and whether it is fair—under the circumstances—for the claimant or the public to bear the burden). If the claimant has stated a compensable case in this sense, then:

(3) The amount of due compensation is calculated and paid.

---

12. See, e.g., Kelo, 545 U.S. at 480 (stating that the natural interpretation of “public use” is “public purpose”).
15. See Tahoe-Sierra, 535 U.S. at 333–36 (outlining legal theories potentially applicable to takings analyses); Palazzolo v. Rhode Island, 533 U.S. 606, 617–18 (2001) (plurality opinion) (noting that “while property may be regulated to a certain extent, if a regulation goes too far it will be recognized as a taking”); Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978) (identifying the “economic impact on the claimant and . . . the extent to which the regulation has interfered with distinct investment-backed expectations” as relevant considerations in takings analyses).
Under these guidelines, there are two analytical junctures where the
valuation of the claimant’s loss, and thus the Michael-Palmquist findings,
are critical. These occur in step (2), when determining the existence of a
compensable case, and in step (3), when calculating compensation.

What the Michael-Palmquist study tells us—at a minimum—is that the
calculation of these values is a very uncertain enterprise in environmental-
regulation cases.

The traditional method for land valuation is the appraisal approach,
which begins with the recent sale of “comparable” land, and then adjusts
this value for differences in character between the comparable and
appraised properties. Ideally, the appraiser will find another parcel of a
very similar type and known value, and—after adjustments for particular
characteristics—will estimate from this the value of the appraised property.
This process sounds relatively straightforward. However, as the Michael-
Palmquist study illuminates, use of this method in cases of significant
regulatory change can be highly problematic.

In this setting, there will rarely be anything resembling a true
comparable for the appraisal calculation. A true comparable would have a
known market valuation (through recent sale), very similar physical and
other characteristics, and identical zoning restrictions. Because of the
highly subjective and location-specific nature of amenities effects—
including visual amenities, recreational opportunities, wildlife enjoyment,
and psychological satisfaction from land preservation efforts—
the finding of a comparable piece of land for any newly restricted parcel will be
difficult. In addition (and perhaps more fundamentally), value
enhancement from amenities effects is often fully apparent only as the new
caracter of the restricted area emerges. Amenities effects, as the
Michael-Palmquist study points out, often involve fewer immediate value
gains than longer-term, evolving positive effects on value. For this
reason, the most useful empirical studies of preservationist change involve
land-value assessments tracked for several years after restrictions are
imposed. In short, the complex and evolving nature of the elements
involved in land-restriction cases strongly warn of the hazards of “snap-
shot” appraisals in this context.

It would therefore seem, at the very least, that takings cases should
acknowledge the complexities and amenities effects of environmental land-

17. Michael & Palmquist, supra note 1, at 3.
18. Id. at 12.
19. Id. at 10 (discussing theoretical studies); see id. 12–13 (discussing empirical studies).
20. Id. at 17 (discussing Garrit J. Knapp, The Price Effects of Urban Growth Boundaries in
use restrictions. This should be true whether the valuation of the landowner’s loss is part of the threshold determination of whether a compensable case exists, or as a part of the later remedy calculation. For instance, with the amenities effects of land-use restrictions now a known economic factor, one would expect to see the value of these positive effects—just like the value of negative effects—occupying a prominent place in assessments of valuation, loss, and remedy in typical cases.

In fact, this has not happened. Courts rarely mention amenities effects or related complexities in discussions of land valuation in the typical environmental-restriction case. If these factors exist, one would not know it from these opinions. Rather, questions of valuation, loss, and remedy are typically handled through a two-part—and contradictory—strategy. On the one hand, property owners are assured (rhetorically, at least) that courts agree that development restrictions cause economic loss, with any benefits from those restrictions (presumably) viewed as a collateral and irrelevant matter. On the other hand, courts use doctrinal dodges to avoid the simultaneous practical impossibilities of implementing this view, making the recovery of compensation very difficult to achieve.21

A number of recent United States Supreme Court decisions illustrate the initial thrust of this strategy. In case after case, the Court has ostensibly assumed that environmental restrictions cause economic loss and has ignored the issue of the complaining landowner’s benefit from the challenged regulations. In Dolan v. City of Tigard, for instance, the Court engaged in a lengthy discussion of the development-thwarting and value-costing character of green-space preservation, impervious-surface restrictions, and pollution-avoidance regulations, while never mentioning their benefits.22 In Palazzolo v. Rhode Island, involving a challenge to a typical state wetlands-preservation law, the Court framed the question as whether “[t]he right to improve [private] property” was “unreasonably] and onerous]” burdened—with no mention of environmental benefits.23 Only in the recent case of Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency was there any explicit acknowledgment of environmental benefits as any part of the takings calculation.24

24. See Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Planning Agency, 535 U.S. 302, 324–25 (stating that while landowners may lose value as the result of development restrictions, that fact is not dispositive of the takings question; rather, that loss must be evaluated in the context of the public program in which it occurs, and the program’s broader burdens and benefits).
In contrast, the Court has at the same time erected doctrinal barriers that work to preclude the claimant’s recovery in the vast run of environmental-restriction cases. As noted in the sketch of takings law above, courts assume a compensable case exists when there is a complete or nearly complete loss of economic value, or when the land is permanently, physically invaded by government. Otherwise, the court must use the Penn Central “too far” test, which considers the amount of the claimant’s loss, the purpose of the regulation, and other factors that bear upon the question.

In the case of environmental restrictions imposed upon land, there is no permanent physical invasion by government. Nor is there generally a plausible claim that the restriction has destroyed all or nearly all of the land’s economic value. Even if viewed in a purely detrimental light, growth-management laws, minimum-lot-size or density restrictions, agricultural and open-space zoning laws, and other environmental measures rarely render land worthless as an economic matter. Wetlands-preservation laws might arguably come the closest to this; but even then, the widely acknowledged role of wetlands in pollution control, the maintenance of flora and fauna, and other critical functions undermines the claim of their economic worthlessness.

This leaves us, in environmental-restriction cases, with the “too far” test—a test which the courts (with good reason) are notoriously reluctant to find satisfied. Environmental regulations are generally enacted to vindicate strong interests held by neighbors or the general public. Whether development harms a pristine lake, or the filling of wetlands threatens marine pollution, or the creation of impervious surface causes water run-

25. See, e.g., Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1003 (1992) (finding that regulatory action is compensable “where regulation denies all economically beneficial or productive use of land”); Palazzolo, 533 U.S. at 631 (requiring compensation if the landowner is “left with [only] a token interest”).
26. See, e.g., Tahoe-Sierra, 535 U.S. at 322 (stating that compensation is required when “government physically takes possession of an interest in property”); Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 434–35 (1982) (holding that “a permanent physical occupation of property” is compensable, “without regard to whether the action achieves an important public benefit”).
28. See cases cited supra notes 23–24.
29. See, e.g., Tahoe-Sierra, 535 U.S. at 302 (dealing with development restrictions to preserve Lake Tahoe).
30. See, e.g., Palazzolo, 533 U.S. at 606 (dealing with wetlands-preservation laws).
off problems on the land of others, controls of this sort are an attempt to acknowledge the inherently bilateral nature of property rights and the need for landowners to account for the actual negative externalities of their conduct. This reality, together with the financial implausibility of societal indemnification for the frustration of development interests that environmental laws entail, makes courts extremely and justifiably reluctant to find compensable takings in such cases.

In addition, even if the court finds a potentially compensable case, the claimant must surmount yet another doctrinal hurdle. According to the idea of average reciprocity of advantage—or, as it is sometimes called, “implied compensation”—a government scheme that might otherwise support a compensable claim will not do so if the complaining owner receives benefits from the restrictions that the scheme imposes upon others. Developed most prominently in the zoning context, this doctrine is potentially applicable in any situation where restrictions are placed on the rights of many. The underlying theory, in takings terms, is that the government action has provided non-monetary compensation to the claimant. Although compensation (in a monetary sense) has not been paid, this doctrinal twist asserts that the restraints the regulation has placed upon others are the equivalent and work to offset the claimant’s loss. When environmental restrictions are rooted in the physical and ecological interdependence of land—when they restrict the many, for the benefit of many—the claim that landowners receive implied compensation for the operation of these laws is obvious.

33. The facts in Palazzolo illustrate the economic stakes. The claimant owned three parcels of salt marsh, which together encompassed about 20 acres. For this, he claimed damages in the amount of $3,150,000, “a figure derived from an appraiser’s estimate as to the value of a 74-lot residential subdivision.” Palazzolo, 533 U.S. at 616.
34. See, e.g., Keystone Bituminous Coal Ass’n v. DeBenedictis, 480 U.S. 470, 491 (1987) (noting that “reciprocity of advantage” occurs when a complaining owner “benefit[s] greatly from the restrictions that are placed on others”) (quoting Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922)).
36. As a result of this doctrine, the general diminution in value of land through zoning short of the prohibition of all economically viable use is not a compensable taking. See, e.g., Agins v. Tiburon, 447 U.S. 255, 260–61 (1980); Gorieb v. Fox, 274 U.S. 603, 607 (1927); Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 392 (1926).
37. See, e.g., Keystone, 480 U.S. at 491 n.21 (comparing “benefits received” from regulation of others to benefits received from taxation); Agins, 447 U.S. at 262 (noting that zoning schemes “benefit the [claimants] . . . as well as the public by serving the city’s interest in assuring careful and orderly development of residential property”).
38. UNDERKUFFLER, IDEA OF PROPERTY, supra note 21, at 47.
39. Id. at 100.
So, where do we end up? We could shrug, and argue that despite the problems with this body of doctrine, it still achieves the correct result. The simple idea of landowners’ loss from environmental controls might be wrongly entrenched, and the true complexities involved in the valuation of environmentally restricted land might be wrongly ignored, but, in the end, the payment of compensation is rightly denied. The process is awkward, but the result is correct. Thus, there is no real complaint with this body of law.

However, this answer has a serious problem. Rhetoric matters. More precisely, judicial rhetoric matters. Popular preoccupation with constitutional guarantees—in particular, federal takings guarantees—gives judicial rhetoric a meaning and importance in this context that it might lack in others. For better or worse, we have seized upon the Takings Clause as the legal and political arena for struggles over the ideologies of individual prerogative and state power. Property rights and their security trigger deeply emotional human aspirations and fears regarding control, hoarding, achievement, and survival. Rights in land, as the most psychologically elemental and (for most people) economically important of these rights, incite particular passion. When courts portray property rights in land as “establishing a sphere of private autonomy which government is bound to respect,” and the individual landowner as a project pursuer with a right to act who is wronged by government action, they encourage, entrench, and ultimately frustrate a popular view and deny the landowner any practical remedy. Indeed, the explicit failure of federal law to vindicate the mythology of sweeping and irrevocable rights in land has led to ill-fated efforts by popular initiative to do so.

40. Id. at 37–38.
42. See, e.g., Measure 37, OR. REV. STAT. § 197.352 (2005), repealed by Measure 49, OR. REV. STAT. § 195.305 (2007).
Measure 37 claims . . . ranged from a desire to put a single additional house on a residential lot, to the building of large housing developments, to an open-pit mining operation. The new law pit[ted] neighbor against neighbor, as landowners who relied on zoning and other laws to create value for their property now . . . [found] those laws crumbling in the face of their neighbors’ claims.
In sum, to avoid the entrenchment of false (and necessarily frustrated) expectations, courts must explicitly acknowledge the dependency of economic rights in land in the context of land, as a scarce, critical, and physical asset owned in collaboration with others. This means that both the contributions of others and the needs of others must be a part of the legal treatment of claimed rights in land. In particular, in the takings context, this requires recognition:

First, that the creation of economic value in land is the product of a complex mosaic of both private and public factors.

It is apparent, after only brief reflection, that the value of land is the product of both individual (private) and collective (public) investment and other actions. For instance, the value of a particular parcel of land is affected by private construction, preservation, or other activities regarding the target parcel or neighboring properties; the creation of public utilities, bricks-and-mortar projects, or other infrastructure; continually changing market conditions, such as changing tastes in the buying public and natural and historical factors; unplanned and uncontrolled shifts in population centers; and a myriad of other factors.

Furthermore, public regulation and public investment are often as important as private factors in this mix. In particular, they have a great deal to do with the value—particularly, the positive value—of much urban, suburban, and ex-urban land. Yet, when one considers American takings law, there is virtually no conceptual space for the acknowledgment or public recovery of publically created value. Apart from the idea of implicit compensation received by a takings claimant—an idea that has more to do with the claimant not having suffered a loss than with her receiving any cognizable government benefit—takings doctrine has no piece that accounts for public contributions to land’s value.

Indeed, in even the clearest of cases—for instance, when the construction of a highway interchange triples the value of raw land—there is an assumption that the landowner simply recovers this value in a later takings action. Whether land doubles in value because of the construction of public infrastructure, or the heavy investment of revitalization tax dollars or other particular and disproportionate benefit, these investments by the public are invisible, as offsets of any kind, when it comes to the takings calculation. It is simply assumed, without any reason or explanation given, that such windfalls inure to the owner’s benefit and are capitalized as a part

43. See supra text accompanying notes 34–39.
of land’s value. Effectively, government action is assumed to count, for takings purposes, only when it impairs individual interests. Otherwise, it is simply part of an unmentioned one-way ratchet up, for the landowner’s unquestioned and exclusive benefit.

Arguably, this omission is justified because of the difficulties involved in attaching a dollar value to the benefits to land conferred by public action. For instance, it is (perhaps) difficult to say what percentage of value is due to amenities effects, public revitalization dollars, or other government action. However, as the Michael-Palmquist study shows, all valuations of land are in fact complex.\textsuperscript{44} Assessments of benefits conferred by government would be no different—if the motivation were there—than assessment of government detriments. Indeed, other legal regimes with similar takings frameworks include the value of government investments and subsidies in their takings calculations.\textsuperscript{45}

This leads us to the second reality that must be recognized:

\textit{That investments in land are investments, like any other; and that the public fisc can no more pretend to be a guarantor for economic return in this context than it can in any other.}

In most areas of economic endeavor, Americans are realistic. We, as a society (and the courts, as a matter of legal doctrine) assume that investments in stocks, bonds, fertilizer plants, automobiles, or in any other of thousands of instruments or commodities are investments with risk, including the risk of potentially adverse government action. There is no assumed eruption of frustration, claims of betrayal, and the playing of the “politics of outrage”\textsuperscript{46} if, for example, someone invests in automobile stock, which by reason of government policy falls in value; or if someone invests in the manufacture of a particular pesticide, which later (for environmental reasons) is banned; or if someone invests in a college-town bar, which is adversely affected when the drinking age is raised to twenty-one, eliminating patrons. There is no invocation of simplified notions of property ownership, with the image of government as “thief”\textsuperscript{47} There is an

\textsuperscript{44} Michael & Palmquist, supra note 1, at 12.

\textsuperscript{45} See, e.g., S. AFR. CONST. 1996 ch. 2, § 25(3) (“The amount of the compensation [awarded] . . . must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances, including . . . the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property . . . .”).

\textsuperscript{46} UNDERKUFFLER, IDEA OF PROPERTY, supra note 21, at 127–28.

\textsuperscript{47} See Palazzolo v. Rhode Island, 533 U.S. 606, 637 (2001) (Scalia, J., concurring) (arguing that value accruing to the public through wetlands-preservation laws is “profit to the thief”).
acceptance in these investment contexts that values ebb and flow, and that although one might try to predict or hedge against such changes, they are an inherent part of the risks of profit-seeking enterprise.

Peculiarly, investments in land do not share the reality of this context. There seems to be a view, prevalent among many, that investments in land are different: protected, immune—indeed, guaranteed—against the changing needs of others and resultant loss. This, it seems, is believed to be true, whether the collective action is necessary or not. As Chief Justice Rehnquist (joined by Justices Scalia and Thomas) recently urged, such cases are properly viewed—and only properly viewed—“[f]rom the [complaining owner’s] . . . standpoint.”48 And that standpoint does not include, as a purported legal matter, the risk of public change and loss.49

The image of land solely as a capitalized (individual) asset, with takings law as its guarantor, is, of course, not a sustainable one. Land is an essential constituent of life, on which all human beings depend. The actions of landowners can advance or jeopardize the physical and psychological needs of others. There is, furthermore, no way that we, as a society, can or should pay for the preservation of millions of acres of farmlands, wetlands, watersheds, or other assets on which we all depend. As takings law in fact has recognized, the public fisc cannot—and should not—insure landowners against every collectively induced change or risk of loss. The truth is the truth. The sooner that legal images and legal rhetoric acknowledges this reality, the better.

CONCLUSION

The Michael-Palmquist study and others with similar findings challenge notions that occupy an illogical but prominent place in American law. They challenge the notion that environmental restrictions imposed on land invariably reduce land’s value. They challenge the idea that property in land is simple, stable, and easily assessed. They challenge, in essence, the isolation of private land, in a context apart from the efforts and needs of others.

These findings accord with what takings law, in its operation, has often implicitly acknowledged. Property rights in land cannot be the simple,


49. See, e.g., id. (arguing that the majority opinion ignores the “practical equivalence” between the respondent’s deprivation and the deprivation resulting from a leasehold, allowing the government to “take private property without paying for it”).
concrete entitlements that political and judicial rhetoric often makes them out to be. Takings law cannot insure landowners against the risks of environmental protection and related collective change. Land cannot be seen as something given and endowed, expressing the needs, wants, and wealth prerogatives of individual owners alone.

The question is how, and when, the images and rhetoric of law will acknowledge these realities. Until it does, the schism between legal fact and fantasy will continue to persist. We, as a society, will continue to encourage beliefs of entitlement that cannot be. We will continue to separate—as a rhetorical matter, at least—the truth about land from the images of law. By using the law to reinforce mythology—and then, to deny its remedies—we will continue to incur serious social and legal costs.
TEMPORARY TAKINGS: SETTLED PRINCIPLES AND UNRESOLVED QUESTIONS

Daniel L. Siegel & Robert Meltz

TABLE OF CONTENTS

Introduction .................................................................................................................. 480
I. Temporary Regulatory Actions ........................................................................ 482
   A. Prospectively Temporary Regulations .................................................. 482
   B. Retrospectively Temporary Regulations: Can Lucas Ever Apply? 496
   C. Ultra Vires Delay ..................................................................... 500
II. Temporary Physical Appropriations ........................................................... 502
   A. Physical Impositions Versus Use Limitations ................................ 503
   B. Permanent Versus Temporary Physical Impositions .................... 504
   C. Partial Versus Total Temporary Impositions ................................ 506
   D. Prospectively Versus Retrospectively Temporary Physical Imposition
      ...................................................................................................... 508
   E. Ultra Vires Physical Imposition .................................................. 508
III. Determining Compensation ........................................................................ 509
   A. Before First English .................................................................... 509
   B. First English ........................................................................ 510
   C. Broad Considerations Governing Measure of Damages for Temporary
      Takings ..................................................................................... 511
   D. Formulae Adopted By Courts for Regulatory Takings ............... 512
Conclusion ................................................................................................................. 523

* Supervising Deputy Attorney General, California Department of Justice. Some of this
material appears in California Land Use Practice, copyright 2008 by the Regents of the University of
California. Reproduced with permission of Continuing Education of the Bar - California. (For
information about CEB publications, telephone toll free 1-800-CEB-3444 or visit CEB.com). In
addition, limited portions of this material appeared in Daniel L. Siegel, The Impact of Tahoe-Sierra on
materials, and the related conference presentation, represent the views of the authors and do not
necessarily represent those of the California Department of Justice or of the Congressional Research
Service.

** Attorney, Congressional Research Service.
INTRODUCTION

When it comes to fundamental principles concerning temporary takings under the Federal Constitution’s Takings Clause, the dust has settled. Government is potentially required to pay just compensation when it temporarily limits property uses (“regulatory takings”), as well as when it temporarily occupies or appropriates property for itself or through a third party (“physical takings”). Beyond those core principles, however, lurk numerous uncertainties regarding both how to determine whether a governmental action actually amounts to a temporary taking, and how to calculate just compensation for such a taking.

A trilogy of United States Supreme Court cases involved the federal government’s total and complete, but temporary, occupation of properties during World War II: Kimball Laundry Co. v. United States, United States v. Petty Motor Co., and United States v. General Motors Corp. In each case, both the Court and the federal government simply assumed that the government must pay just compensation for those temporary but total physical takings. Up until 1987, however, the Court had not resolved whether a regulation limiting a property’s uses could impose a temporary taking. Some state courts, such as those in California, New York, and Pennsylvania, have interpreted federal and state constitutions as not requiring compensation when government rescinded a regulation after a court determined that it was a taking. Inverse condemnation damages were

1. The Fifth Amendment to the United States Constitution includes what is commonly called the “Takings Clause” or the “Just Compensation Clause.” It provides: “[N]or shall private property be taken for public use, without just compensation.” U.S. CONST. amend. V.

2. This article includes as potential “physical takings” regulations that require owners of private property to submit to occupations by the government or by third parties. See generally Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982) (presenting the issue of whether a cable company’s physical occupation of a person’s property as authorized by New York Law amounted to a taking, and finding that such actions were a taking). In contrast, this article characterizes regulations that restrict uses of property as potential “regulatory takings.”


only available where, after a court determined that the regulation was excessive, the government nevertheless decided to maintain the regulation.\footnote{See \textit{First English Evangelical Lutheran Church v. County of Los Angeles}, 482 U.S. 304, 312 (1987) (explaining that California decisions did not allow a plaintiff to recover damages for a temporary regulatory taking) (citations omitted).}

In 1987, the United States Supreme Court resolved this issue in \textit{First English Evangelical Lutheran Church v. County of Los Angeles}, holding that property owners had the right to be compensated for temporary regulatory takings.\footnote{\textit{Id.} at 321.} The Court subsequently described \textit{First English} as establishing the following rule:

\begin{quote}
[O]nce a court finds that a police power regulation has effected a taking, the government entity must pay just compensation for the period commencing on the date the regulation first effected the taking, and ending on the date the government entity chooses to rescind or otherwise amend the regulation.\footnote{Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Planning Agency, 535 U.S. 302, 328 (2002) (internal quotation marks omitted) (quoting \textit{San Diego Gas & Elec. Co. v. City of San Diego}, 450 U.S. 621, 658 (1981)) (Brennan, J., dissenting).}
\end{quote}

Although \textit{First English} affirmed the right to compensation for a temporary regulatory taking, it left open the question of how to identify such a taking. As will be seen, courts have not fully resolved the factors to consider in answering that question. Moreover, the factors may differ for prospectively temporary governmental actions (from the outset intended to be temporary), as opposed to retrospectively temporary (intended at the outset to be permanent but later become temporary). Uncertainty also remains concerning temporary physical takings. This article will review those uncertainties, as well as why the question of whether an imposition amounts to a taking will often turn on: (a) whether the Court deems the imposition physical, as opposed to a use restriction; (b) if physical, whether the Court considers the imposition to be temporary or permanent; and (c) if physical and temporary, whether the imposition is seen as partial or total. Finally, the article will conclude by reviewing the difficult question of how courts determine just compensation for temporary takings.
I. TEMPORARY REGULATORY ACTIONS

A. Prospectively Temporary Regulations

Some property use restrictions are from the outset intended to be temporary. These restrictions, most commonly in the form of land-use moratoria and permitting delays, are designed to put development and other activities on hold pending triggering events—for example, the drafting of a plan to control development in a region,\(^\text{10}\) the availability of sufficient water to allow new water hookups,\(^\text{11}\) or a determination of whether it would be safe to allow oil and gas drilling under public lands that were slated for use as a nuclear waste disposal site.\(^\text{12}\) As will be seen in Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, the Court held that takings challenges to these restrictions, even when they eliminate all economic use or value of the property, should be analyzed under the multi-factor approach articulated in Penn Central Transportation Co. v. City of New York, rather than the per se approach outlined in Lucas v. South Carolina Coastal Council.\(^\text{13}\) In addition, this section will review the special consideration that a number of courts have given to so-called “extraordinary delays” and “erroneous delays.”\(^\text{14}\)

1. Lucas Is Inapplicable

In Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, the Court reviewed whether a land-use moratorium could impose a so-called per se “total taking” under Lucas v. South Carolina Coastal Council.\(^\text{15}\) Courts usually determine whether a regulation amounts to a taking by applying the various factors outlined in Penn Central Transportation Co. v. City of New York.\(^\text{16}\) These factors include “the economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations,” as well as the “character of the governmental...

---

\(^\text{10}\) See id. at 306 (“[I]nvolv[ing] two moratoria . . . to maintain the status quo while studying the impact of development on Lake Tahoe and designing a strategy for environmentally sound growth.”).

\(^\text{11}\) Lockary v. Kayfetz, 917 F.2d 1150, 1153 (9th Cir. 1990).


\(^\text{13}\) Tahoe-Sierra, 535 U.S. at 330.


\(^\text{15}\) Tahoe-Sierra, 535 U.S. at 330–31 (citing Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1003 (1992)).

action.” Where, however, a regulation imposes the “complete elimination of a property’s value,” then, with limited exceptions, there is no need for a court to look at the various Penn Central factors; the regulation imposes a per se total taking under Lucas. In Tahoe-Sierra, landowners asserted that the Tahoe Regional Planning Agency’s (TRPA) imposition of a thirty-two-month development moratorium while the agency created a comprehensive regional plan amounted to a Lucas per se taking because during that period the owners were allegedly unable to use their properties in economically viable ways.

The Tahoe-Sierra Court rejected the property owners’ argument. It explained that Lucas only applies when a regulation entirely eliminates a property’s value. Moreover, in determining whether value remains in a property, courts need to look at the “parcel as a whole.” Further, the parcel as a whole is not limited to the physical dimensions of the property; it also includes its temporal dimension—the potential use of the property over time. Considering these concepts together, a moratorium does not make property valueless, as required to come within Lucas, because the property “will recover value as soon as the prohibition is lifted.” Rather, moratoria should be analyzed using the Penn Central approach.

The Court did indicate that in engaging in such a Penn Central analysis, the length of a moratorium is an important factor for courts to consider, and that moratoria lasting more than one year may “be viewed with special skepticism.” That said, the Court pointed out that given the district court’s finding that TRPA’s thirty-two-month moratorium was reasonable, a blanket one-year rule would be inappropriate. In rejecting such a blanket rule, the Court also noted that a moratorium ultimately upheld by a California appellate court in First English lasted for six years.

As a result of Tahoe-Sierra, with the possible exception of a restriction that prohibits all economic use during the entire period of a leasehold,
courts can no longer hold that prospectively temporary development bans are per se takings under Lucas. This was starkly apparent in two cases that reversed pre-Tahoe-Sierra decisions finding that moratoria caused Lucas takings.

In Bass Enterprises Production Co. v. United States, the owner of oil and gas rights brought a temporary taking challenge when the government took forty-five months to determine whether drilling near a prospective nuclear waste disposal site was safe.\(^{29}\) The Court of Federal Claims initially held that the delay constituted a taking.\(^ {30}\) Specifically, citing Lucas, the court had held that there was a categorical taking because “[p]laintiffs have not been permitted to use their leases for a substantial period of time. Their loss during that period was absolute.”\(^ {31}\)

Following the Tahoe-Sierra decision, however, the government moved for reconsideration on the ground that the delay should not have been considered a Lucas categorical taking, but instead should have been analyzed utilizing the Penn Central factors.\(^ {32}\) The court agreed\(^ {33}\) and went on to apply those factors in rejecting the takings claim.\(^ {34}\) The court explained that, while the owners had a reasonable investment-backed expectation that they could drill, the owners’ interest was outweighed by the government’s important health and safety interest in delaying the drilling, as well as the minimal economic impact of the delay when looking at the property—that is, the full lease term—as a whole (since, as the government explained, “[t]he property was still there at the end of the delay period”).\(^ {35}\) On appeal, the Federal Circuit affirmed.\(^ {36}\)

Tahoe-Sierra had a similar impact in a Florida case, Leon County v. Gluesenkamp.\(^ {37}\) Leon County is a temporary takings action in which property owners were denied a building permit due to an injunction that had been issued in a separate lawsuit.\(^ {38}\) That injunction prevented the county from issuing any building permits in a certain area until the county

\(^{30}\) Id. at 401.
\(^{32}\) Bass Enters., 54 Fed. Cl. at 402.
\(^{33}\) Id.
\(^{34}\) Id. at 403–04.
\(^{35}\) Id.
\(^{38}\) Id. at 462.
complied with various requirements of its comprehensive plan. After the county rejected the property owners’ permit application, the owners sued the county, alleging a taking. While the takings action was pending, the injunction was dissolved. The trial court then held that the property owners suffered a categorical taking under Lucas because they “had suffered a loss of all or substantially all economically viable uses of” their property during the injunction period.

Based on Tahoe-Sierra, however, the state court of appeal reversed. The court stated in general terms that Tahoe-Sierra “implicitly rejected a categorical rule in the [temporary] regulatory taking context.” The court went on to disapprove the trial court’s application of Lucas to this case, explaining that “under the Court’s holding in Tahoe-Sierra, the development moratorium could not constitute a per se taking of property under Lucas.” The court then weighed the Penn Central factors and concluded that no taking occurred.

2. Extraordinary Delay (Dragging Feet)

The notion that “normal delays” in regulatory decision-making are not takings, while “extraordinary delays” might be, was first articulated in Agins v. City of Tiburon. The Agins Court rejected the property owners’ claim that the city’s precondemnation activities constituted a taking, explaining in a footnote that “[m]ere fluctuations in value during the process of governmental decisionmaking, absent extraordinary delay, are incidents of ownership. They cannot be considered a taking in the constitutional sense.” The Court reinforced the difference between normal

39. Id.
40. Id.
41. Id.
42. Id. at 463.
43. Id. at 465.
44. Id. at 466.
45. Id. at 466–67.
46. Id. at 467–68.

The mere assertion of regulatory jurisdiction by a governmental body does not constitute a regulatory taking. . . . A requirement that a person obtain a permit before engaging in a certain use of his or her property does not itself ‘take’ the property in any sense: after all, the very existence of a permit system implies that permission may be granted, leaving the landowner free to use the property as desired. Moreover, even if the permit is denied, there may be other viable uses
and extraordinary regulatory delays in *First English Evangelical Lutheran Church v. County of Los Angeles*, where it went out of its way to distinguish the facts before it from “the case of normal delays in obtaining building permits, changes in zoning ordinances, variances, and the like which are not before us.” More recently, as previously noted, the Court in *Tahoe-Sierra* indicated that courts can consider the length of and justification for a delay as part of their *Penn Central* analysis.

The exact role of an “extraordinary delay” in deterring whether a governmental action amounts to a taking, however, is somewhat confusing. Many courts indicate that extraordinary delay ripens a claim, which should then be reviewed using *Penn Central* factors. Other courts seem to deem extraordinary delay as a per se taking, while still others see it as something to be considered as part of a *Penn Central* analysis.

This article will first examine the factors courts use in determining whether a delay is extraordinary. It will then discuss how a court’s finding that a delay is extraordinary relates to the takings determination. Note that extraordinary delay is closely related to, but not the same as, erroneous delay. Extraordinary delay essentially focuses on whether the governmental entity was, to use the vernacular, dragging its feet. Erroneous delay, in contrast, is limited to a governmental decision that was incorrect and therefore reversed by a court.

a. Factors in Determining Whether Delay Is Extraordinary

Courts focus on two factors when they analyze whether a regulatory delay is extraordinary: whether the delay was reasonable given the complexity of the agency’s charge, and whether the agency acted in bad

---

486  VERMONT JOURNAL OF ENVIRONMENTAL LAW  [Vol. 11

and extraordinary regulatory delays in *First English Evangelical Lutheran Church v. County of Los Angeles*, where it went out of its way to distinguish the facts before it from “the case of normal delays in obtaining building permits, changes in zoning ordinances, variances, and the like which are not before us.” More recently, as previously noted, the Court in *Tahoe-Sierra* indicated that courts can consider the length of and justification for a delay as part of their *Penn Central* analysis.

The exact role of an “extraordinary delay” in deterring whether a governmental action amounts to a taking, however, is somewhat confusing. Many courts indicate that extraordinary delay ripens a claim, which should then be reviewed using *Penn Central* factors. Other courts seem to deem extraordinary delay as a per se taking, while still others see it as something to be considered as part of a *Penn Central* analysis.

This article will first examine the factors courts use in determining whether a delay is extraordinary. It will then discuss how a court’s finding that a delay is extraordinary relates to the takings determination. Note that extraordinary delay is closely related to, but not the same as, erroneous delay. Extraordinary delay essentially focuses on whether the governmental entity was, to use the vernacular, dragging its feet. Erroneous delay, in contrast, is limited to a governmental decision that was incorrect and therefore reversed by a court.

a. Factors in Determining Whether Delay Is Extraordinary

Courts focus on two factors when they analyze whether a regulatory delay is extraordinary: whether the delay was reasonable given the complexity of the agency’s charge, and whether the agency acted in bad

---

52. See infra Part I.A.2.a–b, discussing these three approaches.
54. See *Landgate, Inc. v. Cal. Coastal Comm’n*, 953 P.2d 1188, 1204 (Cal. 1998) (discussing a “governmental mistake” that led to a delay, but did not amount to a taking).
Generally, courts will not find extraordinary delay unless the agency-caused delay was both unreasonable and the result of bad faith.56

i. The Nature of the Regulatory Scheme

In deciding whether a delay is extraordinary, courts not only look at its length, but also whether it “is disproportionate to the regulatory permitting scheme from which it arises.”57 For example, delays will be expected when government review is part of a “complex regulatory permitting process.”58 That is particularly true where review “requires detailed technical information necessary to determine the environmental impact of a proposed project.”59 And, where agencies are involved in a complex process, they “should be afforded significant deference in determining what additional information is required to satisfy statutorily imposed obligations.”60 Finally, courts will generally ignore the portion of any delay that is attributable to an applicant.61

ii. Rare Without Bad Faith

Courts not only require that a delay be unreasonably long before they deem it extraordinary; they also usually require that the government acted in bad faith.62 Thus, a Court of Federal Claims decision recently noted the Federal Circuit’s “admonition that extraordinary delay rarely travels without bad faith . . . .”63 Moreover, when property owners seek to establish bad faith, they must overcome “the well-established rule that government officials are presumed to act in good faith.”64

---

55. Bass Enters., 381 F.3d at 1366.
56. Id.
57. Id.
59. Id.
60. Id.
61. Id.; see Res. Invs., Inc. v. United States, 85 Fed. Cl. 447, 502 (2009) (holding that a plaintiff’s contribution to the delays raises a genuine issue of material fact that strikes at the heart of a governmental taking).
62. Boise Cascade Corp. v. United States, 296 F.3d 1339, 1347 n.6 (Fed. Cir. 2002).
64. Aloisi, 85 Fed. Cl. at 95.
b. A Shield or a Sword? (Ripening Versus Establishing Claim)

Older cases out of the Federal Circuit suggested that an extraordinary delay in and of itself established a taking.\footnote{See, e.g., Bass Enters. Prod. Co. v. United States, 381 F.3d 1360, 1366 (Fed. Cir. 2004) (stating that an extraordinary delay "may result" in a taking); Wyatt v. United States, 271 F.3d 1090, 1097 (Fed. Cir. 2001) (indicating that an extraordinary delay would be a taking); Tabb Lakes, Ltd. v. United States, 10 F.3d 796, 801 (Fed. Cir. 1993) (stating that "[m]ere fluctuations in value during the process of governmental decisionmaking, absent extraordinary delay, are ‘incidents of ownership.’ They cannot be considered a ‘taking’ in the constitutional sense.”) (citing Agins v. City of Tiburon, 477 U.S. 255, 263 n.9 (1980)) (quoting Danforth v. United States, 308 U.S. 271, 285 (1993)).} Newer cases, however, indicate that such delays ripen a takings claim, and may be relevant to the takings determination itself, but that the delays do not impose per se takings.\footnote{See, e.g., Appolo Fuels, Inc. v. United States, 381 F.3d 1338, 1351 (Fed. Cir. 2004) (stating that only extraordinary delays ripen into a compensable taking and “[i]f the delay is extraordinary, the question of temporary regulatory takings liability is to be determined using the Penn Central factors”); Res. Invs., 85 Fed. Cl. at 494–95 (stating that “[e]ven extraordinary delay requires that the landowner establish that the delay caused a taking”); Aloisi, 85 Fed. Cl. at 93 (stating that “[a]n extraordinary delay in permit processing by an agency can give rise to a ripe takings claim”); Riviera Drillings & Exploration Co., Inc. v. United States, 61 Fed. Cl. 395, 405 (2004) (finding that only extraordinary delays ripen into a compensable taking).}

Tabb Lakes, Ltd. v. United States was the first Federal Circuit decision to address the concept of extraordinary delay.\footnote{Tabb Lakes, 10 F.3d at 798.} In that case, the U.S. Army Corps of Engineers ordered Tabb Lakes to cease and desist from filling its wetlands before receiving a permit.\footnote{Id. at 798–99.} Tabb Lakes then filed a lawsuit that ultimately resulted in a decision that the Corps had no jurisdiction over these wetlands.\footnote{Id. at 799.} Tabb Lakes then proceeded with its project.\footnote{Id.} It also brought a takings action against the Corps, asserting among other things that the Corps imposed a taking because its improper assertion of jurisdiction unreasonably delayed Tabb Lakes’s project.\footnote{Id. at 803.} The Federal Circuit rejected the claim.\footnote{Id. (emphasis omitted).} It did, however, seem to indicate that where a delay becomes unreasonable, a taking occurs from that point forward, explaining that “only after the delay become unreasonable, would the taking begin . . . .”\footnote{Id. (emphasis omitted).}

In 2001, the Federal Circuit likewise appeared to imply that an extraordinary delay can itself constitute a taking. In Wyatt v. United States, the court’s discussion of extraordinary delay focused on the elements needed to establish such a delay, and why the plaintiff failed to make its
Wyatt did, however, include the following language: “[W]e hold that any delay in processing the permit application was not sufficiently ‘extraordinary’ to constitute a taking.” The court’s use of the phrase “constitute a taking” indicated that extraordinary delay would be a taking, but it does not have much weight because there was no discussion or analysis of this issue. The court was even more ambiguous three years later in Bass Enterprises Production Co. v. United States. Like Wyatt, Bass Enterprises’s extraordinary delay discussion almost exclusively addressed the elements of such a delay and why the plaintiff did not make its case. The court did, however, include one sentence indicating that an extraordinary delay “may result” in a taking. On the other hand, the court seemed to suggest that even if an extraordinary delay exists, Penn Central factors must still be satisfied.

As will be explained, however, the Federal Circuit did address this issue directly in a decision that it issued contemporaneously with Bass Enterprises, and in two more recent opinions, all of which point to extraordinary delay as ripening a claim rather than establishing it. In Appolo Fuels, Inc. v. United States, the owner of surface mining leases asserted that the government’s eventual prohibition of mining on a portion of property covered by its leases constituted a permanent taking. The court rejected the permanent takings claim. It found that, even assuming (without deciding) that the economic impact of the government’s action was substantial, Appolo’s lack of reasonable expectations, plus the government’s need to protect the public’s health and safety, outweighed any economic impact. The court explained that the Penn Central factors also apply to extraordinary delay challenges: “Delay in the regulatory process cannot give rise to takings liability unless the delay is extraordinary. If the delay is

75. Id. at 1097.
76. Id.
78. Id. at 1366–68.
79. Id. at 1366.
80. Id. at 1365.
82. Id.
83. Id. at 1347.
84. Id. at 1351.
extraordinary, the question of temporary regulatory takings liability is to be
determined using the *Penn Central* factors.85

The court then rejected *Appolo*’s temporary takings claim, stating that
given its finding that there was no permanent taking under *Penn Central*, “it
would be strange to hold that a temporary restriction imposed pending the
outcome of the regulatory decisionmaking process requires compensation.”86

The Court of Federal Claims addressed this issue directly in two recent
decisions.87 In 2008, the court expressly held in *Aloisi v. United States* that
extraordinary delay is a ripeness issue:

> An extraordinary delay in permit processing by an agency
can give rise to a ripe takings claim notwithstanding the
failure to deny the permit . . . . If the court determines that
there is an extraordinary delay by the government, the
question of temporary regulatory takings liability is then
determined using the Supreme Court’s three-part analysis
in *Penn Central*.88

Similarly, in 2009, a different judge from that court explained in
*Resource Investments, Inc. v. United States* that “[e]ven extraordinary delay
requires that the landowner establish that the delay caused a taking, rather
than merely retard a permitting process without the requisite impact on
property interests.”89 Neither *Appolo*, *Aloisi*, nor *Resource Investments*,
however, discussed whether, when a court finds that a case is ripe due to
extraordinary delay, that finding affects the merits of its takings analysis.

At least one state court, the Supreme Court of South Carolina, has
simply assumed that any permitting delay is ripe for takings review, and
that the delay is considered as part of a *Penn Central* analysis.90 In *Byrd v.
City of Hartsville*, a land owner entered an agreement to sell his agricultural
parcel to a developer, conditioned on its being zoned for commercial use.91

---

85. *Id.* (internal citations omitted).
86. *Id.* at 1352. One month before the court decided *Appolo*, the Court of Federal Claims
directly stated that once a court finds extreme delay its “next step . . . tests the government action for the
*Penn Central* factors demonstrating a compensable taking.” *Riviera Drilling & Exploration Co. v.
United States*, 61 Fed. Cl. 395, 405 (2004) (holding that the second step—a *Penn Central* analysis—was
unnecessary “because plaintiff has failed to allege the existence of the extraordinary delay”).
Cl. 447, 467–68 (2009).
91. *Id.* at 78.
The city deferred acting on the landowner’s rezoning request for eleven months because it wanted to make sure that the rezoning would not lead the National Park Service to revoke the National Historic Landmark designation for related farm property. The city eventually rezoned the parcel, but the delay caused the prospective purchaser to lose financing, and the sale fell through. The South Carolina Supreme Court interpreted Tahoe-Sierra as requiring the court to determine whether there was a Penn Central taking during the eleven-month period. According to South Carolina’s high court, this determination requires an analysis of “whether the delay ever became unreasonable,” which in turn involves a consideration of “the reasons for the delay, and the economic impacts on Byrd.” Here, the court found that the city had a “legitimate governmental interest” in the landmark designation, and that “delaying the zoning decision was a reasonable means of furthering that interest.” The court went on to hold that the economic impact of the delay was “too slight to render the delay unreasonable,” given, among other things, the fact that the owner could still farm the property.

An Ohio state court likewise viewed delay as a Penn Central factor (along with economic impact and investment-backed expectations) in Duncan v. Village of Middlefield. The court also suggested, however, that “normal delays” are shields, that economic impacts due to normal delays can never impose a taking.

On the other hand, a North Dakota Supreme Court decision involving a moratorium, as opposed to the delayed review of a permit application, included language suggesting that delay could itself amount to a taking. In Wild Rice River Estates, Inc. v. City of Fargo, the court stated that “extraordinary delay . . . coupled with bad faith . . . may result in a compensable taking.” In spite of that statement, however, the court appeared to consider delay and bad faith as factors that courts should consider along with the traditional Penn Central factors, as opposed to stand alone factors.

---

92. Id.
93. Id.
94. Id. at 81.
95. Id.
96. Id. at 82.
97. Id.
99. Id. at 956.
100. Wild Rice River Estates, Inc. v. City of Fargo, 705 N.W.2d 850, 859 (N.D. 2005).
101. Id.
102. Id.
Given the various ways that courts have applied the extraordinary delay concept, which method is correct? This paper suggests that the decisions in cases such as Appolo, Aloisi, and Resource Investments, which view delay as ripening a claim, are correct.103 The concept of “extraordinary” delay is contrasted with the concept of a “normal” delay, which is never a taking even if it imposes an extreme economic burden on a property owner.104 Only when the delay crosses the “normal” line and becomes “extraordinary” should it ripen into a potential taking.105

Moreover, if extraordinary delay, without more, itself amounted to a taking, then it would impose a taking even where a delay had virtually no economic impact on a property owner.106 This result would run counter to the Supreme Court’s clarification of takings law in Lingle v. Chevron U.S.A., Inc.107 Lingle stepped back and clarified years of confusing regulatory takings decisions. It explained that whether a regulation amounts to a taking turns on whether it is “so onerous that its effect is tantamount to a direct appropriation or ouster.”108 The key is identifying “those regulations whose effects are functionally comparable to government appropriation or invasion of private property.”109 Courts should also look at whether governmental action singles out a property owner and requires her to bear public burdens that should be borne by the public.110 If an extraordinary delay only caused a minor economic impact, however, it would not meet those requirements. Extraordinary delay itself, therefore, should not constitute a per se taking.

That leaves the question of whether, when extraordinary delay ripens a claim, delay factors (reasonableness and bad faith) should be considered as part of a court’s Penn Central review. Although the Court’s decision in Tahoe-Sierra hints that both factors may be relevant,111 the Court’s


104. See First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 320–21 (1987) (limiting the holding so as to not affect the “normal delays” associated with obtaining building permits, variances, and the like, because absent “extraordinary delay” these activities do not constitute a taking).

105. See Boise Cascade Corp. v. United States, 296 F.3d 1339, 1352 (Fed. Cir. 2002) (stating that only “extraordinary delays in the permitting process ripen into a compensable taking”).

106. But cf. First English, 482 U.S. at 320 (stating that “a taking does not occur until compensation is determined and paid”).


108. Id. at 537.

109. Id. at 542.

110. Id.

111. See Tahoe-Sierra Pres. Council, Inc., 535 U.S. 302, 333 (2002) (listing theories under which “[c]onsiderations of ‘fairness and justice’ arguably could support the conclusion that TRPA’s moratoria were takings”).
subsequent decision in Lingle tempers their consideration.\textsuperscript{112} Unreasonableness and bad faith do not, in and of themselves, establish that a governmental restriction meets Lingle’s requirement that the burden be “so onerous” as to be the same as a direct appropriation, or that it is improperly singling out the property owner.\textsuperscript{113} They may, however, inform various Penn Central factors. For example, unreasonableness and bad faith may be relevant to “the character of the governmental action.”\textsuperscript{114} Moreover, excessive delay may increase the economic burden of government’s action, and thereby be relevant to “[t]he economic impact of the regulation on the claimant.”\textsuperscript{115} It might also affect whether or not government’s actions interfered with “distinct investment-backed expectations.”\textsuperscript{116} Thus, while a court’s finding of extraordinary delay should not amount to a per se taking, it may be applicable to a court’s Penn Central analysis.

3. Erroneous Delay (Judicial Reversal)

A significant number of state courts have reviewed the closely related question of whether delays due to governmental positions that courts subsequently reverse are normal and therefore not temporary takings.\textsuperscript{117} These cases are slightly different than the extraordinary delay cases, as they exclusively focus on invalid governmental decisions, rather than on the length and reasonableness of delays.\textsuperscript{118} That said, like the extraordinary delay cases, these opinions tend to find that, absent indicia of bad faith, erroneous delays are not takings.

The leading state court case comes out of California, where the state’s Supreme Court held that a two-year delay caused by a commission’s “mistaken assertion of jurisdiction” that was corrected on appeal is “in the nature of a ‘normal delay’ that does not constitute a taking.”\textsuperscript{119} The court indicated, however, that a different case would be presented if the

\begin{footnotesize}
\begin{enumerate}
\item[112.] Lingle, 544 U.S. at 528.
\item[113.] Id. at 537, 542.
\item[115.] Id.
\item[116.] Id.
\item[118.] See, e.g., Landgate, 953 P.2d at 1202 (“Landgate’s development was denied because of the Commission’s plausible, though perhaps legally erroneous, position that Landgate or its predecessor failed to comply with one of the conditions of obtaining a coastal development permit by illegally reconfiguring the lot boundaries.”).
\item[119.] Id. at 1190.
\end{enumerate}
\end{footnotesize}
commission’s “position was so unreasonable from a legal standpoint as to lead to the conclusion that it was taken for no purpose other than to delay the development project before it.”

Subsequently, relying on Landgate, a California appellate court held in Lowenstein v. City of Lafayette that a city’s mistaken denial of a landowner’s lot line adjustment request, which resulted in a two-year delay, was not a taking. The court explained that “the City’s action was not objectively unreasonable because it was not taken solely to delay the proposed project.”

On the other hand, in Ali v. City of Los Angeles, a California appellate court found that a city’s denial of a permit to demolish a damaged hotel, where the city was seeking to preserve single occupancy units, imposed a temporary taking. The court explained that the denial was “arbitrary and unreasonable” in light of a state statute and existing case law that required the issuance of the permit.

California’s approach has been endorsed by at least one federal court. Citing Landgate and Lowenstein, the district court in North Pacifica, L.L.C. v. City of Pacifica held that California provides an adequate remedy for temporary takings based upon allegedly improper delays in processing development applications, and consequently that remedy must be pursued prior to bringing a federal court action.

The Wisconsin Supreme Court, however, has rejected the Landgate approach. In Eberle v. Dane County Board of Adjustment, property owners alleged that they were improperly denied a permit for a driveway needed to access their property. A trial court subsequently ordered the county to issue the permit. Wisconsin’s high court held that these facts stated a temporary taking claim under the Wisconsin Constitution. In doing so, the majority expressly rejected Landgate’s reasoning. The Chief Justice issued a strong dissent, however, asserting that where an administrative body refuses to allow a particular land use, and a court subsequently

120. Id. at 1199.
121. Lowenstein, 127 Cal. Rptr. 2d at 87.
122. Id.
124. Id.
126. Eberle v. Dane County Bd. of Adjustment, 595 N.W.2d 730, 740 (Wis. 1999).
127. Id. at 735.
128. Id. at 739.
129. Id. at 742 n.25.
overturns the denial and allows the use, there is no temporary taking.\textsuperscript{130} In support, she cited—in addition to \textit{Landgate}—decisions from Vermont, New Hampshire, Pennsylvania, and New York.\textsuperscript{131}

The holding in \textit{Eberle}, and the dicta concerning bad faith in \textit{Landgate}, are in tension with \textit{Lingle v. Chevron U.S.A., Inc.}\textsuperscript{132} As previously outlined in discussing the degree to which an extraordinary delay can be considered in determining the merits of a taking claim, \textit{Lingle}'s explanation that regulatory takings should turn on a regulation's impact on property—whether it is tantamount to a direct appropriation and whether government singles out a particular property owner—means that mistakes and bad faith are at most elements courts can consider when they engage in a \textit{Penn Central} analysis.\textsuperscript{133}

Moreover, \textit{Landgate} itself is at least partially based on the very same “substantially advance[s]” formula discarded in \textit{Lingle}.\textsuperscript{134} \textit{Landgate} held that a court's erroneous delay determination looks at “whether the [mistaken] development restrictions imposed on the subject property substantially advanced some legitimate state purposes so as to justify the denial of the development permit.”\textsuperscript{135} After \textit{Landgate} was decided, however, the United States Supreme Court held in \textit{Lingle} that the “substantially advances” test “ensconced in our Fifth Amendment takings jurisprudence . . . is [not] an appropriate test for determining whether a regulation effects a Fifth Amendment taking.”\textsuperscript{136} As a result, a number of lower California courts have questioned, but not decided, whether \textit{Landgate} is still good law.\textsuperscript{137}

The continuing validity of \textit{Landgate} and similar decisions in other states may depend upon whether those cases are interpreted as swords or shields. On the one hand, \textit{Landgate} can be seen as providing an

\begin{itemize}
\item \textsuperscript{130} \textit{Id.} at 749 (Abrahamson, C.J., dissenting).
\item \textsuperscript{132} \textit{Lingle v. Chevron U.S.A. Inc.}, 544 U.S. 528 (2005).
\item \textsuperscript{133} \textit{Id.} at 537, 542.
\item \textsuperscript{134} \textit{Landgate, Inc. v. Cal. Coastal Comm’n}, 953 P.2d 1188, 1198 (Cal. 1998).
\item \textsuperscript{135} \textit{Id.}
\item \textsuperscript{136} \textit{Lingle}, 544 U.S. at 532.
\item \textsuperscript{137} See, e.g., \textit{Shaw v. County of Santa Cruz}, 88 Cal. Rptr. 3d 186, 216 (2008) (discussing whether subsequent cases have undercut the \textit{Landgate} holding).
\end{itemize}
independent theory for finding a taking, that is, delay for arbitrary reasons is a taking whether or not its impact is sufficient to impose a taking under the “so onerous” and singling out concepts sanctioned in Lingle.\textsuperscript{138} On the other hand, Landgate can be viewed as holding that even where a delay imposes impacts that would ordinarily amount to a taking, no taking occurs for delays that are legitimate.\textsuperscript{139} The first approach, under which a delay that does not meet a “substantially advances” test provides an independent basis for finding a taking, would appear to conflict with Lingle.\textsuperscript{140} The latter, in contrast, would not pose a conflict. Rather, the “substantially advances” formula would only be a means of determining whether a delay comes within the “normal delays” that cannot constitute temporary takings under First English.\textsuperscript{141}

**B. Retrospectively Temporary Regulations: Can Lucas Ever Apply?**

In contrast to prospectively temporary regulations, which at the outset are intended to be temporary, other regulations are intended to be permanent but are subsequently rescinded. The rescission is often in response to an adverse judicial decision or a defensive reaction to a threatened or actual lawsuit.\textsuperscript{142} Courts have used the term “retrospectively temporary” to describe this type of temporary restriction.\textsuperscript{143} For claims that a permanent use restriction that is cut short amounts to a taking, the most interesting question is whether the claim can be analyzed using the Lucas per se rule.

\textsuperscript{138} Lingle, 544 U.S. at 537, 542.

\textsuperscript{139} Landgate, 953 P.2d at 1190.

\textsuperscript{140} Lingle, 544 U.S. at 548 (“We hold that the ‘substantially advances’ formula is not a valid takings test, and indeed conclude that it has no proper place in our takings jurisprudence.”).

\textsuperscript{141} First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 321 (1987).

\textsuperscript{142} Along these lines, the Court in First English explained that the government has the right to convert a potentially permanent taking into a temporary taking:

> Nothing we say today is intended to abrogate the principle that the decision to exercise the power of eminent domain is a legislative function . . . . Once a court determines that a taking has occurred, the government retains the whole range of options already available—amendment of the regulation, withdrawal of the invalidated regulation, or exercise of eminent domain.

\textit{Id.}

\textsuperscript{143} See Res. Invs., Inc. v. United States, 85 Fed. Cl. 447, 482 (2009) (exemplifying the various governmental actions that can constitute “retrospectively temporary” restrictions); Woodbury Place Partners v. City of Woodbury, 492 N.W.2d 258, 262 (Minn. Ct. App. 1992) (describing the restrictions addressed in First English as “retrospectively temporary”); Keshbro, Inc. v. City of Miami, 801 So.2d 864, 873 (Fla. 2001) (applying the Lucas categorical takings analysis to prospectively and “retrospectively temporary” takings).
The Federal Circuit has questioned, but not expressly resolved, whether Tahoe-Sierra’s rejection of Lucas’s per se rule extends to retroactively temporary takings.\textsuperscript{144} In Seiber v. United States, the government initially denied a permit to log a portion of the landowner’s property that had been designated as protected spotted owl nesting habitat.\textsuperscript{145} Two years later, the government lifted the restriction, finding that the spotted owls had left the area and that the area no longer needed protection.\textsuperscript{146} Seiber asserted various takings theories, including an argument that the government’s actions constituted a temporary taking that should be deemed per se under Lucas.\textsuperscript{147} In response, the government argued that the case did not fall under Lucas because, among other things, after Tahoe-Sierra “there is no such legal category as a temporary categorical taking because by its very nature a temporary taking allows a property owner to recoup some measure of its property’s value.”\textsuperscript{148} Although the court declined to address that question, holding that there was no categorical taking because the landowners could have logged other portions of their parcel, it did question the government’s argument:

In Boise Cascade we explained that the Supreme Court may have only rejected the application of the per se rule articulated in Lucas to temporary development moratoria and not to temporary takings that result from the rescission of a permit requirement or denial.\textsuperscript{149}

More recently, a Court of Federal Claims case addressed this issue and expressly rejected the government’s argument that Lucas can never apply to a retrospectively temporary taking. In Resource Investments, Inc. v. United States, the court reasoned that Tahoe-Sierra did not apply.\textsuperscript{150} It said that where a permit denial is “unconditional and permanent,” the government takes “the parcel as a temporal whole.”\textsuperscript{151} The court categorized the denial before it as “prospectively permanent,” and reasoned that the fact that “the taking was ‘cut short’ does not transmute the interests that it had

\textsuperscript{144} Seiber v. United States, 364 F.3d 1356, 1368 (Fed. Cir. 2004).
\textsuperscript{145} Id. at 1360.
\textsuperscript{146} Id. at 1362.
\textsuperscript{147} Id. at 1368.
\textsuperscript{148} Id.
\textsuperscript{149} Id. (internal citations omitted).
\textsuperscript{151} Id. at 484.
Resource Investments went on to conclude that the alleged taking “falls under Lucas rather than Tahoe-Sierra and Penn Central.”

The answer to whether Lucas applies to retrospectively temporary regulations turns on the appropriate temporal focus: should it be the time that the government first prohibited the use, or should it be the present? Resource Investments looked at the burden from the vantage point of when it was imposed, that is, as a permanent burden. This viewpoint is attractive. In Lingle, the Court explained that regulatory takings liability is to a large degree based upon whether a restriction’s impact on property is extremely onerous. Where a restriction is intended to be permanent, its economic impact at the time of its imposition will be the same as a permanent restriction. From this point of view, the fact that the restriction was lifted would affect the amount of compensation, if any, that the government owes, but it would not seem to affect liability.

Apart from whether Resource Investments was correct in reaching its conclusion, however, the court included some faulty reasoning. For example, Resource Investments found that Lucas applied to the facts before it by ignoring Tahoe-Sierra’s determination that Lucas turns on the loss of value, not the inability to use property. Resource Investments stated that “[a]s Lucas elaborates, categorical assessment of an alleged taking is appropriate when the property is purportedly without economically viable use, and does not require the parcel to be without all accounting or appraisal value.” Resource Investments compounds its error by implying that the Lucas Court intentionally applied its categorical rule to property that retained value.

152. Id.
153. Id. at 493.
154. Id. at 484.
155. See supra text accompanying notes 107–110.
156. See Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1012 (1992) (“Yet, Lucas had no reason to proceed on a ‘temporary taking’ theory at trial, or even to seek remand for the purpose prior to submission of the case to the South Carolina Supreme Court, since as the Act then read, the taking was unconditional and permanent.”).
157. In Tahoe-Sierra, the Court stressed that “[a]nything less than a ‘complete elimination of value,’ or a ‘total loss,’ the [Lucas] Court acknowledged, would require the kind of analysis applied in Penn Central.” Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Planning Agency, 535 U.S. 302, 330 (2002). Tahoe-Sierra thus emphasized that unless a challenged restriction “permanently deprives property of all value,” Lucas does not apply. Id. at 332. Chief Justice Rehnquist issued a dissent that underscores this aspect of the majority’s decision; the Chief Justice criticized “the Court’s position that value is the sine qua non of the Lucas rule.” Id. at 350 (Rehnquist, C.J., dissenting).
159. Id.
160. Id. at 488 (internal citations omitted).
That observation, however, is very misleading. In *Lucas*, the trial court had determined that the regulations prohibiting development on Lucas’ lots “rendered them valueless.”¹⁶¹ The Supreme Court declined to question this conclusion because the government did not raise this point in opposing the petition for certiorari.¹⁶² Specifically, the Court explained that “[t]his [valueless] finding was the premise of the petition for certiorari, and since it was not challenged in the brief in opposition we decline to entertain the argument in respondent’s brief on the merits . . . that the finding was erroneous.”¹⁶³

*Resource Investments* notably never cites any portion of the majority decision for the proposition that property comes within the *Lucas* categorical rule even where it retains some accounting or appraised value. Rather, the Court of Federal Claims points to Justice Blackmun’s dissent.¹⁶⁴ In doing so, however, *Resource Investments* ignores Justice Blackmun’s agreement that the majority “has the power to decide a case that turns on an erroneous finding,” as well as his “question[ing] the wisdom of” doing so.¹⁶⁵ Likewise, *Resource Investments* fails to note Justice Kennedy’s concurring opinion, expressing “reservations” about the valueless assumption, but explaining that “we must accept the finding as entered below.”¹⁶⁶

The value-versus-use distinction is important because even where no uses of property remain, it might still have speculative value and thereby be excluded from a *Lucas* per se evaluation. Thus, in *Florida Rock Industries, Inc. v. United States*, the United States Court of Appeals for the Federal Circuit reversed the lower court’s review of a takings claim under the *Lucas* per se rule.¹⁶⁷ There, even though the Army Corps of Engineers denied a permit to mine limestone under the landowner’s wetlands, the court found that the property had value due to the existence of a speculative market.¹⁶⁸

But the authors of this article digress. While the authors believe that *Resource Investments* failed to properly apply *Lucas*, the court may have been correct in concluding that *Lucas* can apply to retroactively temporary takings.

¹⁶¹. *Lucas*, 505 U.S. at 1009.
¹⁶². Id. at 1020 n.9.
¹⁶³. Id.
¹⁶⁶. Id. at 1034 (Kennedy, J., dissenting).
¹⁶⁷. Fla. Rock Indus., Inc. v. United States, 18 F.3d 1560, 1566 n.12 (Fed. Cir. 1994).
¹⁶⁸. Id.
C. Ultra Vires Delay

The concept that acts of government officials must be authorized before they can violate the Takings Clause goes back at least to 1910. In *Hooe v. United States*, the Court rejected a landlord’s claim for additional rent for offices leased by a federal agency on the ground that Congress had not authorized the higher payment.169 According to the Court:

> The constitutional prohibition against taking private property for public use without just compensation is directed against the Government, and not against individual or public officers proceeding without the authority of legislative enactment. The taking of private property by an officer of the United States for public use, without being authorized, expressly or by necessary implication, to do so by some act of Congress, is not the act of the Government.  

Similarly, in *Regional Rail Reorganization Act Cases*, the Court cited *Hooe* in reiterating that “Government action must be authorized.”171

Consistent with these Supreme Court opinions are lower court decisions, primarily out of the Federal Circuit, which state that unauthorized acts, by definition, cannot constitute a taking.172 As a result, if a governmental entity or representative imposed a delay without authority to do so, there is no taking. The concept of “unauthorized act,” however, does not provide governments with a broadly applicable defense, that is, the ability to say that almost any action that amounts to a taking could not have been authorized and therefore is not a taking. At least in the Federal Circuit, the courts have limited the notion of “unauthorized” by deeming even unlawful acts as authorized for takings purposes when the acts fall within an official’s or governmental entity’s general charge.

The Federal Circuit’s approach was summarized by the Court of Federal Claims in *Pi Electronics Corp. v. United States*.173 That court first explained that an act must be “authorized” to be a taking:

---

170. *Id.* at 335–36.
172. See, e.g., *Acadia Tech., Inc. v. United States*, 458 F.3d 1327, 1331 (Fed. Cir. 2006) (citing numerous decisions, mainly from that circuit).
It is well settled that a “compensable taking arises only if the government action in question is authorized.” Del-Rio Drilling Programs, Inc. v. United States, 146 F.3d 1358, 1362 (Fed. Cir.1998); see also Rith Energy, Inc. v. United States, 247 F.3d 1355, 1365 (Fed. Cir. 2001). An unauthorized action cannot predicate liability for a compensable taking, given that it does not “vest some kind of title in the government and entitlement to just compensation in the owner or former owner.” Armijo v. United States, 229 Ct. Cl. 34, 40, 663 F.2d 90, 95 (1981) (cited with approval in Del-Rio, 146 F.3d at 1362). Therefore, a “claimant must concede the [authorization] of the government action which is the basis of the takings claim to bring suit under the Tucker Act.” Tabb Lakes, Ltd. v. United States, 10 F.3d 796, 802 (Fed. Cir. 1993).174

Pi Electronics noted, however, that acts within an entity’s or individual’s responsibilities may be authorized even if they are illegal:

[T]he Federal Circuit has “drawn an important distinction between conduct that is ‘unauthorized’ and conduct that is authorized but nonetheless unlawful.” Del-Rio, 146 F3d at 1362. The “mere fact that a government officer has acted illegally does not mean he has exceeded his authority for Tucker Act purposes, even though he is not ‘authorized’ to break the law.” Id. at 1362.175

In Del-Rio, the court thus stated that an ultra vires action is one that was “either explicitly prohibited or was outside the normal scope of the government official’s duties.”176

174. Id.
175. Id. at 289.
176. Del-Rio Drilling Programs, Inc. v. United States, 146 F.3d 1358, 1363; see Cienega Gardens v. United States, 503 F.3d 1266 (Fed. Cir. 2007). Cienega Gardens provides a relatively recent example of an unauthorized activity. In that case, the Federal Circuit had previously held that federal statutory provisions, which restricted the ability of owners of certain low-income housing projects from pre-paying their mortgages, and thereby prospectively avoiding rent control requirements, imposed a taking on four “model plaintiffs” before it. Id. at 1275. In this latest opinion, reviewing the claims of other plaintiffs, the court explained that the analysis of whether their property was taken needs to include a consideration of the duration of the pre-payment restriction. Significantly for our purposes, the statutory restriction was eventually lifted, but plaintiffs asserted that government officials nevertheless refused to allow pre-payments even after the statutory change. The Federal Circuit determined that any actions of the officials that occurred after the statute was changed could not count in calculating the duration of the alleged taking. The court explained that since the actions were not authorized, they could not have imposed a taking. Id. at 1287 n.18.
At least one commentator, however, has asserted that illegal governmental acts cannot amount to takings even if they come within an agency’s or official’s duties.\(^{177}\) That is because illegal acts, by their nature, arguably do not meet the Taking Clause’s “public use” requirement.\(^{178}\) An illegal act does not appear to be a public use. Two courts have noted this concept, although neither ended up addressing it. In *Custer County Action Association v. Garvey*, the Tenth Circuit called the position “intriguing,” although the court did not reach the issue because it rejected the takings claim before it on other grounds.\(^{179}\) The California Supreme Court also acknowledged this argument in *Landgate, Inc. v. California Coastal Commission*, although like the Tenth Circuit it ruled on other grounds and therefore did not reach this issue.\(^{180}\)

Finally, courts have issued apparently conflicting decisions concerning whether a governmental act is *ultra vires* when government bases its jurisdiction on an incorrect factual determination. In *Bailey v. United States*, the Court of Federal Claims suggested in dictum that such an action may nevertheless be “authorized” and subject to a takings claim.\(^{181}\) A prior Federal Circuit decision, however, indicates otherwise. In *Florida Rock Industrial, Inc. v. United States*, the court explained that the federal government’s Clean Water Act jurisdiction over a mining project turned on whether the project threatened to pollute certain waters.\(^{182}\) Absent that threat, the governmental action would be unauthorized and therefore would not support a takings award.\(^{183}\) The court thus explained that the government could defeat the takings claim by showing that its pollution assumption was incorrect.\(^{184}\)

## II. TEMPORARY PHYSICAL APPROPRIATIONS

With physical takings, the key questions are usually: (1) whether the imposition is in fact physical as opposed to a use restriction; (2) if physical, whether an imposition is permanent or temporary; and (3) if physical and

---


178. *Id.*

179. *Custer County Action Ass’n v. Garvey*, 256 F.3d 1024, 1042 (10th Cir. 2001).


183. *Id.*; see *Marks v. United States*, 34 Fed. Cl. 387, 409–10 (1995) (stating that the federal government’s actions were unauthorized and thus could not be the basis for a taking where it prohibited development above the mean high water line).

temporary, whether the imposition is total or only partial. Citing Loretto v. Teleprompter Manhattan CATV Corp., the Court therefore reiterated in Lingle v. Chevron U.S.A., Inc. that “where government requires an owner to suffer a permanent physical invasion of her property—however minor—it must provide just compensation.” Loretto also explained, however, that the per se rule does not apply where imposed occupations are only temporary. Rather, the government’s actions are “subject to a more complex balancing process to determine whether they are a taking.” This paper will now analyze these questions in more detail.

A. Physical Impositions Versus Use Limitations

Because permanent physical occupations are per se takings, while takings based upon regulatory limitations of use are considerably more difficult to establish, litigants can expend considerable energy over whether a governmental action amounts to a physical imposition or a use limitation. These disputes have been particularly heated concerning water rights, as exemplified by the California state court decision in Allegretti & Co. v. County of Imperial and the Federal Circuit’s decision in Casitas Municipal Water District v. United States.

In Allegretti, the county granted Allegretti a permit to redrill an inoperable well, but limited the amount of groundwater that he could draw. Allegretti asserted that the county restriction amounted to a permanent physical taking of his right to use the groundwater, as well as a regulatory taking. The court rejected his claims. Its rejection of the physical taking claim illustrates the potential difficulty in identifying some per se physical takings. The court first noted that the federal court in Tulare Lake 185.

186. Id. at 419.
188. Loretto, 458 U.S. at 440.
189. Id. at 436 n.12. In Tahoe-Sierra, the Court includes a broad comparison of physical takings and regulations of property uses, in which it seems to indicate that government’s physical acquisition of property, even if temporary and minor, is always a taking. Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Planning Agency, 535 U.S. 302, 322 (2002). The Court, however, was not focusing on the physical takings doctrine, because the case before it involved a regulation of property uses. Id. at 306. Moreover, in support the Court cites Loretto without any discussion of Loretto’s express explanation that temporary physical takings are not per se takings. Id. at 322.
190. Allegretti & Co. v. County of Imperial, 42 Cal Rptr. 3d 122 (Cal. Ct. App. 2006); Casitas Mun. Water Dist. v. United States, 543 F.3d 1276 (Fed. Cir. 2008).
192. Id. at 126.
Basin Water Storage District v. United States had held that pumping restrictions can constitute Loretto-type takings because they were, in the Tulare Lake court’s view, no different than actual physical diversions of water.193 Based in part, however, on a prior federal decision that was highly critical of Tulare Lake,194 the Allegretti court explained that the county’s groundwater limitation was different than an actual appropriation of water because it was passive—it only required Allegretti to leave water in place.195

After Allegretti was decided, a Federal Circuit majority panel added to the confusion. Casitas held that certain governmental actions requiring water diversions to protect endangered fish should be analyzed as physical takings.196 In that case, a water district diverted river water into its canal.197 The federal government purportedly required the district to return some of that water over a fish ladder and then back to the river.198 The court held that, as a result, “the government did not merely require some water to remain in stream, but instead actively caused the physical diversion of water away from the” canal.199 A strong dissent asserted that there was no physical taking because the “usufructuary” nature of a water interest makes it unamenable to physical invasion, and because government neither made proprietary use of Casitas’s water rights, nor diverted those rights to a third party.200

Where an imposition is physical, it still may not amount to a taking if it is temporary. Determining whether an imposition is temporary, however, is not always easy.

B. Permanent Versus Temporary Physical Impositions

In Loretto, the Court downplayed as “overblown” the dissent’s concern that the distinction between “a permanent physical occupation and a temporary invasion will not always be clear.”201 Nine years later, however,
the Federal Circuit sowed significant confusion about that dividing line. In Hendler v. United States, a case involving the federal government’s installation and maintenance of wells on private property, the court took what appeared to be an expansive view of the term “permanent”:

[I]n this context, “permanent” does not mean forever, or anything like it. A taking can be for a limited term—what is “taken” is, in the language of real property law, an estate for years, that is, a term of finite duration as distinct from the infinite term of an estate in fee simple absolute.202

At least one court sharply reacted to Hendler’s characterization of permanency. In Juliano v. Montgomery-Otsego-Schoharie Solid Waste Management Authority, the district court characterized Hendler as “completely emasculat[ing]” the concept.203 The court went on to mockingly state:

[T]he Hendler court’s creative use of language calls to mind Lewis Carroll’s famous passage: “When I use a word,” Humpty Dumpty said in a rather scornful tone, “it means just what I choose it to mean—neither more nor less.” “The question is,” said Alice, “whether you can make words mean so many different things.”204

Subsequent Federal Circuit decisions, however, tried to put the genie back in the bottle. Most notably, in Boise Cascade Corp. v. United States, the court clarified that the Hendler language “has been widely misunderstood and criticized as abrogating the [Loretto] permanency requirement.”205 Boise Cascade explained that Hendler “must be read in context. And in context, it is clear that the court merely meant to focus attention on the character of the government intrusion necessary to find a permanent occupation, rather than solely focusing on temporal duration.”206

Boise Cascade went on to further limit the apparently expansive Hendler decision, stating that:

---

204. Id. at 327 n.7 (N.D. N.Y. 1997) (quoting LEWIS CARROLL, THROUGH THE LOOKING GLASS 190 (Roger L. Green ed., Oxford Univ. Press 1971) (1872)).
205. Boise Cascade Corp. v. United States, 296 F.3d 1339, 1356 (Fed. Cir. 2002).
206. Id.
Putting its dicta to one side, Hendler’s holding was unremarkable and quite narrow: it merely held that when the government enters private land, sinks 100-foot deep steel reinforced wells surrounded by gravel and concrete, and thereafter proceeds to regularly enter the land to maintain and monitor the wells over a period of years, a per se taking under Loretto has occurred.207

Boise Cascade contrasted that with the “transient invasion by owl surveyors” involved in the case before it.208

C. Partial Versus Total Temporary Impositions

Finally, where an imposition is temporary, it is considerably more likely to be seen as a taking if the occupation or appropriation is total as opposed to partial. Thus, in the three World War II cases reviewed in the introduction to this article, where government totally took over buildings for its own use, the parties and the Court assumed that a government’s temporary occupations imposed takings.209 The only issue in those cases was how to calculate just compensation.210

In exceptional cases, however, even total occupations are not inevitably takings. For example, in National Board of YMCA v. United States, United States troops protecting the Panama Canal Zone occupied a YMCA building for one night during a battle with rioters.211 A mob had been wrecking the building before the troops arrived.212 After the troops arrived and subsequently entered the building, the rioters set it afire.213 The building owner filed suit seeking just compensation for the damages that rioters caused after the troops had entered the building.214 The Court rejected the claim.215 As part of its reasoning, the Court pointed to the limited nature of the government’s occupation.216 The owner could not have used the

207. Id. at 1357.
208. Id.
209. See supra notes 3–5 and text accompanying those notes; see also First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 318 (1987) (explaining that in those cases there was “no question that compensation would be required for the government’s interference with the use of the property”).
210. See, e.g., First English, 482 U.S. at 304 (answering “whether the Just Compensation Clause requires the government to pay for ‘temporary’ regulatory takings”).
212. Id.
213. Id. at 87–88.
214. Id. at 88.
215. Id. at 93.
216. Id.
property during its occupation, since it was under heavy attack by rioters.\textsuperscript{217} Moreover, the Court explained that “the temporary, unplanned occupation of petitioners’ buildings in the course of battle does not constitute direct and substantial enough government involvement to warrant compensation under the Fifth Amendment.”\textsuperscript{218} That said, courts will generally find that government’s temporary, total occupation of property constitutes a taking.

Partial temporary occupations, in contrast, may not amount to takings where they are minor. For example, as previously noted, the Federal Circuit rejected a claim that the “transient invasion by owl surveyors” constituted a per se physical taking.\textsuperscript{219} Similarly, in Tennessee Scrap Recyclers Association v. Bredesen, the Sixth Circuit Court of Appeals upheld inspections of real property by law enforcement officials and potential victims.\textsuperscript{220} In that case, an ordinance authorized those individuals to inspect scrap dealers’ premises during business hours to see if metal was stolen.\textsuperscript{221} The court rejected the dealers’ claim that the inspections constituted physical takings.\textsuperscript{222} These decisions are consistent with the “overwhelming majority” of state court cases, which reject takings claims based upon “examinations and surveys” of property.\textsuperscript{223} One district court, therefore, expressly distinguished partial temporary occupations from the World War II cases, explaining that the latter “involved total appropriations: i.e., the government appropriated the claimant’s entire property.”\textsuperscript{224}

In Otay Mesa Property L.P. v. United States, the Court of Federal Claims summarized Federal Circuit decisions in a manner that seemed to blend the partial versus total imposition concept with the issue of duration.\textsuperscript{225} In essence, the court’s decision indicated that the permanency determination turns on a combination of the degree of the physical imposition and its duration.\textsuperscript{226} Although Otay Mesa accurately described Federal Circuit law, it is in tension with Loretto’s limitation of the per se approach in these cases to permanent physical takings. Where a physical

\begin{flushleft}
\textsuperscript{217} Id.
\textsuperscript{218} Id.
\textsuperscript{219} Boise Cascade Corp. v. United States, 296 F.3d 1339, 1357 (Fed. Cir. 2002).
\textsuperscript{220} Tenn. Scrap Recyclers Ass’n v. Bredesen, 556 F.3d 442, 446–47 (6th Cir. 2009).
\textsuperscript{221} Id. at 454.
\textsuperscript{222} Id.
\textsuperscript{223} Sandra Bullington, Entry Onto Private Property, in 9 Nichols on Eminent Domain § G32.06, at G32-25 (3d ed. 2007).
\textsuperscript{224} Juliano v. Montgomery-Otsego-Schoharie Solid Waste Mgmt. Auth., 983 F. Supp. 319, 327 (N.D. N.Y. 1997). That court went on to hold that the particular structures that the governmental entity built on the property at issue were permanent, and therefore imposed per se takings. Id. at 328.
\textsuperscript{226} Id. at 786.
\end{flushleft}
imposition will last for only a number of years, even if it is major it is still temporary. It is not, as the Court put it in \emph{Loretto}, “forever.”\footnote{Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 436 (1982).} Rather, the imposition should be subject to the “more complex balancing process” that \emph{Loretto} explained should be applied to temporary physical takings.\footnote{Id. at 435 n.12.} That process would consider the factors discussed in \emph{Otay Mesa}: the degree of the imposition and its duration.

\textbf{D. Prospectively Versus Retrospectively Temporary Physical Imposition}

For alleged physical takings, the distinction between prospectively and retrospectively temporary impositions is even more significant than for regulatory takings claims. If an imposition is initially intended to be permanent, it would appear to amount to a per se taking. This article previously noted skepticism with the argument that, in the regulatory taking context, a \emph{Lucas} per se claim cannot be stated concerning a retroactively temporary use restriction.\footnote{See supra discussion in Part II.B (discussing disbelief over the argument that a \emph{Lucas} per se claim cannot be found when there is a retroactive temporary use restriction).} A court would likely look at the alleged taking from the perspective of when government imposed the restriction, and if that imposition removed all value from property, a \emph{Lucas} taking would likely have occurred (barring a background principles defense).\footnote{Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1027 (1992).} Similarly, government’s physical appropriation of property would likely be viewed from the perspective of the intent at the time of the imposition: if the appropriation was meant to be permanent, then the alleged taking would be permanent. Government’s subsequent rescission of the imposition may go to the question of compensation, but probably not to liability.

\textbf{E. Ultra Vires Physical Imposition}

The answer to the question of whether an unauthorized governmental act can amount to a physical taking should be the same as the answer concerning an alleged regulatory taking. If a government official lacked the authority to engage in an action that allegedly imposed a taking, there is no Takings Clause violation.\footnote{Hooe v. United States, 218 U.S. 332, 335–36 (1910).} The Court reiterated that point in a physical takings case—one in which railroads asserted that a federal act requiring them to convey their properties to Conrail amounted to a taking. In \textit{Regional Rail Reorganization Act Cases}, the Court explained that a taking
must be expressly or implicitly “authorized.”\textsuperscript{232} Thus, \textit{ultra vires} government acts cannot impose a taking, whether they involve an onerous restriction on the use of property or an actual physical imposition on that property.

III. DETERMINING COMPENSATION

\textbf{A. Before First English}

How is a court to assess just compensation when the government action found to be a taking has ended? This issue first came to the fore in the trio of World War II direct condemnation decisions noted in this article’s introduction: \textit{United States v. General Motors Corp.},\textsuperscript{233} \textit{United States v. Petty Motor Co.},\textsuperscript{234} and \textit{Kimball Laundry Co. v. United States}.\textsuperscript{235} Each dealt with a formal government takeover of a property for a period, during which the existing business on the property was suspended and a government activity conducted in its place. All three decisions rejected the usual standard of compensation for permanent takings, market value, and opted instead for rental value.\textsuperscript{236} The rental value standard, of course, may have to be specially calibrated to the circumstances.\textsuperscript{237}

Another World War II decision, \textit{United States v. Pewee Coal Co.}, offers a scenario in which, instead of the government bringing a direct condemnation action against an owner, the owner sues the government asserting that governmental actions temporarily took its property and therefore amounted to a temporary “inverse” condemnation.\textsuperscript{238} Here, the United States took over operation of the business on the property (coal mines needed for the war effort) rather than, as above, substituting its own activity.\textsuperscript{239} After holding that a Fifth Amendment taking had occurred, a

\textsuperscript{235} Kimball Laundry Co. v. United States, 338 U.S. 1 (1949).
\textsuperscript{236} See, e.g., id. at 7 (rejecting the market value on the date of taking minus market value on the date of return as the compensation standard).
\textsuperscript{237} See, e.g., Gen. Motors Corp., 323 U.S. at 382 (when United States condemns short-term occupancy of warehouse from long-term lessee, compensation must be based on market rental value on a sublease by long-term tenant to temporary occupier, not long-term rental rent for empty building; such sublease rental value may reflect cost of removing stored items at beginning of sublease and returning them at end).
\textsuperscript{239} Id.
five-justice majority awarded the business owners the operating losses incurred during the period of government operation.240 Because plaintiffs did not seek the value of the use of a going concern, the Court avoided the “difficult problems” inherent in fixing that amount.241

The World War II cases establish the principle that for temporary takings, as for permanent ones, the constitutional standard of just compensation is a flexible one, changing to suit the circumstances. For example, Justice Reed explained in his concurring opinion in Pewee Coal that:

[I]n the temporary taking of operating properties . . . market value is too uncertain a measure to have any practical significance. The rental value for a fully functioning railroad for an uncertain period is an unknowable quantity. . . . The most reasonable solution is to award compensation to the owner as determined by a court under all the circumstances of the particular case.242

Importantly, the Supreme Court routinely cites its World War II decisions involving temporary direct condemnations as precedent for the compensation required for temporary inverse condemnations.243 This seems only appropriate: it is hard to see why the determination of compensation for a temporary taking should depend on whether the taking was effectuated through inverse as opposed to direct condemnation.

B. First English

The World War II decisions revolved around physical takings. Decades later, as discussed in the introduction to this article, the Court addressed temporary regulatory takings in First English Evangelical Lutheran Church v. County of Los Angeles and held that once a court finds a regulation to be a taking, the government must compensate for the period during which the regulation was in effect.244 Although First English clarified that the remedy for temporary regulatory takings is compensation, it did not resolve the sticky question of how to determine the compensation amount. It simply

240. Id. at 118.
241. Id. at 117.
242. Id. at 120 (Reed, J., concurring) (internal citations omitted).
referred to the World War II decisions, previously mentioned, dealing with temporary physical takings.245

C. Broad Considerations Governing Measure of Damages for Temporary Takings

The Supreme Court decisions suggest two broad concerns as animating the judicial search for “just” measures of interim damages. The first, as with permanent takings, is that the property owner is to be put in as good a position monetarily as he or she would have occupied if the property had not been taken.246 A corollary is the well-worn adage that just compensation is to be measured by the property owner’s loss, not the government’s gain.247

The second concern in these decisions is that just compensation for temporary takings should be guided by the value of the property’s use for the period in question.248 Most often, this “value of the use” standard devolves to fair rental value, as it did in General Motors, Petty Motor Co., and Kimball Laundry, but as the following list shows, there are many variants. Such use value should, at least in the short term, be less than the market-value compensation generally required for a permanent taking. This follows from the fact that with a temporary taking, the property is returned to the plaintiff and retains long-term use.

Finally, note that in all temporary taking cases, the plaintiff has a duty to mitigate damages.249

245. *Id.* at 318.
247. *Brown*, 538 U.S. at 235–36; United States *v.* Causby, 328 U.S. 256, 261 (1946); see Kimball Laundry Co. *v.* United States, 338 U.S. 1, 5 (1949) (“Because gain to the taker . . . may be wholly unrelated to the deprivation imposed upon the owner, it must also be rejected as a measure of [compensation].”).
249. *See,* e.g., *Heydt*, 38 Fed. Cl. at 310 (stating that although the government occupied a private facility, owner had access and could have moved its machines from the facility to another location or sold them); Shelden *v.* United States, 34 Fed. Cl. 355, 373 (1995) (“[P]laintiffs had an obligation to mitigate damages by paying on time.”); accord 767 Third Ave. Assocs. *v.* United States, 48 F.3d 1575, 1584 (Fed. Cir. 1995) (noting that claimant was not precluded from alternative economically viable use of property).
D. Formulae Adopted By Courts for Regulatory Takings

Although determining compensation can be difficult for both physical temporary takings and regulatory temporary takings, it can be particularly vexing for the latter. In the wake of First English, commentators and courts alike have been unable to agree on a consistent measure of compensation for temporary regulatory takings and have instead adopted a wide range of formulations. Unsurprisingly, many of the law review articles in this area came out in the years after First English. As for the courts, the principal approaches are discussed below. To a greater or lesser degree, most of these approaches may be viewed as approximations of “value of use” or its less abstract embodiment, fair rental value. Some are quite fact-specific, paralleling the dominant ad hoc analysis used in regulatory takings to determine liability. In United States v. Miller, the Supreme Court explained that “[i]t is conceivable that an owner’s indemnity should be measured in various ways depending upon the circumstances of each case and that no general formula should be used for the purpose.”


251. See Primetime Hospitality, Inc. v. City of Albuquerque, 168 P.3d 1087, 1094 (N.M. Ct. App. 2007) (“[A]cademic commentators agree that no one measure of damages is appropriate to meet all the factual scenarios bound to be seen in temporary takings.”), rev’d on other grounds, 206 P.3d 112 (N.M. 2009).


253. United States v. Miller, 317 U.S. 369, 373–74 (1943); see Corrigan v. City of Scottsdale, 720 P.2d 513, 518 (Ariz. 1986) (explaining that the “proper measure of damages in a particular [temporary taking] case is an issue to be decided on the facts of each individual case”).
1. Rental Value

This is the most commonly used measure of compensation for temporary regulatory takings, and is the standard closest to that used in the World War II temporary condemnation cases.\textsuperscript{254} Fair rental value is defined as “the price that a willing lessee would pay to a willing lessor for the period of the taking.”\textsuperscript{255} The rental value standard derives from the leasehold nature of the temporary interest taken by the government.\textsuperscript{256}

As the determination of market value in permanent takings is generally based on comparable sales, the determination of rental value in temporary takings is typically measured by comparable rentals—that is, contemporaneous rentals of nearby properties reasonably similar to the property taken.\textsuperscript{257} In the absence of comparable rental data, a recent prior lease between the owner of the property and another lessee is useful.\textsuperscript{258} In contrast with permanent takings, where a temporary government occupation requires the suspension of an ongoing business on the property, the rental value should reflect loss in going-concern value (i.e., lost profit and good will).\textsuperscript{259}

\textsuperscript{254} See Reunion, Inc. v. United States, No. 09-280L, 2009 WL 4800045, at *8 (Fed. Cl. Dec. 10, 2009) (affirming recently that “just compensation for a temporary taking . . . frequently is measured by the fair market rental value of the property”) (emphasis in original); see also Kimball Laundry Co. v. United States, 338 U.S. 1, 7 (1949) (holding that “the proper measure of compensation is the rental [value]”); United States v. Gen. Motors Corp., 323 U.S. 373, 382 (1945) (holding that the value should be determined based on “the market rental value of such a building on a lease by the long-term tenant to the temporary occupier”); Yuba Natural Res., Inc. v. United States, 904 F.2d 1577, 1581 (Fed. Cir. 1990) (“The usual measure of just compensation for a temporary taking . . . is the fair rental value of the property for the period of the taking.”); Sixth Camden Corp. v. Twp. of Evesham, 420 F. Supp. 709, 728–29 (D.N.J. 1976) (“The compensation for a ‘temporary taking’ is normally the fair rental value of the property.”).

\textsuperscript{255} Heydt v. United States, 38 Fed. Cl. 286, 309 (1997); accord Yuba Natural, 904 F.2d at 1581.

\textsuperscript{256} See, e.g., United States v. Banisadr Bldg. Joint Venture, 65 F.3d 374, 378 (4th Cir. 1995) (“[I]t is well established that when the Government takes property only for a period of years . . . it essentially takes a leasehold in the property. Thus, the value of the taking is what rental the marketplace would have yielded for the property taken.”).

\textsuperscript{257} Heydt, 38 Fed. Cl. at 309; Yaist v. United States, 17 Cl. Ct. 246, 257 (1989).

\textsuperscript{258} Yuba Natural, 904 F.2d at 1581; Shelden v. United States, 34 Fed. Cl. 355, 369 (1995).

\textsuperscript{259} Kimball Laundry Co., 338 U.S. at 11–16. The Supreme Court justified the distinction in the treatment of going-concern value by noting that in a permanent taking, the owner can relocate his or her business elsewhere and presumably preserve much of going-concern value. By contrast, a temporary taking generally leaves the owner without a practical option of briefly setting up business elsewhere. For one thing, his or her investment remains tied up at the original site. Rather, the owner must wait until the temporary taking comes to an end and then resume operations at the original location, with diminished going-concern value. See State ex rel. Comm’r of Transp. v. Arifee, 2009 WL 2612367, at *4 (N.J. Super. Ct. App. Div. Aug. 27, 2009) (discussing the previously mentioned distinction made between permanent takings and temporary takings).
The rental value method is generally suitable only when the property has a preexisting use as of the start of the temporary regulatory taking. By contrast, the typical regulatory taking case involves restrictions on the future use of property. Thus, courts and commentators have discouraged use of the rental value method for undeveloped property. The speculation involved in assigning a rental value for unimproved land includes both what type of development would have been permitted, and would have occurred if permitted, had the offending regulation not existed, and also the profitability of such development.

Where the same facts give rise to both a temporary taking and a breach of contract, damages have been assessed under the breach claim—but nonetheless were equated with fair rental value.

2. Actual Damages—A Ceiling?

Some courts assert that the standard for calculating compensation is the property owner’s actual loss, but they are often unclear whether this standard is intended as a ceiling on the compensation amount after applying some other formula, or as the goal of applying that other formula. When stated, the standard is often accompanied by a disavowal that any particular formula for determining temporary-taking compensation is generally appropriate. A requirement of actual damages may limit recovery in some circumstances, as when the owner has no plans for the use of an undeveloped parcel at the time of the temporary regulatory taking. In the published decisions referring to actual damages, it is difficult to ascertain whether on remand (in the final determination of compensation by the trier of fact) one of the formulae listed elsewhere in this section was ultimately used because state trial court decisions are rarely reported.

260. See, e.g., City of Austin v. Teague, 570 S.W.2d 389, 395 (Tex. 1978) (“Anticipated rentals from land that is presently undeveloped is just as speculative and uncertain as measuring anticipated profits from a presently unestablished business.”).


263. See, e.g., SDDS, Inc. v. State, 650 N.W.2d 1, 13–14 (S.D. 2002) (informing jury of various damage-calculating methods while reemphasizing the importance of a fact-specific award); Lucas v. S.C. Coastal Council, 424 S.E.2d 484, 486 (S.C. 1992) (emphasizing that there is no specific method for calculating damages for a temporary takings); Corrigan v. City of Scottsdale, 720 P.2d 513, 519 (Ariz. 1986) (stating that “no matter what measure of damages is appropriate in a given case, the award must only be for actual damages”) (emphasis in original); Poirier v. Grand Blanc Twp., 481 N.W.2d 762, 766 (Mich. Ct. App. 1992) (making same statement as in Corrigan and endorsing “a flexible approach” to compensation awards for temporary takings).

This approach calls for determining the market value of the property just before the regulation was imposed, then subtracting the value of the property either (1) just after it was imposed, or (2) on the date that the regulatory restriction was lifted.\(^\text{264}\) A moment’s thought reveals that this standard corresponds only loosely, if at all, to the Supreme Court’s call for a criterion based on the value of use during the restriction period. Moreover, subtracting the value when the restriction was lifted means that when real estate values are falling, the before-and-after standard poses the danger that the property owner will be overcompensated, and when real estate values are rising, undercompensated.

The number of regulatory cases adopting the before-and-after approach appears to be rather small, and deservedly so.\(^\text{265}\) The approach has been criticized or rejected in favor of other compensation standards.\(^\text{266}\) The Supreme Court explicitly rejected it in a temporary condemnation case.\(^\text{267}\)

4. Option Value

The New Jersey courts have determined that the measure of damages for a temporary regulatory taking may, in appropriate circumstances, be the value of a hypothetical option to purchase the property for the period during which the regulation was in effect.\(^\text{268}\) In the seminal case, the state’s highest court dealt with a state statute providing that upon receiving an application for plat approval, a municipality may reserve for one year the location and extent of parks and playgrounds for future public use.\(^\text{269}\) If, during that year, the municipality does not enter into a contract to purchase the property or institute condemnation proceedings, the reservation shall no longer bind

\(^{264}\) See, e.g., Washington Mkt. Enters., Inc. v. City of Trenton, 343 A.2d 408, 416–17 (N.J. 1975) (landowner entitled to value of property before the city announced a redevelopment project minus the value of the property after the city abandoned that project).

\(^{265}\) See, e.g., Kimball Laundry Co. v. United States, 338 U.S. 1, 7 (1949) (rejecting the before-and-after-market-value approach in a temporary takings case).


\(^{267}\) \textit{Kimball Laundry}, 338 U.S. at 7 (noting that, if change in market value during the temporary taking was the standard, “there might frequently be situations in which the owner would receive no compensation whatever because the market value of the property had not decreased”).

\(^{268}\) See Lomarch Corp. v. Mayor of Englewood, 237 A.2d 881, 884 (N.J. 1968) (holding that “[t]he landowner should receive the value of an ‘option’ to purchase the land for a year”).

\(^{269}\) \textit{Id.} at 882.
the applicant.270 Thus, said the court, the state statute271 essentially granted the municipality a one-year option for the purchase of the land in question, and the value of that option fixed the measure of damages.272

On facts paralleling those above, the option value method can be an accurate measure of the property interest actually taken. Because there is often a market for options to purchase undeveloped land, this approach is more appropriate than the rental value method when vacant property is at issue. On the other hand, the value of the option does not necessarily bear any relation to the property owner’s actual losses.273

5. Market Rate of Return

This standard gives the property owner an amount designed to approximate the temporary loss of the ability to produce income or profits.274 It does so by assuming that this loss can be approximated by applying a market rate of return to the difference between the value of the property with and without the challenged regulation, calculated over the period of time the regulation was in effect.275 This approach was adopted in Nemmers v. City of Dubuque276 and was modified two years later by the Eleventh Circuit in Wheeler v. City of Pleasant Grove.277

Wheeler modified Nemmers by replacing the difference between the property’s value with and without the temporary regulation with something quite different.278 In Wheeler, the court determined that where a city withdraws a permit to build an apartment complex only to have the courts invalidate the withdrawal, the relevant quantity is the market rate of return on the difference between equity interests—that is, the difference between the equity that the property owner would likely have had in the apartment complex had it been built and the equity the owner would likely have had in

270. Id.
271. N.J. REV. STAT. § 40:55D-44 (1966) (option value is the proper method of calculating just compensation when the “reservation of public areas” constitutes a taking).
272. Lomarch, 237 A.2d at 884.
275. Id.
277. Wheeler, 833 F.2d at 267.
278. Id. at 271.
the undeveloped land—in each case, based on the prevailing loan-to-value ratio at the time.279

One can speculate that the Wheeler court moved from value difference to equity difference because, as it acknowledged, the value of the undeveloped land in this case was unaffected by the permit withdrawal.280 Thus, use of value difference would have yielded zero compensation, something the court seemed to feel would not be fair to the property owner.281 In any event, the use of the difference in equity interests as opposed to the difference in values has sometimes led commentators to put the Eleventh Circuit’s approach into a new category called “the equity interest approach.”282 At least one district court outside the Eleventh Circuit has followed this approach.283 Courts and commentators, however, have expressed concern that the equity interest approach (1) improperly relies on speculation that a project will meet its developer’s full expectations; (2) fails to consider the developer’s construction costs; and (3) neglects to consider alternative available uses of the property under the challenged regulation.284

6. Probability Method

Like several of the other formulae for computing damages, the probability method was born of the circumstances involved in the case that announced it. The decision in Herrington v. County of Sonoma arose from property owners’ challenge to the county’s rejection of their thirty-two-lot subdivision proposal as inconsistent with the county’s general plan.285 The court invalidated the rejection and awarded compensation for the period between the rejection and its invalidation, based on the owners’ claim under section 1983.286 Though the owners’ claim was based on due process, having abandoned their takings claim, the measure of damages used to

279. Id.
280. Id.
281. Id.
282. Calculating Compensation, supra note 252, at 229.
283. See Front Royal & Warren County Indus. Park Corp. v. Town of Front Royal, 749 F. Supp. 1439, 1445 (W.D. Va. 1990) (finding that employment of an equity interest approach results in “a remedy which is fair and adequate”), vacated on other grounds, 945 F.2d 760 (4th Cir. 1991).
284. See, e.g., Corn v. City of Lauderdale Lakes, 771 F. Supp. 1557, 1571 (S.D. Fla. 1991), aff’d in part, rev’d in part, 997 F.2d 1369 (11th Cir. 1993) (citing Green Briar, Ltd. v. City of Alabaster, 881 F.2d 1570, 1576 n.11 (11th Cir. 1989) (“[I]t is simply unfair to award compensatory damages for ‘an injury to the property’s potential for producing income’ . . . when the property could still be put to its highest and best use.”)); Calculating Compensation, supra note 252, at 232 (noting commentators’ criticism related to first factor).
286. Id.
compensate for the development delay seems useful in a takings context and is often cited by commentators.\textsuperscript{287}

The \textit{Herrington} formula has three key steps. First, it multiplies the probability that the county would have approved the development proposal had it applied proper criteria by the value of the land with that development allowed.\textsuperscript{288} Similarly, the formula multiplies the probability that the county would have denied all development by the value of the land as so restricted.\textsuperscript{289} The sum of these multiplicative products represents a probability-weighted estimate of the property’s value during the delay period.\textsuperscript{290} As explained by the court, this formula:

\[ \text{[R]educes speculation on what subdivision proposals might have been submitted, and on possible levels of development short of 32 lots that the County might have approved. The formula also factors in the reasonableness of the Herringtons’ subdivision proposal and the County’s procedures in handling subdivision applications after a consistency determination.} \textsuperscript{291} \]

Second, the formula calculates the difference between this sum and the value of the property with no development allowed.\textsuperscript{292} This is its lost use value. Third, the formula multiplies this lost use value by both a market rate of return and the period of the delay.\textsuperscript{293} As an adjustment to this final dollar figure, the formula allows an addition for any increased costs of development owing to the delay (again, weighted by the probability that the development would be approved).\textsuperscript{294}

7. Profit and Loss

In the usual case, lost profits are but a factor in gauging the fair rental value of the temporarily taken property; courts generally refuse to award them directly. For example, in \textit{Yuba Natural Resources, Inc. v. United

\begin{itemize}
\item\textsuperscript{288} \textit{Herrington}, 790 F. Supp. at 916.
\item\textsuperscript{289} \textit{Id.}
\item\textsuperscript{290} \textit{Id.}
\item\textsuperscript{291} \textit{Id.} at 915.
\item\textsuperscript{292} \textit{Id.} at 916.
\item\textsuperscript{293} \textit{Id.} at 915–16.
\item\textsuperscript{294} \textit{Id.} at 916.
\end{itemize}
States, involving a government-caused delay in mineral extraction, the court asserted without qualification that lost profits, as a form of consequential damages, are “not an appropriate element of just compensation for the temporary taking of property.” And, in Pettro v. United States, another delayed extraction case, lost profits were denied as a supplement to fair rental value to avoid the possibility of double recovery and because they would be too speculative. But, in at least one case, lost profits were held to be the sole measure of fair rental value. In Primetime Hospitality, Inc. v. City of Albuquerque, the plaintiff had begun construction of a hotel when it accidentally ruptured an encroaching city water line, delaying the hotel’s opening. The city stipulated to liability for an inverse condemnation, leaving only the issue of compensation. The New Mexico Supreme Court held that under the state’s constitution and the circumstances presented, lost profits were the best evidence of rental value. The parties had not advanced any other measure of compensation (so there were no concerns about double recovery), and the lost profits were a direct and easily ascertainable (i.e., non-speculative) result of the city-caused delay.

In United States v. Pewee Coal Co., recall that a very different situation was involved—the United States took over operation of the business on the property. The Supreme Court was relieved of the unenviable task of determining the value of the use of a going concern because the business owner sought only a clarification that the United States should bear any losses during its period of operation. The Court agreed, but it sent conflicting signals as to whether such losses represented an element of constitutionally required compensation. In a concurrence, one Justice argued that in light of the takings principle that the measure of just compensation is the loss to the property owner, and not the gain to the

296. Pettro v. United States, 47 Fed. Cl. 136, 151 (2000) (determining that the spectre of double recovery could arise from the fact that the minerals whose extraction the government delayed could still be sold after the delay period).
298. Id.
299. Id.
300. Primetime, 206 P.3d at 123.
301. Id. at 119.
303. Id. at 117.
304. Id. at 118–19.
government, the United States should only have to pay for those losses resulting from acts of the government.305

8. Cash Flow

Yet another formula was articulated in Bass Enterprises Production Co. v. United States, which dealt with a forty-five-month delay imposed by the United States on oil and gas extraction by the lessees of federal land.306 The formula was shaped by two key facts. First, the oil and gas remained in the ground until Bass was permitted to develop it, meaning that “Bass has not lost any of the oil and gas. Bass has lost time.”307 Second, the plaintiffs’ initial investment costs would likely have precluded any profit during the delay period, making unfair a compensation formula based on lost profits owing to the delay.308 Accordingly, the court held that fair rental value was approximated by “the difference between the interest on the present value of the cash flows with and without delay.”309 The court concluded that awarding the plaintiffs a royalty stream or the present value of the income stream would lead to double recovery.310

Another court likened the facts before it to those in Bass and adopted the same compensation formula. In SDSS, Inc. v. State, a property owner was prevented for forty-three months from developing its land as a solid waste disposal site.311 After finding a temporary taking, the court noted in its damages discussion that as in Bass, the resource (i.e. available landfill space) was still in place when the delay ended and that owing to upfront costs, plaintiffs would have made no profit during the delay period had the delay not occurred.312

9. Section 1983-Based Damages Approach

Takings actions against non-federal defendants are today routinely brought under the Civil Rights Act of 1871, 42 U.S.C. § 1983, and are commonly called “1983 actions.” Indeed, there is some authority, not

305. Id. at 121 (Reed, J., concurring).
307. Id. at 624.
308. Id. at 625.
309. Id.
310. Id. at 622.
311. SDSS, Inc. v. State, 650 N.W.2d 1, 14 (S.D. 2002).
312. Id. at 16.
undisputed, for the proposition that a Fifth Amendment takings claim against a municipality must be brought under § 1983.\textsuperscript{313}

A problem arises, however. Much case law independent of regulatory takings litigation has developed on how money damages should be measured in § 1983 cases. If these § 1983-based principles are applied in the temporary regulatory takings context, different damage awards may result. The reason is that § 1983 is grounded in traditional tort law principles.\textsuperscript{314} For example, a cardinal precept of § 1983 is that damages awarded under that statute are compensatory in nature, and that a plaintiff may therefore only recover if he or she is able to prove actual loss or injury resulting from the government’s act.\textsuperscript{315} A landowner may have a hard time proving damages under this standard. For example, if real estate is not being used at the time of the temporary (regulatory or physical) taking, it may be difficult to show injury. An illustration would be the government’s use of undeveloped private land for military training, during a period when the landowner had no plans to make economic use of the land—and indeed may not have discovered the incursion until after it was terminated.

As noted under subsection two above, the actual damages concept has been sporadically held to fix a ceiling for damages in temporary takings cases where, as far as appears in the court’s opinion, § 1983 was not invoked. Thus, it may not always make a difference whether or not the temporary taking claim proceeds under § 1983. It would be highly useful to have the benefit of judicial illumination in this area.

10. Addendum: Separately Compensable and Permanent Injuries

It is a general postulate of takings law that the Fifth Amendment requires compensation only for the property interest taken, not for the effects of that taking—so-called “consequential damages.”\textsuperscript{316} Perhaps owing to the peculiarities of compensating for temporary takings, this postulate has been honored in the breach with some regularity in temporary takings cases. Courts deciding temporary takings claims have addressed

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{313} See, e.g., Azul-Pacifico, Inc. v. City of Los Angeles, 973 F.2d 704, 705 (9th Cir. 1992) (dismissing the appeal for lack of subject matter jurisdiction because the claim was not brought under § 1983), questioned in Lawyer v. Hilton Head Pub. Serv. Dist. No. 1, 220 F.3d 298, 302 n.4 (4th Cir. 2000).
\item \textsuperscript{316} Yuba Natural Res., Inc. v. United States, 904 F.2d 1577, 1581 (Fed. Cir. 1990).
\end{itemize}
\end{footnotesize}
numerous particular items of damage, and in many cases appear to have found them compensable separately from the use or rental value of the property for the takings period. This is to be contrasted with consideration of such items not as standing alone but as factors influencing the use or rental value of the interest taken—as, for example, the moving costs of a tenant (from and back to the leased property) when only a portion of the lease term is taken.\footnote{317}

It is beyond the scope of this article to review the temporary takings case law on all such items of damage. Some examples where compensation was required under the circumstances are: physical injury to a landowner during activity on a condemned temporary construction easement (i.e., as from removal of trees and crops by the condemnor);\footnote{318} loss of access to the unburdened portion of a tract during activity on a temporary easement;\footnote{319} equipment wear and tear beyond the ordinary at a laundry plant temporarily condemned by the United States;\footnote{320} the cost of restoring property to its pre-taking condition;\footnote{321} and excess construction costs directly resulting from a developer’s accidental rupture of an encroaching city water line.\footnote{322}

This list makes evident that a temporary taking can produce a permanent injury. In two factually similar cases,\footnote{323} this situation led plaintiffs to focus on the permanent injury as the basis for compensation—likely to avoid the uncertainties of valuing temporary property interests. In the more recent case, \textit{Arkansas Game & Fish Commission v. United States}, the state argued that the Corps of Engineers’s water releases from its dam during 1993–2000 caused flooding of a state-owned wildlife management area, thereby taking a temporary flowage easement.\footnote{324} The state did not seek compensation for the temporary easement, however. Rather, it sought compensation only for the timber value of the trees destroyed by the flooding, a permanent injury. As the court put it, the “temporary taking of a flowage easement . . . resulted in a permanent taking of timber . . . and the

\footnote{317. See United States v. Gen. Motors Corp., 323 U.S. 373, 383 (1945) (stating that "such items may be proved not as independent items of damage, but to aid in the determination of what would be the usual—the market—price" in temporary occupancy situations).
318. \textit{E.g.}, Colonial Pipeline Co. v. Weaver, 310 S.E.2d 338, 342 (N.C. 1984).
324. \textit{Ark. Game}, 87 Fed. Cl. at 600.
value of the timber thus serves as the basic measure of monetary relief to which the Commission is entitled.”

CONCLUSION

The broad contours of temporary takings are set. Total physical acquisitions of property are always takings, and regulations that temporarily restrict property uses can be takings that require government to pay just compensation. Beyond these basic principles, however, lurk many temporary takings uncertainties such as whether *Lucas* can ever apply to a retroactively temporary regulation; whether extraordinary delay is a ripeness issue or a (or the) takings factor itself; how to deal with delays due to government’s erroneous assertion of jurisdiction; and the exact role of allegedly *ultra vires* actions by government officials on takings liability. The courts will likely refine, if not resolve, some of these issues over time. The courts are unlikely, however, to resolve how to determine compensation for temporary takings. The compensation questions in temporary taking cases appear to be too fact-specific for the courts to develop one formula, or even a small number of formulas, that they can apply in most or all cases. Rather, like Sisyphus, the courts are probably destined to forever struggle with their various ad-hoc approaches to calculating compensation for temporary takings.

---

325. *Id.* at 634–35; *see Cooper*, 827 F.2d at 763 (holding, under similar facts that loss of timber was a compensable permanent taking of property interest).
"[O]ur ‘takings’ jurisprudence . . . has traditionally been guided by the understandings of our citizens regarding the content of, and the State’s power over, the ‘bundle of rights’ that they acquire when they obtain title to property."1

TABLE OF CONTENTS

Introduction ............................................................................................... 526
I. The Supreme Court’s Mahon-Penn Central Takings Analysis .......... 530
II. The Lucas Per Se Takings Rule................................................................. 535
   A. South Carolina’s Land Use Regulation and the Lucas Land...... 535
   B. The Supreme Court’s Holding in Lucas ........................................ 537
   C. The Mahon-Penn Central Analysis After Lucas ....................... 539
   D. Lucas Dictum.............................................................................. 540
III. Takings and Bundled Rights .............................................................. 543
   A. Property and the Rights and Duties of Property Owners.......... 543
   B. The “Bundle of Rights” and Severed Mineral Interests .......... 546
   C. Pennsylvania Coal Co. v. Mahon ............................................ 547
   D. Keystone Bituminous Coal Ass’n v. DeBenedictis ................... 549
IV. Keystone: Severed Coal Property Interests and Investment-Backed Expectations .............................................................................. 554
   A. The Contract Clause and Liability Waivers in Keystone .......... 554
   B. The Evolution of Property Law in the Coalfields .................... 556
   C. The Broad Form Deed ............................................................. 558
   D. Investment-Backed Expectations and the Broad Form Deed ...... 561
   E. Additional Judicial Rationale for Enhancing Property Rights of Severed Coal Interest Ownership .................................................. 563
V. Putting the Investment-Backed Expectations of Fee Land and Severed Coal Property Owners in Perspective............................... 567

* Judge Charles H. Haden II, Professor of Law, West Virginia University College of Law.
INTRODUCTION

The Supreme Court of the United States has recognized that the Takings Clause of the Constitution’s Fifth Amendment affords a significant measure of protection to the expectations of owners of a fee simple interest in land. When the government exercises the power of eminent domain, or otherwise by regulation enters land and actually occupies it, the Court applies a per se takings rule requiring that the owner of the occupied land be paid “just compensation.” In Lucas v. South Carolina Coastal Council, the Court established a second categorical rule that applies to regulations that deprive an owner of “all economically beneficial use” of one’s property. In Lucas, the Court held that the government must pay just compensation for such “total regulatory takings,” except to the extent that “background principles of nuisance and property law” independently restrict the owner’s intended use of the property. “Outside these two relatively narrow categories,” the Court has said that “regulatory takings challenges are governed by the standards set forth in Penn Central.”

2. The Fifth Amendment to the Constitution provides in relevant part: “No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.” U.S. CONST. amend. V. The Fifth Amendment protects rights of citizens from federal government action; enactment of the Fourteenth Amendment to the Constitution extended the protection afforded by the Takings Clause to state action. The Takings Clause was first applied to the states through the Fourteenth Amendment in Chi. Burlington & Quincy R.R. Co. v. Chicago, 166 U.S. 226, 239 (1897). The Takings Clause was the first Bill of Rights provision to be found applicable to the states. Id. at 239; see Erwin Chemerinsky, CONSTITUTIONAL LAW PRINCIPLES AND POLICIES 640 (3d ed. 2006) (describing the Takings Clause and its purpose).


4. Lucas, 505 U.S. at 1003.
5. Id. at 1019.
6. Id. at 1026–32.
So-called “regulatory takings” were first recognized in *Pennsylvania Coal Co. v Mahon* when “the Court recognized that government regulation of private property may, in some instances, be so onerous that its effect is tantamount to a direct appropriation or ouster, and that such ‘regulatory takings’ may be compensable under the Fifth Amendment.” In what the Court itself has called “Justice Holmes’ storied but cryptic formulation,” *Mahon* held that “while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.”

More recently, the Supreme Court has embraced a metaphor now firmly associated with its traditional takings jurisprudence—bundle of rights—that expresses the high level of expectation attendant citizen ownership of land held in fee simple absolute. It is fair to say that the breadth of those expectations is directly proportional to the composition of a property owner’s bundle of rights. As mentioned above, *Lucas* deemed those expectations worthy of creating its new categorical or per se takings rule. The *Lucas* Court identified the historical source of its new rule as “the historical compact recorded in the Takings Clause that has become part of our constitutional culture.”

---

9. Lingle, 544 U.S. at 537.
10. Id. at 537–38 (citing Mahon, 260 U.S. at 415).
13. *Lucas* v. S. C. Coastal Council, 505 U.S. 1003, 1027–28 (1992) (“We think the notion . . . that title is somehow held subject to the ‘implied limitation’ that the State may subsequently eliminate all economically valuable use is inconsistent with the historical compact recorded in the Takings Clause that has become part of our constitutional culture.”).
It is axiomatic that ownership of land historically has held a unique and favored position in the hierarchy of individual rights protected by our Constitution. More than a century ago, the Supreme Court of the United States observed:

The requirement that the property shall not be taken for public use without just compensation is but “an affirmance of a great doctrine established by the common law for the protection of private property. It is founded in natural equity, and is laid down as a principle of universal law. Indeed, in a free government almost all other rights would become worthless if the government possessed an uncontrollable power over the private fortune of every citizen.”

But, the right of citizens to organize into a government empowered by law to protect the public health and safety and advance the general welfare is also a deeply rooted societal value of our nation. Thus, the Court has also recognized:

When one becomes a member of society, he necessarily parts with some rights or privileges which, as an individual not affected by his relations to others, he might retain. “A body politic . . . is a social compact by which the whole people covenants with each citizen, and each citizen with the whole people, that all shall be governed by certain laws for the common good.” This . . . authorize[s] the establishment of laws requiring each citizen to so conduct himself, and so use his own property, as not unnecessarily to injure another. . . . Under these powers the government regulates the conduct of its citizens one towards another, and the manner in which each shall use his own property, when such regulation becomes necessary for the public good.

Whether these competing values are best protected by Lucas’s categorical takings rule has been the subject of considerable debate since it was decreed almost two decades ago. The following discussion focuses

on a particular type of property ownership interest—the right to extract minerals like coal from land—and explores the extent to which the *Lucas* per se rule may impact the rights of owners of severed/segmented mineral interests.\(^\text{17}\) In this quest for understanding, it seems appropriate to ask whether the values inherent in ownership of less than fee simple interests in land give rise to the type of citizen expectations recognized by “the historical compact recorded in the Takings Clause that has become part of our constitutional culture.”\(^\text{18}\)

This essay argues that the expectations of owners of less-than-fee interests in one mineral—coal—do not deserve the additional protection of *Lucas*’s categorical rule. I reach this conclusion based upon consideration of the historic limited expectations of severed coal interest ownership. I submit that *Penn Central*’s examination of a takings claimant’s distinct investment-backed expectations should continue to be applied to claims of regulatory takings of coal property interests severed from fee simple estates in land.

Finally, I argue that restricting the application of *Lucas*’s per se rule to claims of government taking of the entire economic value of fee simple land ownership does not immunize government regulation nor allow it to “plunder” the rights of a coal interest owner.\(^\text{19}\) On the contrary, limiting application of the categorical takings rule to claims of fee simple owners of land does no more than allow courts to consider the claimants’ investment-backed expectations when a total taking of coal interests is alleged. Under my interpretation of *Lucas*, courts would continue to apply the regulatory takings analysis synthesized in *Penn Central*—an analysis first expressed in *Mahon* that has evolved over three quarters-of-a-century of Supreme Court takings jurisprudence.\(^\text{20}\)

---

17. When a freehold estate in coal, oil and/or gas is separated from fee ownership of land, the mineral estate is said to be “severed.” Severance occurs when a fee simple owner of land conveys one or more (or all) coal seams underlying her property; in the alternative, a fee owner may convey the surface land and reserve to herself the underlying mineral. See, e.g., Charles Q. Gage & John L. McLaugherty, *The Coal Leasing Transaction, in 4 COAL LAW & REGULATION § 81.01* (Patrick C. McGinley & Donald H. Vish eds., 1983).


19. *Id.* at 1028 n.14. ("[A] regulation specifically directed to land use no more acquires immunity by plundering landowners generally than does a law specifically directed at religious practice acquire immunity by prohibiting all religions.") (emphasis in original).

I. THE SUPREME COURT’S MAHON-PENN CENTRAL TAKINGS ANALYSIS

Mahon first articulated vague contours of an essentially ad hoc regulatory takings inquiry:

As long recognized some values are enjoyed under an implied limitation and must yield to the police power. But obviously the implied limitation must have its limits, or the contract and due process clauses are gone. One fact for consideration in determining such limits is the extent of the diminution. When it reaches a certain magnitude, in most if not in all cases there must be an exercise of eminent domain and compensation to sustain the act. So the question depends upon the particular facts. The greatest weight is given to the judgment of the legislature but it always is open to interested parties to contend that the legislature has gone beyond its constitutional power.21

The property interest involved in Mahon was less than a fee simple interest in coal that had been severed from a fee simple interest in land.22 The coal company alleged that the state statute prohibiting mining under buildings to prevent subsidence damage effected an unconstitutional taking of private property without just compensation.23 Penn Central synthesized the seminal regulatory takings principles of Mahon and the Court’s post-Mahon regulatory takings cases in identifying the relevant considerations to be used by courts in determining whether a compensable regulatory taking has occurred. The Court stated:

[W]hether a particular restriction will be rendered invalid by the government’s failure to pay for any losses proximately caused by it depends largely “upon the particular circumstances [in that] case.” In engaging in these essentially ad hoc, factual inquiries, the Court’s decisions have identified several factors that have particular significance. The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant

22. Id. at 412.
23. Id.
considerations. So, too, is the character of the governmental action.24

Unlike Lucas, Penn Central involved a claim of the taking of less than a full fee simple interest in land allegedly rendered valueless by government regulation.25 The Penn Central Company asserted that a New York City historic landmarks preservation ordinance effected a taking because it barred the use of airspace above the company’s Grand Central Station to construct a high-rise building.26 The takings claim was based upon the theory that one hundred percent of the economic value of the airspace had been taken as a result of the historic preservation law, notwithstanding the fact that Penn Central owned the entire tract in fee simple.27 The Court characterized the company’s argument as follows:

They first observe that the airspace above the Terminal is a valuable property interest. . . . They urge that the Landmarks Law has deprived them of any gainful use of their “air rights” above the Terminal and that, irrespective of the value of the remainder of their parcel, the city has “taken” their right to this superjacent airspace, thus entitling them to “just compensation” measured by the fair market value of these air rights.28

Thus, the Penn Central Court was called upon to identify the “property interest” against which Penn Central’s alleged loss of property value was to


25. Penn Central, 438 U.S. at 130.
26. Id.
27. Id.
28. Id. (citations omitted).
be measured—now often referred to by courts and scholars as the “denominator” issue.\textsuperscript{29} The Court made short shrift of the company’s argument:

\begin{quote}
[T]he submission that appellants may establish a “taking” simply by showing that they have been denied the ability to exploit a property interest that they heretofore had believed was available for development is quite simply untenable. . . . “Taking” jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated.\textsuperscript{30}
\end{quote}

A decade after \textit{Penn Central}, in \textit{Keystone Bituminous Coal Ass’n v. DeBenedictis}, the Court confronted a takings claim similar to that made by the coal company in \textit{Mahon}.\textsuperscript{31} In \textit{Keystone}, the Court once again was asked to determine whether a 1966 Pennsylvania law prohibiting the undermining of an occupied dwelling constituted a compensable taking.\textsuperscript{32} The Court described the scope and effect of the statute:

\begin{quote}
[. . . .]
\end{quote}

\begin{footnotes}
\footnote{29. See generally Keith Woffinden, \textit{The Parcel As a Whole: A Presumptive Structural Approach for Determining When the Government Has Gone Too Far}, 2008 B.Y.U. L. REV. 623 (2008) (discussing horizontal divisions of property and the Supreme Court’s jurisprudence regarding the denominator problem); Timothy J. Dowling, \textit{Tahoe-Sierra’s Effect on the Parcel-as-a-Whole Rule and Its Importance in Defending Against Regulatory Takings Challenges}, in \textit{TAKING SIDES ON TAKINGS ISSUES: THE IMPACT OF TAHOE-SIERRA}, at 33. (Thomas E. Roberts ed., 2003) (discussing the parcel-as-a-whole rule). \textit{Lucas} did not reach the denominator issue because the property interest involved was a fee simple and the Court found that the entire economic value of the land had been taken. However, the Court emphasized “uncertainty regarding the composition of the denominator in our ‘deprivation’ fraction has produced inconsistent pronouncements by the Court.” \textit{Lucas} v. S. C. Coastal Council, 505 U.S. 1003, 1016 n.7 (1992).}

\footnote{30. The opinion observed that “[w]ere this the rule this Court would have erred not only in upholding laws restricting the development of air rights, but also in approving those prohibiting both the subjacent and the lateral development of particular parcels.” \textit{Penn Central}, 438 U.S. at 130 (citations omitted).}

\footnote{31. Keystone Bituminous Coal Ass’n v. DeBenedictis, 480 U.S. 470, 473–74 (1987). \textit{Keystone} rejected the coal company’s assertion that the two cases involved essentially the same issues: petitioners assert that disposition of their takings claim calls for no more than a straightforward application of the Court’s decision in \textit{Pennsylvania Coal Co. v. Mahon}. Although there are some obvious similarities between the cases, we agree with the Court of Appeals and the District Court that the similarities are far less significant than the differences, and that \textit{Pennsylvania Coal} does not control this case. \textit{Id.} at 481.}

\footnote{32. \textit{Id.} at 478–79.}
\end{footnotes}
Pennsylvania’s Subsidence Act authorizes the Pennsylvania Department of Environmental Resources (DER) to implement and enforce a comprehensive program to prevent or minimize subsidence and to regulate its consequences. Section 4 of the Subsidence Act . . . prohibits mining that causes subsidence damage to three categories of structures that were in place on April 27, 1966: public buildings and noncommercial buildings generally used by the public; dwellings used for human habitation; and cemeteries. Since 1966 the DER has applied a formula that generally requires 50% of the coal beneath structures protected by § 4 to be kept in place as a means of providing surface support.33

As it had in Penn Central, the Court in Keystone considered the argument that the “denominator” in its takings analysis should be the coal placed off limits by the 1966 Pennsylvania subsidence law.34 Relying substantially on Penn Central and Andrus v. Allard, the Keystone Court rejected the companies’ claim that the twenty-seven million tons of coal required to be left in place to prevent subsidence constituted a separate segment of property for takings law purposes.35 Although this amount of coal required to be left un-mined by the 1966 Pennsylvania law seems enormous, in fact it represented only a very small percentage—two

33. Id. at 476–77 (citations omitted).
34. Id. at 496–97. The Court characterized the coal companies’ claim:

[P]etitioners have sought to narrowly define certain segments of their property and assert that, when so defined, the Subsidence Act denies them economically viable use . . . . [T]hey focus on the specific tons of coal that they must leave in the ground under the Subsidence Act, and argue that the Commonwealth has effectively appropriated this coal since it has no other useful purpose if not mined.

Id. Moreover:

The parties have stipulated that enforcement of the DER’s 50% rule will require petitioners to leave approximately 27 million tons of coal in place. Because they own that coal but cannot mine it, they contend that Pennsylvania has appropriated it for the public purposes described in the Subsidence Act.

Id. at 498.
35. Id. Keystone drew an analogy to land use regulations like setbacks or open space requirements that “place limits on the property owner’s right to make profitable use of some segments of his property. A requirement that a building occupy no more than a specified percentage of the lot on which it is located could be characterized as a taking of the vacant area as readily as the requirement that coal pillars be left in place.” Id. The Court observed that the petitioners’ theory would lead one to “always argue that a setback ordinance requiring that no structure be built within a certain distance from the property line constitutes a taking because the footage represents a distinct segment of property for takings law purposes.” Id. (citing Gorieb v. Fox, 274 U.S. 603, 608–09 (1927), which upheld the validity of a setback ordinance).
percent—of the total coal tonnage owned by the taking claimants.\textsuperscript{36} “There is no basis for treating the less than 2% of petitioners’ coal as a separate parcel of property,” said the Court.\textsuperscript{37} Turning to the \textit{Mahon-Penn Central} emphasis on consideration of a taking claimant’s economic expectations, the \textit{Keystone} Court found it easy to distinguish \textit{Mahon} and justify a contrary result:

\begin{quote}
[T]here is no record in this case to support a finding, similar to the one the Court made in \textit{Pennsylvania Coal}, that the [1966] Subsidence Act makes it impossible for petitioners to profitably engage in their business, or that there has been undue interference with their investment-backed expectations.
\end{quote}

\ldots

When the coal that must remain beneath the ground is viewed in the context of any reasonable unit of petitioners’ coal mining operations and financial-backed expectations, it is plain that petitioners have not come close to satisfying their burden of proving that they have been denied the economically viable use of that property. The record indicates that only about 75% of petitioners’ underground coal can be profitably mined in any event, and there is no showing that petitioners’ reasonable “investment-backed expectations” have been materially affected by the additional duty to retain the small percentage that must be used to support the structures protected by [the Pennsylvania subsidence law].\textsuperscript{38}

In sum, \textit{Mahon}’s ad hoc non-categorical takings analysis provided the core principles underlying seventy years of the Supreme Court’s regulatory takings jurisprudence, including \textit{Penn Central} and \textit{Keystone}.\textsuperscript{39} However,\textsuperscript{36, 37, 38, 39}
only five years after *Keystone* was decided, *Lucas* added a new twist to the Court’s regulatory takings jurisprudence when it posited its new categorical or per se constitutional rule requiring compensation “when . . . a regulation . . . declares ‘off-limits’ all economically productive or beneficial uses of land . . . .”40

II. THE *LUCAS* PER SE TAKINGS RULE

A. South Carolina’s Land Use Regulation and the Lucas Land

In 1986, real estate developer David Lucas purchased a fee simple interest in two residential lots on a South Carolina barrier island with the intention of building single-family homes on the lots like those constructed on immediately adjacent parcels.41 At the time of Lucas’s purchase, his lots were not subject to the state’s coastal zone building permit regulations.42 Two years later, in 1988, the South Carolina legislature enacted the Beachfront Management Act43 (BMA), which had the effect of prohibiting Lucas from building any permanent habitable structures on his land.44

---

417 (1989) (holding that a taking resulted from the enactment of the Surface Mining Control and Reclamation Act’s prohibition of surface mining); Cane Tenn., Inc. v. United States and Wyatt v. United States, 60 Fed. Cl. 694 (2004) (*Cane V*); M & J Coal Co. v. United States, 47 F.3d 1148, 1150 (Fed. Cir. 1995) (holding a mining company’s rights by deed does not allow endangerment of public health and safety); Cane Tenn., Inc. v. United States (*Cane I*), 44 Fed. Cl. 785, 793 (1999) (involving a complaint asserting a right to just compensation for a taking of mineral interests as a result of government regulatory action); Cane Tenn., Inc. v. United States (*Cane II*), 54 Fed. Cl. 100, 109 (2002); Cane Tenn., Inc. v. United States (*Cane III*), 57 Fed. Cl. 115, 122 (2003); Cane Tenn., Inc. v. United States (*Cane IV*), 62 Fed. Cl. 481, 482 (2003); Cane Tenn., Inc. v. United States (*Cane V*), 60 Fed. Cl. 694, 695 (2004) (Wyatt claims); Cane Tenn., Inc. v. United States (*Cane VI*), 62 Fed. Cl. 703, 704 (2004) (Wyatt claims); Cane Tenn., Inc. v. United States (*Cane VII*), 63 Fed. Cl. 715 (2005); Cane Tenn., Inc. v. United States (*Cane VIII*), 71 Fed. Cl. 432, 433 (2005), *aff’d per curiam*, 214 Fed. Appx. 978, (Fed. Cir. 2001). Earlier takings claims involving the same property are discussed in Wyatt v. United States, 271 F.3d 1090 (Fed. Cir. 2001), rev’d E. Minerals Int’l Inc. v. United States, 36 Fed. Cl. 541 (1996). *But see* State *ex rel.* R.T.G., Inc. v. Ohio, 780 N.E.2d 998 (2002) (stating that state environmental protection regulation prohibiting an owner of severed interest in coal from mining reserve are held compensable as a total taking under *Lucas*).

41. *Id.* at 1006–07.
42. *Id.*
44. Justice Scalia’s opinion for the Court in *Lucas* observed:

The Beachfront Management Act brought Lucas’s plans to an abrupt end. Under that 1988 legislation, the Council was directed to establish a “baseline” connecting the landward-most “point[s] of erosion . . . during the past forty years” in the region of the Isle of Palms that includes Lucas’s lots. S.C. CODE ANN. §
Lucas filed suit in state court against the South Carolina Coastal Council, the state regulatory agency tasked with enforcing the BMA. Lucas contended that the ban on construction deprived him of all economically viable use of his land, and thus constituted a “taking” under the Fifth and Fourteenth Amendments. Lucas argued that “complete extinguishment” of the value of his land necessitated payment of “just compensation,” notwithstanding the fact that the enactment may have substantially advanced an important and valid public interest. The South Carolina trial court agreed with Lucas, holding that the ban rendered his parcels “valueless.” Judgment was entered by the trial court in Lucas’s favor in an amount exceeding $1.2 million.

On appeal, the South Carolina Supreme Court reversed. “It found dispositive what it described as Lucas’s concession ‘that the Beachfront

48-39-280(A)(2) (Supp. 1988). In action not challenged here, the Council fixed this baseline landward of Lucas’s parcels. That was significant, for under the Act construction of occupable improvements was flatly prohibited seaward of a line drawn 20 feet landward of, and parallel to, the baseline. § 48-39-290(A). The Act provided no exceptions. Lucas, 505 U.S. at 1008-09 (quoting Lucas v. S. C. Coastal Council (Lucas State Case), 404 S.E.2d 895, 896 (S.C 1991)). The Act permitted construction of non-habitable improvements including “wooden walkways no larger in width than six feet” and “small wooden decks no larger than one hundred forty-four square feet.” S.C. CODE ANN. § 48-39-290 (1987).

45. Lucas, 505 U.S. at 1009.
46. Id.
47. Id.
48. The trial court found that “at the time Lucas purchased the two lots, both were zoned for single-family residential construction and . . . there were no restrictions imposed upon such use of the property by either the State of South Carolina, the County of Charleston, or the Town of the Isle of Palms.” Id. The trial court also found the BMA permanently banned construction of houses on Lucas’s lots, and that this prohibition “deprive[d] Lucas of any reasonable economic use of the lots . . . eliminated the unrestricted right of use, and render[ed] them valueless.” Id.
49. Id. The state court held that Lucas’s land had been “taken” by operation of the Act and ordered the Coastal Council to pay “just compensation” in the sum of $1,232,387.50. Id. Lucas dissenters and many commentators questioned the trial court’s finding that the value of Lucas’s property had been wiped out. See, e.g., Lazarus, supra note 16, at 1412. Professor Lazarus has observed: The Supreme Court based its ruling for the landowner on the factual assumption that the challenged developmental restriction had deprived the landowner of the entire economic value of his property. But no member of the Court seemed to believe that this assumption was valid. Four Justices explicitly questioned its accuracy, and the majority opinion carefully avoided any intimation to the contrary.

Id. at 1412 (citations omitted).
Management Act [was] properly and validly designed to preserve . . . South Carolina’s beaches.***51

The state supreme court’s refusal to recognize the legitimacy of Lucas’s takings claim was based significantly upon a long-established holding that when a regulation is designed to prevent “harmful or noxious uses” of property akin to public nuisances, no compensation is due under the Takings Clause.52

B. The Supreme Court’s Holding in Lucas

Reduced to its essence, the holding of Lucas is that “when . . . a regulation that declares ‘off-limits’ all economically productive or beneficial uses of land goes beyond what the relevant background principles would dictate, compensation must be paid to sustain it.”53 In assessing whether Lucas’s categorical taking rule should be applied to less-than-fee severed coal interests, the definition of the “land” referenced in the Court’s holding is a crucial inquiry. Lucas, and indeed all of the Court’s modern taking cases, requires the property alleged to have been taken to be specifically identified before a judicial assessment is made as to whether compensation is required.54

Fundamental principles of Supreme Court adjudication and Article III’s case or controversy restriction on federal judicial power require the scope of the Lucas per se takings rule to necessarily be limited to the case actually decided by the Court. The property David Lucas claimed had been taken

51. Lucas, 505 U.S. at 1009–10. The state supreme court emphasized that Lucas “admittedly fails to attack the validity of the Act, and therefore concedes the validity of the legislative declaration of its ‘findings’ and ‘policy’ embodied in [the BMA].” Lucas State Case, 404 S.E.2d at 896. The South Carolina court thus considered itself “in no position to question the legislative scheme or purpose.” Id. at 896.

52. Lucas State Case, 404 S.E.2d at 899 (citing Goldblatt v. Hempstead, 369 U.S. 590, 590 (1962) (prohibiting excavating below the water table in order to extract gravel); Miller v. Schoene, 276 U.S. 272, 277 (1928) (involving state action that destroyed diseased cedar trees of certain property owners to prevent the infection of apple orchards); Hadacheck v. Sebastian, 239 U.S. 394, 404 (1915) (prohibiting the manufacture of bricks near residents in Los Angeles); Mugler v. Kansas, 123 U.S. 623, 662 (1887) (prohibiting the manufacture and sale of intoxicating liquors).

53. Lucas, 505 U.S. at 1030. Lucas defined “relevant background principles” as “the restrictions that background principles of the State’s law of property and nuisance . . . place upon land ownership” including the State’s common law of private and public nuisance. Id. at 1029.

54. See Suitum v. Tahoe Reg’l Planning Agency, 520 U.S. 725, 734 (1997) (quoting Pa. Coal Co. v. Mahon, 260 U.S. 393, 412 (1922) (describing that “‘only a regulation that goes too far’ results in a taking under the Fifth Amendment”); MacDonald, Sommer & Frates v. County of Yolo, 477 U.S. 340, 348 (1986) (“A court cannot determine whether a regulation has gone ‘too far’ unless it knows how far the regulation goes.”); Lucas, 505 U.S. at 1015, 1019 (noting that a regulation “goes too far” and results in a taking “at least in the extraordinary circumstance when no productive or economically beneficial use of land is permitted”).
was a fee simple absolute interest in two lots—an interest that included all of the strands or sticks that comprise a fee simple owner’s interest in real property. As explained below, a fee simple interest in land is fundamentally different than severed and segmented interests in coal underlying land. The Lucas Court holding applies only after a judicial determination has been made that an unencumbered fee simple interest in land has been rendered valueless by government regulation.

The question of whether the holding in Lucas specifically requires its categorical takings rule to be applied to severed and segmented mineral interests is easy to answer. The Court, in footnote seven, identifies “uncertainty” in the Court’s regulatory takings jurisprudence as it relates to the denominator issue of how a court should identify “the property interest against which the loss of value is to be measured.” That “uncertainty” was not resolved in Lucas because David Lucas owned a fee simple interest in land:

[W]e avoid this difficulty in the present case, since the “interest in land” that Lucas has pleaded (a fee simple interest) is an estate with a rich tradition of protection at common law, and since the South Carolina Court of Common Pleas found that the Beachfront Management Act left each of Lucas’ beachfront lots without economic value.

Thus, in the context of takings claims of less than a fee simple interest in land, Lucas explicitly left unresolved the denominator issue—the issue of how to identify “the property interest against which the loss of value is to

55. See Lucas, 505 U.S. at 1017 n.7 (“[I]n the present case . . . the “interest in land” that Lucas has pleaded [is] a fee simple interest . . .”). The Federal Circuit has described the characteristics of a fee simple estate: “(1) it is a present estate in land that is of indefinite duration; (2) it is freely alienable by deed inter vivos, by will post-mortem and involuntarily by execution or judicial sale; (3) it carries with it the right of possession; (4) the holder may make use of any portion of the freehold without being beholden to any person except to the extent that the sovereign has not limited such right of use. Cienega Gardens v. United States, 331 F.3d 1319, 1329 n.18 (Fed. Cir 2003) (citing 2 GEORGE LEFCOE & DAVID A. THOMAS; THOMPSON ON REAL PROPERTY § 17.02 (David A. Thomas ed., 2d ed. 2000)).

56. Lucas, 505 U.S. at 1032–33.

57. Lucas, 505 U.S. at 1016 n.7. The text in the opinion referenced by footnote 7 states “the Fifth Amendment is violated when land-use regulation . . . ‘denies an owner economically viable use of his land.’” Id. at 1016. (citing Agins v. Tiburon, 447 U.S. 255, 260 (1980)). The footnote to this statement begins with a caveat: “Regrettably, the rhetorical force of our ‘deprivation of all economically feasible use’ rule is greater than its precision, since the rule does not make clear the ‘property interest’ against which the loss of value is to be measured.” Id. at 1016 n.7.

58. Id. at 1017.
be measured." Therefore, one cannot argue that Lucas’s holding must be applied in the event that a takings claimant alleges a total taking of a severed/segmented mineral interest. Lucas’s new “categorical” or per se takings rule is narrowly limited to the “relatively rare,” indeed, “extraordinary circumstance” when a government regulatory initiative eliminates all economic value in a fee simple estate in land. The efficacy of extending the per se takings rule to total takings of severed interests in coal is discussed below.

C. The Mahon-Penn Central Analysis After Lucas

In Lucas, the Court focused on the first Penn Central factor—the economic impact of the regulation on the claimant. An important consequence of application of the Lucas categorical takings rule is that where a “total taking” is found, the second component—the character of the governmental action involved—is specifically eliminated.

The third factor, examination of the takings claimant’s distinct investment-backed expectations, has been held by the Federal Circuit to be jettisoned by Lucas. Once a court has determined that the economic impact of a regulation has effected a total taking of a claimant’s fee simple interest in land, the Federal Circuit has held that judicial inquiry into the claimant’s investment-backed expectations is proscribed by Lucas. As so

59. Id. at 1016 n.7.

60. It is worthy of note that, while the Lucas Court identified a categorical takings rule applicable in any case where regulation totally devalues a particular piece of land held in fee simple, the Court did not find David Lucas had suffered a compensable taking of his two lots. Rather, the Court remanded the case to the South Carolina court with the admonition that “South Carolina must identify background principles of nuisance and property law that prohibit the uses he now intends in the circumstances in which the property is presently found.” Id. at 1031. “Only on this showing,” said the Court, “can the State fairly claim that, in proscribing all such beneficial uses, the Beachfront Management Act is taking nothing.” Id. at 1031–32.

61. Id. at 1019 n.8.

62. Good v. United States, 189 F.3d 1355, 1361 (Fed. Cir. 1999) (barring courts per se from balancing “the importance of the public interest advanced by the regulation against the regulation’s imposition on private property rights,” i.e., the character of the governmental action).

63. See, e.g., Palm Beach Isles Assocs. v. U.S., 208 F.3d 1374, 1381 (Fed. Cir. 2000) (“Since there is a categorical taking of the 50.7 acres, the issue is of [the takings claimant’s] investment-backed expectations . . . analysis is not applicable.”).

64. See Fla. Rock Indus. v. United States, 18 F.3d 1560, 1564–65 (1994) (“The recent Supreme Court decision in Lucas v. South Carolina Coastal Council teaches that the economic impact factor alone may be determinative; in some circumstances, no balancing of factors is required. If a regulation categorically prohibits all economically beneficial use of land-destroying its economic value for private ownership-the regulation has an effect equivalent to a permanent physical occupation. There is, without more, a compensable taking.”) (citation omitted); see also Palm Beach Isles Assocs., 208 F.3d at 1381
interpreted, *Lucas* makes it considerably more difficult for a public body to resist a takings compensation claim and raises the specter of a vast increase in the number of cases where compensation will be required, notwithstanding the dubious nature of a claimant’s economic expectations. If accepted, such an interpretation of *Lucas* would cause takings analysis to significantly depart from the long extant case-by-case ad hoc *Mahon-Penn Central* takings analysis. Thus, when a court concludes that a regulation leaves no value in the claimant’s land owned in fee simple, *Lucas* narrowly restricts judicial inquiry to a determination of whether the government regulation at issue is based upon “restrictions that background principles of the State’s law of property and nuisance already place upon land ownership”—restrictions on uses that inhered in the title of the property when it was acquired by the takings claimant.65

It is arguable, however, that *Lucas* did not intend to and should not eliminate from judicial consideration the “distinct investment backed expectations” component of the *Penn Central* takings test, at least where the property claimed to have been taken as a result of government regulation is a coal or other mineral interest severed from fee ownership of land.66

D. Lucas Dictum

Writing for the *Lucas* majority, Justice Scalia alluded to “numerous occasions” on which the Court had previously said that “the Fifth Amendment is violated when land-use regulation . . . ‘denies an owner economically viable use of his land.’”67 Following this observation, Justice Scalia inserted into the opinion what Professor David Callies has termed

---

65. *Lucas*, 505 U.S. at 1030. The *Lucas* “total taking inquiry” also entails “analysis of, among other things, the degree of harm to public lands and resources, or adjacent private property, posed by the claimant’s proposed activities . . . and their suitability to the locality in question . . . and the relative ease with which the alleged harm could be avoided through measures taken by the claimant and the government (or adjacent private land owners) . . . .” Id. at 1030–31 (citations omitted).

66. See generally Kristine Tardiff, *Expectations: The Final Lucas Frontier*, 11th Annual CLE Conference on Litigating Regulatory Takings and Other Challenges To Land Use and Environmental Regulation (Stanford, CA., November 6-7, 2008) (noting the “lingering confusion” resulting from the *Lucas* decision); see *Good*, 189 F.3d at 1361 (“[T]he Supreme Court in *Lucas* did not mean to eliminate the requirement for [reasonable investment-backed expectations] to establish a taking.”).

“the infamous footnote 7.” Footnote seven is almost entirely dictum. It begins:

Regrettably, the rhetorical force of our “deprivation of all economically feasible use” rule is greater than its precision, since the rule does not make clear the “property interest” against which the loss of value is to be measured. . . . Unsurprisingly, this uncertainty regarding the composition of the denominator in our “deprivation” fraction has produced inconsistent pronouncements by the Court.

Thus, the footnote identifies “uncertainty” in the Court’s regulatory takings jurisprudence as it relates to how a court should identify the denominator—“the property interest against which the loss of value is to be measured.” The answer to this “difficult question,” the Court opines:

[M]ay lie in how the owner’s reasonable expectations have been shaped by the State’s law of property—i.e., whether and to what degree the State’s law has accorded legal recognition and protection to the particular interest in land.

---


69. Id. Although there is considerable debate in the academy regarding the appropriate definition of “dictum” as distinguished from “holding,” the most common and widely accepted understanding defines “holding” as “[a] court’s determination of a matter of law pivotal to its decision; a principle drawn from such a decision” and “obiter dictum” as “[a] judicial comment made while delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential.” BLACK’S LAW DICTIONARY 749, 1102 (8th ed. 2004). See generally Michael Abramowicz & Maxwell Stearns, Defining Dicta, 57 STAN. L. REV. 953, 966 (2005) (discussing how to identify dicta); Michael C. Dorf, Dicta and Article III, 142 U. PA. L. REV. 1997, 1998 (1994) (discussing Article III’s role in “determining how federal courts ought to distinguish between the holdings and dicta of past cases”); Henry Paul Monaghan, Stare Decisis and Constitutional Adjudication, 88 COLUM. L. REV. 723, 765 n.236 (1988) (noting that distinctions between holding and dicta should not be dispensed with).

70. Lucas, 505 U.S. at 1016–17 n.7. Footnote 7 also included the observation that “[w]hen, for example, a regulation requires a developer to leave 90% of a rural tract in its natural state, it is unclear whether we would analyze the situation as one in which the owner has been deprived of all economically beneficial use of the burdened portion of the tract, or as one in which the owner has suffered a mere diminution in value of the tract as a whole.” Id. Understood literally, this comment applies only to a fee simple estate in land that, of course, was the subject of the case presented by the facts in Lucas.

71. Id. at 1016 n.7.
with respect to which the takings claimant alleges a diminution in (or elimination of) value.\textsuperscript{72}

That the statements in footnote seven are dictum is not subject to dispute.\textsuperscript{73} The note ends with the Court’s disclaimer that it “avoids the difficulty in the present case” because the “interest in land” involved was a fee simple.\textsuperscript{74} Commentators have recognized footnote seven as dictum, observing that “Justice Scalia’s ruminations . . . might well be seen as judicial encouragement to litigants to revisit the denominator issue in future regulatory takings cases.”\textsuperscript{75} Importantly, “[w]ith the exception of the Scalia dictum in \textit{Lucas}, the Court has uniformly taken the view that the denominator in regulatory cases should be viewed expansively . . . .”\textsuperscript{76}

Thus, while this \textit{Lucas} dictum may have been intended to encourage application of the majority’s new categorical rule in future cases where less than a fee simple interest in land is the basis for a takings claim, the holding in \textit{Lucas} does not require this result. At least as far as severed/segmented mineral interests are concerned, \textit{Lucas} clearly does not require application of its per se rule.\textsuperscript{77} Notwithstanding this fact, lower courts may respond to Justice Scalia’s “encouragement to revisit the denominator issue” in cases involving severed coal and other mineral interests. As discussed below,

\textsuperscript{72} \textit{Id.} at 1017 n.7. Justice Blackmun’s dissent, however, cautions:

As the Court admits, whether the owner has been deprived of all economic value of his property will depend on how “property” is defined. The “composition of the denominator in our ‘deprivation’ fraction . . . is the dispositive inquiry.” Yet there is no “objective” way to define what that denominator should be. “We have long understood that any land-use regulation can be characterized as the ‘total’ deprivation of an aptly defined entitlement . . . . Alternatively, the same regulation can always be characterized as a mere ‘partial’ withdrawal from full, unencumbered ownership of the landholding affected by the regulation . . . .”


\textsuperscript{73} \textit{See} Monaghan, \textit{supra} note 69, at 765 n.236 (“I do not think we can—or should—dispense with some distinctions between holding and dicta. . . . Some distinctions along this line seems to be particularly necessary with respect to sprawling, undisciplined, heavily footnoted opinions issued by the Supreme Court. Closely analogous is recognition that important holdings are not made in passing in footnotes.”) (citation omitted).

\textsuperscript{74} \textit{Lucas}, 505 U.S. at 1017 n.7.

\textsuperscript{75} R. MELTZ ET AL., THE TAKINGS ISSUE 146 (1999).

\textsuperscript{76} \textit{Id.}

\textsuperscript{77} Justice Stevens’s dissent in \textit{Lucas} recognizes that the dictum of footnote 7 of the Court’s opinion “suggests that a regulation may effect a total taking of any real property interest” notwithstanding that “[i]n past decisions, we have stated that a regulation effects a taking if it ‘denies an owner economically viable use of his land’ . . . indicating that this ‘total takings’ test did not apply to other estates.” (citation omitted). \textit{Lucas}, 505 U.S. at 1066.
there are cogent reasons to question the application of the per se rule to claims of takings of severed/segmented coal and other mineral real property interests.

III. TAKINGS AND BUNDLED RIGHTS

A. Property and the Rights and Duties of Property Owners

As mentioned above, the “bundle of rights” term used by the Court in its regulatory takings cases is rooted in the evolution of a legal concept of property that arose in the late nineteenth and early twentieth centuries.\(^{78}\) Property as a bundle of rights is much more than a mere metaphor. One commentator has observed that “the metaphor of property as a bundle of rights dominates contemporary property law.”\(^{79}\) It is generally conceded that the doctrine’s parameters were shaped to a significant degree by Wesley Hohfeld’s analysis of rights and A.M. Honoré’s description of the incidents of ownership.\(^{80}\) The concept of bundled rights of property has been the target of growing criticism over the last two decades but it remains the dominant theory of property embraced by judges and law teachers.\(^{81}\)

\(^{78}\) See, e.g., Wesley Newcomb Hohfeld, Fundamental Legal Conceptions As Applied in Judicial Reasoning, 26 YALE L.J. 710, 714 (1917) (discussing property duties and rights); see also A.M. Honoré, Ownership, in OXFORD ESSAYS IN JURISPRUDENCE 107, 112–24 (A.G. Guest ed., 1961) (discussing the standard incidents of ownership).


\(^{81}\) Compare Eric T. Freyfogle, On Private Property: Finding Common Ground on the Ownership of Land 13–14 (2007) (asserting that inherently conditional allocation of possessory and use rights of property is the only currently viable model) with Robert C. Ellickson, Property in Land, 102 YALE L.J. 1315, 1364 (1993) (arguing that the bundle of sticks model is comparatively constant and stabilizes ownership of non-fungible resources like land providing an essential support mechanism for democratic constitutionalism). See, e.g., Denise R. Johnson, Reflections on the Bundle of Rights, 32 VT. L. REV. 247, 247 (2007) (“In recent years, an academic debate has raged about whether the bundle of rights is a correct or useful way of thinking about property rights. Whatever its faults or inadequacies,
Considerable disagreement exists among scholars concerning the specific content of the property “bundle.” The metaphor’s image is a bundle of sticks or strands in which each stick in the bundle represents a different right associated with property. Scholars are unable to agree about the specific rights the property bundle contains. Such rights have been said to include the right to exclude others; the right to possess; the right to use; and the right to transfer, dispose or alienate, receive income, to manage, be secure, and maintain quiet enjoyment.

More generally, for the student of property law and the legal practitioner seeking to understand the essence of the property protected by the Fifth Amendment’s stark exhortation—“nor shall private property be taken for public use without just compensation”—the task is daunting indeed. The myriad perspectives, models, paradigms, and theories of property law scholars juxtaposed with the Supreme Court’s periodic ex

82. One commentator lists the various rights identified by Honore with the caveat that “[t]he list . . . provides general definitions . . . subject to variations, qualifications, and limitations on scope that come from common law rules, statutes, or private agreements that the owner has entered:

1. The right to possess—the right to “exclusive physical control of the thing owned. Where the thing cannot be possessed physically” because it is intangible, “possession may be understood metaphorically or simply as the right to exclude others from the use or other benefits of the thing.”
2. The right to use—the right “to personal enjoyment and use of the thing as distinct from” the right to manage and the right to the income.
3. The right to manage—the right “to decide how and by whom a thing shall be used.”
4. The right to the income—the right “to the benefits derived from foregoing personal use of a thing and allowing others to use it.”
5. The right to capital—“the power to alienate the thing,” meaning to sell or give it away, “and to consume, waste, modify, or destroy it.”
6. The right to security—“immunity from expropriation,” that is, the land cannot be taken from the right-holder.
7. The power of transmissibility—“the power to devise or bequeath the thing,” meaning to give it to somebody else after your death.
8. The absence of term—“the indeterminate length of one’s ownership rights,” that is, that ownership is not for a term of years, but forever.
9. The prohibition of harmful use—a person’s duty to refrain “from using the thing in certain ways harmful to others.”
10. Liability to execution—liability for having “the thing taken away for repayment of a debt.”
11. Residuary character—“the existence of rules governing the reversion of lapsed ownership rights”; for example, who is entitled to the property if the taxes are not paid, or if some other obligation of ownership is not exercised.

Johnson, supra note 81, at 253.

83. See, e.g., Arnold, supra note 79, at 284–85 nn.19–20 (citing various commentators).
84. Id.
I do not intend to enter this theoretical mire in this essay. Rather, my purpose is narrowly limited to discussing the Supreme Court’s extant regulatory takings jurisprudence and how it may be rationally applied to severed coal interests, given the narrow holding of *Lucas*’s per se “total takings” rule.

My goal, however narrowly crafted, is fraught with complexity if Professor Colburn’s perspective on the Court’s property law jurisprudence bears credence—and I, for one, believe it does. Professor Colburn asserts that much of the current critical scholarly thinking about property and property rights “is virtually unrecognizable in the present Court’s rights jurisprudence, especially its constitutional property opinions.” Colburn finds the Court “[i]ntent on deriving supposed logical necessities from the Constitution’s text or structure or, barring that, logical necessities from its own analogies extending and distinguishing precedents, the Court has at turns epitomized what can go wrong with practical reasoning.” He suggests, with considerable logic, that *Penn Central* was an attempt to “re-engineer” the structural underpinnings of our understanding of property and the rights and duties attendant property so as to recognize that “[a]llocations of property rights are under constant revision in society—much like our intuitions on what things count as property.” “*Penn Central* and its related precedents,” Colburn rightly asserts, “normalized this provisionalist model of property.”

Professor Colburn’s critique of *Penn Central* and the Court’s subsequent regulatory takings cases may seem hyperbolic to some, but for the practitioner and the law student groping for threads of understanding to assist in sorting out the Court’s regulatory takings jurisprudence, it is perhaps deservedly so. In any event, Professor Colburn’s critique is worth repeating below at length, as it, in my view, captures the context in which this essay attempts to provide at least a glimmer of insight into an issue heretofore unresolved by the Court:

The bold structural (re-)engineering of *Penn Central*, with its announcement of a broadly applicable test unhinged

---

86. *Id.* at 1457.
87. *Id.* (citations omitted).
88. *Id.*
89. *Id.*
from every source of authority but the Court itself, is later embarrassed by the opportunistic minimalism of *Nollan*, *Dolan*, and a dozen others that must be reconciled in heaps of dicta like the opinion in *Lingle*. The Court almost never speaks with both the modesty and precision its unique position demands, even though the one necessary outcome of its constitutional rights precedents is the preemption of other legal actors’ (present) reasoning to one degree or another. Compared to virtually any other legal agent, the Supreme Court speaks with unmatched scope and force. . . . This puts the Court in a uniquely vulnerable position in terms of errors and error costs because the only justification for exerting authority, ultimately, must be epistemic and courts’ usual epistemic position is relatively weak. Yet the Court couches its opinions in archaisms, metaphor and simile, sarcasm, casuistry, and other forms of argumentative communication that are uninformative, excessively manipulable, and too often blatantly self-contradictory.90

It is in this context that I attempt below to synthesize the Court’s regulatory takings cases regarding less-than-fee interests in land. In doing so, my goal is to come to grips with the Court’s reliance on concepts of “bundled property rights” and “reasonable investment-backed expectations” in order to determine where exactly severed mineral interests fit into the takings puzzle.91

**B. The “Bundle of Rights” and Severed Mineral Interests**

Logically, the Court’s prior cases would inform the determination of how severed mineral property interests fit into its current regulatory takings jurisprudence. In *Lucas’s* footnote seven, however, the Court stated, “[r]egrettably, the rhetorical force of our ‘deprivation of all economically feasible use’ rule is greater than its precision, since the rule does not make clear the ‘property interest’ against which the loss of value is to be measured.”92 The *Lucas* Court then cavalierly dismissed *Mahon* and *Keystone*—the only cases it has decided that appear directly on point. Referring to those cases, the Court said, “uncertainty regarding the

---

90. *Id.* at 1458–59.
composition of the denominator in our ‘deprivation’ fraction has produced inconsistent pronouncements by the Court. According to the Lucas majority, the earlier law “restricting subsurface extraction of coal [was] held to effect a taking” and the later “nearly identical law held not to effect a taking.” I submit that, carefully examined, Mahon and Keystone do, in fact, offer guidance that can assist in identifying the proper denominator, as well as informing decisions adjudicating taking claims of severed mineral interests.

As the doctrinal touchstone of this essay, Lucas is as good a point to start as any in unraveling the “inconsistent pronouncements” of the Court relating to the “denominator issue.” As discussed previously, David Lucas owned his two South Carolina beachfront lots in fee simple. With a nod in footnote seven to the “difficult [denominator] problem” of determining “the property interest against which the loss of value is to be measured,” the Court declared, “we avoid this difficulty in the present case, since the ‘interest in land’ that Lucas has pleaded (a fee simple interest) is an estate with a rich tradition of protection at common law.” The Lucas holding does not resolve the severed mineral property issue, notwithstanding that a possible outcome is suggested in dictum. Lucas, then, provides the impetus for examining the issue, but we must look elsewhere for enlightenment.

C. Pennsylvania Coal Co. v. Mahon

Pennsylvania Coal Co. v. Mahon dealt directly with the issue of severed mineral interests alleged to have been destroyed by the 1921 Pennsylvania coal mine subsidence law. The Court found the state law prohibiting mining under occupied dwellings resulted in a taking of Pennsylvania Coal Company’s property—property that included only a reserved coal seam and attendant mining rights. Mahon opined that the 1921 Pennsylvania statute

93. Id. at 1017 n.7.
94. Id.
95. Id.
96. Id. The dictum of “infamous” Lucas footnote 7 has had some resonance. In one lower court decision, the Lucas per se rule was applied to mineral interests comprising less than a fee simple estate in land. See Cane Tenn., Inc. v. United States (Cane V), 60 Fed. Cl. 694, 705–06 (2004) (applying Lucas to mineral interests). See Tardiff, supra note 66, at 12–18, for a thorough exposition of these complex consolidated cases that spawned a combined total of eight separate opinions from the Court of Claims and the Federal Circuit.
98. Id. at 414. Some commentators have challenged the assertion that Pa. Coal v. Mahon was a case involving the just compensation clause, arguing that Justice Holmes’ opinion for the Court was actually grounded in a version of the later discredited substantive due process doctrine of Lochner v. New York, 198 U.S. 45 (1905), and its progeny. See, e.g., Robert Brauneis, The Foundation of Our
(the “Kohler Act”) made “it commercially impracticable to mine certain coal” and that it had “very nearly the same effect for constitutional purposes as appropriating or destroying it.” 99 Based on the unique facts involved, *Mahon* found (in the parlance of *Lucas*) that the entire interest or bundle of rights in the coal property had been totally taken. 100 The unique facts alleged by the coal company caused the Court to expedite and quickly

---

99. *Mahon*, 260 U.S. at 414. Subsequently, in *Keystone*, the Court emphasized that the portion of the *Mahon* opinion that observed the 1921 Pennsylvania law “had very nearly the same effect for constitutional purposes as appropriating or destroying it”—was actually an *advisory opinion*:

[U]ncharacteristically—Justice Holmes provided the parties with an advisory opinion discussing ‘the general validity of the Act.’ In the advisory portion of the Court’s opinion, Justice Holmes rested on two propositions, both critical to the Court’s decision. First, because it served only private interests, not health or safety, the Kohler Act could not be “sustained as an exercise of the police power.” Second, the statute made it “commercially impracticable” to mine “certain coal” in the areas affected by the Kohler Act.


But the case has been treated as one in which the general validity of the act should be discussed. The Attorney General of the State, the City of Scranton, and the representatives of other extensive interests were allowed to take part in the argument below and have submitted their contentions here. It seems, therefore, to be our duty to go farther in the statement of our opinion, in order that it may be known at once, and that further suits should not be brought in vain.

Id. at 484 n.12.

decide the coal company’s appeal.\textsuperscript{101} The company asserted “that the impact of the statute was so severe that ‘a serious shortage of domestic fuel is threatened.’”\textsuperscript{102} The company paraded “horribles,” explaining in its appeal papers that “until the Court ruled, ‘no anthracite coal which is likely to cause surface subsidence can be mined,’ and that strikes were threatened throughout the anthracite coal fields.”\textsuperscript{103}

Mahon emphasized, however, that “the question depends upon the particular facts” and “this is a question of degree—and therefore cannot be disposed of by general propositions.”\textsuperscript{104} Nevertheless, the Mahon Court found the 1921 Pennsylvania law effected a compensable taking. The Court reasoned that because the law extinguished all economic value of the company’s severed coal estate and because “private persons or communities” bore “the risk of acquiring only surface rights,” “the fact that their risk ha[d] become a danger [did not] warrant[] the giving to them [of] greater rights than they bought.”\textsuperscript{105}

D. Keystone Bituminous Coal Ass’n v. DeBenedictis

Sixty-five years after Mahon and a decade after Penn Central, the Court returned to the issue of takings in the context of a claim of taking of severed mineral interests in Keystone Bituminous Coal Association v. DeBenedictis.\textsuperscript{106} The Keystone Court confronted a takings claim remarkably similar to that made by the coal company in Mahon. The Supreme Court was again asked to determine whether a Pennsylvania law prohibiting a coal company from undermining an occupied dwelling constituted a compensable taking.\textsuperscript{107} Keystone found distinctions between the two cases more significant than their similarities.\textsuperscript{108} The 1966 Pennsylvania mine subsidence prevention law furthered broad and important public interests, the Court said, while the 1921 Kohler Act “involve[d] a balancing of the private economic interests of coal companies

\begin{itemize}
\item \textsuperscript{101} Keystone, 480 U.S. at 483 n.11 (“The urgency with which the case was treated is evidenced by the fact that the Court issued its decision less than a month after oral argument; a little over a year after the test case had been commenced.”).
\item \textsuperscript{102} Id. at 482.
\item \textsuperscript{103} Id. at 482–83.
\item \textsuperscript{104} Mahon, 260 U.S. at 413, 416.
\item \textsuperscript{105} Mahon, 260 U.S. at 416.
\item \textsuperscript{106} Keystone, 480 U.S. at 474.
\item \textsuperscript{107} Id. at 478–79.
\item \textsuperscript{108} Id. at 481 (“Although there are some obvious similarities between the cases, we agree with the Court of Appeals and the District Court that the similarities are far less significant than the differences, and that Pennsylvania Coal does not control this case.”).
\end{itemize}
against the private interests of the surface owners.”

The Keystone Court, relying on *Penn Central*, identified two grounds for distinguishing *Mahon* and justifying a contrary result:

The holdings and assumptions of the Court in [*Mahon*] provide obvious and necessary reasons for distinguishing [*Mahon*] from the case before us today. The two factors that the Court considered relevant, have become integral parts of our takings analysis. We have held that land use regulation can effect a taking if it “does not substantially advance legitimate state interests, . . . or denies an owner economically viable use of his land.” Application of these tests to petitioners’ challenge demonstrates that they have not satisfied their burden of showing that the Subsidence Act constitutes a taking. First, unlike the Kohler Act, the character of the governmental action involved here leans heavily against finding a taking; the Commonwealth of Pennsylvania has acted to arrest what it perceives to be a significant threat to the common welfare. Second, there is no record in this case to support a finding, similar to the one the Court made in [*Mahon*], that the Subsidence Act makes it impossible for petitioners to profitably engage in their business, or that there has been undue interference with their investment-backed expectations.

The first of these two factors relied upon by Keystone—whether land use regulation substantially advances legitimate state interests—has been eliminated from the Court’s current takings jurisprudence by its ruling in *Lingle v. Chevron U.S.A., Inc.* *Lingle* held:

> Although a number of our takings precedents have recited the “substantially advances” formula . . . this is our first opportunity to consider its validity as a freestanding takings test. We conclude that this formula prescribes an inquiry in the nature of a due process, not a takings, test, and that it has no proper place in our takings jurisprudence.

However, *Lingle* also confirmed the continuing relevance of *Penn Central’s* focus on property owners’ “investment-backed expectations” as a central

---

109. *Id.* at 485.
110. *Id.* at 484–85 (internal citations omitted).
112. *Id.*
component of regulatory takings jurisprudence in the great majority of
cases that do not involve government physical occupation of land nor a
“total taking” caused by regulation. Thus, the Keystone analysis of the
coil owners’ investment-backed expectations should continue to be
recognized as an important factor to consider in determining whether a
severed mineral interest effects an unconstitutional uncompensated taking.

Keystone directly addressed both the denominator and the taking
claimant’s investment-backed expectations issues. The Court refused to
view Mahon as declaring a taking any time a regulation renders part of a
severed coal interest un-mineable: “We do not consider Justice Holmes’
statement that the Kohler Act made mining of ‘certain coal’ commercially
impracticable as requiring us to focus on the individual pillars of coal that
must be left in place.”

Rather, the Keystone majority saw Justice Holmes’s statement to be
“best understood as referring to the Pennsylvania Coal Company’s assertion
that it could not undertake profitable anthracite coal mining in light of the
Kohler Act.” The extent to which the law was alleged to have interfered
with Pennsylvania Coal Company’s investment-backed expectations was
extraordinary. The coal company claimed that the Kohler Act made it
“unable to operate six large collieries in the city of Scranton, employing
more than five thousand men.” Judge Adams’s opinion for the Third
Circuit below explained:

At first blush, this language seems to suggest that the Court
would have found a taking no matter how little of the

113. Id. at 539–40.
115. Id. at 498.
116. Id. Keystone recited the dire picture that the coal company had painted in seeking
expedited review of the constitutionality of the Kohler Act from the Pennsylvania Supreme Court’s
decision upholding the law: “The company promptly appealed to this Court, asserting that the impact of
the statute was so severe that ‘a serious shortage of domestic fuel is threatened.”’ Id. at 482.
The company explained that until the Court ruled, “no anthracite coal which is
likely to cause surface subsidence can be mined,” and that strikes were threatened
throughout the anthracite coal fields. In its argument in this Court, the company
contended that the Kohler Act was not a bona fide exercise of the police power,
but in reality was nothing more than “robbery under the forms of law” because its
purpose was “not to protect the lives or safety of the public generally but merely
to augment the property rights of a favored few.”

Id. at 482–83 (footnote omitted).

[T]he company also argued that the Subsidence Act made it commercially
impracticable to mine the very coal that had to be left in place. Although they
could have constructed pillars for support in place of the coal, the cost of the
artificial pillars would have far exceeded the value of the coal.

Id. at 499 n.26.
defendants’ coal was rendered unmineable—that because “certain” coal was no longer accessible, there had been a taking of that coal. However, when one reads the sentence in context, it becomes clear that the Court’s concern was with whether the defendants’ “right to mine coal . . . [could] be exercised with profit.” Thus, the Court’s holding in *Mahon* must be assumed to have been based on its understanding that the Kohler Act rendered the business of mining coal unprofitable.\(^{117}\)

Importantly, *Keystone*’s analysis of the claim of a total taking effected by the 1966 state mine subsidence law included consideration of the mineral interest owner’s reasonable investment-backed expectations.\(^ {118}\) *Keystone* rejected the coal company’s argument that the “denominator” in its takings analysis should have been the coal required to be left in place by the 1966 law:

> When the coal that must remain beneath the ground is viewed in the context of any reasonable unit of petitioners’ coal mining operations and financial-backed expectations, it is plain that petitioners have not come close to satisfying their burden of proving that they have been denied the economically viable use of that property. The record indicates that only about 75% of petitioners’ underground coal can be profitably mined in any event, and there is no showing that petitioners’ reasonable “investment-backed expectations” have been materially affected by the additional duty to retain the small percentage that must be used to support the structures protected by [the 1966 Act].\(^ {119}\)

In addition, in *Keystone* “[t]he complaint allege[d] that Pennsylvania recognize[d] three separate estates in land: [t]he mineral estate; the surface estate; and the ‘support estate.’\(^ {120}\) *Keystone* rejected the claim that the 1966 law constituted a taking, assuming *arguendo* that it entirely destroyed the value of the coal company’s unique “support estate” in land.\(^ {121}\) The Court explained that the support estate had first been recognized in the latter part of the nineteen century and that the transfers of severed property interests in coal from fee estates were accomplished by broad form

---

117. *Id.* at 499 (citation omitted).
118. *Id.*
119. *Id.*
120. *Id.* at 478.
121. *Id.* at 479.
deeds containing sweeping waivers of liability for damages caused by mining.\footnote{122}

*Keystone* looked directly at the takings claimant’s investment-backed expectations in determining whether the “total taking” of the support estate in land effected a “regulatory taking” under the Fifth and Fourteenth Amendments.\footnote{123} “[I]n practical terms,” said the Court, “the support estate has value only insofar as it protects or enhances the value of the estate with which it is associated.”\footnote{124} The value of the support estate under Pennsylvania law constituted “merely a part of the entire bundle of rights possessed by the owner of either the coal or the surface.”\footnote{125} *Keystone* explained that “[b]ecause petitioners retain the right to mine virtually all the coal in their mineral estates, the burden the Act places on the support estate does not constitute a taking.”\footnote{126} I do not suggest that a “total taking” of a severed mineral estate cannot constitute a taking for just compensation purposes. The point is simply that when a taking claimant alleges a total taking of a mineral estate or other mineral property interest rather than a fee simple interest in land, *Keystone* stands for the proposition that the claimants’ investment-backed expectations are a relevant subject of inquiry.

In my view, the argument that *Lucas*’s holding excludes judicial consideration of a “total taking” claimant’s investment-backed expectations seriously conflicts with the holding of *Keystone*. Moreover, the dictum in *Lucas*’s infamous footnote seven identifying *Mahon* and *Keystone* as “inconsistent pronouncements” “regarding the composition of the denominator in our ‘deprivation’ fraction” rings hollow given *Keystone*’s careful analysis distinguishing its facts and holding from that of *Mahon*.\footnote{127} The force of *Lucas*’s bald dictum on this point seems grounded only upon *ipse dixit*.

\footnote{122}{Id. at 478.}
\footnote{123}{Id. at 485.}
\footnote{124}{Id. at 501.}
\footnote{125}{Id.}
\footnote{126}{Id.}
\footnote{127}{The Court invited comparison of *Mahon*, which it characterized as involving a law restricting subsurface extraction of coal held to effect a taking, with *Keystone*, a case *Lucas* described as a “nearly identical law held not to effect a taking.” *Lucas* v. S. C. Coastal Council, 505 U.S. 1003, 1016 (1992).}
IV. **Keystone: Severed Coal Property Interests and Investment-Backed Expectations**

**A. The Contract Clause and Liability Waivers in Keystone**

Before the Fourteenth Amendment was added to the Constitution, Article I, Section 10 “provided the primary constitutional check on state legislative power.”\(^{128}\) The first sentence of that provision provides:

> No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold or silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.\(^ {129}\)

In *Keystone*, the coal company claimants relied heavily on *Mahon* in arguing that section four of the 1966 subsidence law violated the Contract Clause by not allowing them to hold surface owners to the coal severance deed contractual agreements waiver of the coal estate owner’s liability for surface subsidence damage.\(^ {130}\) The *Keystone* Court explained that “the

---

\(^{129}\) U.S. CONST. art. I, § 10.
\(^{130}\) *Keystone*, 480 U.S. at 502. Section 6 of the Subsidence Act, authorized the state’s Department of Environmental Resources (“DER”) to revoke a mining permit if coal removal caused damage to a structure or area protected by § 4 of the Act and the operator had not within six months either repaired the damage, satisfied any claim arising there from, or deposited a sum equal to the reasonable cost of repair with the state department of environmental resources as security. *Id.* at 477. Section 4 of the 1966 law provided:

> Protection of surface structures against damage from cave-in, collapse, or subsidence.

> In order to guard the health, safety and general welfare of the public, no owner, operator, lessor, lessee, or general manager, superintendent or other person in charge of or having supervision over any bituminous coal mine shall mine bituminous coal so as to cause damage as a result of the caving-in, collapse or subsidence of the following surface structures in place on April 27, 1966, overlying or in the proximity of the mine:

> (1) Any public building or any noncommercial structure customarily used by the public, including but not being limited to churches, schools, hospitals, and municipal utilities or municipal public service operations.

> (2) Any dwelling used for human habitation; and

> (3) Any cemetery or public burial ground; unless the current owner of the structure consents and the resulting damage is fully repaired or compensated.

*Id.* at 476 n.6. Responding to enactment in 1977 of the Federal Surface Mining Control and Reclamation Act (“SMCRA”), 30 U.S.C. § 1201 (2006), and to regulations promulgated by the
prohibition against impairing the obligation of contracts is not to be read literally” and that “its primary focus was upon legislation that was designed to repudiate or adjust pre-existing debtor-creditor relationships that obligors were unable to satisfy.”\textsuperscript{131} \textit{Keystone} noted with approval Justice Potter Stewart’s statement that “it is to be accepted as a commonplace that the Contract Clause does not operate to obliterate the police power of the States.”\textsuperscript{132}

In assessing the validity of the coal company’s Contract Clause claim in \textit{Keystone}, the Court began by “identifying the precise contractual right that ha[d] been impaired and the nature of the statutory impairment.”\textsuperscript{133} The coal company claimed that it had “obtained damages waivers for a large percentage of the land surface protected by the Subsidence Act, but that the Act removes the surface owners’ contractual obligations to waive damages.”\textsuperscript{134} The Court acknowledged that the 1966 law substantially impaired a contractual relationship and thus proceeded to analyze the justifications asserted for the impairment. \textit{Keystone} held that the 1966 Subsidence Act “plainly survives scrutiny under our standards for evaluating impairments of private contracts.”\textsuperscript{135}

---

\textsuperscript{131}Id. at 502, 503.

\textsuperscript{132}Id. at 503 (quoting Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 241 (1978) (citations omitted); see also Manigault v. Springs, 199 U.S. 473, 480 (1905) (“This power, which in its various ramifications is known as the police power, is an exercise of the sovereign right of the Government to protect the lives, health, morals, comfort and general welfare of the people, and is paramount to any rights under contracts between individuals.”).

\textsuperscript{133}Keystone, 480 U.S. at 504.

\textsuperscript{134}Id. \textit{Keystone} emphasized that the record did not indicate the percentage of petitioners’ acquired support estate that was restricted under the 1966 Pennsylvania subsidence law; the record was also devoid of evidence that would allow a determination of how substantial a part of the support estate were the waivers of liability. “These inquiries,” \textit{Keystone} states, “are both essential to determine the severity of the impairment,” which in turn affects “the level of scrutiny to which the legislation will be subjected.” Id. at 504 n.31 (quoting Energy Reserves Group, Inc. v. Kan. Power & Light Co., 459 U.S. 400, 411 (1983)). Nonetheless, the Court indicated that “[w]hile these dearths in the record might be critical in some cases, they are not essential to our discussion here because the Subsidence Act withstands scrutiny even if it is assumed that it constitutes a total impairment.” Id.

\textsuperscript{135}Id. at 506. The Court further explained its holding:

The Commonwealth has determined that in order to deter mining practices that could have severe effects on the surface, it is not enough to set out guidelines and impose restrictions, but that imposition of liability is necessary. By requiring the
This brief background on the coal company’s Contract Clause argument and the Court’s decision rejecting it is only tangentially relevant to analyzing severed mineral interest takings claims in light of *Lucas*. What I find significant about the Court’s treatment of the Contract Clause in *Keystone* is what it says about the nature of the investment-backed expectations of owners of severed mineral interests as compared to the expectations of owners of land in fee. I submit that the coal interest claimed to have been taken in *Keystone* was quite unlike the interest of David Lucas or, indeed, most owners of a fee simple estate in land, and is not deserving of protection afforded the latter by *Lucas*’s per se rule. An analysis of the history of severed coal interests confirms the significant distinction between the economic expectations of owners of land in fee simple and owners of severed coal interests.

**B. The Evolution of Property Law in the Coalfields**

Until the rise of the Industrial Age in the mid-nineteenth century, land was owned in fee simple and was widely recognized by courts and the public as extending from the center of the earth to the heavens. The coal companies either to repair the damage or to give the surface owner funds to repair the damage, the Commonwealth accomplishes both deterrence and restoration of the environment to its previous condition. We refuse to second-guess the Commonwealth’s determinations that these are the most appropriate ways of dealing with the problem. We conclude, therefore, that the impairment of petitioners’ right to enforce the damages waivers is amply justified by the public purposes served by the Subsidence Act.

Id.

136. See id. at 493–97 (distinguishing *Keystone* from *Mahon*).

There are two maxims of property law that prevented horizontal severance from being recognized as a legal doctrine at early common law. The first maxim is *cujus est solum, ejus est usque ad coelum et ad inferos* “to whomsoever the soil belongs, he owns also to the sky and to the depths.” Following this maxim, the rights to all subterranean minerals should belong solely to the owner of surface. The landowner could draw a vertical line around his property and control the property rights within from the heavens above to the depths below. The second maxim is that land transfers could only occur through the ritual of “livery of seisin,” or delivery of possession. Following this maxim, land only changed hands after the parties traveled to the land being conveyed, walked the metes and bounds, and the transferor symbolically handed the transferee a clump of soil or a tree branch taken from the land. Requiring the parties to grasp some physical manifestation of the land being transferred theoretically precluded the horizontal severance of undiscovered subsurface mineral lands from the surface estate. To
history of those regions reveals that, before the value of fossil fuels was recognized more than a century ago, individual tracts of private land were owned exclusively in fee simple absolute.\textsuperscript{138} This perspective on the scope of real property ownership changed dramatically as the demand for fossil fuels grew exponentially at the beginning of the nation’s industrialization in the latter part of the nineteenth century.\textsuperscript{139} The enormous potential economic value of coal reserves was recognized by powerful, well-financed interests who sought to acquire and exploit them.\textsuperscript{140}

At least in Appalachia and in the Midwest, coal and the right of extraction was not acquired by purchase of a fee simple interest in land and underlying minerals.\textsuperscript{141} To the contrary, it was the usual and standard procedure for those seeking to purchase coal and other mineral reserves to transfer subsurface mineral rights, the parties would have had to meet the elements of seisin. The minerals would first have to be discovered by opening a mine. Then, the mine could be transferred through seisin.

\textit{Id.} (citations omitted).

\textsuperscript{138.} See Ronald W. Polston, \textit{Mineral Ownership Theory: Doctrine in Disarray}, 70 N.D. L. REV. 541 (1994) (explaining that the long established concept of fee simple ownership of land was altered to accommodate the development of coal, oil, and gas).

The theory upon which mineral ownership is based was created to serve the coal industry as it developed early last century and was subsequently modified to serve the oil industry. Its purpose was to give the coal industry, and later the oil industry, a more substantial ownership interest in the land, with respect to developmental rights, than the industries would have received under the existing and developing legal institutions at the time the first coal cases were decided. The legal system, at the time the theory was developed, characterized the fee simple interest in land as corporeal, and the servitudes as incorporeal. It seemed fairly clear that the interest in the coal, whether acquired by a deed of the coal itself, or by the exclusive right to mine it, would have been classified as incorporeal under that system. The courts rejected that approach, however, and labeled the interest in the coal as corporeal. Furthermore, the courts conceived of that corporeal interest as a tract of land which lay beneath the surface and included everything except a thin layer of soil, which was of sufficient depth to permit the residual owner, who they labeled the “surface owner,” to cultivate or build upon.

\textit{Id.} at 541 (citing Caldwell v. Fulton, 31 Pa. 475, 481 (1858)).


\textsuperscript{140.} Banks, \textit{supra} note 137, at 132–33. Professor Banks explains:

As the Civil War ended and America’s Industrial Revolution began, the natural resources abundant throughout Appalachia became increasingly important and irresistible. “In financial and industrial circles occasional talk was heard that railroads should be built into the region and its great wealth of raw materials made available to the nation’s rapidly swelling industrial complex.”

\textit{Id.} (quoting HARRY M. CAUDILL, \textit{NIGHT COMES TO THE CUMBERLANDS: A BIOGRAPHY OF A DEPRESSED AREA} 61 (1963)).

\textsuperscript{141.} Banks, \textit{supra} note 137, at 133.
limit their acquisition to only the underlying coal (and/or oil and natural gas). To accomplish this, purchasers of mineral interests prepared contracts of conveyance—deeds or leases—that carved a property interest in the mineral from a fee simple interest in the land. Typically, the owner of the surface retained (or reserved) the land along with all other minerals not described in the granting clause of the contract of conveyance.

In 1898, the Supreme Court of the United States weighed in on the issue of severed mineral rights in Del Monte Mining & Milling Co. v. Last Chance Mining & Milling Co., a decision enabling the segmentation of mineral interests from fee interests in land. Del Monte Mining & Milling Co. held that horizontal severance of minerals could be accomplished under a theory of contract law and that surface owners had an unquestioned right to convey interests in minerals beneath the surface while keeping title to the surface.

C. The Broad Form Deed

The process of obtaining coal ownership and mining rights from rural, largely unschooled Appalachian landowners was problematic:

Northern industrialists sent a wave of land agents into Kentucky with instructions to obtain the mineral rights from the unsophisticated and illiterate mountaineers. The parties to these agreements were hardly equal. The mountaineers thought they received the better deal. After all, they had traded a meaningless right to unattainable, potentially non-existent minerals, to an outsider for an

142. See generally Wendy B. Davis, Out of the Black Hole: Reclaiming the Crown of King Coal, 51 AM. U. L. REV. 905, 908–16 (2002) (describing an example of the pervasive use of mineral severance deeds to acquire ownership of coal and the right to mine as it was experienced in Southeastern Kentucky where, by 1910, nearly eight-five percent of the mineral rights in the area had been acquired by out-of-state entities).

143. See Keystone Bituminous Coal Ass’n v. DeBenedictis, 480 U.S. 470, 478 (“Beginning well over 100 years ago, landowners began severing title to underground coal and the right of surface support while retaining or conveying away ownership of the surface estate.”); see also Banks, supra note 137, at 132–33 (describing northern industrialists’ purchase of mineral rights from mountaineers, leaving landowners with normal rights to “the surfaces and total responsibility for property taxes”).

144. See e.g., 4 PATRICK C. McGINLEY & DONALD H. VISH, COAL LAW & REGULATION, Chapter 81, § 81.01 [1] (1987) (noting that a “granting clause” transfers an estate in land and describes the nature of the estate and the geographical area included in the conveyance).

145. Del Monte Mining & Milling Co. v. Last Chance Mining & Milling Co., 171 U.S. 55, 60 (1898) (“[T]he possible fact of a separation between the ownership of the surface and the ownership of mines beneath that surface, growing out of contract, in no manner abridged the general proposition that the owner of the surface owned all beneath.”).
outrageous sum of money. In reality, the agents had taken advantage of a superior bargaining position to swindle the residents out of their property rights. Many agents escaped with a stack of broad form deeds. Those deeds left only a nominal title to the surface and total responsibility for property taxes with the landowner. To add insult to injury, the court held those deeds conveyed the rights to excavate and remove all subsurface minerals and permitted the subsurface owner to use the surface as necessary for either removal or storage of those minerals.146

The coal at issue in *Keystone* was acquired through this process.147 The facts recited in the Court’s opinion provide a snapshot of the enormous, long-lasting impact of the use of broad form deeds and leases to sever mineral interests from a fee simple estate in land:

It is stipulated that approximately 90% of the coal that is or will be mined by petitioners in western Pennsylvania was

146. Banks, *supra* note 137, at 132–33 (citations omitted); see RONALD D ELLER, MINERS, MILLHANDS, AND MOUNTAINEERS: INDUSTRIALIZATION OF THE APPALACHIAN SOUTH, 1880-1930, at 44–45 (1982) (describing the exploitation of mountains for their minerals); HARRY M. CAUDILL, THEIRS BE THE POWER: THE MOGULS OF EASTERN KENTUCKY (1983); BARBARA RASMUSSEN, ABSENTEE LANDOWNING AND EXPLOITATION IN WEST VIRGINIA, 1760-1920, at 2 (discussing the exploitation of coal and timber resources in nineteenth century West Virginia); DAVIS, *supra* note 142, at 908–16 (describing the history of life in the Appalachian coal fields). One of the most egregious judicial interpretations of the broad form coal deed was that of the Kentucky courts. In Kentucky, the broad form deed was interpreted for many decades as allowing the destruction of the surface of land by strip mining although strip mining was clearly not contemplated by the parties to turn-of-the-twentieth-century coal severance deeds. See Martin v. Ky. Oak Mining Co., 429 S.W.2d 395, 397 (Ky. 1968), overruled by Akers v. Baldwin, 736 S.W.2d 294 (Ky. 1987) (describing that “whether or not the parties actually contemplated or envisioned strip or auger mining is not important”). Every other Appalachian coal-producing state supreme court reached a contrary conclusion. It was not until 1988 that the Kentucky legislature enacted what became known in that state as the “Broad Form Deed Amendment” that altered Kentucky’s Constitution to prevent the exploitation of surface owners and the despoliation of surface lands and waters occasioned by coal strip mining. 1988 Ky. Acts page no. 300, 301. The amendment required:

In any instrument . . . purporting to sever the surface and mineral estates . . . which fails to state or describe in express or specific the method of extraction to be employed . . . in the absence of clear and convincing evidence to the contrary . . . the intention of the parties . . . was that the coal be extracted only by the method . . . commonly in use in Kentucky in the area affected at the time the instrument was executed . . .

Id. at 301; Banks, *supra* note 137, at 158 n.205 (describing the constitutional amendment as protecting landowners “by a reversion to the general assumption held by the early mountaineers”). Specifically, “if the method of coal extraction was not explicitly stated in the language of the deed, then the only extraction methods permitted are those that were known at the time and were in the specific area covered by the deed.” *Id.* at 158.

severed from the surface in the period between 1890 and 1920. When acquiring or retaining the mineral estate, petitioners or their predecessors typically acquired or retained certain additional rights that would enable them to extract and remove the coal. Thus, they acquired the right to deposit wastes, to provide for drainage and ventilation, and to erect facilities such as tipples, roads, or railroads, on the surface. Additionally, they typically acquired a waiver of any claims for damages that might result from the removal of the coal.\textsuperscript{148}

Importantly for this discussion of takings principles, coal severance deeds almost universally contained such broad waivers of liability and exculpatory clauses in favor of the person or entity purchasing the mineral.\textsuperscript{149} The breadth of these waivers could be and generally was

\textsuperscript{148} Id.  
\textsuperscript{149} Id. One of the most egregious judicial interpretations of the broad form coal deed was that of the Kentucky courts. In Kentucky, the broad form deed was interpreted for many decades as allowing the destruction of the surface of land by strip mining although strip mining was clearly not contemplated by the parties to turn-of-the-twentieth-century coal severance deeds. See Martin, 429 S.W.2d at 397 (overruled by Akers, 736 S.W.2d at 294 (overruling “any cases which hold that the mineral owner can use and damage the surface without the payment of damages”). Every other Appalachian coal-producing state supreme court reached a contrary conclusion. See Franklin v. Callicoat, 119 N.E.2d 688, 693 (Ohio 1954) (summarizing authority that the rule in Ohio is “that the owner of the surface has a right to subjacent support of the surface unless the reservation of the minerals contained in the deed expressly provided to the contrary.”); E. Ohio Gas Co. v. James Bros. Coal Co., 85 N.E.2d 816, 817 (Ohio C.P Tuscawas County 1948); Williams v. Hay, 14 A. 379, 382 (Pa. 1888); Livingston v. Moingona Coal Company, 49 Iowa 369 (1878); Catron v. S. Butte Mining Co., 181 F. 941, 943 (9th Cir. 1910) (describing that the grant of the surface “does not permit the destruction of the surface”); Oresta v. Romano Bros., 73 S.E.2d 622, 627 (W. Va. 1952) (stating that the intent of the deed was to allow coal mining and removal in the usual method and that strip mining was not included among such usual methods); W. Va-Pittsburgh Coal Co. v. Strong, 42 S.E.2d 46, 47 (W. Va. Cir. Ct. 1947) (discussing the owner’s assertion of the right to strip mine); Rochez Bros., Inc. v. Duricka, 97 A.2d 825, 825 (Pa. 1953) (holding that the right to remove coal could not be effectuated using strip mining methods); Chesapeake & Ohio R.R. Co. v. Bailey Prod. Corp., 163 F. Supp. 666, 671 (S.D. W. Va. 1958); Campbell v. Campbell, 199 S.W.2d 931, 933 (Tenn. Ct. App. 1946) (describing that “a reasonable support must be left for the surface” where there is a general grant or reservation of minerals); United States v. Polino, 131 F. Supp. 772, 777 (N.D. W. Va. 1955) (“This Court must conclude that both parties to the deed which contained the mineral reservation knew that the United States was acquiring these lands for forestry purposes and that such lands would be of little or no use for such purposes if the surface, the timber and other growth could be totally removed and destroyed.”); Wilkes-Barre Twp. Sch. Dist. v. Corgan, 170 A.2d 97, 98 (Pa. 1961) (holding defendant liable for 150 foot hole resulting in deep excavation); Rocky Mountain Fuel Co. v. Heflin, 366 P.2d 577, 580 (Colo. 1961) (discussing mineral owners’ rights pursuant to surface rights); Benton v. United States Manganese Corp., 313 S.W.2d 839, 843 (1958) (holding that the owner of surface rights is entitled to damages when the owner of a mineral estate performs excavation resulting in complete destruction of surface). It was not until 1988 that the Kentucky Legislature enacted what became known in that state as the “Broad Form Deed Amendment.”
Bundled Rights and Reasonable Expectations

D. Investment-Backed Expectations and the Broad Form Deed

The seemingly perpetual life of these liability waivers, coupled with judicial enforceability against those not party to the original contract, has had a continuing effect that has reverberated for more than a century. A majority of coal reserves in Appalachia and the Midwest are now owned as interests in land long ago severed from fee simple estates.

The Court in *Keystone* was confronted with the issue of the “value” of these broad form deed waivers of liability as it analyzed the coal company’s Contract Clause claim. As indicated above, the company’s argument was that the 1966 subsidence law violated the Contract Clause by abrogating the liability waivers in deeds conveying various tracts of coal to the company’s predecessors in interest:

Most of these waivers were obtained over 70 years ago as part of the support estate which was itself obtained or retained as an incident to the acquisition or retention of the right to mine large quantities of underground coal. No question of enforcement of such a waiver against the original covenantor is presented; rather, petitioners claim a

---

150. *See*, e.g., *Johnson v. Junior Pocahontas Coal Co.*, 234 S.E.2d 309, 313 (W. Va. 1977). The waiver or exculpatory clauses in *Johnson* are typical of the over-reaching by coal company drafters of severance deeds. See *infra* at notes 38–39, for the language of the exculpatory clause in *Johnson*. Such waivers continue today to be inserted into coal severance deeds.

151. *See*, e.g., *Kormuth v. U.S. Steel Co.*, 108 A.2d 907, 909 (Sup. Ct. Pa. 1954) (announcing that the deed granted a right of way to remove coal belonging to the grantee, “its successors and assigns, or which may hereafter be acquired”); *Scranton v. Phillips*, 94 Pa. 15, 22 (1880) (recognizing the retention of a full property interest, the dominion over all the coal, and the ability to transfer such interest to heirs and assigns). For an extensive discussion of the history and impact of these broad form deeds and related issues, see generally, Banks, *supra* note 137, at 133–49, discussing the history and impacts of broad form deeds and related issues. *Keystone* suggested that these waivers of liability might be subject in the future to annulment by state courts. *Keystone*, 480 U.S. at 505 n.32 (“That the Pennsylvania courts might have had, or may in the future have, a valid basis for refusing to enforce these perpetual covenants against subsequent owners of the surface rights is not necessarily a sufficient reason for concluding that the legislative impairment of the contracts is permissible.”).


153. *Id.* at 133; *see* *Watson v. Kenlick Coal Co.*, 422 U.S. 1012 (1975) (Douglas, J., dissenting from denial of certiorari) (proclaiming “rape of Appalachia for its precious coal has been a dark and dismal chapter in our Nation’s history”).
right to enforce the waivers against subsequent owners of the surface. This claim is apparently supported by Pennsylvania precedent holding that these waivers run with the land.\(^{154}\)

Justice Stevens, writing for the *Keystone* majority, identified the heart of the coal company’s Contract Clause claim: “[I]t is the petitioners’ position that, because they contracted with some previous owners of property generations ago, they have a constitutionally protected legal right to conduct their mining operations in a way that would make a shambles of all those buildings and cemeteries.”\(^{155}\) That said, the Court then observed that “the Commonwealth has a strong public interest in preventing this type of harm, the environmental effect of which transcends any private agreement between contracting parties.”\(^{156}\)

Clearly, when interests in coal were severed from fee simple estates in land a century or more ago, the expectations of those investing in such property were not at all comparable to the expectations of those purchasing the land in fee simple. Even in those early years when coal mining methodologies were just beginning to be developed, the coal buyers surely knew of the significant adverse externalities accompanying the mining of coal—including externalities that significantly affected the rights of the coal grantor, her neighbors, and the public.\(^{157}\) Were it otherwise, there would have been no need to incorporate such extensive exculpatory clauses (waivers of liability) in coal deeds and leases. Consider, for example, the language of the exculpatory clause examined by the West Virginia Court in *Johnson v. Junior Pocahontas Coal Co.*\(^{158}\) The clause included, *inter alia:*

> [T]he right to mine, produce, remove and carry away all and the entire amount and body of the coal, in and from and adjacent to the described real estate, without liability for damage and injury to and destruction of the surface or to anything now or hereafter therein and thereon, including but not limited to buildings, structures and improvements, growing things, pipes, lines and ways, wells, springs and water courses.

\(^{154}\) *Keystone*, 480 U.S. at 505 n.32 (citations omitted).

\(^{155}\) Id. at 504–05.

\(^{156}\) Id. at 505.

\(^{157}\) See generally *Banks*, supra note 137, at 132–48 (describing the uneven bargaining power northern industrialists used to obtain mineral rights and the damage that coal has caused in Kentucky).

The right to construct, maintain, use and operate, adjacent to and within the vicinity of the described and conveyed real estate, coal tipple, loading facilities, preparation and cleaning plants and facilities, coke and by-product structures and facilities, gob and refuse dumps and piles, whether burning or not, pumps and drains and all other mining plant, appurtenances and operations, without liability for damage or injury to and destruction of said real estate and anything now or hereafter therein and thereon, including but not limited to buildings, structures and improvements, trees and other growing things and property, arising out of or resulting from, including without limitation, noise, vibration, smoke, dust, fumes, noxious gases, air pollution, stream pollution, water stagnation, erosion, deposits of waste, silt, coal dust and other substances, discharge of mine waters through natural or artificial courses and channels, and diversion of waters and streams.\textsuperscript{159}

Obviously, the expectation of the coal buyer who drafted this language of conveyance envisioned multiple harmful externalities that, absent the waiver, would create legal liability under the common law of property, contract, and tort. But for the exculpatory clause, liability for damages caused by such externalities could have made it uneconomical to mine the purchased coal or have triggered injunctive relief that would substantially curtail the ability to mine the coal economically.

\textbf{E. Additional Judicial Rationale for Enhancing Property Rights of Severed Coal Interest Ownership}

The overt embrace of the economic interests of mineral extractive industries over the interests of land owners and the public by nineteenth century state courts is remarkable. Recognition of the viability and enforceability of liability waivers of broad form coal conveyances was accompanied by judicial re-working of long-established tenets of tort law. Disregarding settled investment-backed expectations of fee land owners and the public, courts modified existing law in order to accommodate the vast expansion of mineral extraction activities fueling the Industrial Revolution.\textsuperscript{160} Indeed, the state courts of the time, in their rush to

\textsuperscript{159} \textit{Id.}

\textsuperscript{160} See, e.g., Pa. Coal Co. v. Sanderson, 6 A. 453, 464–65 (Pa. 1886) (subordinating domestic plaintiff’s tort claims to business defendant’s mining interests using cost benefit analysis).
accommodate and promote the new fossil fuel industries, could be viewed as often ignoring what Lucas referred to as “the historical compact recorded in the Takings Clause that has become part of our constitutional culture.”¹⁶¹

Not only did those state courts place their imprimatur on broad form deed/lease waivers of liability, but they also held that such contractual provisions run with the land and are to be enforceable against subsequent successors in interest—although contractual exculpatory clauses in most circumstances are generally viewed with disfavor.¹⁶² The concept of contractual waivers of liability being held enforceable against those not party to the original contract is exceptional—so much so that Keystone remarked on the possibility that such provisions in coal severance deeds might be invalidated in the future by state courts.¹⁶³ Moreover, notwithstanding coal severance deed or lease language, state courts further modified existing property, contract, and tort law to allow coal miners to escape liability for serious mining-related damages impacting neighboring property owners and the public at large. Justice William O. Douglas, in the twilight of his long tenure on the Court, had occasion to recognize the role state courts played in limiting the investment-backed expectations of Appalachian land owners vis-à-vis coal companies:

With the advance of [coal mining] technology . . . the stakes increased; each successive innovation was visited upon the mountaineers with the approval of the courts, which found . . . new and unforeseen [mining] techniques to fall within the scope of the aged and yellowing deeds. Judicial decisions gave virtually untrammeled powers to the coal companies, so long as they acted without malice. . . .¹⁶⁴

¹⁶². Keystone Bituminous Coal Ass’n v. DeBenedictis, 480 U.S. 470, 505 n.32 (1987); see, e.g., RESTATEMENT (SECOND) OF CONTRACTS § 195 (1) (1981) (“A term exempting a party from tort liability for harm caused intentionally or recklessly is unenforceable on grounds of public policy.”); K. A. Drechsler, Annotation, Validity of Contractual Provision by One Other than Carrier or Employer for Exemption from Liability, or Indemnification, for Consequences of Own Negligence, 175 A.L.R. 8, 16 (1948) (“The first leading principle is that contractual exemption from liability for negligence is rarely allowed to stand where the contracting parties are not on roughly equal bargaining terms.”).
¹⁶³. Keystone, 480 U.S. at 505 n.32. (“That the Pennsylvania courts . . . may in the future have . . . a valid basis for refusing to enforce these perpetual covenants against subsequent owners of the surface rights is not necessarily a sufficient reason for concluding that the legislative impairment of the contracts is permissible.”).
An excellent example of the judicial decisions referenced by Justice Douglas is a late nineteenth-century case, *Pennsylvania Coal Co. v. Sanderson*. In that case, the state court rejected claims of damages to the riparian rights of land owners through whose property ran a stream heavily polluted by a company’s coal mining operations. The water pollution and many other adverse impacts of coal mining were and are fully predictable, but fact-based predictability was of no consequence to the *Sanderson* court. The court consciously chose to favor coal property owners’ interests over those of a family who lived near a coal mine:

The plaintiff’s grievance is for a mere personal inconvenience; and we are of opinion that mere private personal inconveniences, arising in this way and under such circumstances, must yield to the necessities of a great public industry, which, although in the hands of a private corporation, subserves a great public interest. To encourage the development of the great natural resources of a country trifling inconveniences to particular persons must sometimes give way to the necessities of a great community . . . in the operation of mining in the ordinary

With impunity [the companies] could kill the fish in the streams, render the water in the farmer’s well unpotable and, by corrupting the stream from which his livestock drank, compel him to get rid of his milk cows and other beasts. They were authorized to pile mining refuse wherever they desired, even if the chosen sites destroyed the homes of farmers and bestowed no substantial advantage on the corporations. The companies which held “longform” mineral deeds were empowered to withdraw subjacent supports, thereby causing the surface to subside and fracture. They could build roads wherever they desired, even through lawns and fertile vegetable gardens. They could sluice poisonous water from the pits onto crop lands. With impunity they could hurl out from their washeries clouds of coal grit which settled on fields of corn, alfalfa and clover and rendered them worthless as fodder. Fumes from burning slate dumps peeled paint from houses, but the companies were absolved from damages . . . . The companies, which had bought their coal rights at prices ranging from fifty cents to a few dollars per acre, were, in effect, left free to do as they saw fit, restrained only by the shallow consciences of their officials.

*Id.* at 1015–16 (quoting HARRY M. CAUDILL, NIGHT COMES TO THE CUMBERLANDS 306–07 (1963)).


166. *Id.*

167. In fact, absent broad form deed/lease liability waivers and judicial sanctioning of the externalization of harms attendant coal mining, such conduct would surely meet the general definition of civil intent. See *Restatement (Second) of Torts* § 8A Intentional Harms to Persons, Land, and Chattels (2009) (“The word ‘intent’ is used throughout the Restatement of this Subject to denote that the actor desires to cause consequences of his act, or that he believes that the consequences are substantially certain to result from it.”).
and usual manner, [a coal company] may, upon [its] own lands, lead the water which percolates into [its] mine into the streams which form the natural drainage of the basin in which the coal is situate, although the quantity as well as the quality of the water in the stream may thereby be affected. 168

The court recognized the consequences of limiting the liability of the coal company for such an adverse externality: “if the responsibility of the operator of a mine is extended to injuries of the character complained of, the consequences must be that mining cannot be conducted except by the general consent of all parties affected.” 169 Avoiding this result, the court held that no liability for such damages as water pollution resulting from coal mining could attach because:

The defendants, being the owners of the land, had a right to mine the coal. It may be stated, as a general proposition, that every man has the right to the natural use and enjoyment of his own property; and if, while lawfully in such use and enjoyment, without negligence or malice on his part, an unavoidable loss occurs to his neighbor, it is *damnnum absque injuria*; for the rightful use of one’s own land may cause damage to another, without any legal wrong. Mining in the ordinary and usual form is the natural user of coal lands. They are, for the most part, unfit for any other use. 170

Other coalfield court decisions like *Sanderson* allowed the broad externalization of the costs of pollution and other negative coal mining externalities onto landowners, communities, and the public as a whole. 171

It is important, then, to understand that the investment-backed interests of severed coal property owners were enhanced enormously by early state court decisions that modified then-existing property law. Without such judicial decisions, the reasonable investment-backed interests of the Sandersons and others like them who lived near and above coal mines would have been protected. In this day and age, to deem coal mining “the

169. *Id.* at 456.
170. *Id.* at 457.
natural use” of “coal lands” seems bizarre. Sanderson’s observation that coal lands are otherwise “unfit for any other use” is certainly at odds with reality and modern science. It is understandable only by reference to a judicial policy decision to favor the interests of one type of property over another.\textsuperscript{172}

V. PUTTING THE INVESTMENT-BACKED EXPECTATIONS OF FEE LAND AND SEVERED COAL PROPERTY OWNERS IN PERSPECTIVE

A. Application of Lucas’s Categorical Rule to Claims of Takings of Severed Coal Property Interests

At the beginning of this essay I identified its focus as the extent to which the \textit{Lucas} per se rule may impact the rights of owners of severed/segmented mineral interests. Some commentators have accurately observed that because “[f]ew if any regulations have such a drastic effect” on property value that they destroy all economic value of real property “\textit{Lucas} has been converted to a precedent of largely symbolic significance.”\textsuperscript{173} Notwithstanding the general accuracy of this observation, \textit{Lucas}’s categorical rule still has vitality with regard to claims of takings of severed mineral interests.

For example, the significance of the \textit{Lucas} per se rule in \textit{Cane Tennessee, Inc. v. United States} and \textit{Wyatt v. United States} was far from “symbolic.”\textsuperscript{174} In fact, the rule was outcome determinative of a claim of taking of less than a fee simple interest in coal. The regulatory action triggering the takings claims that was asserted in the case arose as a result of regulatory action taken by a federal agency pursuant to the Federal

\textsuperscript{172} See Heather Fisher Lindsay, 10 J. LAND USE & ENVTL. L. 371, 396 (1995) (“This factual judgment could not have been correct. Perhaps the underlying statement was that the land could not have been used profitably by the coal company in any other way.”).

\textsuperscript{173} Echeverria, \textit{supra} note 3.

\textsuperscript{174} Decisions in these consolidated cases \textit{Cane Tenn., Inc. v. United States} (\textit{Cane I}), 44 Fed. Cl. 785 (1999); \textit{Cane Tenn., Inc. v. United States} (\textit{Cane II}), 54 Fed. Cl. 100 (2002); \textit{Cane Tenn., Inc. v. United States} (\textit{Cane III}), 57 Fed. Cl. 115 (2003); \textit{Cane Tenn., Inc. v. United States} (\textit{Cane IV}), 481 (2003); \textit{Cane Tenn., Inc. v. United States} (\textit{Cane V}), 60 Fed. Cl. 694 (2004); \textit{Cane Tenn., Inc. v. United States} (\textit{Cane VI}), 62 Fed. Cl. 703 (2004); \textit{Cane Tenn., Inc. v. United States} (\textit{Cane VII}), 63 Fed. Cl. 715 (2005); \textit{Cane Tenn., Inc. v. United States} (\textit{Cane VIII}), 71 Fed. Cl. 432 (2005), \textit{aff’d per curiam}, 214 Fed. Appx. 978, (Fed. Cir. 2001) and further background facts may be found in decisions involving earlier takings claims involving the same property. \textit{See Wyatt v. United States}, 271 F.3d 1090 (Fed. Cir. 2001), \textit{rev’d} E. Minerals Int’l Inc. v. United States, 36 Fed. Cl. 541 (1996). See also Tardiff, \textit{supra} note 66, at 12–17, for a detailed description of this complex litigation and an explanation of the courts’ decisions.
Surface Mining Control and Reclamation Act of 1977. This complex consolidated case involved takings claims brought by a number of separate owners of fee as well as severed mineral interests (coal, oil, and gas) in thousands of acres of land in eastern Tennessee. The case was litigated and ultimately resolved in a series of decisions of the Court of Claims and the Court of Appeals for the Federal Circuit. The result ultimately reached by these courts is illustrative both of the continued viability of Lucas in cases where a taking of severed mineral interests is involved and of the confusion and complications attendant application of the Lucas per se takings rule to such interests. Curiously, when all was said and done after almost a decade of takings litigation, only one set of claimants was found to be the victims of a regulatory taking of their less-than-fee-simple interest in coal. The takings claims of all but one of the parties to the litigation were

175. 30 U.S.C. § 1201 (1977). The Federal Surface Mining Control and Reclamation Act of 1977 (“SMCRA”) contains provisions allowing OSM, pursuant to citizen petition or on its own motion, to designate lands incapable of reclamation as unsuitable for all or some types of coal mining. 30 U.S.C. §§ 522(a), 1272(a) (1977). In the Cane-Wyatt cases, a taking of the plaintiffs’ real property interests was alleged after OSM designated certain lands as unsuitable for coal mining, those lands including coal, oil and gas owned by the plaintiffs. The specific regulatory takings claims of the various parties were based on allegations that permitting delays, and later, a Department of the Interior Office of Surface Mining (“OSM”) decision designating much of the tract conveyed to Cane as unsuitable for all types of coal mining affected a taking of both Cane’s fee interests in the land and the Wyatt Trust and Wyatt children’s 3.5% non-participating royalty interest. See supra note 174.

176. The essential facts relating to the property interests owned by the taking claimants are thoroughly explained in Tardiff, supra note 66, at 12–17, and can be summarized as follows: the ownership interests in fee simple of the huge 10,000 acre tract were purchased in 1953 by Wilson W. Wyatt, Sr. and his wife. In 1979 Mr. and Mrs. Wyatt sold their fee interest to Cane, reserving a 3.5% non-participating royalty interest in the gross sales price of all coal mined by the grantee and its successors in interest. When the Wyatt’s sold their interests to Cane, they divided their royalty interest in half and conveyed one half to the Wyatt Trust for the benefit of their three children. In 1991, the Wyatt parents conveyed their retained 3.5% coal royalty interest in the subject property directly to their three children in equal, undivided 1/3 shares. The original tracts from which mineral interests were later sold or severed by the Wyatt children’s parents included 9400 acres of surface land and 8400 acres of minerals. Tardiff, supra note 66, at 13 n.9. The total purchase price for all of these lands and mineral rights was $87,000. The takings claimants in the consolidated cases included Cane Company Ltd. (subsequently “Cane Tennessee, Inc.”) that purchased a fee simple interest in the land and minerals; Eastern Minerals International, Inc, Cane’s coal lessee; the Wyatt trust established by their Wyatt parents for their children; and the three Wyatt children to whom their parents conveyed a non-participating royalty interest in the coal underlying a several thousand acre tract. Id. at 13–15.

177. Id. at 12–17.

178. Cane VIII, 71 Fed. Cl. at 464 (quoting Cienega Gardens v. United States, 331 F.3d 1319, 1341 (Fed. Cir. 2003)). The court used a variety of analytical techniques to arrive at the conclusion that the interests of Cane and the Wyatt trust did not suffer a total taking of their interests. Cane did not suffer a total taking because it owned a fee interest and still could exploit its surface development rights; the court then analyzed the Cane taking claim using the Penn Central doctrine and found that when Cane purchased its fee interest in the tract it could have expected the SMCRA might have interfered with coal mining operations—including the designation of lands as unsuitable provision of 30 U.S.C. § 1270(a). Moreover, the court also found that OSM’s designation “did not constitute a sufficiently
rejected as failing to meet the requirements of the Mahon-Penn Central takings analysis.\textsuperscript{179}

Although the nature of the Wyatt children’s interest was far removed from the lots David Lucas owned in fee simple, the court found that the shares of the 3.5% royalty interest in the coal underlying a portion of the huge tracts involved were taken as a result of the Office of Surface Mining’s (OSM) unsuitability designation.\textsuperscript{180} The trial court found the “relevant parcel” or “denominator” to be the coal royalty interest conveyed to the children by their parents in 1991.\textsuperscript{181} Applying the \textit{Lucas} per se rule to the total taking of the royalty interest, the court found the children’s economic loss to be a compensable taking.\textsuperscript{182} The court rejected the government’s argument that \textit{Lucas} does not prevent judicial consideration of a taking claimant’s reasonable investment-backed expectations when less than fee simple is the focus of the claim.\textsuperscript{183} The trial court observed that the Federal Circuit had previously rejected the government’s position that investment-backed expectations may be considered in the assessment of categorical taking claims under \textit{Lucas}.\textsuperscript{184} Thus, the strange result was clearly the product of judicial application of the \textit{Lucas} per se rule to the children’s royalty interest.\textsuperscript{185}

Such an outcome, I submit, has little to do with \textit{Lucas}’s “historical compact” rationale underpinning the per se rule applied to “total taking” of a fee simple interest in land. As explained above, that compact was one that evolved from the bundle of rights attendant fee simple ownership of land. \textit{Keystone} informs our understanding of the true nature of the property interest acquired through the use of broad form deeds and liability waivers

\begin{itemize}
\item ‘serious financial loss’ to constitute a taking[,]” The Wyatt Trusts taking claim fared no better than Cane. The court found “the relevant parcel” (or “denominator”) to be the fee simple interest in approximately more than 2,000 acres of land transferred to the trusts in 1973 and 1974. After SMCRA was enacted the trusts sold their fee simple estates in most of these lands to Cane for a million dollars and retained only the coal royalty interest. Because the court determined the fee simple estate acquired by the trust in 1973 and 1974 was the relevant parcel determination, it found the 1979 million dollar sale to Cane was value derived by the trust from the relevant parcel and therefore the trust had not suffered a total taking triggering the \textit{per se Lucas} analysis or a compensable taking under \textit{Penn Central}.
\item \textsuperscript{179} See \textit{Cane V}, 60 Fed. Cl. at 703–06; \textit{Cane VIII}, 71 Fed. Cl. at 464 (quoting \textit{Cienega Gardens}, 331 F.3d at 1341.
\item \textsuperscript{180} \textit{Cane V}, 60 Fed. Cl. at 705–06.
\item \textsuperscript{181} Id. at 702–03.
\item \textsuperscript{182} Id.
\item \textsuperscript{183} \textit{Cane VI}, 62 Fed. Cl. at 711–16.
\item \textsuperscript{184} See id. at 716 (citing Palm Beach Isles Assocs. v. United States, 208 F.3d 1374 (Fed. Cir., 2000). Moreover, because the court applied the \textit{Lucas per se} rule, it did not consider the character of the government’s action as it would have been required to do under \textit{Penn Central}. Id.
\item \textsuperscript{185} \textit{Cane VIII}, 71 Fed. Cl. 432, 464.
that created the vast majority of severed coal interests. Rather than
eschew consideration of the investment-backed expectations of severed coal
interests, such expectations should lie at the center of the analysis of claims
that regulation of such interests effects a “total taking” mandating payment
of compensation. Were it not for the enforceability of broad form waivers
of liability in old coal severance deeds, coal companies would either have
to buy surface land overlying coal mines or avoid the destructive effects of
mining.

In my view, “the historical compact recorded in the Takings Clause that
has become part of our constitutional culture” should not be viewed as
extending to the reasonable investment-backed expectations of coal
interests severed from a fee estate in land. The application of the Lucas per
se rule to a non-executory royalty interest in coal property in the Cane cases
is revealing. The notion that it is appropriate to extend the rule to property
interests that have been sliced and diced from the pre-severance fee interest
can find little support in logic or in the professed rationale of Lucas,
notwithstanding the dictum of the infamous footnote seven.

The extension of the Lucas categorical rule to a fractional and
speculative interest in royalties due to be paid, if, and only if, severed coal
can be mined at a profit, renders the “bundle of rights” concept of property
virtually unrecognizable. Application of Lucas to the Wyatt children’s
fractional royalty interest illustrates in effect that the interest is the
equivalent of the full bundle of rights of a fee simple owner of land—a
problematic perspective at best.

A close examination of the Court’s opinion in Lucas provides insight
into the rationale for its categorical rule. Lucas explains that the rule
applied to a “total taking” or “wipeout” of fee simple interests in land as
being in accord with its long-established principles of takings jurisprudence.
That jurisprudence, the Court maintained, “has traditionally been guided by the understandings of our citizens regarding the content of, and the State’s power over, the ‘bundle of rights’ that they acquire when they obtain title to property.” This statement is not
unreasonable when referring to fee simple ownership of a parcel of land
that, in most circumstances, can be used for a multitude of purposes. The

188. See Lucas, 505 U.S. at 1027 (explaining that just compensation for a “regulation that
depri ves land of all economically beneficial use” accords with the Court’s takings jurisprudence, which
has “traditionally been guided by the understandings of . . . citizens regarding the content of, and the
States’ power over, the ‘bundle of rights’ that acquire when they obtain title to property”).
189. Id.
190. Id.
human imagination provides the only limit to ways fee simple land may be utilized by its owner—as long as the fee owner complies with the ancient common law maxim *sic utere tuo ut alienum non laedas*, or “so use your own as not to injure another’s property.” 191 Even when Euclidean zoning limits the use of fee simple land to a single “use”—residential, industrial, commercial, or recreational—the “bundle” of fee ownership rights is complete. 192

However, when the property owned is a severed coal interest or a more ephemeral interest such as the fractional royalty interest at issue in *Cane-Wyatt*, the bundle of rights metaphor seems an inappropriate way to describe the owner’s rights. While there are exceptions, as a general rule, one who owns a possessory interest in coal has, at most, the “right” to sell the coal in place if she can find a buyer; to use the surface to access the reserve; to extract the fuel from the land; and to transport it to market for sale. 193

For owners of non-possessory or non-executory interests in minerals such as the property interest “owned” by the Wyatt children, their “bundle of rights” is sparse indeed. Their rights are narrowly limited to entitlement to a small percentage of the sale price of a mineral extracted from the land and carried to market—such owners do not even possess the right to walk freely upon the land from whence the mineral may be mined. 194 Such ownership “right” is illusory unless and until the mineral is actually mined. 195


192. “Euclidean zoning” is the term generally descriptive of zoning by land use districts advanced by the first Model Zoning Enabling Act whose constitutionality was established in *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 379 (1926).

193. Similarly, ownership of a severed interest in oil or gas allows the owner to access the overlying surface to drill for and extract liquid or gaseous fuel. Whether oil or gas will be recovered in marketable quality and quantity is generally a matter of some speculation, conveyances of oil and gas rights usually contain a “dry hole” provision. The oil or gas interest owners’ rights are correlative to the rights of the owner of the surface and to the rights of owners of other minerals, interests and encumbrances of the land. Because many states recognize the “rule of capture,” one acquiring the right to drill and produce oil and natural gas may lose her total investment if prior drilling by the owner of similar rights on adjacent lands drains the reserves under her land first. *Keystone*, 480 U.S. at 478–93; *Superior Oil Co. v. Stanolind Oil & Gas Co.*, 240 S.W.2d 281, 282–83 (1951).

194. Lee Jones, Jr., *Non-Participating Royalty*, 26 TEX. L. REV. 569, 569 (1948) (describing non-participating royalty owners as having “no present or prospective possessory interest in the land”).

195. It is true that such a non-executory interest in minerals such as a royalty interest in coal may have considerable value in place. But that value is often speculative. The myriad practical, economic, geologic, and technical challenges that frequent the “coalfields” are daunting. Indeed, it is fair to say that government regulation may often be the least of the obstacles limiting the expectations of those investing in modern mineral extractive industries. See generally id. (analyzing cases of non-participating royalty interests).
Moreover, the royalty interest derived from the sale of coal much more closely resembles the type of personal property interest that Lucas concedes may be totally taken by legitimate government regulation. Just as the owner of personal property that is the subject of “commercial dealings” is subject to “the State’s traditionally high degree of control” over commercial dealings, the owner of a fractional non-executory coal royalty interest or an interest in coal otherwise severed from land owned in fee “ought to be aware of the possibility that new regulation might even render his property economically worthless at least if the property’s only economically productive use is sale or manufacture for sale.”

**B. Severed Coal Owners’ Shrinking Bundle of Rights and Diminished Expectations**

Most forms of mineral extraction are fraught with possibilities of injury to adjacent land and land owners, as well as interference with rights of the public. Today, investing in coal severed from a fee simple interest in land is problematic. The speculative nature of the investment-backed expectations of a severed coal interest owner differs greatly from the expectations of a fee land owner. The difference lies primarily in the nature of the rights bundled with each form of property. Today, the scope of the rights acquired via old broad form deeds has shrunk dramatically; the deeds no longer limit the liability of coal mining operators as they did a century or even three decades ago. No longer can a coal operator/owner expect to externalize the costs of mining to overlying surface owners, neighbors, and the public.

---

196. Lucas, 505 U.S. at 1027–28; see Eduardo Moisés Peñalver, *Is Land Special? The Unjustified Preference for Landownership in Regulatory Takings Law*, 31 Ecology L.Q. 227, 239 (2004). Throughout his opinion, Justice Scalia studiously avoided generic references to regulation of “property,” and instead repeatedly and narrowly referred to “land-use regulations” that deprive a “land owner” of all economically beneficial uses of “land.” Professor Peñalver questions the distinction drawn in Lucas between real and personal property. I find much of his critique persuasive but the distinction is one a majority of the Court has drawn and thus, I rely on it, notwithstanding Professor Peñalver’s view that “the Court’s favoritism toward land is an unprincipled one” and that the modern Court’s entire regulatory takings project is called into question by the dubious basis of the distinction . . . .” Id. at 233.

in the extraordinary way envisioned by the nineteenth century drafters of such deeds. 198

A fresh examination of Pennsylvania Coal v. Sanderson reveals the extraordinary diminution of the bundle of rights and attendant investment-backed expectations of severed coal interest owners. Sanderson allowed coal operators to ignore the environmental and economic harm they visited on neighboring landowners and the public when they discharged polluted water into streams. 199 Both tort and statutory law reject Sanderson’s conclusion that water pollution is “a mere personal,” “private,” or “trifling inconvenience” that “must yield to the necessities of a great public industry.” 200 The Clean Water Act and the Surface Mining Control Act and Reclamation Act (SMCRA) prohibit such pollution by coal companies. 201

SMCRA requires that coal companies compensate owners of surface land and dwellings if they are damaged by coal-mining-induced subsidence. 202 Airborne dust from coal tipples and coal preparation plants may not contaminate the air above neighboring properties or communities, since both the Clean Air Act and SMCRA proscribe such pollution. 203

198. Those enormous costs were externalized onto citizens and communities throughout the nation’s coalfields in furtherance of the bundle of rights largely acquired through broad form deeds. Professor Mark Squillace has described those costs attributable to unregulated mining under the carte blanche authority that was afforded the “great public industry” for a century:

[Prior to federal regulation imposed by the SMCRA] coal mining has disturbed almost two million acres of land; only half of that has been reclaimed even to minimum standards. More than 264,000 acres of cropland, 35,000 acres of pasture, and 127,000 acres of forest have been lost. In a 1977 report, Congress estimated the cost of rehabilitating these ravaged lands at nearly $10 billion. . . . [M]ore than 11,000 miles of streams have been polluted by sediment or acid from surface and underground mining combined. Some 29,000 acres of reservoirs and impoundments have been seriously damaged by strip mining. Strip mining has created at least 3000 miles of landslides and left some 34,500 miles of highwalls. [By 1977] two-thirds of the land that had been mined for coal had been left unreclaimed.

Professor Squillace lamented: “Grossly underregulated coal mining in the 1960’s and 1970’s spawned one of the greatest abuses of the environment in the history of the United States. The statistics of strip mine abuse numb the mind and overwhelm the spirit.” Squillace, supra note 197, at 10–12; see generally Patrick C. McGinley, From Pick and Shovel to Mountaintop Removal in the Appalachian Coalfields, 34 ENVTL. L. 21, 24 (2004) (concluding that “regulatory failures and corporate plans to maximize profits by eliminating coalfield communities have combined to continue the historic deprivation of environmental, economic, and social justice long experienced by coalfield citizens”).


200. Id. at 459.


203. Id. § 1271(a)(2).
strip mines can no longer leave land un-reclaimed nor cause soil erosion and stream sedimentation that results in downstream flooding and destroys stream ecology. Externalizing such costs of coal mining is prohibited by SMCRA; common law tort actions and statutory citizen suits may also be brought to bear to force abatement of such activities.

Clearly, coal mining operations no longer enjoy the broad immunities from liability for externalized damages that were afforded by broad form deeds and by courts that exalted the “necessities of a great public industry” over the investment-backed expectations of citizens harmed by mining activities. The exercise of the bundle of rights possessed by severed coal interest owners today is significantly inhibited by statutory and common law so as to greatly reduce investment-backed expectations of coal ownership.

The future value of coal reserves, and thus the expectation of severed coal ownership, is growing more speculative by the day. As global concerns about climate change grow, public and private initiatives to reduce greenhouse gases increasingly include proposals for reducing reliance on coal-fired electric power generation. Coal now profitably mined by the controversial “mountaintop removal” strip mining (MTR) method may be rendered un-mineable if government agencies respond to growing national criticism of the externalities created by MTR. Moreover, additional magnified problems and concomitant lowered investment expectations accompany modern American coal mining methodologies. The excesses of these mining methods were at first tolerated by the public and government regulators. Today, coal operators are pressured more and more to internalize the costs of environmental and other harms that their activities create.

204. Id. § 1202.
205. McGinley, supra note 198, at 103 n.462.
206. See, e.g., Mikael Höök & Kjell Aleklett, Historical Trends in American Coal Production and a Possible Future Outlook, 78 INT’L J. COAL GEOLOGY 201 (2009) (discussing the many variables complicating the prediction of future coal production).
208. Large-scale “mountaintop removal” mining methods involve blasting apart thousands of acres Appalachian mountain ridges with explosives; coal then is scooped up by twenty-story tall “draglines.” The dragline booms may extend 300 feet or more and their buckets are big enough to hold five Jeep Cherokees or more at a time. An enormous amount of rock and debris—the remains of what were high mountain ridges—are shoveled into valleys burying headwater streams creating “valley fills.” See McGinley, supra note 198, at 57, 62, 62 n.208.
210. Today, coal is extracted using advanced technology, unthinkable when coal and the right to mine it were severed from fee simple ownership, often a century ago. New technologies used in
All of these factors must be seen as lowering the expectations of the return on investment that will accrue from ownership of severed interests in coal.\textsuperscript{211}

CONCLUSION

It is obvious that there are dramatic differences between the expectations of owners of a fee simple interest in land and the expectations of owners of severed and often fragmented mineral interests. The question that has not been resolved two decades after \textit{Lucas} was the one the infamous footnote seven left unanswered: “the rule does not make clear the ‘property interest’ against which the loss of value is to be measured.”\textsuperscript{212} It is submitted that \textit{Lucas} itself points the way:

The answer to this difficult question may lie in how the owner’s reasonable expectations have been shaped by the State’s law of property—\textit{i.e.}, whether and to what degree the State’s law has accorded legal recognition and protection to the particular interest in land with respect to which the takings claimant alleges a diminution in (or elimination of) value.\textsuperscript{213}

This statement, however, begs the question. State property law, like the Fifth Amendment’s Takings Clause, applies to all forms of property. The question then is not whether state law has accorded legal recognition to property interests severed from fee simple ownership, for “property” is \textit{a fortiori} that which property law governs. The question, as \textit{Lucas} frames it, is whether the expectations of owners of property that contain meager indicia of the rights bundled in fee simple land ownership should be afforded the heightened protection of the \textit{Lucas} categorical takings rule.

As explained and emphasized above, \textit{Lucas} makes clear that with regard to some property—personal property—the owners’ expectations are

\textsuperscript{211} See generally McGinley, \textit{supra} note 139, at 434–38.
\textsuperscript{212} \textit{Lucas}, 505 U.S. at 1016 n.7.
\textsuperscript{213} \textit{Id.}
so low that they reasonably may expect an exercise of the police power to render their property economically worthless:

    And in the case of personal property, by reason of the State’s traditionally high degree of control over commercial dealings, [the owner] ought to be aware of the possibility that new regulation might even render his property economically worthless (at least if the property’s only economically productive use is sale or manufacture for sale).214

I submit that severed and fragmented mineral property interests are much more like private property interests that are not entitled to the same level of protection that Lucas affords fee simple ownership of land. According to the Lucas Court, the “historic compact” that fee simple land owners have relied on to protect their interests from government confiscation is not one that gives rise to the same expectations in owners of personal property where “the property’s only economically productive use is sale or manufacture for sale.”215 Consider then, the striking similarity between severed mineral owners’ property expectations and those of personal property owners who are on notice that they may lose all economic value as a result of government regulation. Is not the essence of mineral property transactions commercial dealings? Are not coal, oil, gas, and other minerals comparable to personal property in so far as their only economically productive use is sale or manufacture for sale?

In his concurring opinion in Lucas, Justice Kennedy observed that “[p]roperty is bought and sold, investments are made, subject to the State’s power to regulate.”216 “Where a taking is alleged from regulations which deprive the property of all value” he emphasized, “the test must be whether the deprivation is contrary to reasonable, investment-backed expectations.”217 Emphasizing this point and connecting it to Penn Central’s analysis, Justice Kennedy remarked that “the finding of no value must be considered under the Takings Clause by reference to the owner’s reasonable, investment-backed expectations.”218

214. Id. at 1027–28 (citing Andrus v. Allard, 444 U.S. 51, 66–67 (1979)).
215. Id. (emphasis added).
216. Id. at 1034 (Kennedy, J., concurring).
217. Id.
Justice Kennedy’s observation has considerable merit given the rising cost of pervasive safety and environmental regulation, climate change concerns, and the fluctuating and speculative value of severed coal interests.219 Moreover, the ability to sever coal interests by slicing them, into smaller and smaller segments, provides the opportunity to “game” the system and allows manipulation of less than fee simple estates in land to facilitate takings claims. As Justice Stevens’s dissent in Lucas predicted, “developers and investors may market specialized estates to take advantage of the Court’s new rule.”220 “The smaller the estate,” Justice Stevens emphasized, “the more likely that a regulatory change will effect a total taking.”221 Such an approach has no connection whatsoever to the “historical compact” linked to fee simple ownership in land.

The explicit distinction made between ownership of fee land and ownership of personal property identified in Lucas is important in determining how claims of takings of severed coal property interests should be analyzed. Because severed mineral interests have all the characteristics of personal property to which the Lucas categorical taking rule does not apply, the shrunken bundle of property rights inherent in severed coal property interests similarly should disqualify such interests from the per se protection offered by the Lucas categorical rule.

The Lucas “total takings” rule applied to fee simple interests in land should not bar consideration of the investment-backed expectations of severed coal property claimants. Justice Kennedy suggested such claims should be analyzed using the factors set forth in the Penn Central takings equation: “[T]he finding of no value must be considered under the Takings Clause by reference to the owner’s reasonable, investment-backed expectations.”222 The consequence would not be catastrophic for owners of

219. McGinley, supra note 198, at 53 n.166.
220. See Echeverria, supra note 3, at 174. (“[T]he per se Lucas rule is potentially subject to artful manipulation by clever investors who can structure land acquisitions in order to manufacture apparent regulatory wipeouts and create potential claims under that precedent.”).
221. Lucas, 505 U.S. at 1065–66 (Stevens, J., dissenting). Justice Stevens provided a hypothetical example of such gamesmanship:

[A]n investor may, for example, purchase the right to build a multifamily home on a specific lot, with the result that a zoning regulation that allows only single-family homes would render the investor’s property interest “valueless.” In short, the categorical rule will likely have one of two effects: Either courts will alter the definition of the “denominator” in the takings “fraction,” rendering the Court’s categorical rule meaningless, or investors will manipulate the relevant property interests, giving the Court’s rule sweeping effect. To my mind, neither of these results is desirable or appropriate, and both are distortions of our takings jurisprudence.

Id.

222. Id. at 1034 (Kennedy, J., concurring).
severed mineral property. The fairness of such an approach is confirmed by those cases finding a taking of coal property using the *Penn Central* takings calculus. For example, in *Whitney Benefits v. United States*, the court awarded tens of millions of dollars of compensation for lost use of coal property occasioned by a SMCRA regulatory prohibition.\(^{223}\) Courts would simply apply the regulatory takings analysis that has long been extant since *Pennsylvania Coal v. Mahon*.

\(223.\) Whitney Benefits, Inc. v. United States, 18 Cl. Ct. 394, 396 (1989) (applying the *Penn Central* taking analysis, the court found that SMCRA regulation effected a taking; entitling plaintiff coal owners to just compensation in the amount of $60,296,000.00 plus pre-judgment interest).
IS REGULATION OF WATER A CONSTITUTIONAL TAKING?

John D. Echeverria∗

TABLE OF CONTENTS

Introduction ............................................................................................... 579
I. Background on the Casitas Litigation .................................................. 583
II. The Federal Circuit Decided A Different Case than the Claims Court .......................................................................................................... 586
III. The Claims Court Correctly Resolved the Case as It Understood It ........................................................................................................... 591
IV. The Federal Circuit Incorrectly Decided the Case as It Understood It ........................................................................................................... 599
   A. The Ruling Is Contrary to Contemporary Takings Doctrine ........... 600
   B. The Ruling Is Contrary to Precedents Involving Fish-Passage Requirements......................................................................................... 606
V. The Government Should Ultimately Prevail in Casitas ...................... 611
   A. Nollan and Dolan ............................................................................ 611
   B. Background Principles of California Law ....................................... 614
Conclusion ................................................................................................. 622

INTRODUCTION

The U.S. Supreme Court has recently clarified—and to some degree narrowed—the doctrine of regulatory takings. The Court has determined that most claims should be evaluated using the so-called Penn Central framework, a relatively deferential standard that focuses on the economic impact of the regulation, the degree of interference with investment-backed expectations, and the character of the regulation. The Court also has

∗ Professor of Law, Vermont Law School; J.D. 1981, Yale Law School; M.F.S. 1981, Yale School of Forestry and Environmental Studies; B.A. 1976, Yale University.

eliminated the so-called “substantially advance” takings test, which the Court appeared to embrace twenty-five years ago, and which some lower courts, most notably the U.S. Court of Appeals for the Ninth Circuit, had interpreted to support intrusive judicial review of the effectiveness of regulatory policies. Finally, the Court has defined its per se takings rules narrowly by saying that the so-called Lucas takings test only applies when a regulation renders private property essentially “valueless,” and that the per se test for physical takings only applies when the existence of a physical occupation or seizure is “undisputed and obvious.”

Contradicting the recent trend in the Supreme Court, the U.S. Court of Appeals for the Federal Circuit, which exercises intermediate appellate jurisdiction over takings claims against the United States, recently charted a more expansive course in the case of Casitas Municipal Water District v. United States. In its 2008 decision, a divided panel of the Federal Circuit held that a mandate imposed pursuant to the federal Endangered Species Act (ESA) requiring the operator of a dam on the Ventura River in California to pass water through a fish ladder involved a physical taking of the water, potentially triggering per se takings analysis. The panel’s decision to apply a physical takings analysis was outcome determinative in the sense that the claimant had no viable claim under the alternate Penn Central analysis; the plaintiff conceded before the trial court that it could not possibly make a sufficient showing of economic injury to proceed under Penn Central.

3. See Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 548 (2005) (“We hold that the ‘substantially advances’ formula is not a valid takings test, and indeed conclude that is has no proper place in our takings jurisprudence.”).
5. See Chevron USA Inc. v. Bronster, 363 F.3d 846 (9th Cir. 2004), rev’d Lingle v. Chevron U.S.A. Inc., 544 U.S. 528 (2005) (holding a Hawaii law that capped the rent that oil companies could charge local dealers to be a regulatory taking because it did not substantially advance the legitimate state interest in lowering the price of gasoline); Richardson v. City & County of Honolulu, 124 F.3d 1150 (9th Cir. 1997) (using the “substantially advance” test to find a rent control ordinance unconstitutional).
6. Tahoe-Sierra, 535 U.S. at 332 (stating that “the categorical rule in Lucas [v. S.C. Coastal Council, 505 U.S. 1003 (1992)] was carved out for the ‘extraordinary case’ in which a regulation permanently deprives property of all value . . . .”); see Palazzolo v. Rhode Island, 533 U.S. 606, 631 (2001) (stating that the government cannot evade the Lucas rule “on the premise that the landowner is left with a token interest”).
7. Tahoe-Sierra, 535 U.S. at 322 n.17 (“When the government condemns or physically appropriates the property, the fact of a taking is typically obvious and undisputed.”).
9. Id. at 1296.
10. Id. at 1298 (Mayer, J., dissenting in part).
There are significant questions about whether *Casitas* correctly applies Supreme Court precedent, the scope of the ruling, and how other water users in California and across the West might attempt to use this precedent to mount takings claims based on other water regulations.\(^{11}\) The decision has also attracted attention because it represents the latest chapter in a convoluted judicial debate over the proper application of the Takings Clause to water interests. The Federal Circuit decision reversed a ruling by Judge John Wiese of the U.S. Court of Federal Claims declining to apply a physical takings analysis.\(^{12}\) Judge Wiese’s decision, in turn, repudiated his own earlier decision in the case of *Tulare Lake Basin Water Storage District v. United States*, in which he had applied a physical takings analysis to a somewhat similar claim.\(^{13}\) In a controversial move, the Bush Justice Department declined to appeal *Tulare Lake* to the U.S. Court of Appeals for the Federal Circuit.\(^{14}\) On the other hand, the Obama Justice Department decided against filing a petition for certiorari in the U.S. Supreme Court in the *Casitas* case.\(^{15}\)

This article contends that *Casitas* represents a relatively narrow ruling that does not govern most other takings claims based on water regulations. The ruling establishes a test applicable only to a regulation requiring that water be passed through a fish-passage ladder or some similar facility, and arguably only a facility that conforms to the specific design of the facility at issue in *Casitas*. As a result, the decision does not support applying a physical takings test to ordinary water regulations restricting water diversions from rivers and other water bodies. Under the Federal Circuit’s reasoning, takings claims based on these more garden-variety water regulations should continue to be evaluated under the *Penn Central* framework.

This article also contends that, even read narrowly, the ruling is seriously flawed and should not ultimately stand the test of time. The

\(^{11}\) See Roderick E. Walston & Robert M. Sawyer, *Water Districts Armed to Protect Water Rights*, CAL. DAILY J., Nov. 23, 2009 (advocating a broad reading of *Casitas*).

\(^{12}\) *Casitas*, 543 F.3d at 1296.


\(^{14}\) See, e.g., Juliet Eilperin, *Water Rights Case Threatens Species Protection*, WASH. POST, Dec. 7, 2004, at A18 (“[S]ome state and federal officials [are] arguing the government would be better off appealing a federal claims judge’s decision that the government owes as much as $26 million for depriving San Joaquin farmers of their water rights in the early 1900s”); Dean E. Murphy, *In Fish vs. Farmers Cases, the Fish Loses its Edge*, N.Y TIMES, Feb. 22, 2005, at A15 (“[F]armers and water districts are pushing property-rights claims to the forefront of the debate over how to divvy up water among farms, cities and the environment.”).

\(^{15}\) See Jennifer Koons, *Obama Admin Declines to Appeal Key Water-Rights Case*, N.Y. TIMES, July 21, 2009 (discussing the Obama administration’s decision to not appeal *Casitas*).
ruling is inconsistent with basic principles animating modern takings jurisprudence. It also represents an inexplicable departure from a longstanding judicial consensus, predating the development of modern takings tests, that requiring dam operators to build and operate fish ladders to mitigate the adverse effects of their dams on public fisheries does not unconstitutionally impinge on private property interests. Thus, eventually, the Supreme Court, or possibly the Federal Circuit itself, should repudiate this decision.

Finally, focusing on the future course of this particular litigation, this article contends that, notwithstanding the adverse result in the Federal Circuit, the United States should ultimately prevail based on at least three independent legal arguments: (1) the ultimate question of whether a compensable taking occurred should be resolved based on the Nollan/Dolan “exactions” tests, and the United States can easily meet the requirements of those tests; (2) the claim is barred under the public trust doctrine, a background principle of California law for the purpose of takings litigation; and (3) the century-old California statutory requirement that dam operators provide flows via fish ladders to protect fisheries below dams represents a background principle that also bars the claim.

This article proceeds as follows. Section I describes the physical setting for the Casitas litigation and the various rulings and opinions the case has produced. Section II explains the evolving character of the “physical taking” argument over the course of the litigation and discusses the differences between the physical takings theory rejected by Judge Wiese and the physical takings theory embraced by the Federal Circuit. Section III focuses on Judge Wiese’s opinion and contends that he correctly rejected the physical taking theory presented to him and, perhaps more importantly, that the subsequent Federal Circuit decision does not repudiate his analysis and can be read to implicitly support it. Section IV examines the different physical takings theory embraced by the Federal Circuit on appeal and explains why that theory is indefensible in light of Supreme Court precedent and the animating principles of takings doctrine. Section V turns to the issues likely to be addressed on remand and describes three arguments that the United State can present to defeat the takings claim. A conclusion offers some general observations about the Casitas litigation and its larger lessons.
I. BACKGROUND ON THE CASITAS LITIGATION

The Ventura River Project was constructed in the 1950s to provide water for irrigation as well as municipal, domestic, and industrial purposes in Ventura County, California, north of Los Angeles. The project includes a large water-storage reservoir, Lake Casitas, which sits astride and impounds most of the flow of Coyote Creek, a tributary of the Ventura River, which empties into the Pacific Ocean. In addition, the Robles Diversion Dam on the main stem Ventura River diverts a portion of the flow of the river into the four and one-half mile long Robles-Casitas canal feeding into Lake Casitas. The critical feature of the project for the purpose of the takings issue is the Robles Diversion Dam, which blocked upstream migration by steelhead trout, once abundant but now at serious risk of being extirpated from the river.

Congress authorized the construction of the Ventura River Project on March 1, 1956. Pursuant to this authorization, the Bureau of Reclamation entered into a contract with the Casitas Municipal Water District that amounts, in effect, to a one-sided grant of various public benefits to the District. Under the agreement, the government financed construction of the project, and the District agreed to repay the construction costs, but over an extended period of forty years, at a below-market rate of interest, and only up to a cap of $27,500,000 (later amended to $30,900,000). The net effect of these provisions was that the cost of constructing the project was shared by the District and its customers, on the one hand, and by the U.S. taxpayers, on the other. In addition, the contract provided that, upon construction completion, the District would “take over and at its own expense operate and maintain the project works” for the benefit of itself and its customers, though title to the project works nominally remained with the United States. Finally, the contract provided that “the District shall have a prior right in perpetuity to the use of the water made available by the

---

20. Casitas Municipal Water Dist., 72 Fed. Cl. at 748.
project works, subject only to existing vested rights.” The District, not the federal government, acquired the appropriative water rights for the project from the California State Water Rights Board (now the State Waters Resources Control Board).

Even before construction commenced, a debate arose about whether there was a need for a fish-passage facility to permit fish migration past the Robles Diversion Dam. The California Department of Fish and Game took the position that such a facility should be included in the initial construction. The Department ultimately relented on this demand, however, based on the District’s written assurance that “if and when [the] need develops our District will cooperate fully with your Department toward the installation of an adequate fish ladder.” Thus, the project as constructed contained no fish-passage facility.

Forty years later, the National Marine Fisheries Service listed the West Coast Steelhead Trout as an endangered species under the ESA. This action launched a lengthy and contentious process to address the harm being inflicted on the steelhead trout by the existence of the Robles Diversion Dam and the District’s water diversion practices. In particular, an environmental organization, California Trout, sent a sixty-day notice letter to the District (and the Bureau) contending that the Casitas Project resulted in an illegal “take” under the ESA and threatening to sue to enjoin future project operations. Faced with this threat, the District approached the Bureau (the nominal owner of the project) about developing a strategy for addressing the ESA concerns. The District and the Bureau, in consultation with the National Marine Fisheries Service, ultimately settled on a strategy of seeking a biological opinion pursuant to section seven of the ESA which would permit continued project operations on the condition that the project and its operations were modified to allow fish migration up the river past the dam. The resulting biological opinion called for construction of a fish ladder as well as enhanced stream flows below the

21. Id.
23. Id.
24. Id.
25. Id.
dam during migration periods, with part of this minimum flow arriving below the dam via the fish ladder and the rest supplied through a pipe that bypassed the dam.\textsuperscript{28}

While the District initiated the process of obtaining authorization pursuant to the ESA for continued project operations, on January 26, 2005, it filed suit in the U.S. Court of Federal Claims alleging that the new conditions resulted in a taking of its water rights.\textsuperscript{29} As the case was proceeding to trial, the United States filed a motion seeking clarification about the takings standard the Claims Court intended to apply to resolve the takings issue.\textsuperscript{30} For the purpose of the motion, the United States conceded that the District had a property interest in the water affected by the biological opinion and that the District was compelled by the United States to carry out the conditions of the biological opinion.\textsuperscript{31} In response to the motion, Judge Wiese ruled that the claim should be evaluated under the \textit{Penn Central} multi-factor analysis, as the United States contended, rather than under a per se physical taking theory, as the District contended.\textsuperscript{32} The District then stipulated that it could not make the showing of extreme economic harm necessary to present a viable \textit{Penn Central} claim.\textsuperscript{33} At the District’s request, the Claims Court proceeded to dismiss the complaint and entered judgment for the United States.\textsuperscript{34}


\textsuperscript{29} \textit{Casitas Mun. Water Dist.} v. United States, 76 Fed. Cl. 100, 101 (Fed. Cl. 2007), \textit{aff'd in part \\& rev'd in part}, 543 F.3d 1276 (Fed. Cir. 2008), \textit{reh'g denied, reh'g en banc denied}, 556 F.3d 1329 (Fed. Cir. 2009). The District also asserted a breach of contract claim, which the claims court rejected. \textit{Casitas Mun. Water Dist.}, 72 Fed. Cl. at 755. One element of the breach of contract claim was that the United States, not the District, should bear the cost of constructing the fish passage. \textit{Id.} at 749. Both the claims court and the Federal Circuit rejected that argument on the ground that these costs fell into the category of “operation and maintenance” costs for which the District was responsible under the 1956 contract. \textit{Id.} at 752; \textit{Casitas Mun. Water Dist.} v. United States, 543 F.3d 1276, 1284 (Fed. Cir. 2008), \textit{reh'g denied, reh'g en banc denied}, 556 F.3d 1329 (Fed. Cir. 2009). In fact, a substantial part of the cost of constructing the facility was paid by taxpayers, as a result of various government grants awarded to the District for this purpose. \textit{Brief for the Natural Res. Def. Council as Amicus Curiae Supporting Defendant-Appellee at 25–26, Casitas Mun. Water Dist. v. United States, 543 F.3d 1276 (Fed. Cir. 2008)} (No. 2007-5153), 2007 WL 4984848.


\textsuperscript{32} \textit{Casitas Mun. Water Dist.}, 76 Fed. Cl. at 105–06.

\textsuperscript{33} \textit{Casitas Mun. Water Dist.}, 543 F.3d at 1297.

\textsuperscript{34} \textit{Id.} at 1283.
On appeal, a divided Federal Circuit panel reversed.\textsuperscript{35} In an opinion authored by Judge Kimberly Moore, the majority ruled that the District’s case presented a per se physical taking claim based on the allegation that the District was required to pass a portion of the water covered by its state permit through the fish ladder.\textsuperscript{36} Judge Haldane Robert Mayer filed a dissenting opinion on the taking issue, arguing that the claim did not involve a physical taking and should instead be analyzed under \textit{Penn Central}.\textsuperscript{37}

The United States filed a combined petition for rehearing and rehearing en banc, which both the panel and full twelve-member Federal Circuit rejected.\textsuperscript{38} Judge Moore, joined by two other members of the court, defended the panel majority’s reasoning but also emphasized that the case turned on certain concessions offered by United States for the purpose of its motion for summary judgment, including that plaintiff held a property right in the water.\textsuperscript{39} Judge Arthur Gajarsa filed a dissenting opinion from the order denying rehearing en banc, arguing that the panel should have applied the \textit{Penn Central} framework.\textsuperscript{40} Two other members of the court joined in Judge Gajarsa’s opinion, and a fourth judge, Judge Richard Linn, noted his dissent without comment.\textsuperscript{41} All told, seven active members of the court supported (or at least declined to revisit) the panel ruling and five dissented on the merits and/or voted in favor of rehearing (Judge Mayer dissenting from the panel ruling, plus four judges dissenting from the denial of rehearing en banc). It does not get any closer than that.

After reportedly extensive internal debate, the Solicitor General decided against filing a petition for certiorari, at least at this stage of the case.\textsuperscript{42}

\section*{II. The Federal Circuit Decided a Different Case Than the Claims Court}

The challenge of deciphering the meaning and significance of the Federal Circuit \textit{Casitas} decision is complicated by the fact that the case Judge Wiese thought he decided was quite different from the case the Federal Circuit thought it decided.

\begin{thebibliography}{9}
\bibitem{Casitas} \textit{Id.} at 1296.
\bibitem{Moore} \textit{Id.} at 1295.
\bibitem{Mayer} \textit{Id.} at 1297 (Mayer, J., dissenting).
\bibitem{CasitasDist} \textit{Casitas Mun. Water Dist.}, 556 F.3d 1329, 1330–31 (Fed. Cir. 2009).
\bibitem{Gajarsa} \textit{Id.} at 1331–33.
\bibitem{Gajarsa2} \textit{Id.} at 1335 (Gajarsa, J., dissenting).
\bibitem{Linn} \textit{Id.} at 1330.
\bibitem{Koons} Koons, \textit{supra} note 15.
\end{thebibliography}
To understand the confusing evolution of *Casitas* it is necessary to go back to the U.S. Court of Federal Claims’s 2001 decision in *Tulare Lake Basin Water Storage District v. United States.*[^43] That case, which also involved a taking claim based on ESA restrictions on water use, was assigned to Judge Wiese, the same judge who heard *Casitas.* The plaintiff’s lead counsel was Roger Marzulla, the lead counsel for the plaintiff in *Casitas*; and some of the lawyers on the defense side were repeat players in both cases as well.

In *Tulare Lake,* the California Department of Water Resources, the operator of the California State Water Project, limited water pumping from the Sacramento-San Joaquin Delta to comply with the ESA, reducing the volume of water delivered to the Tulare Lake Irrigation District.[^44] The Tulare District alleged that this restriction constituted a taking of its alleged property right to receive water pursuant to its long-term water supply contract with the Department.[^45] Judge Wiese ruled in favor of the District, holding that it was entitled to challenge the regulation on the theory that it represented a per se physical taking of its water interest.[^46] The doctrinal significance of the conclusion that the case was governed by a per se physical takings analysis, rather than the *Penn Central* framework, was that the so-called “parcel as a whole” rule did not apply. As a result, the court evaluated the taking claim without considering the impact of the regulation in the context of the entirety of plaintiff’s contractual right to water, which was substantially larger than the portion of the right affected by the regulation.[^47] Judge Wiese eventually entered a judgment awarding the plaintiff over $20,000,000.[^48] As discussed, the United States did not appeal this judgment.

In the subsequent *Casitas* case, plaintiff’s counsel, not surprisingly, argued the case on the theory that it was a perfect match with *Tulare Lake.* Plaintiff characterized the claim as resting on the fact that the biological opinion called for a certain quantity of water to be provided below the dam.

[^44]: Id. at 315–16.
[^45]: Id. at 314.
[^46]: Id. at 324.
[^47]: See Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Planning Agency, 535 U.S 302, 322 (2002) (explaining that the so-called “parcel as a whole” rule, applicable to regulatory takings claims based on use restrictions, does not apply to claims based on alleged physical occupations or seizures, and therefore, “[w]hen the government physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the former owner regardless of whether the interest that is taken constitutes an entire parcel or merely a part thereof”) (citation omitted).
in order to facilitate fish migration. While some portion of this water arrived downstream via the fish ladder, and another portion arrived via the bypass pipe that diverted water past the dam, plaintiff’s allegations placed no particular emphasis on these plumbing details. What mattered according to plaintiff was that it was required, like the District in Tulare Lake, to leave a certain quantity of water in the watercourse that it otherwise allegedly would have diverted for consumptive use. It is equally clear that this is how Judge Wiese understood and analyzed the taking claim:

The revised operating criteria [in the Biological Opinion]—intended to augment flow requirements essential for fish migration and the preservation of their downstream habitat—prescribed an increase in downstream river flow volumes which correspondingly demanded a decrease in the amount of water Casitas would be allowed to divert. The claim we now have before us is grounded on these revised project operating criteria. Specifically, plaintiff contends that the restrictions on water diversion that were adopted in the Biological Opinion have required Casitas permanently to forgo the exercise of a right to divert up to an additional 3,200 acre-feet of water per year from the Ventura River for irrigation purposes.

Notably absent from this summary of plaintiff’s allegations was any explicit reference to the requirement that the District run water through the fish ladder.

In an admirably frank opinion, Judge Wiese carefully re-examined his opinion in Tulare Lake and declined to follow his previous theory that a restriction on water use should be analyzed as a physical taking. Instead, he concluded, plaintiff’s claim must be analyzed under Penn Central. This meant that the “parcel as a whole” rule would apply to plaintiff’s claim. Therefore, in order to prevail on its claim, the District would have been required to establish that the regulation imposed an extreme economic burden on its entire water interest associated with the project. As discussed

49. Casitas Mun. Water Dist v. United States, 76 Fed. Cl. 100, 103 (Fed. Cl. 2007), aff’d in part & rev’d in part, 543 F.3d 1276 (Fed. Cir. 2008), reh’g denied, reh’g en banc denied, 556 F.3d 1329 (Fed. Cir. 2009).
50. Id.
51. Casitas Mun. Water Dist. v. United States, 76 Fed. Cl. 100, 102 (Fed. Cl. 2007), aff’d in part & rev’d in part, 543 F.3d 1276 (Fed. Cir. 2008), reh’g denied, reh’g en banc denied, 556 F.3d 1329 (Fed. Cir. 2009).
52. Id. at 103–06.
above, the District’s takings case collapsed under this more demanding test, as plaintiff’s counsel voluntarily conceded.\(^5\)

To explain his change of heart, Judge Wiese relied heavily on the intervening Supreme Court decision in *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*.\(^4\) In that case, the Supreme Court drew a sharp distinction between physical takings deserving per se treatment and cases appropriate for regulatory takings analysis; in the Court’s words:

```
Th[e] longstanding distinction between acquisitions of property for public use, on the one hand, and regulations prohibiting private uses, on the other, makes it inappropriate to treat cases involving physical takings as controlling precedents for the evaluation of a claim that there has been a “regulatory taking,” and vice versa.\(^5\)
```

According to Judge Wiese, *Tahoe-Sierra*:

```
[C]ompels us to respect the distinction between a government takeover of property (either by physical invasion or by directing the property’s use to its own needs) and government restraints on an owner’s use of that property. Although from the property owner’s standpoint there may be no practical difference between the two, Tahoe-Sierra admonishes that only the government’s active hand in the redirection of a property’s use may be treated as a per se taking.\(^6\)
```

While *Tulare Lake* was certainly vulnerable to criticisms prior to *Tahoe-Sierra*, as discussed below,\(^5\) for Judge Wiese *Tahoe-Sierra* was the decisive new development that required him to change his position.

In prosecuting its appeal to the Federal Circuit, plaintiff shifted course and presented a new theory of the case. Whereas the requirement that the water pass through the fish ladder on its way to the area of the river below the dam hardly figured in the District’s original argument, the fish ladder

---

53. See *supra* text accompanying note 10.
57. See *infra* text accompanying notes 72–93.
became the centerpiece of the District’s case on appeal. During oral argument before the Federal Circuit, the District’s counsel presented a demonstrative exhibit illustrating the flow of water into and through the fish ladder. The District’s case had shifted from the theory that the government had taken the water by requiring that it be left in the river, to the theory that the government had taken the water by requiring that, once it was diverted into the diversion canal, it be directed through the fish ladder. One government counsel long involved in the case at the trial level quipped, following the oral argument: “What was that about? I don’t remember this case being about a fish ladder.”58

The panel decision, authored by Judge Moore, addressed the District’s new theory without acknowledging that the District had made a legal pirouette and that the new version of the case differed significantly from the Claims Court version. In contrast to the case before Judge Wiese, which focused on the water that the District was required to leave in the river, the Federal Circuit stated that the crucial fact in its analysis was that the regulation did not merely require that water be left in the river but, instead, required that water, once it was diverted out of the river and into the diversion canal, be channeled through the fish-passage facility.59 In other words, whereas Judge Wiese believed that a per se test did not apply because the regulation involved a requirement to leave water in the river, the appeals panel believed that a physical takings test did apply because the regulation did not simply involve leaving water in the river, but also involved a diversion of water through the fish ladder.

The upshot of the District’s mid-course change in litigation strategy is that the case in the Claims Court was quite different from the case before the Federal Circuit. As a result, the question of whether the Claims Court ruled correctly presents a different question from whether the Federal Circuit ruled correctly. We address these separate questions in the next two sections.

58. This is based on the author's recollection of the proceedings.
59. Casitas Mun. Water Dist. v. United States, 543 F.3d 1276, 1292–93 (Fed. Cir. 2008), reh’g denied, reh’g en banc denied, 556 F.3d 1329 (Fed. Cir. 2009) (“When the government forces Casitas to divert water away from the Robles-Casitas Canal to the fish ladder for the public purpose of protecting the West Coast Steelhead trout, this is a governmental use of the water.”). See Casitas Mun. Water Dist. v. United States, 556 F.3d 1329, 1333 (Fed. Cir. 2009) (Moore, J., concurring) (“In our case, the government diverts the water out of the Robles-Casitas Canal and sends it down the fish ladder to the Ventura River below the Robles Dam.”).
III. THE CLAIMS COURT CORRECTLY RESOLVED THE CASE AS IT UNDERSTOOD IT

Viewing *Casitas* as the District originally presented it to the Claims Court, and as Judge Wiese understood it, Judge Wiese properly rejected plaintiff’s per se takings claim. He ruled that a claim under the Takings Clause based on a regulatory restriction on the diversion of water from a river in order to protect fish presents a potential regulatory taking, not a physical taking. For the reasons discussed below, this ruling, even in the aftermath of the Federal Circuit’s *Casitas* decision, is clearly correct.

Judge Wiese was correct, first, because there is no distinction between a regulatory restriction on the use of water and a regulatory restriction on the use of land or any other resource that would justify a special per se physical takings rule for regulations affecting water use. Under the decisions of the U.S. Supreme Court, the same regulatory takings analysis applies to regulations affecting a wide panoply of property interests. Thus, the Court has applied the same basic analysis to restrictions on the development of air rights, the exploitation of underground resources such as coal or oil and gas, and to all manner of restrictions on the use of land. Furthermore, there is nothing in the nature of water or regulations affecting water that would justify putting water restrictions in a special, disfavored category for the purpose of takings analysis. As discussed above, the general test for regulatory measures affecting private property is the *Penn Central* analysis. There is no logical reason, as Judge Wiese correctly ruled, why the courts should not apply the *Penn Central* test to water regulation in the same fashion that they apply it to regulation of any other resource.

Indeed, if anything, regulatory taking analysis, as opposed to a physical takings analysis, applies more naturally to interests in water resources than to interests in other types of natural resources. In California and throughout the West, the public owns the water—that is, the physical molecules themselves—while private appropriators possess “usufructuary” interests in the water. As a result, private water appropriators may (subject to relevant

---

60. See e.g., Penn Cent. Transp. Co. v. New York City, 438 U.S. 104 (1978) (holding that New York City’s Landmark Preservation Law had not resulted in a taking of Penn Central’s air rights by prohibiting it from building an office tower above Grand Central Terminal).

61. See e.g., Keystone Bituminous Coal Ass’n v. DeBenedictis, 480 U.S. 470 (1987) (applying *Penn Central* analysis to a Pennsylvania law requiring coal companies to leave fifty percent of coal intact as subterranean support).

62. See e.g., Palazzolo v. Rhode Island, 533 U.S. 606 (2001) (applying *Penn Central* analysis where Rhode Island prohibited a landowner from building on one part of his land).

63. See CAL. WATER CODE § 102 (West 2009) (“All water within the State is the property of the people of the State, but the right to the use of water may be acquired by appropriation in the manner
background principles of state water law) claim a right to use the water for certain productive purposes. However, they cannot claim the same dominion over water that other owners can claim over other types of resources, including in particular the right to exclude third parties.\footnote{64} Given that regulatory takings analysis focuses on how use rights have been restricted, and usufructuary water interests consist only of use rights, regulatory takings analysis applies in very straightforward fashion in takings cases involving regulation of water interests. By contrast, the per se physical takings theory is especially inapt in takings cases involving water because a water-right holder has neither a legal right to the physical molecules themselves nor a legal right to exclude others from using the water.

Second, Judge Wiese ruled correctly in \textit{Casitas} because, in contrast to legal rights in land and most other natural resources, legal rights in water have long been regarded as especially attenuated in another sense. Under the California public trust doctrine, no water-right holder can claim an entitlement to use water in a fashion that would be harmful to public trust resources, including fisheries.\footnote{65} Similarly, under the California reasonable use doctrine, a water-right holder can claim no vested right to use water in an unreasonable fashion.\footnote{66} These state background principles of water law limit private property interests in water to a much greater extent than background principles ordinarily limit private interests in land. Likewise, property interests in water are also uniquely attenuated as a matter of federal law. In particular, under the navigational servitude, the federal government can act to protect navigation at the expense of private property.

\footnote{64} See John D. Leshy, \textit{A Conversation About Takings and Water Rights}, 83 \textit{TEX. L. REV.} 1985, 2010 (2005) (explaining that an appropriative water right, unlike a fee title interest in land, does not include the “right to exclude others”).

\footnote{65} See Nat’l Audubon Soc’y v. Superior Court, 658 P.2d 709, 721 (Cal. 1983) (“One consequence, of importance to this and many other cases, is that parties acquiring rights in trust property generally hold those rights subject to the trust, and can assert no vested right to use those rights in a manner harmful to the trust.”).

\footnote{66} See \textsc{Cal. Const.} art. X, § 2 (“It is hereby declared that because of the conditions prevailing in this State the general welfare requires that the water resources of the State be put to beneficial use to the fullest extent of which they are capable, and that the waste or unreasonable use or unreasonable method of use of water be prevented, and that the conservation of such waters is to be exercised with a view to the reasonable and beneficial use thereof in the interest of the people and for the public welfare.”); United States v. State Water Res. Control Bd., 182 Cal. App. 3d 82, 129 (Cal. App. 1986) (referring to “the overriding constitutional limitation that water use must be reasonable”).
interests without incurring takings liability.\textsuperscript{67} Thus, as the Supreme Court declared in \textit{United States v. Willow River Power Co.}, “[r]ights, property or otherwise, that are absolute against all the world are certainly rare, and water rights are not among them.”\textsuperscript{68} Given the relatively limited nature of private rights in water resources, it would be implausible to suppose that regulation of water interests would trigger especially demanding scrutiny under the Takings Clause. Indeed, it is more plausible to presume that the Takings Clause should be applied with relatively greater deference in the water context.

Finally, Judge Wiese’s decision was correct because there is literally no judicial precedent to the contrary (at least after Judge Wiese repudiated his own \textit{Tulare Lake} ruling) and there is venerable Supreme Court precedent to support it. The last time the Supreme Court squarely addressed the issue of how the Takings Clause should be applied to regulatory restrictions on water use was over a century ago in \textit{Hudson County Water Co. v. McCarter}.\textsuperscript{69} The Court rejected the claim that a New Jersey law restricting the export of water from a New Jersey river to the neighboring state of New York resulted in a taking of the plaintiff’s riparian water right.\textsuperscript{70} The Court declared:

\begin{quote}
[\textit{I}t appears to us that few public interests are more obvious, indisputable, and independent of particular theory than the interest of the public of a State to maintain the rivers that are wholly within it substantially undiminished, except by such drafts upon them as the guardian of the public welfare may permit for the purpose of turning them to a more perfect use.}\textsuperscript{71}
\end{quote}

While \textit{Hudson County} predates the development of modern takings doctrine and the Court’s analysis is difficult to categorize in terms of modern takings

\begin{footnotes}
\textsuperscript{67} See \textit{Scranton v. Wheeler}, 179 U.S. 141, 163 (1900) (“The primary use of the waters and the lands under them is for purposes of navigation, and the erection of piers in them to improve navigation for the public is entirely consistent with such use, and infringes no right of the riparian owner. Whatever the nature of the interest of a riparian owner in the submerged lands in front of his upland bordering on a public navigable water, his title is not as full and complete as his title to fast land which has no direct connection with the navigation of such water. It is a qualified title, a bare technical title, not at his absolute disposal, as is his upland, but to be held at all times subordinate to such use of the submerged lands and of the waters flowing over them as may be consistent with or demanded by the public right of navigation.”).

\textsuperscript{68} \textit{United States v. Willow River Power Co.}, 324 U.S. 499, 510 (1945).

\textsuperscript{69} \textit{Hudson Water Co. v. McCarter}, 209 U.S. 349 (1908).

\textsuperscript{70} \textit{Id.} at 354–57.

\textsuperscript{71} \textit{Id.} at 356.
\end{footnotes}
tests, the decision basically comports with modern regulatory takings analysis, not the physical takings theory. The fact that the Court rejected the taking claim in *Hudson County* certainly refutes the notion, embraced in *Tulare Lake*, that any restriction on the use of water constitutes a per se taking. *Hudson County* may be an older Court precedent, but it is directly on point and the Court’s resolution of the taking claim has never been questioned.72

In his earlier *Tulare Lake* opinion, Judge Wiese presented several arguments for applying a per se physical takings analysis to water regulation. Upon careful examination, none of these arguments is convincing. In other words, quite apart from the subsequent *Tahoe-Sierra* decision, *Tulare Lake* did not rest on precedent or solid reasoning.

Judge Wiese’s first argument for applying the per se physical taking test to water regulation was that the application of the ESA “destroyed” the value of the District’s water interest in *Tulare Lake*, and that a regulation that destroys all value is equivalent to a physical taking.73 This argument was mistaken for several different reasons.

First, the premise of the argument, that the ESA restriction destroyed the value of the District’s water interest, was flawed. Under the so-called “parcel as a whole” rule in regulatory takings analysis, the economic burden imposed by a regulation must be assessed, not by focusing on the portion of the property affected by the restriction, but in relation to the owner’s property as a whole.74 Applying this rule in *Tulare Lake*, and given the relatively short duration of the restriction, the regulation had only a modest impact on the totality of the District’s water interest.75 Judge Wiese’s assertion that the regulation made the District’s water interest “valueless” apparently rested on the premise that his analysis should focus on the

72. On the other hand, the Court in *Hudson County* also rejected a Commerce Clause challenge to the prohibition on export of water out of state and that aspect of the decision is, to say the least, problematic in light of *Sporhase v. Nebraska* ex rel. *Douglas*, 458 U.S. 941 (1982), holding unconstitutional, as against the Commerce Clause, a Nebraska law that barred Nebraskans from taking water to other states unless the other states reciprocally agreed to allow citizens to take water into Nebraska.


75. *See*, e.g., Melinda Harm Benson, *The Tulare Case: Water Rights, the Endangered Species Act, and the Fifth Amendment*, 32 ENVTL. L. 551, 560 (2002) (discussing how “[t]he restrictions resulted in an overall reduction in water availability of approximately 0.11% and 2.92%” for the two lead plaintiff irrigation districts).
specific portion of the District’s water interest that the District was barred from exploiting. That premise would have been correct only if it had been clear to begin with that the case involved a physical taking, in which case the “parcel as a whole” rule would not apply. But Judge Wiese could not properly assume that the “parcel as a whole” rule did not apply. The question of whether or not the parcel rule applies can logically only be addressed after deciding whether the case involves a regulatory taking or a physical taking claim. In short, Judge Wiese mistakenly relied on an implicit assumption that the case was governed by a per se physical takings analysis to support the conclusion that a per se analysis should apply. This reasoning was hopelessly and fatally circular. Because the premise of the argument for applying a per se test was mistaken, the argument itself collapses.

Second, even if the regulation had destroyed the value of the District’s water interest, that would not, strictly speaking, have supported the conclusion that there was a “physical taking.” A finding that the regulation destroyed the value of the District’s water interest would have led (subject to applicable background principles defenses) to the conclusion that there was a per se regulatory taking under Lucas v. South Carolina Coastal Council. It must be acknowledged that Lucas states that, “from the landowner’s point of view,” a denial of all economically viable use as a result of regulation is “the equivalent of a physical appropriation.” Nevertheless, even assuming that the regulation destroyed the value of the water interest, this would not have supported a ruling that a physical taking occurred. In Lucas, the Court described regulations that deny the owner all economically viable use of property and actions that result in a physical invasion as representing two “discrete categories” of per se takings claims. These two categories may be conceptually related, but, contrary to Judge Wiese’s reasoning, they are not legally identical.

Judge Wiese’s second, related argument for applying a per se physical takings analysis in Tulare Lake was that the case could appropriately be analogized to the Supreme Court case of United States v. Causby. The Causby case involved private landowners complaining of government

---

77. Id. at 1017.
78. Id. at 1015.
79. Tulare Lake Basin Water Storage Dist. v. United States, 49 Fed. Cl. 313, 319 (Fed. Cl. 2001), judgment entered by 59 Fed. Cl. 246 (Fed. Cl. 2003), modified, 61 Fed. Cl. 624 (Fed. Cl. 2004) ("Case law reveals that the distinction between a physical invasion and a governmental activity that merely impairs the use of that property turns on whether the intrusion is 'so immediate and direct as to subtract from the owner's full enjoyment of the property and to limit his exploitation of it.'") (quoting United States v. Causby, 328 U.S. 256, 265 (1946)).
aircraft flying very low over their property during take-offs and landings. The Supreme Court found a taking, observing at one point in its opinion that “[i]f, by reason of the frequency and altitude of the flights, respondents could not use [the] land for any purpose, their loss . . . would be as complete as if the United States had entered upon the surface of the land and taken exclusive possession of it.” Judge Wiese read this language to mean that if a regulation destroys a property interest (which he assumed to be the case in Tulare Lake), then a physical taking results.

This interpretation reads too much into Causby, especially in light of the gloss the Supreme Court subsequently put on this decision. The language quoted above may be read to suggest that the elimination of economic use is comparable to a physical taking. But the critical element of Causby that justified applying the per se physical takings test was the fact that the government’s airplanes actually invaded the plaintiff’s private airspace. As the Court subsequently explained in Tahoe-Sierra, Causby stands for the proposition that when government planes “use private airspace to approach a government airport,” the government “occupies the property for its own purposes.” Contrary to Judge Wiese’s reading, Causby cannot sensibly be read to support the idea that a limitation on use, standing alone, no matter how onerous, should be regarded as a physical taking of the property.

Third, Judge Wiese believed that his conclusion in Tulare Lake that a per se physical taking theory should apply was “confirmed” by a trilogy of older Supreme Court water cases. In those cases, the Court ruled that government actions transferring water from incumbent private water-rights holders and into the possession of new users constituted compensable “appropriation[s]” under the Takings Clause. In Dugan v. Rank and

80. Causby, 328 U.S. at 258–59.
81. Id. at 261.
83. Tulare Lake, 49 Fed. Cl. at 319.
84. See id. ("A seizure of water rights need not necessarily be a physical invasion of land. It may occur upstream, as here. Interference with or partial taking of water rights in the manner it was accomplished here might be analogized to interference or partial taking of air space over land.” (quoting Dugan v. Rank, 372 U.S. 609, 625 (1963)); see also United States v. Gerlach Live Stock Co., 339 U.S. 725, 739 (1950) (holding that Congress took plaintiff’s water rights, established under California law, because “whether required to do so or not, Congress elected to recognize any state-created rights and to take them under its power of eminent domain”); Int’l Paper Co. v. United States, 282 U.S. 399, 407 (1931) (“The petitioner’s right was to the use of the water; and when all the water that it used was withdrawn from the petitioner’s mill and turned elsewhere by government requisition for the production of power it is hard to see what more the Government could do to take the use . . . [T]he Government purported to be using its power of eminent domain to acquire rights that did not belong to it and for which it was bound by the Constitution to pay.").
United States v. Gerlach Live Stock Co., the government deprived owners of riparian water rights by constructing a dam and impounding the water and then conveying the water to new private water users. In International Paper Co. v. United States, the government took water that a paper company used to power its mill and transferred it to a utility for the purpose of generating electricity for use by a different industrial firm. In Tulare Lake, the United States sought to distinguish these cases on the ground that they involved an actual appropriation of water interests “whereas here, it is claimed, the government has merely regulated the plaintiffs’ method of diverting water.” But Judge Wiese rejected this argument, observing that “the ultimate result of the rate and timing restrictions on pumping is an aggregate decrease in the water available to the water projects,” and that “whether the government decreased the water to which plaintiffs had access by means of a dam or by means of pumping restrictions amounts to a distinction without a difference.”

Judge Wiese’s reliance on the trilogy to support his per se physical takings theory was plainly mistaken. These cases involved not mere restrictions on water use to protect the public welfare but the actual transfer of water interests from one private owner to a new private owner. In other words, they involved just the kind of property restrictions “of an unusually serious character” which, according to the Supreme Court, warrants per se takings treatment. Furthermore, Judge Wiese’s logic would convert every regulatory action into a per se taking. After all, every regulatory action could be described as decreasing some element of an owner’s property interest in order to serve some governmental purpose. For example, in Penn Central, the historic landmark designation at issue in that case could have been described as appropriating the air rights above Grand Central Terminal in order to confer an aesthetic benefit on the public. The Supreme Court has obviously rejected this expansive reading of the Takings Clause by refusing to apply a per se takings test in Penn Central and many subsequent regulatory taking cases.

86. Int’l Paper Co., 282 U.S. at 405–06.
87. Tulare Lake, 49 Fed Cl. at 319.
88. Id. at 320.
90. See Palazzolo v. Rhode Island, 533 U.S. 606, 617 (2001) (“Where a regulation places limitations on land that fall short of eliminating all economically beneficial use, a taking nonetheless may have occurred, depending on a complex of factors including 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.”).
All of which leads to the last observation to be made about *Tulare Lake*: that the Supreme Court’s subsequent decision in *Tahoe-Sierra* made the ruling in *Tulare Lake*, whatever its merit before *Tahoe-Sierra*, completely untenable afterwards, as Judge Wiese himself correctly recognized in his *Casitas* opinion. In *Tahoe-Sierra*, the Court emphasized, in a more forceful way than it had before, the need to maintain the “longstanding” and “fundamental” distinction between regulatory takings claims, on the one hand, and physical takings claims, on the other.91 The Court also explained that the multi-factor *Penn Central* test should be treated as the default standard in takings cases, with the per se rule for physical occupations reserved for relatively rare, special cases.92 Judge Wiese’s ruling in *Tulare Lake* that a per se physical taking test applies to regulation of water interests was plainly in serious conflict with the Supreme Court’s directions in *Tahoe-Sierra*. Thus, in *Casitas*, Judge Wiese quite properly read *Tahoe-Sierra* as commanding him to jettison his earlier ruling in *Tulare Lake*.

Judge Wiese’s decision in *Casitas* can and should be viewed as a correct statement of the law despite the fact that the Federal Circuit subsequently overturned his ruling. Nothing in the Federal Circuit’s reasoning undermines Judge Wiese’s analysis of the claim as he understood it. Judge Wiese analyzed the case, and applied the *Penn Central* framework, on the understanding that the case presented the question of how to apply the Takings Clause to a regulation requiring that a dam operator leave water in the stream rather than divert it for consumptive use.93 While the Federal Circuit ruled that a requirement to pass water through a fish ladder should be analyzed as a physical taking, it did not say that the same analysis should apply to the kind of regulatory restriction on water diversion that Judge Wiese thought he was addressing. In fact, the Federal Circuit explicitly stated that it was not deciding that different case. In the court’s words, the record:

>Mak[e]s clear that the government did not merely require some water to remain in stream, but instead actively caused the physical diversion of water away from the Robles-Casitas Canal—after the water had left the Ventura River.

---

92. See id. at 326 (“[W]e still resist the temptation to adopt *per se* rules in our cases involving partial regulatory takings, preferring to examine ‘a number of factors’ rather than a simple ‘mathematically precise’ formula.”).
and was in the Robles-Casitas Canal—and towards the fish
ladder, thus reducing Casitas’ water supply.\textsuperscript{94}

By expressly distinguishing the kind of case Judge Wiese thought he was
deciding, the court suggested that it would not apply its physical takings
analysis to a case involving a “mere” restriction on diversions.

Furthermore, in a revealing footnote, the Federal Circuit addressed
Judge Wiese’s earlier \textit{Tulare Lake} decision and stated that it took no
position on whether that case was correctly decided\textsuperscript{95}. Judge Wiese’s
analysis in \textit{Casitas} was based on the premise that the issue he was
addressing in that case was indistinguishable from the issue addressed in
\textit{Tulare Lake}. Thus, the Federal Circuit’s statement that it was not resolving
whether \textit{Tulare Lake} was correctly decided implicitly indicates that the
Federal Circuit was not deciding whether Judge Wiese correctly decided
\textit{Casitas} as he understood it. This understanding not only suggests that the
Federal Circuit would not necessarily apply its physical takings theory in a
case involving a restriction on water diversion, but that a majority of the
Federal Circuit may well believe Judge Wiese properly repudiated his
\textit{Tulare Lake} ruling.

From the standpoint of Judge Wiese, no doubt the painful irony of the
\textit{Casitas} litigation is that, after taking the courageous steps of reconsidering
his prior ruling on the taking issue in the controversial \textit{Tulare Lake} case and
rejecting application of a per se test, the Federal Circuit reversed his
decision based on a different version of the case than the one presented to
him at the trial level. At the same time, the Federal Circuit’s reasoning
suggests that it may believe Judge Wiese correctly repudiated his \textit{Tulare
Lake} decision and that he correctly resolved the taking issue in \textit{Casitas}
based on the claim as it was presented to him. No good deed, it is
sometimes said, goes unpunished, a saying that appears to apply in spades
in this instance.

\textbf{IV. THE FEDERAL CIRCUIT INCORRECTLY DECIDED THE CASE AS IT
UNDERSTOOD IT}

The Federal Circuit viewed \textit{Casitas} as involving a quite different
question: whether requiring water to be passed through a fish ladder
constitutes a physical taking of the water. Accepting for the sake of

\textsuperscript{94}. \textit{Casitas Mun. Water Dist. v. United States}, 543 F.3d 1276, 1291–92 (Fed. Cir. 2008), \textit{reh’g
denied, reh’g en banc denied}, 556 F.3d 1329 (Fed. Cir. 2009).
\textsuperscript{95}. \textit{Id.} at 1295 n.16.
argument that this different understanding of the case was a plausible one, given the facts of the case, the Federal Circuit erred in ruling that this version of the case presented a physical taking issue. First, the Federal Circuit erred because modern takings precedents, as well as basic principles of contemporary takings analysis, do not support the view that requiring water to pass through a fish ladder constitutes a physical taking of the water. Second, this ruling contradicts, without explanation, the extensive and essentially uniform authority dating from the beginning of the nineteenth century specifically rejecting takings and other constitutional challenges to fish-passage requirements.

A. The Ruling Is Contrary to Contemporary Takings Doctrine

The Federal Circuit offered a series of overlapping arguments to support its ruling, but none is convincing in light of modern takings precedents and principles.

First, the court, reprising a theme from the repudiated Tulare Lake opinion, stated that the fish-passage requirement represented a physical taking because it involved an “appropriation” of the water for a public—i.e., governmental—use. To support this argument, the Federal Circuit relied on the same trilogy of water development cases upon which Judge Wiese had relied in his Tulare Lake opinion. In response to this argument, the United States contended, much as it had in Tulare Lake, that Casitas was distinguishable from the trilogy on the ground that “here, the United States did not appropriate the water for its own use or for use by a third party.” The Federal Circuit declared this argument “unpersuasive,” reasoning that the ESA was adopted to achieve public conservation goals and there was “little doubt that the preservation of the habitat of an endangered species is for government and third party use—the public—which serves a public purpose.” The panel asked rhetorically, “[i]f this water was not diverted for a public use, namely protection of the endangered fish, what use was it diverted for?”

This analysis mistakenly applies the physical appropriations theory far more broadly than the Supreme Court has declared appropriate. Tahoe-Sierra explains the distinction between appropriation and regulation of private property by stating that an appropriation “gives the government

96. Id. at 1296.
97. See supra text accompanying notes 82–85.
98. Casitas Mun. Water Dist., 543 F.3d at 1292.
99. Id.
100. Id. at 1293.
possession of the property, the right to admit and exclude others, and the right to use it for a public purpose," whereas "[a] regulatory taking . . . does not give the government any right to use the property, nor does it dispossess the owner or affect her right to exclude others." Based on this distinction, the Supreme Court has repeatedly recognized that a per se takings rule applies when the government seizes private property and converts it to its own use or hands it over to third parties for their use. Based on this distinction, the Supreme Court has repeatedly recognized that a per se takings rule applies when the government seizes private property and converts it to its own use or hands it over to third parties for their use. The trilogy of water development cases that the Federal Circuit relied upon fit in this category because they involved actual transfers of water from the original owners to new users. But merely regulating the use of water to protect public fisheries does not constitute an “appropriation” of water in the sense that the Supreme Court has used that term.

Furthermore, interpreting the term appropriation in the broad sense used by the Federal Circuit would, like the comparable analysis in Judge Wiese’s Tulare Lake opinion, convert virtually every regulation into a per se taking. Under this approach, any regulation serving a public purpose would have to be called an appropriation triggering per se takings liability. This extreme position is untenable. Modern takings doctrine—from the Court’s recent reaffirmation of the primacy of the deferential Penn Central framework, to Justice Holmes’s aphorism in Pennsylvania Coal Co. v. Mahon that government “hardly could go on” if it had to pay for every regulatory restriction—refutes the idea that every regulation serving a public purpose “appropriates” private property. In sum, the panel’s reasoning in Casitas is wildly out of sync with governing Supreme Court precedent and established doctrine.

The Federal Circuit’s second, equally unpersuasive argument for applying a physical takings analysis rests on the idea that application of the ESA not only placed a negative restriction on how the District could exercise its water right, but imposed an affirmative mandate on how the District should exercise its water right. In the panel’s words, “the United States did not just require that water be left in the river, but instead

---


102. See, e.g., Kelo v. City of New London, 545 U.S. 469, 484 (2005) (“Because that plan unquestionably serves a public purpose, the takings challenged here satisfy the public use requirement of the Fifth Amendment.”); United States v. Pewee Coal Co., 341 U.S. 114, 117 (1951) (“Having taken Pewee’s property, the United States became liable under the Constitution to pay just compensation.”).


physically caused Casitas to divert water away from the Robles-Casitas Canal and towards the fish ladder.”

This argument at least has the virtue of depending on a factual distinction between the case as described in the Claims Court and the case as described in the Federal Circuit. Yet, upon examination, the purported distinction between negative restrictions and regulations mandating affirmative conduct has no foundation in either precedent or logic.

In *Loretto v. Teleprompter Manhattan CATV Corp.*, the Supreme Court recognized that a regulatory takings analysis applies to regulations of property use regardless of whether they impose purely negative restrictions or impose affirmative obligations. In that case, the Court held that a New York law authorizing a cable television company to install, without the owner’s permission, equipment on the outside of her building constituted a per se physical-occupation taking. But, the Court explained that this holding would not reach a regulation requiring the owner to herself install cable television equipment on her property. As the Court put it, the holding in *Loretto*:

> [I]n no way alters the analysis governing the State’s power to require landlords to comply with building codes and provide utility connections, mailboxes, smoke detectors, fire extinguishers, and the like in the common area of a building. So long as these regulations do not require the landlord to suffer the physical occupation of a portion of his building by a third party, they will be analyzed under the [*Penn Central*] multifactor inquiry generally applicable to nonpossessory governmental activity.

According to this analysis, requiring an owner to make some affirmative use of her property constitutes regulation of the property, not an appropriation of it. As a result, a regulation of the use of property, regardless of whether it is a purely negative restriction or imposes an affirmative obligation, is subject to the same analysis under the Takings Clause.

The discussion on this point in *Loretto* is consistent with numerous other decisions applying a traditional takings analysis to claims based on

106. *Id.*
108. *Id.* at 421.
109. *Id.* at 440.
110. *Id.*
government regulations imposing affirmative obligations on property owners. For example, in the venerable case of *Miller v. Schoene*, the Supreme Court rejected a takings claim based on an official order requiring an owner to destroy trees on his land in order to arrest the spread of a plant pest.\footnote{111. Miller v. Schoene, 276 U.S. 272, 281 (1928).} There is no indication in the opinion that the Court’s analysis was affected by the fact that the regulation required that the trees be cut down rather than left standing. Similarly, in the *Regional Rail Reorganization Act Cases*, the Court rejected the argument that congressional legislation compelling an insolvent railroad to continue providing rail service necessarily resulted in a taking of the railroad’s assets.\footnote{112. Reg’l Rail Reorganization Act Cases, 419 U.S. 102, 154 (1974).} There is, in short, nothing to the Federal Circuit’s idea that the involvement of the “active hand” of government in *Casitas* necessarily converted a regulatory action into a physical appropriation.

Apart from precedent, the panel’s theory that regulations imposing affirmative obligations deserve special scrutiny under the Takings Clause is inconsistent with the basic purpose of regulatory takings doctrine. The Supreme Court has declared that the goal of the doctrine is to identify regulations that are so burdensome that they are the “functional[] equivalent” of classical physical occupations or direct appropriations.\footnote{113. Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 539 (2005).} An inquiry that focuses on whether a regulation imposes an affirmative obligation on a property owner rather than a negative restriction on property use sheds no meaningful light on whether the regulation is tantamount to a classical taking. Nor does an affirmative regulatory mandate impair some essential feature of property ownership, such as the right to exclude the public. The government routinely places affirmative duties on property owners to maintain their property in a certain fashion or to install particular equipment on the property without triggering liability under the Takings Clause,\footnote{114. Virtually the entire panoply of federal environmental laws can be characterized as imposing affirmative regulatory mandates on property owners, from requirements to install scrubbers on smokestacks to requirements to install water pollution control equipment. The imposition of these kinds of affirmative obligations has no more given rise to successful takings claims than, at least prior to *Casitas*, requirements that dam owners construct and operate fish-passage facilities. See infra text accompanying notes 129–50.} much less under a per se takings test. For all these reasons, there is simply nothing to the Federal Circuit’s argument.

Several other aspects of the Federal Circuit’s decision deserve brief discussion. First, in response to the government’s reliance on *Tahoe-Sierra* and its discussion of the narrowness of per se rules, the panel asserted that
The panel said that Tahoe-Sierra involved a mere temporary moratorium, whereas the regulation in Casitas was permanent in the sense that the water required to be channeled through the fish ladder would be “forever gone.” This distinction is completely irrelevant to the issue of which takings test should apply. The Supreme Court has made clear that the same takings analysis applies regardless of whether a regulation is temporary or permanent in nature, and the Court has certainly never suggested that permanent regulations should be regarded as per se physical takings. For example, the Court evaluated the claim in Lucas as a regulatory taking claim, even though it assumed that the restriction was “unconditional and permanent.” Likewise, in First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, the case that established that financial compensation is the default remedy for a takings violation, the Court said that regulatory takings analysis typically commences with the assumption that the restriction will be “permanent.” While the Tahoe-Sierra case involved a temporary regulatory restriction, the decision cannot possibly be read to support the radical, novel position that permanent regulatory restrictions all constitute physical takings.

The Federal Circuit also suggested that a finding of a per se taking was supported by the fact that the water was required to be channeled into the fishway after the District had already diverted the water into the canal.
The thinking underlying this suggestion is apparently that the status of the water changed when it was diverted out of the river and into the canal: that the District may have held a mere usufructuary interest in the water while it was still in the river but, after the water was diverted into the canal, the District gained ownership of the physical water molecules. While this theory is certainly debatable as a matter of California law, the critical point is that the legal status of the water once it was diverted into the canal is irrelevant for the purpose of deciding what takings analysis applies. Even if the District owned the physical water once it was in the canal, the government was still merely regulating use of the water, and not appropriating it.

Lastly, the Federal Circuit blatantly misread the most directly relevant Supreme Court precedent, Hudson Water Co. v. McCarter. The panel reasoned that the decision was beside the point because the Supreme Court did not actually reach the issue of the applicable takings test; the panel asserted that the Supreme Court disposed of Hudson County on the threshold basis that the plaintiff did not hold a protected property right to sell the water under New Jersey law. In fact, not only did the Court not reject the taking claim on this ground, it explicitly declined to do so. The panel quoted a passage from Hudson County that purportedly supported its interpretation, but the quoted passage actually appeared in the Court’s discussion of the Commerce Clause issue, and not the takings issue in the case. On the other hand, in the portion of the opinion discussing the takings issue, the Supreme Court noted that the New Jersey court had rejected the

---

122. Id. at 1292; see Casitas Mun. Water Dist. v. United States, 556 F.3d 1329, 1332 (Fed. Cir 2009) (Moore, J., concurring) (“The water for the fish ladder comes out of Casitas’ allotment of 107,800 acre-feet per year. That is so because, once the water is in the canal, it is water that Casitas has diverted pursuant to its allotment. It thus has become the property of Casitas.”).

123. See Brief of California State Water Resources Control Board as Amici Curiae Supporting Appellee, United States, at 24, Casitas Mun. Water Dist. v. United States, 556 F.3d 1329 (Fed. Cir 2009) (No. 2007-5153), 2007 WL 4984849 (quoting Cal. Pastoral and Agric. Co. v. Madera Canal & Irr. Co., 167 Cal. 78, 83 (1914) (“[A]n appropriator is not entitled to the quantity of water actually diverted and taken into possession, if he uses only a portion of it, and . . . his right is limited to the amount he actually uses for a beneficial purpose.”). Interestingly, in a related case involving the scope of the federal Clean Water Act, the Supreme Court rejected the argument that water flowing down the Presumpscot River loses its status as “waters of the United States” when it is temporarily diverted into a power canal. See S.D. Warren Co. v. Me. Bd. of Envtl. Prot., 547 U.S. 370, 379 n.5 (2006) (disagreeing with the Supreme Judicial Court of Maine’s finding that “one can denationalize national waters by exerting private control over them”).


125. Casitas Mun. Water Dist., 543 F.3d at 1294.

126. Id. at 1294–95 (quoting Hudson County Water Co., 209 U.S. at 357).
takings claim based on its understanding that the plaintiff lacked a protected property interest in the water under New Jersey law. 127 But the Supreme Court declined to rest its resolution of the takings claim on this ground, stating, “we prefer to put the authority which cannot be denied to the state upon a broader ground than that which was emphasized below.” 128 The Court then proceeded to explain why, in its view, the regulation did not constitute a “taking.” 129 In short, the Federal Circuit plainly misread Hudson County. 130

In sum, the Federal Circuit ruling in Casitas conflicts with relevant Supreme Court precedent and the broader principles of contemporary regulatory-takings doctrine. Beyond that, however, as discussed below, the ruling is contrary to the overwhelming weight of authority on the constitutionality of fish-passage requirements.

B. The Ruling Is Contrary to Precedents Involving Fish-Passage Requirements

An unfortunate consequence of the plaintiff’s change in the focus of its case—from the water left in the stream, to the water channeled through the fish ladder—is that the parties never briefed, and the Federal Circuit did not address, the numerous judicial precedents specifically addressing government mandates that dam owners install and operate fish-passage facilities. The Federal Circuit decision reads as if no court had previously addressed the constitutionality of such requirements. This is plainly implausible, given the obvious, longstanding conflicts between dams and migratory fish. In fact, there is voluminous precedent on the subject and it strongly favors the government rather than the District. Thus, the Federal Circuit’s second major error in Casitas was to ignore this extensive body of highly relevant precedent.

As Professor John Hart has explained in his leading article on the subject, regulation of dams to protect fish migration has a long and

128. Id. at 355.
129. Id. at 355–57.
130. The panel also sought to distinguish Hudson County on its facts, observing that in this case, in contrast to Hudson County, “the United States did not just require that water be left in the river, but instead physically caused Casitas to divert water away from the Robles-Casitas Canal and towards the fish ladder.” Casitas Mun. Water Dist., 543 F.3d at 1295. But this argument is merely a reprise of the argument that there is a relevant distinction between negative restrictions on the use of property and regulations imposing affirmative obligations on owners. See supra text accompanying note 114 (discussing how both types of regulations are governed by the same takings analysis).
instructive history. Most tellingly perhaps, James Madison, the author of
the federal Takings Clause, was a principal proponent of fish-passage
legislation while a member of the Virginia Assembly—and never suggested
that enforcement of such a measure might constitute a taking requiring
compensation. Given that the author of the Takings Clause was a fish-
passage advocate and never argued that requiring a dam owner to provide
fish passage would raise a constitutional problem, it is, at a minimum,
achistorical to apply the Takings Clause in this context.

In addition, Virginia was hardly alone in America’s early history in
adopting fish-passage legislation. Many colonies adopted fish-passage laws
starting in the early eighteenth century, and most of the original states had
fish-passage laws. “By 1800, thirteen states had laws prohibiting mill
dams on some or all of their rivers from obstructing the passage of fish.”
With the gradual expansion of the United States during the nineteenth
century, more states adopted similar legislation, including—most notably
for the purpose of Casitas—California in 1870, two decades after it joined
the Union.

In keeping with Alexis de Tocqueville’s observation about the
litigiousness of early Americans, these legislative measures inevitably
generated legal claims that they infringed upon dam owners’ property
rights. These claims were variously presented as involving impairments
of contracts, violations of due process, or takings. In the overwhelming
majority of cases, the courts rejected these claims. Some of the decisions
rested on capacious conceptions of the police power, while others

131. John F. Hart, Fish, Dams, and James Madison: Eighteenth-Century Species Protection and
132. Id. at 299–306.
133. Id. at 289, 292.
134. Id. at 292.
135. The leading early-nineteenth century treatise on water resource law stated, “[i]n this
country the statute books of almost all the states shew [sic] the solicitude of the legislature to preserve a
free passage for the fish, especially in those rivers which are annually visited by fish from the ocean.”
JOSEPH K. ANGELL, A TREATISE ON THE COMMON LAW IN RELATION TO WA TER-COURSES 57 (1824).
136. An Act to Provide for the Restoration and Preservation of Fish in the Waters of this State,
137. ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 257 (1835).
138. See, e.g., Holyoke Co. v. Lyman, 82 U.S. 500 (1872) (Contracts Clause claim); Purker v.
People, 111 Ill. 581 (1884) (Due Process claim); State v. Franklin Falls Co., 49 N.H. 240 (1870) (Taking
claim).
139. See State v. Beardsley, 79 N.W. 138, 140 (Iowa 1899) (“The law seems to be as definitely
settled in favor of the public, to protect fish, and provide for their passage along the streams, as well in
unnavigable as in navigable waters.”); W. Point Water Power & Land Imp. Co. v. State, 66 N.W. 6, 8
(Neb. 1896) (“That the declared purpose of the act, viz. the preservation of the fish in our streams, is a
proper function of the state government, as tending directly to promote the public welfare, is a
proposition distinctly recognized by authority . . . .”).
stressed the idea of special public rights in—and correspondingly broad government authority to protect—public fisheries. Representative of these decisions is an early case in which the Massachusetts Supreme Judicial Court declared:

[T]he right to build a dam for the use of a mill was under . . . [an] implied limitation . . . to protect the rights of the public to the fishery; so that the dam must be so constructed that the fish should not be interrupted in their passage up the river to cast their spawn. Therefore every owner of a water-mill or dam holds it on the condition, or perhaps under the limitation, that a sufficient and reasonable passage-way shall be allowed for the fish.

Numerous other cases decided by the state courts articulate the same basic principle.

140. See Inhabitants of Stoughton v. Baker, 4 Mass. 522, 528 (1808) (stating that the right to build a dam was subordinate to “the rights of the public to the fishery”); In re Del. River at Stilesville, 115 N.Y.S. 745, 750 (App. Div. 1909) (“The people of the state have . . . as an easement in this stream the right to have fish inhabit its waters and freely pass to their spawning beds and multiply, and the right to take and use such fish for food, subject to such regulations as the Legislature may prescribe; and no riparian proprietor upon the stream has the right to obstruct the free passage of fish up the stream to the detriment of other riparian proprietors or the public.”).

141. Inhabitants of Stoughton, 4 Mass. at 528.

142. See, e.g., Cottrill v. Myrick, 12 Me. 222, 231 (1835) (“The riparian proprietor may erect a dam upon such a stream, without providing therein a passage for fish, so long as he violates no existing law, but subject to the well established right of the legislature to interpose. No individual can prescribe against this right, which is here held to belong to the public.”); Commonwealth v. Chapin, 22 Mass. (5 Pick) 199, 205 (1827) (holding dam owner liable for monetary penalty unless he constructs fish-passage facilities as required by state statute); State v. Theriault, 70 Vt. 617, 623, 41 A. 1030, 1032 (1889) (“Not a decision in this country, state or national, has been brought to our attention . . . which holds that such acts of the state legislature, in regard to this class of property, and in restraint of the right of the riparian owner to take and appropriate fish therefrom, are unconstitutional. They have uniformly been held to be, not a taking of private property or private rights for public use . . . but an exercise of the police power of the state.”). To be sure, the government did not prevail in every lawsuit challenging fish-passage requirements. See, e.g., People v. Platt, 17 Johns. 195, 215 (N.Y. 1819) (holding that fish-passage legislation violated the Contracts Clause); State v. Glen, 52 N.C. (7 Jones) 321, 334 (1859) (holding that requirement to install fish passage constituted a taking). An article by Professor Eric Claeys states “[d]am owners received just compensation when fish-conservation laws required them to lower their dams so salmon, shad, or other fish could swim upstream to smelt.” Eric R. Claeys, Takings, Regulation, and Natural Property Rights, 88 CORNELL L. REV. 1549, 1591 (2003). But this unqualified statement is obviously an overstatement; to support this assertion he cites only the handful of successful suits by dam owners while ignoring the far larger number of government wins. Furthermore, most of the aberrant decisions reflect special considerations and therefore do not undermine the general judicial consensus that fish-passage requirements are constitutional. People v. Platt, for example, depended on a strict reading of the Contracts Clause, which was epitomized by the Supreme Court’s decision in Fletcher v. Peck, 10 U.S. 87, 138 (1810) (holding that the states cannot rescind grants or contracts without violating the Constitution). That approach was supplanted by a more deferential standard of
By the late nineteenth century, judges, lawyers, and their clients apparently regarded the issue of the constitutionality of fish-passage requirements as largely settled. The Supreme Court’s sweeping rejection of a Contracts Clause challenge to a fish-passage requirement in *Holyoke Co. v. Lyman* was particularly important in solidifying this consensus.143 This 1872 case involved a Massachusetts statute requiring construction of a fish ladder to permit salmon and shad to pass a dam on the Connecticut River.144 The Court rejected the argument that the law, adopted in 1866, violated the company’s charter to build the dam.145 After citing many of the state court precedents on the issue, the Court declared:

[W]ater-power is everywhere regarded as a public right, and fisheries of the kind, even in waters not navigable, are also so far public rights that the legislature of the State may ordain and establish regulations to prevent obstructions to the passage of the fish, and to promote the usual and uninterrupted enjoyment of the right by the riparian owners.146

Following this decision, challenges to fish laws apparently largely fell to the wayside, to the point that in 1909 a New York court could state:

The courts of other states and of the United States have uniformly held that a riparian owner has not the right to maintain a dam or other obstruction which prevents the passage of fish up the streams, and that the Legislature may establish regulations to prevent obstructions to the passage of fish.147

After this point, there are essentially no reported cases addressing the constitutionality of fish-passage requirements.

---

144. *Id.* at 509–10.
145. *Id.* at 522.
146. *Id.* at 506.
In the twentieth century, fish-passage requirements largely became the province of federal law. In 1906, in the General Dam Act, Congress directed that, “[t]he persons owning or operating any . . . dam [across any navigable waters of the United States] shall maintain, at their own expense, such . . . fishways as the Secretary of Commerce . . . shall prescribe.” In 1920, Congress enacted the Federal Water Power Act governing the construction and operation of non-federal hydropower projects and creating the Federal Power Commission (later renamed the Federal Energy Regulatory Commission) to oversee the licensing process. Section eighteen of that Act provided that licensed facilities shall be subject to “rules and regulations [that] may include the maintenance and operation by such licensee at its own expense of such . . . fishways as may be prescribed by the Secretary of Commerce.” In accord with the consensus that emerged from the state courts in the nineteenth century on the constitutionality of this type of requirement, there is apparently no precedent involving takings or constitutional challenges to these federal law provisions.

In sum, when viewed in larger historical context, Casitas represents a dramatic departure from a well-established, longstanding judicial consensus in favor of the constitutionality of fish-passage requirements. Even more remarkably, the Court issued its decision without acknowledging the enormous body of judicial decisions that it was throwing overboard. While the Federal Circuit might fairly be excused for this lapse given the tortured history of the litigation, Casitas’s sharp break with the past provides

151. Id. at 1073 (codified as amended at 16 U.S.C. § 811 (2006)); see 16 U.S.C. § 811 (2006) (“[T]he Commission shall require the construction, maintenance, and operation by a licensee at its own expense of such lights and signals as may be directed by the Secretary of the Department in which the Coast guard is operating, and such fishways as may be prescribed by the Secretary of the Interior or the Secretary of Commerce, as appropriate.”).
152. Although there are apparently no cases involving challenges to the requirements to construct and maintain fishways, there is extensive precedent upholding the Commission’s authority to impose conditions on hydropower licenses requiring the project operator to devote a portion of its project water to mitigation project impacts. See, e.g., Escondido Mut. Water Co. v. La Jolla Band of Mission Indians, 466 U.S. 765, 782 (1984) (noting the Commission’s authority to impose certain conditions upon licenses); California v. Fed. Power Comm’n, 345 F.2d 917, 924 (9th Cir. 1965) (“[T]he Commission had authority to incorporate in the tendered license a condition which could operate to impair the districts’ full use of their irrigation water rights in some future year.”).
another reason to believe that this decision is ripe for re-examination in the future.

V. THE GOVERNMENT SHOULD ULTIMATELY PREVAIL IN CASITAS

Looking to the next steps in the Casitas litigation, it appears unlikely that the District will ultimately prevail on its taking claim, even accepting the validity (at least for the time being) of the Federal Circuit’s ruling that a requirement to direct water through a fish ladder should be treated as a physical taking. First, assuming that a requirement to divert water is a physical taking that would ordinarily trigger per se takings analysis, the larger regulatory context in which the requirement was imposed on the District suggests that the District’s claim should be evaluated as an “exactions” claim in accordance with the standards of Nollan v. California Coastal Commission153 and Dolan v. City of Tigard.154 Applying the “essential nexus” and “rough proportionality” tests that apply to exactions, the Claims Court on remand should conclude that this regulation did not result in a taking.

Second, and in any event, the District’s taking claim should fail because the ESA regulatory requirement is consistent with and supported by background principles of California law. When, as in this case, a claimant cannot point to a protected property interest that has been intruded upon by a challenged regulation, the taking claim fails at the threshold, regardless of what takings analysis applies. In this case there are at least two independent grounds for concluding that background principles apply: (1) the California public trust doctrine, and (2) the century-old California statutory requirement that dam owners provide sufficient water via fishways to meet the flow needs of fisheries below dams.

A. Nollan and Dolan

The Casitas litigation has so far focused on the question of whether a requirement to pass water through a fish ladder should be regarded as a regulation of the water interest or a physical taking of that interest. If the United States had prevailed (as it should have) on the argument that a regulatory requirement to pass water through a fish ladder should be analyzed as a potential regulatory taking, this litigation would be completed and judgment would have been entered for the United States. However,

now that the Federal Circuit has ruled that this requirement should be regarded as involving a physical taking, the question becomes how that conclusion should affect the ultimate resolution of the takings liability issue in the case.

Based on settled takings principles, the taking claim should be analyzed using the exactions framework established in *Nollan* and *Dolan*. An exactions analysis applies in the situation where a government agency grants a property owner permission to exploit some interest, but subject to a condition that imposes a requirement which, considered independently, would constitute a per se taking.155 In *Nollan*, the California Coastal Commission granted permission to the Nollans to build a larger building on their shorefront property, but on the condition that they grant the public a right of passage along the beach in front of their property.156 In *Dolan*, the City of Tigard granted permission to Mrs. Dolan to expand her hardware store, but on the condition that she grant the public access to a greenway running through the property.157 The Supreme Court established that when a condition of this type is not imposed unilaterally, but instead is attached as a condition to a regulatory authorization, the condition does not necessarily result in a taking.158 Instead, the Court ruled that such a condition will be held to be a taking only if there is no “essential nexus” between the condition and the government’s legitimate regulatory purposes, or if the burden imposed by the condition is not “roughly proportional” to the public harm the regulation is designed to avoid.159

The *Nollan* and *Dolan* analytic framework logically applies in *Casitas* on remand. The United States did not impose the requirement that water be provided to operate the fishway unilaterally. Rather, this requirement was imposed as a condition included in the Biological Opinion granting affirmative authorization to the District to operate the project in the future without violating the ESA.160 As discussed above, the purpose of the ESA consultation was to address the claim—initially asserted by California Trout—that operation of the dam without adequate fish-passage facilities would constitute an illegal “take” under the Act. Because the fish-passage requirement was attached as a condition to an affirmative grant of

155. See *Nollan*, 483 U.S. at 836–37 (describing an apparent “lack of nexus between the condition and the original purpose of the building restriction”).
156. *Id.* at 827–28.
158. *Nollan*, 483 U.S. at 836.
160. *Casitas Mun. Water Dist. v. United States*, 543 F.3d 1276, 1282 (Fed. Cir. 2008), *reh’g
denied, reh’g en banc denied*, 556 F.3d 1329 (Fed. Cir. 2009).
regulatory permission, just as in *Nollan* and *Dolan*, the exactions standards apply.

The District might object that, unlike in *Nollan* and *Dolan*, where the conditions were attached to regulatory authorizations to engage in some expanded land use activity, in this case the condition was attached to an authorization for the District to continue operating the dam essentially as it has been doing for the last forty years. However, the Supreme Court has long recognized that the same regulatory takings analysis applies regardless of whether a regulation is being applied to limit some new proposed property use or to constrain some established use. Furthermore, any taking claim arising from any potential regulatory restrictions on the District’s ability to divert the Ventura River unquestionably would have to be analyzed as a regulatory taking issue, as discussed above. After Judge Wiese’s *Casitas* decision, no judicial precedent supports applying the per se physical takings theory to restrictions on water diversions. Given that regulatory takings analysis would apply to any taking claim based on a decision about whether to allow the project to continue to operate or not, a condition imposed on the authorization of continued project operations would have to be tested under *Nollan* and *Dolan*.

Furthermore, regulation of water interests is decidedly less retroactive in operation than regulation of established land use. In this case, the fish-passage requirement has no retroactive effect whatsoever on the District’s past exploitation of the water that flowed down the Ventura River. Instead, the ESA imposes a condition on the District’s future diversions from Ventura River flows. Thus, even if there were a meaningful distinction between regulatory constraints imposed on established property uses and future uses, the regulations at issue in this case are purely prospective in operation.

While the record no doubt will require further development on remand, it appears a virtual certainty that the government can satisfy the essential nexus and rough proportionality tests. The requirement to pass water through the fishway in order to protect the fishery is logically related to the government’s regulatory purpose in reviewing the dam operations to reduce harm to the fishery. The relatively modest amount of water the District is

161. *See* Goldblatt v. Town of Hempstead, 369 U.S. 590, 592 (1962) (stating that the application of a new licensing ordinance to a mining company does not violate the Constitution simply because that company’s mining operation was already underway when the ordinance was adopted); Hadacheck v. Sebastian, 239 U.S. 394, 404–05 (1915) (involving a taking claim based on a law prohibiting the claimant from continuing to operate a brickyard); *see also* Yee v. City of Escondido, 503 U.S. 519, 522–23 (1992) (indicating in dictum that taking claims based on rent control ordinance affecting pre-existing landlord-tenant relationship should be evaluated under *Penn Central* standards).
required to devote to fishway operations is certainly roughly proportional to the public harms from the dam operations that the government is attempting to remedy.

B. Background Principles of California Law

Even assuming that the requirement to pass water through the fish ladder would constitute a taking, there remains the threshold question of whether the regulation can be defended against the taking claim on the ground that it parallels background principles of state law defining and limiting private rights in water. If a regulation simply mirrors limitations that are inherent in a claimant’s property interest to begin with, a taking claim based on the regulation fails at the threshold.162 There are at least two potentially relevant background principles in this case: the California public trust doctrine and the longstanding California statutory requirement that dam operators provide water via fishways to support fisheries below dams.

1. Public Trust Doctrine Defense

Under National Audubon Society v. Superior Court, no California appropriative water-right holder can claim a property right to exploit water in a fashion that is harmful to public trust resources.163 By completely blocking upstream passage by steelhead trout, the operation of the Robles Diversion Dam plainly harmed a public trust resource. The installation and operation of a fishway eliminates or at least reduces the harm to the fishery caused by the dam. Because no water-right holder can claim a property right to use water in a fashion that harms the public trust, and because devoting water to the operation of the fish ladder reduces this harm, the requirement to devote water to operation of the fishway does not impinge on any protected property interest in the water.

Notwithstanding the straightforward logic of this position, the District may present several counter arguments. Upon analysis, none of the likely counter-arguments is convincing.

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

163. Nat’l Aububon Soc’y v. Superior Court, 658 P.2d 709, 712 (Cal. 1983) (discussing how the public trust doctrine bars any person “from claiming a vested right to divert waters once it becomes clear that such diversions harm the interests protected by the public trust”). The California reasonable use doctrine represents another background principle of California water law that very arguably parallels the public trust doctrine in this context. See California Constitution, Article X, Section 2.
The first potential counter argument is suggested by Judge Wiese’s *Tulare Lake* decision. In addition to relying on the physical takings theory to support his conclusion that there had been a taking, he ruled that the United States could not rely on the public trust doctrine or other background principles of California water law to defeat the taking claim.\(^{164}\) In *Casitas*, Judge Wiese repudiated his physical taking theory,\(^{165}\) but he has not had occasion to re-examine this other facet of *Tulare Lake*. He will be required to do so on remand in *Casitas*.

In *Tulare Lake*, Judge Wiese acknowledged, as a general proposition, that California background principles limit private rights in water, and that the nature and scope of these background limitations evolve over time based on new knowledge and information.\(^{166}\) But he also ruled that the California water board has exclusive jurisdiction (along with California state courts) to define how the public trust doctrine or other background principles should be applied in any particular case.\(^{167}\) He concluded that if a water user has been granted an appropriative water right under California law, a federal court has no authority to determine what limitations on the water interest may exist pursuant to the public trust or reasonable use doctrines.\(^{168}\) “The public trust and reasonable use doctrines each require a complex balancing of interests—an exercise of discretion for which this court is not suited and with which it is not charged.”\(^{169}\)

This analysis was mistaken, first, because, focusing specifically on the public trust doctrine, it confused the limits on property rights in water imposed by that doctrine with the scope of the water board’s regulatory authority under the public trust doctrine. Judge Wiese apparently believed that the terms of a water permit issued by the board define the scope of a permittee’s property right in the water.\(^{170}\) But that understanding is based on a misreading of *National Audubon* because the California Supreme Court made clear that the public trust doctrine imposes more severe limitations on property interests in water than on the board’s regulatory

---

166. *Tulare Lake*, 49 Fed.Cl. at 321. “There is, as an initial matter, no dispute that all California water rights are subject to the universal limitation that the use must be both reasonable and for a beneficial purpose.” *Id.*
167. *Id.* at 324.
168. *Id.*
169. *Id.* at 323–24.
170. *Id.* at 322 (stating that the state appropriative water-right permit “define[d] the scope of plaintiffs’ property rights”).
authority over water rights. On the one hand, National Audubon states in unambiguous terms that no water-right holder can claim any property entitlement to use water in a way that is harmful to trust resources. On the other hand, the decision states that the water board has the authority, after giving due consideration to public trust values and other aspects of the public interest, to issue permits authorizing the destruction of public trust resources. The Court explained that the board has “the power to grant usufructuary licenses that will permit an appropriator to take water from flowing streams and use that water in a distant part of the state, even though this taking does not promote, and may unavoidably harm, the trust uses at the source stream." It follows from the difference between the scope of private rights in water and the scope of the board’s regulatory authority over water that a permit issued by the board does not define an appropriator’s property interest. As the California Supreme Court put it in National Audubon, the state only has “the power to grant nonvested usufructuary rights to appropriate water even if such diversions harm public trust uses.” The use of the term “nonvested right” indicates that a water permit may grant a water user an interest enforceable, for example, against other competing water users. But it also indicates that an appropriative permit does not create a vested entitlement against the public in the event exercise of the water right will harm public trust resources.

Furthermore, Judge Wiese was mistaken insofar as his ruling in Tulare Lake was based on the notion that the U.S. Court of Federal Claims, as a federal court, lacks the authority to interpret and apply the state public trust doctrine in the same fashion that a state court or the state water board would. Under the doctrine of Erie Railroad Co. v. Tompkins, a federal court has an obligation to apply state law in the same fashion that a state court would. While Erie represents a broad principle of federal-state relations

172. Id. at 721 (”One consequence, of importance to this and many other cases, is that parties acquiring rights in trust property generally hold those rights subject to the trust, and can assert no vested right to use those rights in a manner harmful to the trust.”); see id. at 727 (stating that the public trust doctrine “prevents any party from acquiring a vested right to appropriate water in a manner harmful to the interests protected by the public trust”); see also id. at 732 (“The public trust doctrine . . . precludes anyone from acquiring a vested right to harm the public trust . . . .”).
173. Id. at 712 (“The prosperity and habitability of much of this state requires the diversion of great quantities of water from its streams for purposes unconnected to any navigation, commerce, fishing, recreation, or ecological use relating to the source stream.”).
174. Id. at 727 (emphasis added).
175. Id. at 712 (emphasis added).
within our system of federalism, it certainly applies in the specific context of a federal takings case where the threshold question of the nature and scope of the property interest is generally defined by state law. In accord with this understanding in *National Audubon* the California Supreme Court explicitly recognized that the federal courts would have the authority and responsibility to apply the public trust doctrine.

The Supreme Court has explained the *Erie* doctrine in part as a way of avoiding divergent results based on whether a federal or state court is addressing a state legal issue. That policy consideration certainly applies in this case because there is no just reason why this taking claim should be resolved differently depending upon whether it was filed in federal or state court. At bottom, however, *Erie* reflects the fundamental constitutional principle of federalism:

> Erie ultimately rests on the principle that the federal government as a whole, including Congress and the federal courts, has no more authority than that given it by the Constitution. This fundamental principle, which is inherent in the political theory underlying the very concept and structure of the federal government, is reinforced by the Tenth Amendment, which reserves to the state or to the people those powers “not delegated to the federal government by the Constitution.”

The U.S. Court of Federal Claims, as much as any federal court, is bound by the principle of federalism.

---

177. See 19 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4520 (2d ed. 1996) (“[T]he Erie doctrine applies, whatever the ground for federal jurisdiction, to any issue or claim which has its source in state law.”) (quoting Maternally Yours, Inc. v. Your Maternity Shop, Inc., 234 F.2d 538, 540 n.1 (2d Cir. 1956)).

178. Id. § 4520 (“[S]tate law has been applied [under *Erie*] to determine the character of property . . . in federal condemnation actions to determine what property interests are compensable . . . .”), see e.g., Phillips v. Wash. Legal Found., 524 U.S. 156, 163–67 (1998) (applying Texas law in a Takings Clause case to determine whether a legal client had a property interest in interest earned by the attorney’s IOLTA account); Esplanade Props., L.L.C. v. City of Seattle, 307 F.3d 978, 980 (9th Cir. 2002) (rejecting taking claim based on application of Washington’s public trust doctrine).


181. WRIGHT, supra note 177, at § 4505.

182. Cf. Petro-Hunt, L.L.C. v. United States, 90 Fed. Cl. 51, 60–61 (Fed. Cl. 2009) (“[A]s numerous cases attest, questions regarding the existence or loss of most property interests, including those of real property, may be—and often are—litigated in this court in resolving a takings claim. And this occurs even where reference to state law is required—indeed, the latter is usually the case.”).
To carry out the *Erie* doctrine, a federal court addressing a state law issue is, “in substance, ‘only another court of the State.’” 183 In other words, a federal court addressing a substantive issue of state law in deciding a case within its jurisdiction “functions as a proxy for the entire state court system, and therefore must apply the substantive law that it conscientiously believes would have been applied in the state court system.” 184

In the context of this case, this means that the claims court on remand must determine whether the fish-passage requirement was designed to minimize the harm to the public fishery that the project’s operation was causing. All or most of the evidence required to support this conclusion has already been collected in the Biological Opinion supporting installing the fish ladder to avoid an illegal “taking” of the fish by the project. 185 Additional relevant evidence could no doubt be marshaled through witnesses presented at trial.

A second potential counter argument to the public trust defense is that there is a decisive difference between a purely negative restriction on water use and an affirmative mandate for the purpose of applying this doctrine as a background principle. In other words, even if the public trust doctrine would bar a taking claim based on a regulation restricting diversions from a stream, it might be contended that it cannot bar a claim based on an affirmative government mandate about how to use or manage water. This potential argument is obviously an echo of the Federal Circuit’s reasoning in *Casitas*, discussed above, that there is a distinctive difference, for the purpose of defining a “taking,” between a negative restriction on property use and an affirmative direction on how property should be used.

There is no merit, however, to this crabbed view of California background principles. First, it offends common sense. According to this view, the public trust doctrine might bar a taking claim if negative restrictions were imposed on the District by, for example, baring the closing of the gates in the dam or prohibiting water diversions during certain high flow period. If these alternative actions can be defended based on the public trust doctrine, however, it would be nonsensical if the same defense could not be raised to support a fishway requirement that accomplishes the same goal but actually requires less water and imposes more modest interference with project operations. The greater power to drastically curtail project operations for species protection purposes based on the

184. WRIGHT, supra note 177, at § 4507.
public trust doctrine should logically encompass the lesser power to require water for a fish ladder to accomplish the same purpose.

Relevant California precedent also refutes this suggested distinction. In the venerable case of People v. Glenn-Colusa Irrigation District, the California Court of Appeal upheld the right of the state to bring a nuisance action seeking an injunction against an irrigation district diverting water into an irrigation canal “until such time as a fish screen [was] constructed and maintained . . . so as to prevent the destruction of fish in consequences of such diversion.” Based on this precedent, surely a regulation imposing a similar screening requirement could be defended against a taking claim on the ground that it parallels background principles of California nuisance law. If so, then it logically follows that the related public trust doctrine should serve to bar takings claims based on either negative restrictions or affirmative mandates designed to protect fish. This reasoning is also supported by the California Supreme Court’s decision in People ex rel. Robarts v. Russ, in which the court held that a property owner was subject to suit to remove dams he had constructed on a non-navigable waterway that affected navigable waters on the ground that such dams constituted a public nuisance.

2. California Fish-Passage Legislation

A second relevant background principle of California law is the longstanding statutory requirement that dam operators provide water via fish ladders for the protection of public fisheries. This requirement has been in effect for so many years, and its validity is so well established, that it should be regarded as a “common, shared understanding” of the scope of a California appropriative water right that defeats the District’s taking claim.

A threshold issue in applying this defense is whether a statutory provision, as opposed to a common law rule, may serve as a background principle of state law for the purposes of takings litigation. While the common law is the more familiar source of background principles, statutory provisions may qualify as well.

188. CAL. FISH & GAME CODE § 5931 (West 1998).
In *Palazzolo v. Rhode Island*, the Supreme Court explicitly embraced, at least in dictum, the notion that some legislative measures can constitute background principles for takings purposes. \(^{189}\) *Palazzolo* is best known for its rejection of the so-called “notice rule”: the view, widely adopted by state and federal courts, “that any new regulation, once enacted, becomes a background principle of property law which cannot be challenged by those who acquire title after the enactment.” \(^{190}\) The Court rejected this “blanket rule,” but at the same time implicitly recognized that a claimant’s pre-acquisition notice of a regulatory restriction should be a highly relevant factor in takings analysis. \(^{191}\) Of more immediate relevance for present purposes, the Court also stated: “We have no occasion to consider the precise circumstances when a legislative enactment can be deemed a background principle of state law or whether those circumstances are present here.” \(^{192}\) The Court’s use of the word “when”—rather than “if”—acknowledges that legislative measures do rise to the level of background principles under some circumstances. Likewise, the Court’s remand of the case to determine whether “those circumstances are present here,” that is, whether the Rhode Island wetland law might constitute a background principle, also indicates that the Court is prepared to recognize that some statutory measures qualify as background principles.

Assuming statutory measures can constitute background principles, the question becomes which types of statutes qualify. One consideration should be whether the statutory measure has been in place so long that it can be considered part of the state’s legal traditions. In *Lucas v. South Carolina Coastal Council*, the Court, without explicitly addressing whether statutory measures can qualify as background principles, emphasized that background principles must be historically rooted. \(^{193}\) The Court said that regulations eliminating all economically viable use cannot be “newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles of the State’s law of property and nuisance already place upon land ownership.” \(^{194}\) In *Palazzolo*, sounding the same theme, the Court said that the background principles concept is ultimately “explained in terms of those common, shared


\(^{190}\) Id. at 629.

\(^{191}\) See id. at 633 (O’Connor, J., concurring); see also id. at 638–39, 642 (Stevens, J., concurring in part & dissenting in part); id. at 634–35 (Breyer, J., dissenting).

\(^{192}\) Id. at 629.


\(^{194}\) Id.
understandings of permissible limitations derived from a State’s legal tradition.”

The dissenting opinion of Chief Justice Rehnquist in Tahoe-Sierra provides additional support for this historically rooted conception of statutes as background principles. Speaking for himself and two other Justices, the Chief Justice objected to the majority’s rejection of a per se takings test for the development moratorium at issue in that case. In the course of arguing for a per se rule, Chief Justice Rehnquist said the potential severity of this approach would be leavened by treating certain legislative measures as background principles. In particular, he said that his view of background principles would cover “normal delays” in obtaining zoning approvals, observing that “[z]oning regulations existed as far back as colonial Boston, and New York City enacted the first comprehensive ordinance in 1916.” Chief Justice Rehnquist’s reasoning suggests that statutory measures that are many decades old should qualify as background principles as easily as common law rules.

Another question is whether a statutory provision must be related to or grow out of a common law rule to qualify as a background principle. Everything else being equal, a statute that builds on longstanding common law rules can more readily be described as an expression of the state’s legal traditions than a statute that represents a relative novelty. This approach is supported by the decision of the U.S. Court of Appeals for the Federal Circuit in American Pelagic Fishing Co. v. United States. In this case, the court rejected a taking claim based on federal legislation barring the claimant from using its vessel to fish for certain species in the Exclusive Economic Zone off the U.S. coast. The court ruled that the 1976 Magnuson Act represented a background principle of law establishing comprehensive federal control over fishing out to the 200-mile limit, precluding claims of private property rights to fish in the area. Significantly, the court observed that its interpretation of the Act was “consistent with the historical role played by the sovereign, state or federal, with respect to its waters,” and observed that “[a]s early as 1876, the Supreme Court concluded that ‘[t]he principle has long been settled in this

195. Palazzolo, 533 U.S. at 630 (citation omitted).
197. Id. at 351–54.
198. Id. at 352 (citations omitted).
200. Id. at 1366.
201. Id. at 1379.
court, that each State . . . own[s] the tide-waters themselves, and the fish in them, so far as they are capable of ownership while running."202 This decision appears to confirm that statutory measures may be more readily treated as background principles when they are consistent with and are derived from common law traditions.

Applying the foregoing analysis, section 5937 of the California Fish and Game Code would certainly qualify as a background principle limiting California appropriative waters rights. Section 5937 provides:

The owner of any dam shall allow sufficient water at all times to pass through a fishway, or in the absence of a fishway, allow sufficient water to pass over, around or through the dam, to keep in good condition any fish that may be planted or exist below the dam.203

This language, with some modest changes in wording, dates back to state legislation originally adopted in 1870.204 In addition, this statutory requirement appears to parallel limitations on title already established under California common law; indeed, for the reasons discussed above, the public trust doctrine provides an independent defense to the claim that the requirement that water be directed through the fish ladder constitutes a taking. In sum, both ancient pedigree and close consanguinity with the public trust doctrine support the conclusion that section 5937 should be treated as a background principle of California law.

CONCLUSION

If there is merit to the foregoing legal arguments, one might well wonder how the plaintiff in Casitas has gotten as far as it has with what is, according to this account, a very weak case. A large measure of credit is due to Roger Marzulla, the experienced private property rights practitioner who has represented the plaintiff with remarkable skill and tenacity throughout this litigation. In particular, Mr. Marzulla deserves credit for his flexibility. After achieving a seemingly major property rights victory in Tulare Lake in 2001, he naturally sought to apply and extend that victory in

202. Id. (quoting McCready v. Virginia, 94 U.S. 391, 394 (1876)).
203. CAL. FISH & GAME CODE § 5937 (West 1998).
204. An Act to Provide for the Restoration and Preservation of Fish in the Waters of this State, ch. 457, § 3, 1870 Cal. Stat. 663, 663–64. Fish and Game Code Section 5900(c) defines an "owner" to include a dam operator, such as Casitas Municipal Water District. CAL. FISH & GAME CODE § 5900(c) (West 1998).
this and other litigation. However, in the aftermath of Tahoe-Sierra, and in particular following Judge Wiese’s well-reasoned decision in Casitas repudiating his own ruling in Tulare Lake, Mr. Marzulla made the sound tactical decision to abandon his hard won victory in Tulare Lake and invent a new theory to present on appeal in Casitas. Whether or not the tactic is ultimately successful in obtaining an award for his client under the Takings Clause, Mr. Marzulla’s refusal to be tied down by ill-fated consistency is a lesson in excellent lawyering.

More difficult to explain is how this case has proceeded as far as it has in the U.S. Court of Appeals for the Federal Circuit and survived, albeit barely, a vigorously contested petition for rehearing and rehearing en banc. While there are two sides to any argument, it would appear difficult for any objective observer to conclude that the position of the Federal Circuit panel more faithfully applies relevant Supreme Court precedent than the position of the dissenters. In part the explanation lies with the change in the plaintiff’s litigating posture, which no doubt deprived the Federal Circuit of the opportunity to receive full briefing on all the relevant issues. Inevitably, perhaps, there also appears to be an ideological component to the decision. The court, at the time the appeal and the petition for rehearing and rehearing en banc were heard, was split eight to four between Republican and Democratic appointees. Of the four Democratic appointees, three dissented on the merits or at least voted to rehear the case.

The last bit of inevitable speculation centers around why the Solicitor General, Elena Kagan, former Dean of Harvard Law School, declined to file a petition for certiorari despite fairly aggressive importuning from various quarters that she do so. Because the Solicitor General does not publicly explain herself on such matters, the answers are a matter of pure speculation. She may have been pessimistic or uncertain about the prospects of success in the Supreme Court. The Solicitor General has an enormous workload and she may have concluded that, relative to all of the other important cases she had to consider, this case did not warrant a major investment of time and effort. She also may have been influenced by the majority’s insistence that the result turned on specific concessions the government had made for the purpose of appeal. While the significance of these concessions for any particular issue at stake in the case remains obscure, the mere suggestion that the case involved a fact-specific problem might ultimately have persuaded the court that the case was not “cert worthy.” She also may have concluded that resolution of the important question of how the Takings Clause applies to water interests should be reserved for a case involving restrictions on water diversions, not one involving the relatively special problem of requiring that water be passed
through a fish ladder. She may have simply wished to see this case mature before presenting it to the Supreme Court.

In the end, what seems clear is that the Federal Circuit’s decision is hardly the last word on how the Takings Clause applies to water interests. There will be extensive litigation on remand in this case that may well yield a determination that the District is not entitled to any recovery. There will be extensive litigation over the potential reach of this new precedent. And, before too long, in either the Supreme Court or the Federal Circuit, the question will be squarely presented whether the Federal Circuit’s *Casitas* ruling was correct or not.
This essay examines adaptation of property law to rapid changes in resource character through climate change. My jurisprudential concern is with judicial disfavoring of legislative adjustments of common law entitlements. My doctrinal concern focuses on regulatory takings challenges to legislative programs to adapt to rising sea levels. Legal adaptation to fast and large changes in resources, such as through sea level rise, will require inventive legislation. It already has become a cliché that climate change changes everything. But some courts privilege common law rights over legislative realignment, invoking the Takings Clause or other constitutional provisions. This essay will examine this problem in the context of current cases wrestling with legislation that purports to govern the allocation of rights to beaches between private owners and the public.

Sea levels have been rising at an accelerating rate in recent years. Substantial sea level rise is nearly certain to occur in subsequent decades as a consequence of global warming regardless of what mitigation measures government or private citizens adopt. Public and private land will disappear beneath the waves and buildings will be destroyed. More severe
storms may well aggravate the loss of land and buildings. The mean high tide line, which typically marks the division between public trust tidelands and privately owned dry land, will move inland. Under traditional common law rules governing erosion, the migration of the mean high tide line will change ownership of locations from private owners to the public. The seas will engulf wetlands, which may establish themselves in locations formerly dry and inland. Private owners, of course, have the incentive to resist these outcomes, either through armoring the shore or through legal arguments. Public officials will have complex incentives and duties: protecting environmental resources (such as dunes and wetlands), securing public rights, promoting economic development, and satisfying constituents, including littoral property owners. But the dramatic changes being brought about by climate change will require rapid developments in rules based upon scientific understandings and the balancing of competing interests that legislatures accomplish better than courts.

Because my underlying concern in this essay is jurisprudential, I will not argue here for any particular regulatory approach for adapting to rising sea levels. Instead, I will consider three approaches, all of which reflect recent judicial decisions or legislative proposals. First is public financing of beach restoration accompanied by fixing the formerly mobile line between public and private land. This is the approach at issue in Stop the Beach Renourishment v. Florida Department of Environmental Protection. Second is the advance inland, or “rolling,” of public easements over eroding, formerly unburdened private land. This is the problem addressed in Severance v. Patterson. The third scenario considers plausible proposals to enact legislation that restricts the ability of private landowners to erect seawalls or other structures meant to protect their land from inundation and the passing to public ownership due to sea level rise. Meg Caldwell proposes something to this effect in a recent article.

Each of these three scenarios raises regulatory takings issues. In decisions addressing these issues, courts have placed weight on whether

---

5. Walton County v. Stop the Beach Renourishment, Inc., 998 So. 2d 1102, 1106 (Fla. 2008), cert. granted, 77 U.S.L.W. 3673 (U.S. June 15, 2009) (No. 08-1151) (At the Supreme Court level, the party names are now Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection.).
public restraints on private rights accord with the common law. This strikes me as unjustified. Such judicial attitudes threaten the ability of the appropriate public authorities to respond to sea level rise in an environmentally responsible manner. The question should not be whether the common law once treated seaside rights in a certain way, but whether contemporary legislation is fair to all interested parties.

This paper analyzes the takings implications of different legal adaptations to sea level rise, with particular attention to the normative precedence given to common law rights. The weight given to common law rights over legislative regulation may be endemic to the regulatory takings area because legislation modifies the common law but not vice versa. But judicial privileging of common law baselines took on another dimension in *Lucas v. South Carolina Costal Council*, where the Court used them as “background principles” that provided a crucial measure of the constitutional authority of legislatures. Unfairness to owners from reasonably unanticipated changes in the law is a long-standing element in regulatory takings analysis, but more seems to be at issue here. Courts seem to be moved by a more general concern about whether limitations on use can be said to “inhere in the title,” or should be viewed merely as political constraints external to the title.

In another paper, I have argued that the character of many common law property rules reflect more the institutional limitations of the common law than a fixed normative judgment about the content of those rules. The resources of modern legislation and ongoing administrative regulation broaden the capacity of the government to register and reflect a broader array of interests and values than common law courts could manage. Thus, I argued that common law courts refused to recognize security interests in personal property or protect a resident’s interest in existing natural light, for example, not because these claims were normatively unattractive, but because they could not be protected in common law adjudication without daunting negative consequences. Legislative and administrative innovations effectively solved these problems through establishing a recording system for security interests in personal property and through zoning setbacks and height limitations, both protecting a broader array of interests with reasonable efficiency. My claim was not that legislative

---


adjustments of property rights are always superior to common law rules, but that they are legitimate parts of property law and have capacities to recognize a broader array of interests, manage information to prevent private losses, and adjust private rights to public needs.

Let us turn to the current cases that illustrate the courts’ fixation on the common law origins of old law. At bottom, Stop the Beach Renourishment challenges the constitutionality of Florida’s Beach and Shore Preservation Act. Under the Act, the State, at the request and with the assistance of the relevant local government, restores eroded beaches at public expense. As part of the process, the state fixes a new boundary between the tidal public trust lands and adjacent private littoral lands, based on the historic mean high tide line. After the boundary is fixed, the property line does not move seaward or landward so long as the state maintains the restored beach. The purpose of this is obvious. It would be absurd for the state to pay to restore the beach if much of the new land was to become privately owned. This program does confer substantial benefits on private littoral owners. The restored beach protects their adjacent land from erosion and storm damage. The Act also provides specific legal protections to the littoral owners, such as guarantees of their unimpeded views of and access to the sea. No private land actually is taken, as the beach has to be eroded to qualify for restoration, and the new dry land was previously under water. The private owner litigants claim that the Act deprives them of the property right to obtain future increases from accretion.

Stop the Beach Renourishment challenges as a “judicial taking” the Florida Supreme Court’s interpretation of its precedent in arriving at the conclusion that the littoral owners never had a distinct right at common law to own future accretions. While there are numerous problems with a judicial takings theory based on state court interpretation of state common

---

12. § 161.141.
13. § 161.191.
14. § 161.201.
15. Stop the Beach Renourishment, Inc., 998 So. 2d at 1107.
16. Brief of Petitioner at 16–18, Stop the Beach Renourishment, Inc. v. Fla. Dep’t of Envtl. Prot., No. 08-1151 (July 13, 2009). The concept of a judicial taking is that a judicial change in the dimension of a common law property right might be analyzed as a regulatory taking in a manner similar to how courts analyze legislative limitations on property rights. Barton H. Thompson, Jr., Judicial Takings, 76 Va. L. Rev. 1449, 1449–50 (1990).
law, I want to focus on the framing of the case around the Florida common law baseline. The Florida Supreme Court felt that it needed to parse the common law rights of the private owners, and the U.S. Supreme Court granted certiorari to determine whether that parsing violated the federal constitution. But none of this should matter. The Act plainly changed the way that the boundaries of the littoral lands would be determined and did so to enable a new approach to reversing beach erosion based on modern technology, fairly balancing private and public interests. There is no suggestion here that the littoral owners relied on or were surprised by the change. Indeed, the Act was enacted in 1970, long before the 1987 court decision that is primarily relied on by the owners as precedent. Furthermore, there was no evidence of when the owners actually acquired their lands. The landowners did not introduce any evidence of loss of value; it seems most likely that the state’s actions increased the value of their property by essentially ruling out the likelihood of erosion and providing an adjacent wide sandy beach.

The petitioners’ arguments in Stop the Beach Renourishment do not invoke key elements in regulatory takings doctrine. The state does not occupy any land that formerly had been private. The owners do not claim that their property has suffered a great economic loss or that the Act surprised them; as such, their reasonable economic expectations have not been frustrated. Nor do they argue that they have been deprived of a common law property interest explicitly bargained for, as in Pennsylvania Coal Co. v. Mahon. Rather, they complain simply that they had enjoyed a

17. Here are two examples. First, courts have frequently changed the common law of property to adapt to new circumstances or understandings, even though such changes have inflicted harm on some owners. See, e.g., Morton J. Horwitz, The Transformation of American Law, 1780–1860 at 31, 37 (1977) (discussing the transformation in the conception of property); Louise A. Halper, Nuisance, Courts and Markets in the New York Court of Appeals, 1850–1915, 54 ALB. L. REV. 301, 302–03 (1990); Joseph L. Sax, Property Rights and the Economy of Nature: Understanding Lucas v. South Carolina Costal Council, 45 STAN. L. REV. 1433, 1447–48 (1993). The U.S. Constitution never has been, nor should it be, construed to give federal courts the authority to oversee or prevent this necessary legal adaptation. Sauer v. New York, 206 U.S. 536, 546 (1907) (rejecting judicial takings argument). Second, the U.S. Supreme Court already has the doctrinal means to prevent state courts from frustrating federal rights through state law rulings that lack a “fair and substantial basis.” Staub v. City of Baxley, 355 U.S. 313, 318–19 (1958).
18. Stop the Beach Renourishment, Inc., 998 So. 2d at 1102.
19. See id. (making no mention of when the land was acquired).
20. Id. at 1115.
22. Pa. Coal Co. v. Mahon, 260 U.S. 393, 412 (1922). In this original regulatory takings decision, legislation had deprived the Pennsylvania Coal Company of the very right to support that it had bargained for previously with the owner of the surface of the land.
common law right to accretion that has been eliminated by the Act and by the Florida Supreme Court’s ruling. It is a puzzle why such an argument should have any traction today. No one disputes that the common law can be superseded by statute.

Severance v. Patterson presents a scenario just as likely to be relevant to sea level rise as Stop the Beach Renourishment, but adopts an opposite adaptation public policy: allowing natural forces to dictate the shape of the coastline. Texas follows the public trust law of the majority of states in holding that public ownership of the foreshore extends to the mean high tide or wet sand line. Following judicial clarification of this rule, in 1959 the Texas legislature passed the Texas Open Beach Act (OBA), which provides:

[I]f the public has acquired a right of use or easement to or over an area by prescription, dedication, or has retained a right by virtue of continuous right in the public, the public shall have the free and unrestricted right of ingress and egress to the larger area extending from the line of mean low tide to the line of vegetation bordering on the Gulf of Mexico.

The effect of such an approach is to enable courts to find the existence of public easements on the dry sand beaches. More to the point of this paper, these are “rolling easements” that move landward with the beach due to erosion or sea level rise, enabling state and local officials to bring actions seeking injunctions to force landowners to remove homes and other improvements from private land that has become beach and thus subject to the easement.

24. “[C]ourts could not entertain a suggestion that legislation contrary to the doctrines of the common law is invalid.” Roscoe Pound, Common Law and Legislation, 21 Harv. L. Rev. 383, 396 (1908). For the hoary maxim that legislation in derogation of common law rights should be strictly construed, see, e.g., Brown v. Barry, 3 U.S. (3 Dall.) 365, 367 (1797) (acknowledging the power of the legislature to change the common law and expressing conservative judicial suspicion of the legislature).
25. Severance v. Patterson, 566 F.3d 490, 493 (5th Cir. 2009).
26. Id.
28. Very recently, Texas adopted through referendum an amendment enshrining the public right of access to the dry sand beach in the state constitution. Tex. Const. art. I, § 33(b).
Severance also makes a big deal out of the common law origins of OBA. To some extent, the OBA itself directs analytic focus to the common law, as its provisions turn on whether the public has enjoyed an easement on the state’s privately-owned beaches “by prescription, dedication, or has retained a right by virtue of continuous right in the public.” But Judge Jones treated as relevant whether the rolling nature of any easement existed at common law or was created by the OBA, both to any takings analysis and to her peculiar search and seizure approach. For example, Judge Jones ruled that the owner’s takings claim was not ripe because presenting her claim in state court would not be futile, since it is unclear whether Texas courts would deny compensation to the landowner, as they have not issued a definitive ruling on whether the rolling nature of the easement comes from the common law or from the Act, “a critical component of takings analysis.”

It is important to note that the Texas scheme builds upon and expands the effect of the public trust doctrine. Normal erosion or sea level rise will move the ownership boundary landward, and private land will become public when tide waters normally lap over it. But the Texas beach easements roll landward in advance of complete public ownership and before water destroys houses and renders private land uninhabitable. For this reason, Texas law interests environmentalists looking for means to manage retreat before rising seawaters. And for this reason, Texas law has generated many regulatory takings challenges, all of which have been rejected by Texas appellate courts.

Before turning to the third approach to sea level rise, it will be helpful to consider the motives for the solicitude for common law rules reflected in the above two cases. Most everyone acknowledges that “[g]overnment 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.” There is something about how the common law shapes property rights that appeals to judges as a moral baseline. I can think of three possible explanations.

First, conservative theorists sometimes privilege judicial over legislative law-making on the ground that legislators respond to the self-
interested lobbying of special interests while judges have sufficient insulation to shape law based on principles such as efficiency or citizen autonomy. The theoretical and empirical problems with this view are substantial, although sorting them out seems inappropriate for a brief paper such as this. It may be enough to say for the moment that its premise is undercut by the very theory of judicial takings upon which the Court granted certiorari in *Stop the Beach Renourishment*: courts (except this U.S. Supreme Court) cannot be trusted to preserve property rights! Whatever the weaknesses of our democratic legislative process, it has important capacities superior to judicial lawmaking, such as “comprehensiveness, prospectivity, flexibility, capacity to create and fund institutions, democratic participation in rule formation, and the inclusion of more diffuse interests.” These virtues are important for aligning property rights with environmental and other communal interests. “[T]here are a number of features of legislative decisionmaking that make it relatively more attractive than common-law decisionmaking as a basis for modifying or creating categories of property rights.”

Second, common property law rules sometimes are thought to embody natural law principles. The U.S. Supreme Court itself has described the littoral owner’s right to accretion as vouchsafed by natural law:

> The riparian right to future alluvion is a vested right. It is an inherent and essential attribute of the original property. The title to the increment rests in the law of nature. It is the same with that of the owner of a tree to its fruits, and of the owner of flocks and herds to their natural increase. The right is a natural, not a civil one. The maxim “*qui sentit onus debet sentire commodum*” [he who enjoys the benefit ought also to bear the burdens] lies at its foundation. The owner takes the chances of injury and of benefit arising

---


36. Byrne, *supra* note 9 (manuscript at 18–19). Many of these observations date at least to the early twentieth century Progressives. See, e.g., Int’l News Serv. v. Associated Press, 248 U.S. 215, 264–67 (1918) (Brandeis, J., dissenting) (arguing for the superiority of legislation to judicial rulemaking in adapting intellectual property to new technologies); *Pound, supra* note 24, at 403–06 (discussing the benefits of legislation).

from the situation of the property. If there be a gradual loss, he must bear it; if a gradual gain, it is his.  

One can understand the intuitive justice, all other things being equal, of allowing party A to obtain the benefit of random shifts in property boundaries if party A must tolerate losses from the same risk. But these statutory adaptations to sea level rise address concerns far beyond a simple bilateral game. The doctrine of accretion may have some weak normative appeal as a useful default, but only when no other ethical values or policy goals compete with it. As Professor Sax’s historical scholarship shows, the early English cases fashioning the rule for littoral owners assumed that littoral owners would improve new alluvial land for grazing while the crown, the owner of the tidelands, would suffer no harm from the land passing into private ownership. In other words, it was seen as likely to make the littoral owner better off without injuring anyone else.

Present littoral boundary issues arise in a vastly different natural and legal context. Sea level rise will move boundaries in one direction—landward—with minor variations. This suspends the moral calculation upon which the appeal of an accretion rule stands. More importantly, climate change and consequent sea level rise pose alarming challenges to environmental resources and public health and safety. The state has important, if sometimes conflicting, interests in protecting wetlands, sand dunes, habitat, storm buffers, and economic infrastructure. Modern real estate development, despite its many benefits, has both contributed to climate change and made adjusting to it far more difficult. At the same time, the state also has vastly greater scientific understanding, technological capacity, and organizational resources to address sea level rise than it did in the pre-modern era. Modern legislation, appropriations, and administrative oversight provide far more powerful regulatory resources than common law adjudication. While any statutory proposals should be scrutinized for fairness, any natural law arguments that turn on the common law origin of prior law should be dismissed.

Third, libertarian lawyers embrace common law property rules precisely because older cases allow an owner more discretion. Such lawyers distrust all efforts of the democratic state that diminish to any

38. County of St. Clair v. Lovingston, 90 U.S. (23 Wall.) 46, 68–69 (1874); see Nebraska v. Iowa, 143 U.S. 359, 360–61 (1892) (discussing the right to accretion).
extent values incident to property and thus argue that all reductions in property rights must be compensated. Common law rules typically predate the administrative state, look primarily to the interests of litigants, and presume that judicial decisions through adjudication will be the principal means of law making. They assume that legislative activity rarely will address underlying resource allocations. Moreover, older decisions are blissfully ignorant of the types of environmental harms that the rational pursuit of self-interest can generate. Thus, treating common law property rules as normative can delegitimize legislative innovations without coming to grips with their goals or substance.

The *Lucas* decision remains the *locus classicus* of this method, where the Court equates background principles of property with common law nuisance rules. But nuisance litigation notoriously fails to adequately weigh the broad public interests present in environmental disputes. Within the *Lucas* framework, shoreline protection legislation could be upheld if it replicated common law principles, but not on the basis that they implement reasonable and necessary protections for the environment and public safety. Indeed, the appeal of enshrining the common law baseline seems to be that it avoids frank discussion of the public interests involved in environmental protection and the weight properly afforded to private interests of various sorts. Property rights advocates fear environmental legislation because the proliferation of externalities and the threats to long term welfare threaten to justify dramatic incursion on private dominion over resources. Invoking the common law is a way of obfuscating this reality and talking about something else.

Another case that demonstrates judicial invocation of the common law to derail legislation without discussion of its fairness or efficiency is *Phillips v. Washington Legal Foundation*. The case considered a claim that IOLTA accounts, or trust funds in which lawyers are required to pool client funds too small to earn interest individually into accounts that earn cumulative interest and used to support indigent legal services, violate the Takings Clause. *Phillips*, rather bizarrely, addressed only whether the interest earned on such IOLTA accounts belongs to the client whose funds

---

45. *Id.* at 160.
the lawyer deposits, even though those funds by definition were too meager to earn interest. Even though positive state and federal law treated the interest earned under IOLTA accounts as owned by the entity that administered indigent legal representation, the Court resorted to the general common law rule that interest follows principal to hold that the owner of the principal in the IOLTA fund owns the interest.46 Fortunately for the administration of justice, the Court subsequently held that the compensation due the owner of the principal was zero.47 The latter decision highlights the ideal character of the first holding because it illustrates that the right found had been purely notional. Both decisions were five to four.48

It is striking that Phillips, like the shoreline cases, involves the principle of accession, i.e. that the new, small element is presumed to be part of the larger contiguous ownership. One might think that the Rehnquist Court might be attaching natural law status to the broader principle of accession. But the greatest modern enthusiast for the principle of accession, Professor Tom Merrill, makes only a very qualified claim for it. He finds it to promote efficiency (at least to a greater extent than the “first possession” principle) because it recognizes the prowess of the owner of the dominant asset by assigning him the gain.49 But this rationale has no purchase in the cases of shoreline accretions or IOLTA account interest; owners do not cause gains, which occur either by natural forces or through legislative innovation. Merrill also recognizes several normative objections to accession.50 Thus, it is hard to see any normative principle in favor of accession as such that could justify a court giving it precedence over direct statutory directives. The Court merely states that the common law rule must apply when in positive law it does not. It changes the subject from the constitutional merits of the common law.

With these considerations in mind, let us turn to the barriers this attachment to common law baselines imposes on a third statutory approach that is prominently discussed by others for adapting to sea rise caused by climate warming: mandating retreat of development in order to permit wetlands and sand dunes to be re-established landward. Any such policy would be applied selectively to rural coastlines where dunes and marshes already exist and would be justified by the ecological essentiality of such

46. Id. at 165, 168.
48. Id. at 218–19; Phillips, 524 U.S. at 158.
50. Id. at 470–74.
natural features for water quality, fisheries, and storm protection. The statute at issue in Lucas broadly can be understood as such a measure; it prohibited construction of a permanent structure seaward of a line plausibly expected to be underwater in a few years.51

For present purposes, consider a state statute less immediately and severely restrictive. Commentators have suggested that all the law need do to ensure a policy of retreat is to prohibit “armoring,” that is erection of erosion control structures such as levees and jetties.52 Such laws predictably will permit rising sea levels to deprive some private owners of their land. The land will be flooded and thus rendered unusable. Government authorization of flooding of private property generally amounts to a taking.53 Moreover, the public trust doctrine transfers ownership of submerging lands to state ownership as rising waters move the boundary line landward, which creates an effect resembling inverse condemnation.

Yet, there are substantial arguments against treating an anti-armoring statute as causing a regulatory taking. Such a statute would prohibit construction that could harm other property owners and the environment generally. Shoreline fortifications force rising water elsewhere, increasing the flooding of areas that are not protected by such defenses. The statute under discussion arguably solves a prisoner’s dilemma, taking away some of the pressure to armor that all would feel in the absence of the statute or an improbable agreement among many littoral owners, making coastal area property owners, as a group, better off.54 Armoring would also force rising waters onto existing wetlands and prevent reestablishment of wetlands in geologically suitable locations further inland, thus seriously reducing the quantity of wetlands in violation of long-standing cornerstones of environmental policy. These factors should weigh in any analysis. In this regard, one should note that the Lucas per se rule would not apply, as littoral owners’ land would continue to be used and valuable for several years after the prohibition and before the waters rise. Owners would not lose all of the present value of their land.

Most importantly, the destruction of the owner’s estate will result from sea level rise, not the statute, which only forbids a defensive device to

52. See Caldwell & Segall, supra note 7, at 570–74 (discussing several such state statutes).
54. See Caldwell & Segall, supra note 7, at 574–75 (discussing the economic benefits of restrictions on armoring).
postpone the problem but imposes substantial harms on others. Littoral owners may have nuisance claims against large emitters of greenhouse gases. Indeed, they might have a more sympathetic claim against the United States for failing to curb emissions than against the government enacting the probation of armoring, although I know of no precedent for a government omission (rather than an act) providing a basis for a takings claim. Similarly, the exchange of ownership from the private owners to the government under the public trust doctrine would be the result of natural forces, not legal will. Moreover, the private owners’ erection of defenses can be seen to invade the rights of the sovereign to gain by sea level rise. As the court recently held in United States v. Milner, “because both the upland and tideland owners [the Lummi Indian tribe] have a vested right to gains from the ambulation of the boundary, the Homeowners cannot permanently fix the property boundary, thereby depriving the Lummi of tidelands that they would otherwise gain.”

One issue that property owners likely will raise is that such a statute deprives littoral owners of their common law right to wall out the sea. At common law, a landowner could erect a sea wall to protect against erosion and was not liable for the diversion of the waters onto the land of his neighbors, a variant of the common enemy rule for casual surface water. Reflecting the view embedded within Stop the Beach Renourishment and Severance, upland owners could claim that the right to armor the coastline is inherent in littoral title, so that a statute prohibiting it deprives them of their property right. Indeed, in two significant modern cases involving

55. See, e.g., Connecticut v. Am. Elec. Power Co., Inc., 582 F.3d 309, 310 (2d Cir. 2009) (reinstating case based on the public nuisance of global warming). The argument in this paper does not imply that existing statutes or regulations displace common law rights, such as those involved in American Electric Power, but that the constitutional validity of any future statutes that do displace the common law should be assessed without regard to the fact that the rights private owners had before enactment were common law rather than statutory rights.

56. United States v. Milner, 583 F.3d 1174, 1187 (9th Cir. 2009).

57. See, e.g., Cass v. Dicks, 44 P. 113, 114 (Wash. 1896) (providing an example of the common law application to sea wall construction). In Cass, the court quoted with approval from a treatise:

If a landowner whose lands are exposed to intrusions of the sea, or to inundations from adjacent creeks or rivers, erects sea walls or dikes for the protection of his land, and by so doing causes the tide, the current, or the waves to flow against the land of his neighbor, and wash it away, or cover it with water, the landowner so causing an injury to his neighbor is not responsible in damages to the latter, as he has done no wrong, having acted in self-defense, and having a right to protect his land and his crops from inundation.

Id. (citing EDWARD P. WEEKS, DAMNUM ABSCQUE INJURIA 3–4 (1879)).

58. “[I]f the State refuses to allow construction of some protective device, the oceanfront property owners, whose houses or other structures face destruction from the relentless forces of nature, believe that they are being denied the exercise of some fundamental common law littoral right to protect
construction of sea walls, state supreme courts have had to resort to creative interpretations of state common law to reject landowners’ claims that they had a common law right to wall out seawater. In Shell Island Homeowners Association v. Tomlinson, the North Carolina Court of Appeals rejected the property owners’ constitutional challenge to a state statute prohibiting construction of seawalls. The property owners based their takings claim on the argument that “the protection of property from erosion is an essential right of property owners.” The court summarily rejected the argument as having “no support in the law,” although Professor Kalo, while highly sympathetic to the policy of the statute, commented that “the issue of whether waterfront property owners have any common law right to erect hardened structures in statutorily designated areas of environmental concern is not as simple as the court makes it appear.”

In the other case, Grundy v. Thurston County, the Washington Supreme Court held that the common enemy rule did not apply to seawater, despite language in prior decisions strongly suggesting that it did. Thus, these courts had to sift moldy common law precedents to find some accordance with contemporary statutory approaches, much in the same way as the court did in Stop the Beach Renourishment. Similar to that case, the buildings at issue in Shell Island were permitted after the regulations challenged were adopted, so that unfair surprise was not at issue. The displacement of common law was advanced as an independent ground for the invalidity of the challenged statutory approach, so that courts felt that they had to interpret the common law not to include the rule.

The purpose of this essay is to argue that courts should not need to worry about the old common law rule, adopted under vastly different assumptions. No constitutional or jurisprudential principle gives it precedence over the subsequent statute. There may be circumstances where a ban on armoring might constitute a regulatory taking, for example, where the prior law had led an owner to rely on a legal right to armor that was taken away suddenly resulting in a wipeout. In such circumstances, it should not matter whether the baseline rule was common law or statutory, nor whether the change was a new statute or a clear change in the common

---

60. Tomlinson, 517 S.E.2d at 414.
61. Id.
62. Kalo, supra note 58, at 1489.
63. Grundy, 117 P.3d at 1090.
Moreover, even if not a constitutional violation, a new statutory prohibition may authorize some compensation for reasons of either fairness or politics. There may be unfairness to littoral owners from the application of a common law rule shifting boundaries with the mean high tide line when sea level rise creates a one-way shift. The one point argued here is that the replacement of a common law rule with a statutory one, as such, should have no bearing on whether a regulatory taking has occurred.
Some Unorthodox Thoughts About Rising Sea Levels, Beach Erosion, and Property Rights

Joseph L. Sax*

When legal problems arise involving migrating seashores, they are routinely posed as regulatory takings issues. The usual setting is a restriction on seawall construction, a setback regulation, a claimed public easement across the beach, or (as in the most recent case to come before the U.S. Supreme Court) an asserted loss of littoral rights emanating from a beach nourishment program.

The conventional way to characterize these cases is that a landowner wants to exercise his property rights and a government wants to restrict those uses to achieve a public purpose, the question being who ought to pay for the (proprietary) burden thus imposed, and the (public) benefit thus achieved. I propose here an alternative way of looking at these controversies.

In short, I suggest that most such cases should be seen as disputes between two neighboring proprietors, the state and a littoral owner, each of which has legitimate proprietary interests at stake. At what is literally a line drawn in the sand, the line of mean high tide (MHTL) is a property boundary. Landward of that line are (usually) private littoral landowners.

* James H. House and Hiram H. Hurd Endowment Professor of Environmental Regulation, Emeritus, Univ. of California, Berkeley.

1. I will use the term “seawall” generically to describe a variety of wall-like structures, including revetments and bulkheads. Similar purposes are sometimes achieved with jetties or groins, structures that extend out into the water and may function to shift the deposition of sand toward or away from nearby beaches.

2. See Walton County v. Stop the Beach Renourishment, Inc., 998 So. 2d 1102 (Fla. 2008), cert. granted, 77 U.S.L.W. 3673 (U.S. June 15, 2009) (No. 08-1151) (U.S. argued Dec. 2, 2009). At the Supreme Court level, the party names are now Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection. Id.

3. Various terms are used to describe the MHTL. On non-tidal, navigable waters it is usually called the line of ordinary, or mean, high water, and those terms are also sometimes used for tidal waters. The technical issues and ambiguities involved in defining and measuring these locations are not in issue here. See generally BRUCE C. FLUSHMAN, WATER BOUNDARIES: DEMYSTIFYING LAND BOUNDARIES ADJACENT TO TIDAL OR NAVIGABLE WATERS, 68–69 (2002) (describing essential legal terminology and principles involved in defining property boundaries for navigable and tidal waters).

4. On the sea, owners of land adjacent to the water are called “littoral,” while on rivers they are called “riparian”; legally, the same rules apply. The terms can be used interchangeably.
Usually, seaward of that line is the state, a public landowner. Each of those landowners has certain proprietary rights. I emphasize that I am describing only state proprietorship that is indisputable under any view of background principles of property law. For purposes of this article, I put aside any dispute about whether some state proprietary claims, like the customary uses of beaches in Oregon and Texas, should—as Justice Scalia suggested some sixteen years ago—be rejected as “pretextual.”

Under ordinary circumstances, there is nothing particularly obscure or mysterious about these rights. For example, the littoral owner has a right to occupy and make economically productive use of his land. The state is entitled to have the public use the foreshore (the wet beach between high and low tide) for passage and recreation, and to employ coastal wetlands seaward of the MHTL as habitat. Assuming a rather stable situation at the water’s edge, with the boundary moving modestly back and forth over time, these two uses can coexist with little or no conflict.

But where the sea is substantially and continuously rising, or where violent storms periodically wipe away massive areas of sand beach, littoral owners are understandably anxious to protect their upland. Generally, they want to build a protective device (I will use the term “seawall” generically to describe all such devices) to hold back the rising sea or storm wave action. In the case of rising sea levels, absent a seawall, the ocean migrates landward and the foreshore (with its public uses) migrates with it. If a seawall is constructed, when the water rises to the elevation of the seawall, the foreshore and coastal wetlands disappear—the ocean simply meets the wall. Moreover, the presence of a seawall intensifies the force of the wave

6. In some states, public use rights extend farther upland, e.g., to the vegetation line, under a number of different legal theories and historical uses. See, e.g., Texas Open Beaches Act, TEX. NAT. RES. CODE ANN. § 61.011(a) (2009); Application of Ashford, 440 P.2d 76, 77 (Haw. 1968); Diamond v. State, 145 P.3d 704, 712 (Haw. 2006); Glass v. Goeckel, 703 N.W.2d 58, 72–73 (Mich. 2005).
7. A recent Ninth Circuit decision held that on an eroding shoreline the property line migrated landward, despite the presence of a seawall, to where the MHTL would have intersected the land had there not been a seawall preventing its migration. Because the case involved an Indian Reservation and federal trust ownership of the land seaward of the MHTL, in contrast to the usual state ownership under the equal footing doctrine, the court fashioned federal common law, and acknowledged that its decision might be of very limited application. The decision, if applied generally, might make many homes now behind seawalls trespassers on state property. United States (Lummi Nation) v. Milner, 583 F.3d 1174,
action hitting against it, accelerating the loss of the sand beach and the foreshore.

The reason for reciting these well-known facts is to suggest something that is not so well known, or at least not well recognized. It makes an important difference in all of these settings that the state is not simply a regulator, but is also a proprietor. As a proprietor, the state has pre-existing entitlements of its own that stand on par with those of other proprietors, including its neighbors. In such settings, the state is not simply diminishing some pre-existing entitlement that regulated parties (other proprietors) enjoyed. It is also safeguarding its own pre-existing rights.

The law is well settled that in its proprietary capacity the state is entitled to assert its ownership rights in the same way, and with the same vigor, as any other owner. Of course, the state is also making the rules, and where it chooses to rest on its proprietary interests, it should stand before

---

1189 (9th Cir. 2009); see also Wilson v. Omaha Indian Tribe, 442 U.S. 653, 669–71 (1979) (outlining the application of federal common law to migratory shorelines involving treaty reservations). On the right to defend one’s property generally, see infra note 14.

8. State ownership of tidelands is not simply a “legal fiction” or a metaphor. Cf. Hughes v. Oklahoma, 441 U.S. 322, 335–36 (1979) (stating there are legitimate state concerns, not inconsistent with the commerce clause, underlying the legal fiction of state ownership of wild animals).

9. See Wilkie v. Robbins, 551 U.S. 537, 557 (2007) (“Just as a private landowner . . . may press charges of trespass every time a cow wanders across the property line or call the authorities to report every land-use violation, the Government too may stand firm on its rights and use its power to protect public property interests.”); see also Int’l Soc’y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 678 (1992) (“Where the government is acting as a proprietor” different standards apply than when it is acting simply in its regulatory capacity); Washoe County v. United States, 319 F.3d 1320, 1327–28 (Fed. Cir. 2003) (“[T]he government was acting as a landowner whose neighbor sought permission to lay a pipeline across its property. . . . [I]t had no obligation as a neighbor to assist [its neighbor] . . . .”).

As Justice Brandeis put it many years ago, “The character of the state’s ownership in the land and in the waters is the full proprietary right.” Port of Seattle v. Or. & Wash. R.R., 255 U.S. 56, 63 (1921). The exact nature of the state’s proprietorship of tidelands is sometimes disputed, see, e.g., Fabrikant v. Currituck County, 621 S.E.2d 19, 27 (N.C.Ct. App. 2005) (discussing whether “claim of title” to tidelands by state is shown by public trespass on land), but it cannot be doubted that the state has ownership rights sufficient to defend and protect the uses for which, as sovereign it holds the lands beneath navigable waters. The position of most states is that “not only does the State hold title to this land in jus privatum, it holds it in jus publicum, in trust for the benefit of all the citizens of the . . . State.” McQueen v. S.C. Coastal Council, 580 S.E.2d 116, 119 (S.C. 2003) (emphasis in original) (citing State v. Pac. Guano Co., 22 S.C. 50, 84 (1884)).

And as a state court put it in one seashore case, “If the judge finds that the revetment was to be built on the Commonwealth’s property, we do not hesitate to note that such a situation could never describe a compensable taking.” Wilson v. Massachusetts, 583 N.E.2d 894, 900 n.15 (Mass. 1992), aff’d, 597 N.E.2d 43, 43 (Mass. 1992).

10. The state has a choice. It can forego its status as an owner, and rely on its regulatory authority, in which case, if the regulation is challenged as a taking, the constitutional regulatory takings analysis would apply. My assumption here is that in some instances involving sea level change, the state might well be better off, or at least as well off, resting on its proprietary rights, as I seek to illustrate in discussing Stop the Beach Renourishment, Inc., infra.
a court like any other owner. When the state makes such claims, its position as governor and rule-maker should carry no weight. As a proprietor, it should be neither worse off nor better off than any other proprietor.\(^\text{11}\)

As an owner, the state’s legal position might be more favorable than its position as a regulator. Illustratively, if a state as the owner of tidelands deprives the private upland littoral owner of access to the water, from the conventional regulatory takings perspective that would \textit{a priori} seem to present the expropriation of a common law littoral right of access. But analyzed as a proprietary case, it may look entirely different. In a controversy where the state granted tideland it owned to a third party, who then filled those lands thereby cutting off the littoral owner’s water access, the U.S. Supreme Court held that so long as the state’s action was compatible with the purposes for which it owned the tideland, i.e., “in aid of commerce,” the state could dispose of its tidelands free from any access claim of the upland proprietor.\(^\text{12}\) It was exercising a legitimate proprietary right.

Of course, the outcome in that case was rather extreme. In general, as I suggest below, the courts should seek an equitable balance between the legitimate claims of both the upland owner and the state, as some regulatory schemes do now. Thus, for example, in exchange for permission to construct a seawall, a littoral owner might be required to permit public access across its upland, or to provide mitigation for lost habitat formerly within the publicly owned foreshore, or both.

In addition to the desire for balanced resolution of today’s seashore cases, as contrasted to the either/or outcomes provided in regulatory takings

\(^{11}\) There are various situations where government acts both as a proprietor and as a sovereign. The government uses its regulatory authority to implement its proprietary rights, as on national forests, where private parties claim easements across public land. See United States v. Jenks, 22 F.3d 1513,1518 (10th Cir. 1994) (describing the permit process used to effectuate an easement across its land and limit use to scope of the easement). Another situation is where municipally owned airports are authorized to implement noise regulations. Obviously, there is a potential for conflict in such situations, but courts have been able to deal with the problem, e.g., assuring that regulation given for that limited purpose is used solely for the protection of proprietary rights, such as preventing noise that amounts to a nuisance. See British Airways Bd. v. Port Auth. of N.Y., 558 F.2d 75, 83 (2d Cir. 1977) (a state or local agency, as proprietor of an airport, may still implement regulations to control noise); see also State \textit{ex rel.} King v. H.F. Wilcox Oil & Gas Co., 19 P.2d 572, 575 (Okla. 1933) (stating that a state as sovereign regulates production, and is also a competing landowner of oil land). Courts can easily separate two different claims by the state, one as an owner, and the other as a regulator, and apply the proper standards to each.

\(^{12}\) United States v. Mission Rock Co., 189 U.S. 391, 405, 407 (1903) (citing Shively v. Bowlby, 152 U.S. 1 (1894)). \textit{See infra} notes 31–32. State laws and regulations expressly recognize a state’s interest in tidelands as “proprietary” and not merely regulatory. \textit{E.g.}, 310 MASS. CODE REGS. 9.02 (2009) (defining “trust lands” as waterways in which the fee simple, any easement, or other proprietary interest is held by the Commonwealth in trust for the benefit of the public.”).
cases, other reasons may make regulatory takings analysis inapt for these cases.

The categorical takings rules usually do not fit these cases. As the sea rises, if the accretion/erosion rule is applied, the sea and the state’s migratory ownership will cover the upland. That looks like a physical invasion of the upland owner’s property, but it hardly seems appropriate that application of the traditional common law erosion rule would ipso facto constitute a taking of the upland owner’s property. Conversely, application of a traditional defense-of-property rule on behalf of the upland owner would (as described above) allow the state’s proprietary interest to be destroyed.

Traditional common law rules do not fit contemporary circumstances. For example, in previous eras, the foreshore was not important for public recreational use or as habitat, and the right (even the obligation under the English common law, known as “inning”) of upland owners to defend against rising waters was not in conflict with public ownership of the sea up to the (migrating) line of mean high tide. Nor was the migratory boundary that moved with accretion and erosion unidirectional, as it is with modern sea level rise, so it was not so threatening to upland owners.

The rate and magnitude of the rising sea levels are physically quite different from the historical experience out of which the common law rules grew. The rising sea level is neither gradual like traditional accretion, erosion, or reliction; nor is it sudden and violent like traditional avulsion. We are facing a historically distinct situation that is not a good factual fit with the “background” rules.

13. The alternative view is that nature will take its course and landowners will have to retreat when the sea moves inland. See, e.g., Arrington v. Mattox, 767 S.W.2d 957, 958 (Ct. App. Tex. 1989) (“This public right of use or easement migrates and moves landward or seaward with the natural movements of . . . the line of mean low tide.”).

In thinking about how to analyze these cases, the enemy waters problem provides a helpful analogy. Those cases also involve two neighboring owners at odds over an invasive natural hazard.\textsuperscript{15} The evolution of doctrine in those cases is instructive. Traditionally, the law acknowledged only one owner’s rights. In some jurisdictions, the so-called “common enemy doctrine” applied.\textsuperscript{16} It permitted an owner to defend his property, and thus to do whatever he wished on his own land to get rid of the unwanted water. That approach took no account of the owner who was not physically positioned to defend himself.\textsuperscript{17} The other traditional approach, the so-called “civil law rule,” held that the natural situation must be left alone, that one must simply abide whatever natural flows brought.\textsuperscript{18}

Today, both of those extreme solutions have given way to a balancing approach that seeks an accommodation sensitive to the fact that both owners have a legitimate interest and are innocent victims of a phenomenon beyond their control.\textsuperscript{19} In effect, a balancing approach has replaced an either/or approach, and rigidity of result yielded to a consequentialist accommodation of competing entitlements, which recognizes the legitimacy of each party’s proprietary claim.

A California opinion written some forty years ago put the issue nicely, employing a distinction between tort and property mentalities to illustrate the difference between flexibility and rigidity:

\textit{[W]e are urged to consider the reasonable use rule as an attempt to cope with the problem [of enemy waters] through the use of tort rather than property concepts. . . . Such words as “right”, “servitude”, and “easement” connote a state that is fixed and definite, and they cannot be applied in those terms to describe flexible legal relations dependent upon varying circumstances. . . . [W]hile tort

\textsuperscript{15} See generally \textsc{Restatement (Second) of Torts} § 833 (suggesting it may be a nuisance to invade one’s interest in landed property by interfering with the flow of surface water).

\textsuperscript{16} In parallel to the problem presented by rising sea levels, the common enemy doctrine held that a threatened landowner need not concern himself with the effect of his action, but could “deal with it in such a manner as best suits his own convenience; . . . includ[ing] wailing the water . . . out . . . .” \textsc{Pflum v. Wayne County Bd. of Comm’rs}, 892 N.E.2d 233, 237 (Ind. Ct. App. 2008).

\textsuperscript{17} See id.

\textsuperscript{18} \textsc{Page Motor Co., Inc. v. Baker}, 438 A.2d 739, 742 (Conn. 1980) (“Some jurisdictions have adopted the civil law rule which holds that ‘the right of drainage of surface-waters, as between owners of adjacent lands, of different elevations, is governed by the law of nature.’”) (quoting Rutkoski v. Zalaski, 96 A. 365 (Conn. 1916)).

\textsuperscript{19} \textit{E.g.}, \textit{id.} at 741 (“The landowner, in dealing with surface water, is entitled to take only such steps as are reasonable, in light of all the circumstances of relative advantage to the actor and disadvantage to the adjoining landowners, as well as social utility. Ordinarily, the determination of such reasonableness is regarded as involving factual issues to be determined by the trier.”).
terminology is not necessarily a panacea, a court is more likely to produce an acceptable result if it analyzes “prerequisites of liability” rather than merely the “rights of the parties.”

Whatever the proper label may be, the idea is that the presence of two legitimate preexisting rights calls for reasonable accommodation, rather than an either/or resolution.

A hypothetical example drawn from a recently filed case illustrates the poor fit of traditional rules to contemporary problems. There is a spit of land with the ocean on one side and an inlet on the other with valuable undeveloped real estate along its spine. With the water rising and eroding the shore, an application to build a seawall is denied. The state has a setback law that is measured by an estimate of the rate of erosion (forty years back from the shore, at the present rate of erosion). While such a law makes good sense in a stable or very slowly changing situation, in the circumstance of a rapidly disappearing beach, such a setback rule would soon put all the privately owned land within the setback zone, making it worthless to the owner.

Setback laws are usually a good management tool, keeping development and the demand for seawalls back enough to assure maintenance of a public foreshore. But where protection of one property interest threatens to swallow the other, such measures do not do the job. Either the setback law takes the upland tract, or it does not. If the property is very valuable for development, it would seem that whatever public uses would be lost to the public as the result of a seawall might be dealt with by requiring a mitigation payment as the price for permitting a seawall. There may be a variety of other accommodations. The important point is that dramatically rising sea levels and intensified storm-caused erosion are going to present many variations on this sort of problem, and traditional rules are poorly calculated to deal with them.

The Florida case now before the U.S. Supreme Court, although arising out of erosive storm damage rather than out of sea level rise, also illustrates

---

22. Id. See also S.C. Coastal Conservation League v. S.C. Dep’t of Health & Envtl. Control, 548 S.E.2d 887, 896 (S.C. App. 2001) (holding that the Beachfront Management Act prohibits the Department from issuing a permit to construct new or existing groins).
24. F. Patrick Hubbard, The Impact of Lucas on Coastal Development: Background Principles, the Public Trust Doctrine, and Global Warming, 16 SOUTHEASTERN ENVTL. L.J. 65, 80 (2007) (suggesting that a setback rule based on predicted erosion would lead to legal challenges).
the unsuitability of the conventional rules and standard regulatory takings analysis to such situations. The actual setting in that case is a state statute that substitutes a fixed property line for the migratory MHTL. But effectively the claim is that the state, by building a public beach in front of the littoral tract, destroys two elements of a littoral owner’s property right: physical adjacency to the water and the right to future accretions.

As the case has been presented and briefed (putting aside a judicial takings issue and other jurisdictional matters), it presents a regulatory taking claim: the landowner had certain preexisting property rights and expectations (adjacency, accretions), and the government has stripped them away to achieve some public benefit. Thus conceived, the dispute turns on questions such as whether adjacency, rather than merely access, is a littoral right under Florida law; whether adjacency would be considered a property right by state law in the context of a beach nourishment program that maintained access; and whether the claimed right to future accretions, which are only a contingent possibility, are property rights. (Because the case arose as a facial challenge to the statute, the Penn Central standards are not at issue in the case before the Court).

My suggestion is that the case, thus conceived, misses a fundamentally important point. The state also has important property rights. The case should turn on a balance between the littoral owner’s claimed property rights and the state’s property rights as the owner of the land seaward of the MHTL. From my reading of the various papers in the case, that issue was not even raised, except in the amicus brief of the Coastal States Organization.

In any event, the shape of the Florida case would be entirely different if it turned out that the beach nourishment program could be defended as an exercise of a preexisting property right that the State itself had as a proprietor. If that were so, even if some preexisting property rights of the littoral owner were impaired or destroyed, the issue in that case would be entirely different from the issues in a regulatory takings case.

What is the State’s potential proprietary interest? I am not an expert on Florida law, and I do not assert that Florida courts would necessarily

---

25. See Walton County v. Stop the Beach Renourishment, Inc., 998 So. 2d 1102 (Fla. 2008), cert. granted, 77 U.S.L.W. 3673 (U.S. June 15, 2009) (No. 08-1151) (U.S. argued Dec. 2, 2009). At the Supreme Court level, the party names are now Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection. Id.
26. Stop the Beach Renourishment, Inc., 998 So. 2d at 1107.
27. Id. at 1105 n.1.
recognize the following, but here is one possible way to look at the Florida case from a state-proprietary perspective.

The legal posture of the State (entirely apart from the statute in question in the case) would be that it was simply filling in its own submerged land. Such a deliberate filling process, it would assert, is not accretion under Florida law, and therefore the new land is a state-owned beach. Since the filling assertedly would have been in accord with the purposes for which, under Florida law, the State owns the area water-ward of high tide (i.e. for “navigation, commerce, fishing, bathing and other easements allowed by law”), the result would be that the former littoral owner is legally no longer a littoral owner and that the State itself owns the newly created littoral property. Under such circumstances any future accretions would inure to it, and it would suffer any future erosion. In such a case, there could be no regulatory taking, as no regulation of the littoral owner’s property would be required, and no law would need to set a fixed state/private property boundary.

There is a good deal of authority favoring such a position. I have already mentioned the U.S. Supreme Court decision in the 

Mission Rock case from California. Indeed, that was a major issue in the early development of San Francisco. In the mid-nineteenth century, the waterfront was filled and littoral owners were cut off by docks and other structures built on tidelands in front of their properties. If you visit the city, you may notice that Front Street (whose name once meant what it said) is now about four (filled) city blocks from the waterfront.

In a 1909 Massachusetts case, 

Home for Aged Women v. Commonwealth, a state river basin commission built a dam and a lock on
the Charles River and filled a strip of submerged land in front of the plaintiff’s riparian tract, making the filled land a public park. The riparian owner sued on the ground that the newly created park blocked their riparian right of access to the river and sought damages.33 The court denied their claim, holding that:

The waters and the land under them beyond the line of private ownership are held by the state, both as the owner of the fee and as the repository of sovereign power, with a perfect right of control in the interest of the public. The right of the Legislature . . . has been treated as paramount to all private rights . . . .34

The Massachusetts court cited the street access analogy, and said that if the public interest requires the discontinuance of the street, the abutting owner’s right of access comes to an end.35

The court later distinguished that case on the ground that the park there was part of a larger project for the improvement of navigation, and that the Commonwealth holds the land beneath navigable waters for the limited purpose of protecting navigation and fisheries.36 While it is true that the earlier case spoke about the project there as part of an “improvement to a navigable highway,”37 it also spoke much more generally in the same passage, saying that grants of land bounded by tide water are impliedly subject to paramount government uses of the waterfront “for the promotion of commerce and the general welfare.”38 And it emphasized the Commonwealth’s proprietary posture, saying that “there is no change within the boundaries of the [private upland owner’s] estates, and the adjacent land and water [below the MHTL] are held in a separate ownership, for a public use, under which it may be appropriated as the interests of the public require.”39

Definition of the scope and purpose of the state’s proprietorship is a matter of state law and varies from state to state. In some states, it is rather strictly limited to navigation, fishing, and fowling, but in others it is

33. Home for Aged Women, 89 N.E. at 125.
34. Id.
35. Id. at 126.
36. Michaelson v. Silver Beach Improvement Ass’n, 173 N.E.2d 273, 277 (Mass. 1961). Notably, the U.S. Supreme Court has conceived the state’s ownership of tidelands more broadly, as including commerce. See supra note 12.
37. Home for Aged Women, 89 N.E. at 127 (quoting Gibson v. United States, 166 U.S. 269, 275 (1897)).
38. Id.
39. Id. at 129.
considerably more broadly defined.\textsuperscript{40} As noted earlier, Florida includes bathing and recreation among its public trust uses,\textsuperscript{41} and enhancing public beaches, particularly where loss of beach land through storm-caused erosion is serious, might well be considered a legitimate proprietary use under that State’s background principles of property law.

Another possible state proprietary claim could arise if—as the Florida Supreme Court found—the earlier loss of beach was caused by avulsion, and the public/private boundary did not move landward. In such an event, the foreshore between high and low tide (which formerly had been publicly owned and available for public use) would now be located entirely on land owned by the littoral proprietor and the public might not have a legal right of access to it.\textsuperscript{42} In such a case, assuming it could practically be accomplished without also filling the littoral owner’s submerged land (perhaps by building a structure around the littoral owner’s submerged land\textsuperscript{43}), a filling project seaward of the public/private property line (on land which is now wholly submerged) to assure the existence of a publicly-owned, publicly-usable foreshore would almost certainly be within even the most traditional state definition of public trust proprietorship.

Finally, there is the question whether the kind of fill in the Florida-type beach nourishment program would even qualify as an accretion that would

\textsuperscript{40} E.g., Marks v. Whitney, 491 P.2d 374, 380 (Cal. 1971); White v. Hughes, 190 So. 446, 448 (Fla. 1939) (navigation, fishing, and bathing); In re Water Use Permit Applications, 9 P.3d 409, 448 (Haw. 2000); Mesenbrink v. Hosterman, 210 P.3d 516, 518 (Idaho 2009); People ex rel. Scott v. Chi. Park Dist., 360 N.E.2d 773, 780 (Ill. 1976); Glass v. Goeckel, 703 N.W.2d 58, 74 (Mich. 2005); Cinque Bambini P’ship v. State, 491 So. 2d 508, 512 (Miss. 1986); Borough of Neptune City v. Borough of Avon-by-the-Sea, 294 A.2d 47, 52 (N.J. 1972); Orion Corp. v. State, 747 P.2d 1062, 1072–73 (Wash. 1987). See generally DAVID C. SLADE ET AL., PUTTING THE PUBLIC TRUST TO WORK (1997) (stating that traditional public trust uses are navigation, fishing, bathing, hunting, skating, cutting ice, etc.).

\textsuperscript{41} Adams v. Elliott, 174 So. 731, 734 (Fla. 1937).

\textsuperscript{42} Traditionally, during submergence, the boundary would not move, but there would be a public easement in the water; whether it would include public use of the intertidal zone is unclear. The upland owner could reclaim the land if the water later declined, under a doctrine known as re-emergence. But there is no historical authority for the right of the state to fill such land. See generally Joseph L. Sax, The Accretion/Avulsion Puzzle [etc.], TUL. ENVTL. L.J. (forthcoming 2010).

Some states have changed the common law rule by statute; e.g., North Carolina law now provides that the seaward boundary of all property that adjoins the ocean is the mean high water mark. N.C. GEN. STAT. § 7-20(a) (2009). See Joseph J. Kalo, North Carolina Oceanfront Property and Public Waters and Beaches: The Rights of Littoral Owners in the Twenty-First Century, 83 N.C. L. REV. 1427, 1436 (2005).

\textsuperscript{43} Alternatively, it would be necessary to fill the privately owned area between the pre-erosion, pre-avulsion MHTL, and the current MHTL. The Florida Supreme Court seemed to think the state could do that without compensating the littoral owner, which seems a novel view of the right of reclamation of avulsively eroded land. In any event, such a situation would present some perplexing issues in order to have a publicly owned foreshore, which is yet another reason to doubt the contemporary value of the avulsion rule. See generally Sax, The Accretion/Avulsion Puzzle, supra note 42.
belong to the littoral owner. If not, the argument that the sand placed on state land just seaward of the MHTL is an accretion and belongs to the upland owner would be legally erroneous. The issue is whether dumping dredged sand on the land is within the historic scope of the accretion rule under the background accretion property law rule.

The historic common law development, up to and including Blackstone, did not deal with artificial accretions one way or another. Even when artificial accretions were first said to come within the accretion rule in America in the nineteenth century, the cases involved gradual additions of alluvium generated by structures like jetties and groins, and not dredging and dumping of sand, as in some modern beach nourishment cases. There is at least some reason to think that judges did not think the accretion rule applied to such fill projects.

It is now the law virtually everywhere that an artificial, rather than natural, process does not prevent alluvium from qualifying as accretion, so long as it has not been created by the littoral owner himself. That is clearly the law in Florida, as was held in a case where a state beach nourishment project was accomplished by construction of a jetty that gradually caused alluvion to build up in front of the defendant’s littoral tract. However, traditional doctrine requires that the process be gradual

44. See e.g., Jones v. Johnston, 59 U.S. (18 How.) 150 (1855) (noting that harbor construction and pier extensions led to gradual additions of alluvium, as earth and sand washed up onto the shore).

45. See Marine Ry. & Coal Co. v. United States, 257 U.S. 47, 66 (1921); see also Gibson v. United States, 166 U.S. 269, 275–76 (1897); Transp. Co. v. Chicago, 99 U.S. 635, 635–42 (1878) (acknowledging that legitimate public projects on public submerged lands (such as dikes) cutting off a riparian owner’s access to the water did not constitute an expropriation of the riparian owner’s property, though such cases may have assumed only a narrowly conceived pre-existing servitude in favor of navigation); Home for Aged Women v. Commonwealth, 89 N.E. 124, 129 (Mass. 1909) (no expropriation for project that included fill for parkland); Bruning v. City of New Orleans, 115 So. 733, 738 (La. 1928) (Where the city had filled in submerged land to create a park, the court denied the upland owner’s claim of ownership and said: “There is, of course, no such thing as a ‘right of batture, alluvions, and accretions’ on the shore of Lake Ponchartrain, an arm of the sea . . . nor in any case as to lands reclaimed by artificial process and with public money . . . .”).

46. See generally Riparian Owner’s Right to New Land Created by Relicition or by Accretion Influenced by Artificial Condition Not Produced by Such Owner, 63 A.L.R.3d 249, 255–56 (1975) (outlining case of County of St. Clair v. Lovingston, 90 U.S. 46 (1874) and upholding riparian owner’s claim to alluvium collected by accretion). Artificial accretion cases usually involve accretion in the traditional sense, as, for example, where a jetty or dike causes alluvion to drift to shore and build up gradually.

California is an exception. See State ex rel. State Lands Comm’n v. Superior Court, 900 P.2d 648, 666 (Cal. 1995) (recognizing an exception for distant artificial accretions); Carpenter v. City of Santa Monica, 147 P.2d 964, 973 (Cal. Dist. Ct. App. 1944) (stating that, for tidelands, where the state is an adjacent owner, accretions do not belong to the upland owner); see also Bruning v. City of New Orleans, 115 So. 733, 738 (La. 1928) (denying landowner’s claim to accreted land).

47. Bd. of Trs. of Internal Improvement Trust Fund v. Sand Key Assocs., 512 So. 2d 934, 937 (Fla. 1987).
Some Unorthodox Thoughts About Rising Sea Levels

and imperceptible to qualify as an accretion, and it is doubtful that a beach nourishment program effectuated by dredging and then dumping sand would meet those tests.\footnote{E.g., City of Long Branch v. Liu, 833 A.2d 106 (N.J. Super. Ct. Law Div. 2003) (Federal beach replenishment program held to be avulsion); In re Driveway in New York, 93 N.Y.S. 1107, 1107–08 (1905) (rejecting the view that filled-in land should be treated as an accretion, saying the accretion rule only applies to gradual and natural deposits of soil at the edge of the upland property); see City of Long Branch v. Liu, 2009 WL 1393221 (N.J. Super. App. Div. 2009) (unpublished opinion) ("We do not find it necessary in order to resolve this issue that we delve into the distinctions drawn by the common law with respect to boundary lines between accretion . . . and avulsion . . . . It is undisputed that the enhanced beachland to which defendants seek to lay claim and for which they seek compensation was the result of a public agency spending public funds. We can perceive no policy justification which would permit defendants to reap such a private monetary benefit from those public efforts."); see also Wildwood Crest v. Masciarella, 240 A.2d 665, 669–70 (N.J. 1968) ("[A]rtificially filled tide lands filled rapidly and not gradually and imperceptibly, belong to the state or its grantees and do not belong to the upland owner."). Carpenter v. City of Santa Monica, 147 P.2d 964, 972 (Cal. Dist. Ct. App. 1944).} In Florida, an appellate court has said that “[f]illing is not a gradual and imperceptible process which would qualify as natural accretion.”\footnote{Bentz v. McDaniel, 872 So. 2d 978, 980 (Fla. Dist. Ct. App. 2004).} Indeed, an older Florida case held that a state lake-lowering project, which exposed shore land, was not a refliction (legally the mirror-image of accretion), one reason being that the water did not recede “by imperceptible degrees.”\footnote{Martin v. Busch, 112 So. 274, 287 (Fla. 1927).} And Florida courts recognize the common law rule that “boundaries do not shift when the loss of land occurs suddenly . . . rather than gradually.”\footnote{Trepanier v. County of Volusia, 965 So. 2d 276, 283 (Fla. Dist. Ct. App. 2007); Walton County v. Stop the Beach Renourishment, Inc., 998 So. 2d 1102, 1116 (Fla. 2008), \textit{cert. granted}, 77 U.S.L.W. 3673 (U.S. June 15, 2009) (No. 08-1151) (U.S. argued Dec. 2, 2009). At the Supreme Court level, the party names are now \textit{Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection}. Id.} Presumably the same rule would apply to gain of land.

Perhaps the proprietary claims that I have spelled out here would fail in whole or part under Florida’s analysis of its background principles of state property law.\footnote{Courts seem quite able to make doctrine fit a desired outcome. \textit{See} State v. Gill, 66 So. 2d 141, 145 (Ala. 1953) (holding quite justly, if without much legal support, that land created by government dumping of waste mud upland from a dredging project was accreted to the littoral owner of that upland tract).} My point is simply that in a case like this, the state is at the least entitled to place itself on an equal proprietary plane with the landowner who is challenging it. It may prevail in whole or in part as a proprietor.\footnote{As indicated earlier, I think the property rule should be one of seeking balance. Thus, even though as an owner the state might totally cut off the littoral owner, the more balanced result set out in the Florida statute seems desirable, giving the upland owner access and use, and limiting development on the public beach. Subjecting upland owners to public access along the shore is hardly the end of the world, as anyone who has ever vacationed in Hawaii knows. There, all beaches, even in front of the most luxurious hotels and the richest residents’ homes, are publicly accessible up to the vegetation line.} If it does, its valid proprietary action cannot constitute a
taking. Of course, it is not obliged to follow that path. It can always opt to defend its actions under the regulatory takings rubric.

---

And still Hawaiian tourism and real estate prospers. See In re Application of Ashford, 440 P.2d 76, 77 (Haw. 1968) (noting that the seaward boundary between private upland and public beach is “along the upper reaches of the wash of waves, usually evidenced by the edge of vegetation or by the line of debris . . . .”)), aff’d, Diamond v. State, 145 P.3d 704, 712 (Haw. 2006).